

**Hertzfeld v Northwell Health Manhattan Eye, Ear & Throat Hosp.**

2024 NY Slip Op 31017(U)

March 26, 2024

Supreme Court, New York County

Docket Number: Index No. 805270/2021

Judge: John J. Kelley

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This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY**

**PRESENT: HON. JOHN J. KELLEY PART 56M**

*Justice*

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NANCY HERTZFELD,

Plaintiff,

- v -

NORTHWELL HEALTH MANHATTAN EYE, EAR &  
THROAT HOSPITAL, STEVEN J. LEE, M.D., and NY  
ORTHOPEDICS,

Defendants.

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INDEX NO. 805270/2021

MOTION DATE 11/08/2023

MOTION SEQ. NO. 004

**AMENDED DECISION + ORDER  
ON MOTION**

**The court's prior decision and order, also dated March 26, 2024, is recalled and vacated, upon the court's own motion, in order to correct a typographical error in the deadline for compliance therewith, and the following decision and order is substituted therefor:**

The following e-filed documents, listed by NYSCEF document number (Motion 004) 81, 82, 83, 84 were read on this motion to/for DISMISS.

In this action to recover damages for medical malpractice, the defendants Steven J. Lee, M.D., and NY Orthopedics (together the Lee defendants) move pursuant to CPLR 3126 and 3042 for the imposition of sanctions upon the plaintiff for her failure to respond to their outstanding discovery demands and demands for particulars, and her failure to comply with case management orders. The plaintiff does not oppose the motion. The motion is granted to the extent that the complaint is conditionally dismissed unless, on or before May 8, 2024, the plaintiff shall produce the outstanding particulars and discovery items that have been demanded. The dismissal shall become absolute should she fail to comply with that deadline.

In an order dated November 16, 2022, the court granted the motion of the plaintiff's then attorney for leave to withdraw as counsel. In that order, the court further directed the parties to appear for a remote compliance conference on December 20, 2022, and cautioned the plaintiff that her failure to comply with the directives set forth therein may result in the imposition of

sanctions, including dismissal of the complaint. The conference was adjourned until January 31, 2023, and all parties appeared at the conference on the rescheduled date, after which the court issued a compliance conference order directing the defendants to resend their discovery demands to the plaintiff by March 2, 2023, and the plaintiff to respond to those demands within 45 days of receipt. That order also scheduled a status conference for April 18, 2023. As of April 18, 2023, the plaintiff had not responded to the Lee defendants' discovery demands or complied with the January 31, 2023 compliance conference order. The parties appeared for the scheduled status conference on April 18, 2023, upon which the court issued a status conference order bearing the same date, which set a May 26, 2023 deadline for the plaintiff's production of outstanding discovery items, including demands for authorizations, demands for bills of particulars, information as to prior lawsuits, and the names of witnesses. That order further provided that "[t]he Plaintiff's failure to timely comply with this Order shall result in a Conditional Order of Dismissal upon a Motion by the Defendants." That status conference order scheduled a follow-up status conference for June 20, 2023, which was adjourned until June 27, 2023.

At the June 27, 2023 status conference, the plaintiff informed the court that she had provided the Lee defendants with a few authorizations permitting them to obtain some of her medical records, but had not responded to any of their other demands. Although the court did not issue a new status conference order at that time, it reiterated that the defendants were entitled make any appropriate motions addressed to the outstanding items of discovery. Since that time, the plaintiff has not provided any particulars or responses to the Lee defendants' discovery demands.

"If the credibility of court orders and the integrity of our judicial system are to be maintained, a litigant cannot ignore court orders with impunity" (*Kihl v Pfeffer*, 94 NY2d 118, 123 [1999]). CPLR 3126 authorizes the court to sanction a party who "*refuses to obey an order for disclosure or wilfully fails to disclose information which the court finds ought to have been disclosed*" (*Kutner v Feiden, Dweck & Sladkus*, 223 AD2d 488, 489 [1st Dept 1998] [emphasis

added]). A party's failure to satisfy his or her discovery obligations, particularly after a series of court orders has been issued, "may constitute the dilatory and obstructive, and thus contumacious, conduct" (*id.* at 489; see *CDR Creances S.A. v Cohen*, 104 AD3d 17 [1st Dept 2012]; *Reidel v Ryder TRS, Inc.*, 13 AD3d 170 [1st Dept 2004]). The court concludes that the plaintiff's conduct was not so willful and contumacious as to warrant outright dismissal at this juncture. Rather, the sanction of conditional dismissal is more appropriate (see *Badome v Zaret*, 2020 NY Slip Op 34786[U], \*6, 2020 NY Misc LEXIS 19101, \*8-9 [Sup Ct, Nassau County, Aug. 5, 2020]).

The Lee defendants' motion is thus granted to the extent of conditionally dismissing the complaint insofar as asserted against them unless, on or before May 8, 2024, the plaintiff provides them with responses to their demands for particulars, their demand for all authorizations permitting them to obtain her medical, hospital, and pharmacy records, their demand for information concerning prior lawsuits, and their demand for the names and addresses of witnesses. This conditional order shall become absolute upon the plaintiff's failure to comply with its provisions (see *Trabanco v City of New York*, 81 AD3d 490 492 [1st Dept 2011]; *Rampersad v New York City Dept. of Educ.*, 30 AD3d 218, 219 [1st Dept 2006]), which may be established by an affirmation from the Lee defendants' attorneys.

Accordingly, it is,

ORDERED that the motion is granted, without opposition, to the extent that the complaint is conditionally dismissed insofar as asserted against the defendants Steven J. Lee, M.D., and NY Orthopedics, unless, on or before May 8, 2024, the plaintiff provides them with responses to all of their demands for bills of particulars, including any demands for a supplemental bill of particulars, their demand for all authorizations permitting them to obtain her medical, hospital, and pharmacy records, their demand for information concerning prior lawsuits, and their demand for the names and addresses of witnesses, and the motion is otherwise denied; and it is further,

ORDERED that, if the plaintiff shall fail to comply with the deadline and directives set forth in this conditional order of dismissal, this order shall become absolute, and the complaint shall be dismissed insofar as asserted against the defendants Steven J. Lee, M.D., and NY Orthopedics, upon the submission of an affirmation of those defendants' counsel attesting that the plaintiff failed to comply with that deadline and those directives.

This constitutes the Amended Decision and Order of the court.

3/26/2024  
DATE



JOHN J. KELLEY, J.S.C.

CHECK ONE:

CASE DISPOSED

GRANTED

SETTLE ORDER

INCLUDES TRANSFER/REASSIGN

DENIED

NON-FINAL DISPOSITION

GRANTED IN PART

SUBMIT ORDER

FIDUCIARY APPOINTMENT

OTHER

REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: