

Uzzal v Tsai
2023 NY Slip Op 35107(U)
September 29, 2023
Supreme Court, Queens County
Docket Number: Index No. 718060/2022
Judge: Tracy Catapano-Fox
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF QUEENS

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MAHBUBUR RAHMAN UZZAL and
NAZMA AKTHER,

Index No. 718060/2022

Part MDP

Plaintiffs,

Motion Date: September 6, 2023

-against-

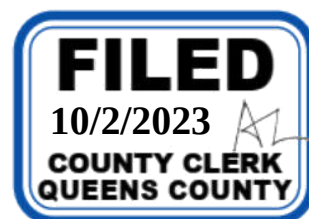
Calendar No. 22

Sequence No. 1

DR. TONY TSAI and NEW YORK FERTILITY
CENTER,

Defendants.

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The following papers numbered EF29 to EF78 read on this motion by defendants to dismiss plaintiffs' Complaint pursuant to CPLR §3126(2) and §3126(3), or alternatively to compel plaintiffs to comply with discovery pursuant to CPLR §3126 and §3124, and this cross-motion by plaintiffs for leave to amend the Complaint pursuant to CPLR §3025(b).

Papers

Numbered

Notice of Motion, Affirmation, Exhibits.....EF29-EF44
Notice of Cross-Motion, Affirmation, Exhibits.....EF62-EF69
Affirmation in Opposition, Exhibits.....EF71-EF76
Reply Affirmation.....EF77
Correspondence.....EF78

Upon the foregoing papers, it is ordered that this motion is determined as follows:

Defendants Dr. Tony Tsai and New York Fertility Center's motion to dismiss plaintiffs' Complaint pursuant to CPLR §3126 is denied, as defendants failed to demonstrate that plaintiffs acted in a wilful and contumacious manner with respect to discovery. Defendants' motion to compel discovery is granted to the extent that plaintiffs are directed to serve a Certificate of Merit within thirty (30) days of the date of this Order with Notice of Entry. Plaintiffs' cross-motion for leave to amend the Complaint pursuant to CPLR §3025(b) is granted. Plaintiffs commenced this medical malpractice action based upon defendants' alleged failure to properly carry out In Vitro Fertilization (hereinafter referred to as "IVF") medical procedures. Plaintiffs filed the Summons

and Complaint on August 30, 2022, and issue was subsequently joined via defendant Tsai's Answer on October 13, 2022 and defendant New York Fertility Center's Answer on November 4, 2022.

Defendants argue that plaintiffs' Complaint should be dismissed because they failed to provide defendants with a Certificate of Merit and discovery responses despite plaintiffs' continued attempts to push discovery forward. Defendants presented the pleadings and correspondence between the parties related to discovery. Defendants argue that plaintiffs acted in a wilful and contumacious manner warranting dismissal of the Complaint, as plaintiffs failed to provide a Certificate of Merit or discovery responses, or respond to multiple demands and good faith letters. Defendants further argue that in the event the Court does not dismiss plaintiffs' Complaint, plaintiffs should be compelled to produce the outstanding discovery and Certificate of Merit. Defendants further argue that plaintiffs' Request for Admission is improper, should be stricken, and warrants a protective order because it improperly seeks information that is in dispute.

Plaintiffs oppose defendants' motion and cross-move for leave to amend their Complaint. Plaintiffs argue that defendants' motion should be denied because they have diligently and in good faith complied with all discovery requests by providing two Amended Bills of Particulars, comprehensive discovery responses, and authorizations. Plaintiffs further argue that they have not been able to file a Certificate of Merit because they are being stonewalled by defendants' refusal to provide plaintiffs with their medical records. Plaintiffs further argue that defendants are not entitled to a protective order with respect to the Requests for Admission because it seeks information regarding factual matters that are not in dispute and is meant to clarify essential aspects of the case. Finally, plaintiffs argue that amendments to the pleadings are freely given and plaintiffs are entitled to amend the Complaint to provide a comprehensive and accurate account of the claims and plaintiffs' position.

Defendants oppose plaintiffs' cross-motion and argue that plaintiffs failed to demonstrate a basis to add claims for breach of contract, unjust enrichment, unconscionability, fraudulent misrepresentation, intentional infliction of emotional distress, and negligent infliction of emotional distress. Defendants further argue that they would be prejudiced by plaintiffs' Amended Complaint because the proposed amendments are without merit, and defendants would be forced to litigate meritless causes of action.

CPLR §3012-a(a)(1) provides that in any action for medical, dental, or podiatric malpractice, "the complaint shall be accompanied by a certificate executed by the plaintiffs' attorney declaring that the attorney has reviewed the facts of the case and consulted with at least one licensed physician, dentist, or podiatrist whom the attorney believes to be knowledgeable about the relevant issues of the action, and that as a result of such review and consultation, the attorney has concluded that the action has a reasonable basis." (*Rabinovich v. Maimonides Med.*

Ctr., 179 A.D.3d 88, 91 [2d Dept. 2019].) The purpose behind the statute was to deter the commencement of frivolous actions by counsel on behalf of their clients and to reduce the cost of medical malpractice litigation and insurance premiums. (*Id.*)

CPLR §3101 governs the scope of discovery disclosure. Pursuant to CPLR §3101(a), there shall be full disclosure of all matter material and necessary in the prosecution or defense of an action. The test for whether something is material and necessary to the action is “usefulness and reason...It is incumbent on the party seeking disclosure to demonstrate that the method of discovery sought will result in the disclosure of relevant evidence or is reasonably calculated to lead to the discovery of information bearing on the claims, and unsubstantiated bare allegations of relevancy are insufficient to establish the factual predicate regarding relevancy.” (*Rrengo v. New York City Tr. Auth.*, 204 A.D.3d 1049, 1050 [2d Dept. 2022].) The supervision of discovery and the setting of reasonable terms and conditions for disclosure are within the sound discretion of the trial court. (*Id.*)

Pursuant to CPLR §3123, “a party may serve upon any other party a written request for admission by the latter...of the truth of any matters of fact set forth in the request, as to which the party requesting the admission reasonably believes there can be no substantial dispute at the trial and which are within the knowledge of such other party or can be ascertained by him upon reasonable inquiry.” (*CPLR §3123(a)*). The purpose of a notice to admit is only to eliminate from the issues in litigation matters which will not be in dispute at trial. (*Alberto v. Jackson*, 118 A.D.3d 733, 734 [2d Dept. 2014].)

Pursuant to CPLR §3103(a), a court may issue a protective order denying, limiting, conditioning, or regulating the use of any disclosure device, in order to prevent unreasonable annoyance, expense, embarrassment, disadvantage, or other prejudice to any person or the courts. (*Kim & Bae, P.C. v. Lee*, 173 A.D.3d 990, 993 [2d Dept. 2019].) The supervision of disclosure and the setting of reasonable terms and conditions rests within the sound discretion of the trial court and, absent an improvident exercise of discretion, its determination will not be disturbed. (*Id.*)

The nature and degree of a penalty to be imposed pursuant to CPLR §3126 lies within the trial court’s discretion. (*Lucas v. Stam*, 147 A.D.3d 921 [2d Dept. 2017].) However, the striking of a pleading is a drastic remedy that may only be warranted upon a clear showing that the failure to comply with discovery demands was wilful and contumacious. (*Id.*; *see also Lazar, Sanders, Thaler & Assoc. LLP v. Lazar*, 131 A.D.3d 1133 [2d Dept. 2015].)

Motions for leave to amend the pleadings should be freely granted, absent prejudice or surprise directly resulting from the delay in seeking leave, unless the proposed amendment is palpably insufficient or patently devoid of merit. (*U.S. Bank, Natl. Assn. v. Sharif*, 89 A.D.3d 723,

724 [2d Dept. 2011].)

Defendants' motion to dismiss plaintiffs' Complaint pursuant to CPLR §3126 is denied, as defendants failed to establish that plaintiffs acted in a wilful and contumacious manner with respect to discovery. While plaintiffs failed to disclose a Certificate of Merit, they provided multiple Bills of Particulars, discovery responses, and authorizations. Standing alone, plaintiffs' failure to provide a Certificate of Merit does not warrant dismissal of plaintiffs' Complaint. (*See Russo v. Pennings*, 46 A.D.3d 795, 796-797 [2d Dept. 2007][holding that the trial court erred in dismissing the action based on plaintiff's failure to comply with CPLR §3012-a, as such sanction is unauthorized, and improvidently exercised its discretion in denying plaintiff's motion to extend time to serve notice of the medical malpractice action].) Based upon the foregoing, defendants' motion to dismiss plaintiffs' Complaint is denied.

Defendants' motion to compel discovery is granted, as defendants demonstrated good cause to compel plaintiffs to serve a Certificate of Merit and to proceed with a Preliminary Conference and deposition schedule.

Plaintiffs' cross-motion for leave to amend the Complaint pursuant to CPLR §3025 is granted, as leave to amend the pleadings is freely given and defendants failed to demonstrate surprise or prejudice based upon the proposed amendments. The instant action is in the earliest stages of discovery, as the Preliminary Conference Order has yet to be submitted. Based upon the foregoing, plaintiffs' cross-motion for leave to amend the Complaint is granted.

Accordingly, defendants' motion to dismiss plaintiffs' Complaint pursuant to CPLR §3126 is denied. Defendants' motion to compel discovery is granted to the extent that plaintiffs are directed to serve a Certificate of Merit within thirty (30) days of the date of this Order with Notice of Entry, and the parties are directed to appear at 9:30 am in Courtroom 48 on Tuesday, November 14, 2023 for a Preliminary Conference Order and to resolve outstanding discovery disputes. Plaintiffs' cross-motion for leave to serve an amended Complaint pursuant to CPLR §3025(b) is granted. Plaintiffs are directed to serve the amended Complaint within thirty (30) days of the date of this Order with Notice of Entry.

This constitutes the decision and Order of the Court.

Dated: September 29, 2023



Hon. Tracy Catapano-Fox, J.S.C.

