

Brooks v Gott
2024 NY Slip Op 35235(U)
June 11, 2024
Supreme Court, Westchester County
Docket Number: Index No. 58260/2023
Judge: Lewis J. Lubell
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER - MDPM PART

To commence the statutory time period
for appeals as of right (CPLR 5513[a]),
you are advised to serve a copy of this
order, with notice of entry, upon all parties.

P R E S E N T:

HON. LEWIS J. LUBELL
JUSTICE OF THE SUPREME COURT

-----X
DANIELLE E. BROOKS,

Plaintiff,

-against-

MICHAEL GOTT, M.D., and WHITE PLAINS
HOSPITAL MEDICAL CENTER,Defendants.
-----X

LUBELL, J.

**SEALING ORDER &
DECISION & ORDER**

[Sealing Doc. No. 43]

Index No. 58260/2023
Seq. No. 1

The following papers were considered on this motion by the defendants for an order, inter alia, pursuant to CPLR 3126 dismissing the plaintiff's verified complaint for repeated failure to provide discovery, serve a responsive supplemental bill of particulars and comply with court orders; or, alternatively, for an order pursuant to CPLR 3124 compelling the plaintiff to provide all outstanding discovery by a date certain; and for such other and further relief as this court may deem to be just and proper.

Notice of Motion
Affirmation in Support of Fiona Colin, Esq.
Affirmation of Good Faith of Fiona Colin, Esq.
Exhibits A through I
Affirmation in Opposition of Cornelius Redmond, Esq.
Exhibits 1 through 3
Reply Affirmation of Fiona Colin, Esq.
NYSCEF File

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

Factual & Procedural Background

This action was commenced on or about March 21, 2023, when the plaintiff filed her summons with verified complaint seeking to recover damages against the defendants as a result of alle-

gations of medical malpractice. Issue was joined on or about April 12, 2023 when the defendants filed their separate answers.

A Preliminary Conference Stipulation and Order was entered on June 16, 2023, wherein counsel for the plaintiff and the defendants stipulated that the plaintiff was to serve a verified bill of particulars, authorizations, and all responses to defendants' outstanding initial combined demands dated May 18, 2023, within 20 days of entry of the order (NYSCEF Doc. No. 18). Thereafter, the Court entered Compliance Conference Referee Reports & Orders on October 16, October 27 and November 16, 2023 directing the exchange of outstanding discovery by the plaintiff (NYSCEF Doc. Nos. 22, 23, 25).

More specifically, by Compliance Conference Referee Report & Order dated October 13, 2023, the plaintiff was directed to serve all outstanding discovery, including authorizations and verified bills of particulars. Plaintiff failed to do so. By Compliance Conference Referee Report & Order entered October 27, 2023, the plaintiff was again directed to serve verified bills of particulars and to serve corrected authorizations with the plaintiff's corrected date of birth, responses to the PC Order and to two separate deficiency letters defendants had served. Further this order specifically warned the plaintiff as follows: "Plaintiff is reminded that compliance with Court orders is mandatory, and that late service of discovery responses or partial responses does not constitute compliance. Noncompliance with this order shall result in the issuance of a briefing schedule and shall be grounds for the striking of pleadings, dismissal, preclusion, imposition of costs and/or sanctions and any other relief the Court deems warranted." The plaintiff yet again failed to comply. More particularly, while the plaintiff served bills of particulars, they contained allegations that were clearly related to a different action alleging claimed injuries of decreased fertility and ability to become pregnant, that were wholly unrelated to her claims regarding her left knee. Further, the bills were identical for both the individual defendant and institutional defendant. By Compliance Conference Referee Report & Order entered November 16, 2023, the plaintiff was directed to serve corrected bills of particulars for each separate defendant and outstanding Arons authorizations. This order contained the same warning language as was provided in the October 27, 2023 order. After the plaintiff failed to comply, at the January 23, 2024, compliance conference, the defendants requested and were issued a briefing schedule for this motion. This motion ensued.

The defendants contend that they have attempted in good faith on multiple occasions to resolve discovery disputes herein to no avail. According to the defendants, the plaintiff has repeatedly failed to provide responsive bills of particulars and authorizations. Moreover, the defendants note that to date, the plaintiff never served supplemental bills of particulars as directed in this Court's Compliance Conference Orders. The defendants argue that the plaintiff's repeated failure to provide discovery clearly rises to the level of willful and contumacious warranting the striking of her pleadings. The defendants contend that the willfulness and contumacious nature of the plaintiff's behavior can be inferred by the repeated failure to comply with the deadlines set by this Court.

In opposition, the plaintiff's counsel generally argues that his conduct was neither willful nor contumacious. Without specifically addressing the deficiencies set forth in the defendants' moving papers, plaintiff argues that she responded to the defendants' demands on May 18, 2023. Further,

plaintiff argues that public policy strongly favors the resolution of action on the merits. Counsel argues that “in light of the discovery provided that the underlying motion is moot.

In reply, the defendants argue that the plaintiff’s continued failure to heed court deadlines is demonstrated by the plaintiff’s failure to timely file her opposition papers that were filed four days late, having been filed on March 5 and not on March 1 as provided for in the Court’s briefing schedule. Further, the defendants contend that the plaintiff’s opposition fails to address the deficiencies identified in the moving papers regarding both the bill of particulars and Arons authorizations. According to the defendants, the plaintiff’s continuous refusal to obey the court’s orders is therefore willful and contumacious and the complaint should be stricken.

CPLR 3101(a) requires full disclosure of all matters material and necessary in the prosecution or defense of an action, regardless of the burden of proof. The phrase Amaterial and necessary is to be interpreted liberally to require disclosure, upon request, of any facts bearing on the controversy which will assist preparation for trial by sharpening the issues and reducing delay and prolixity. The test is one of usefulness and reason (*Allen v Crowell-Collier Publishing Co.*, 21 NY2d 403, 406 [1968]; *Foster v Herbert Slepoy Corp.*, 74 AD3d 1139 [2d Dept 2010]). The court has broad discretion to supervise discovery and to determine whether information sought is material and necessary in light of the issues in the matter (*Mironer v City of New York*, 79 AD3d 1106, 1108 [2d Dept 2010]; *Auerbach v Klein*, 30 AD3d 451, 452 [2d Dept 2006]; *Feeley v Midas Properties, Inc.*, 168 AD2d 416 [2d Dept 1990]). If the information sought is sufficiently related to the issues in litigation so as to make the effort to obtain it in preparation for trial reasonable, then discovery should be permitted (*see Allen v Crowell-Collier Publishing Co.*, 21 NY2d at 406B407; *In re Beryl*, 118 AD2d 705 [2d Dept 1986]). It is immaterial that the information sought may not be admissible at trial as pretrial discovery extends not only to proof that is admissible but also to matters that may lead to the disclosure of admissible proof (*Twenty Four Hour Fuel Oil Corp. v Hunter Ambulance Inc.*, 226 AD2d 175 [1st Dept. 1996]; *Polygram Holding Inc. v Cafaro*, 42 AD3d 339 [1st Dept 2007]).

CPLR 3126 provides that if any party willfully fails to disclose information which the court finds ought to have been disclosed, the court may, inter alia, issue an order of preclusion or an order striking the pleadings, dismissing the action, or rendering judgment by default against the disobedient party. The nature and degree of the penalty to be imposed on a motion pursuant to CPLR 3126 is a matter generally left to the discretion of the Supreme Court (*Carbajal v Bobo Robo*, 38 AD3d 820 [2d Dept 2007]). The penalties are designed to prevent a party who has refused to disclose evidence from affirmatively exploiting or benefitting from the unavailability of the proof during the pending civil action (*Sands v News Am. Publ.*, 161 AD2d 30, 37 [1st Dept 1990]; *see Matusiewicz v Jo Jo’s Auto Parts*, 18 AD3d 828 [2d Dept 2005]; *DiDomenico*, 252 AD2d at 49). To invoke the drastic remedy of striking a pleading or of preclusion, a court must determine that the party’s conduct is willful and contumacious (*see Greene v Mullen*, 70 AD3d 996, 997 [2d Dept 2006]; *Maiorino v City of New York*, 39 AD3d 601 [2d Dept 2007]). A court may issue an order “prohibiting the disobedient party . . . from producing in evidence designated things or items of testimony” as a sanction against a party who “refuses to obey an order for disclosure or willfully fails to disclose information which the court finds ought to have been disclosed” (CPLR 3126[2]). AWillful and contumacious conduct can be inferred from repeated noncompliance with court orders coupled with no

excuses or inadequate excuses (*Russo v Tolchin*, 35 AD3d 431, 434 [2d Dept 2006]; *see also*, *Apladenaki v Greenpoint Mortg. Funding, Inc.*, 117 AD3d 976, 977 [2d Dept 2014]; *Orgel v Stewart Tit. Ins. Co.*, 91 AD3d 922, 923 [2d Dept 2012]; *Rock City Sound, Inc. v Bashian & Farber, LLP*, 83 AD3d 685, 686–687 [2d Dept 2011]; *Prappas v Papadatos*, 38 AD3d 871, 872 [2d Dept 2007]).

Here, it is undisputed that the plaintiff has repeatedly failed to timely provide discovery and comply with court orders. In fact, the plaintiff's opposition to this motion wholly fails to give any explanation or excuse as to the reason for the repeated untimeliness in her service of responsive discovery. Notably, plaintiff's counsel asserts that he responded to the defendants' demands on May 18, 2023 (Redmond Affirmation in Opposition, at ¶ 5 [NYSCEF Doc. No. 42]). However, the exhibits attached in support of that contention are discovery responses dated November 9, 2023, almost six months later (NYSCEF Doc. No. 43). Further, while the plaintiff's counsel attached what he argues is the plaintiff's complete responses to all outstanding demands—which were served on the eve of the Court's November 16, 2023 conference—counsel has failed to demonstrate that he in fact has complied with this court's November 16, 2023, order that directed the corrected bill of particulars be served on or before December 8, 2023 (NYSCEF Doc. No. 25).

In view of the foregoing, dismissal of the complaint or preclusion at this time is not warranted since it would unduly punish plaintiff for what appears to be the failings of plaintiff's counsel. However, plaintiff's counsel's habitually sloppy discovery practices cannot be countenanced by this Court.¹ Plaintiff still has not provided the outstanding discovery and served meaningfully responsive bills of particulars and has therefore impeded the defendants' ability to defend this action. There is no dispute that a bill of particulars is so fundamental to the plaintiff's discovery obligations that the prolonged and repeated failure to provide a responsive bill of particulars may warrant dismissal of the complaint (*Gibbs v St. Barnabas Hospital*, 16 NY3d 74, 81 [2010]; *Kihl v Pfeffer*, 94 NY2d 118, 123 [1999]). It is axiomatic that a verified bill of particulars is essential to the defense of an action. The defendants have been prejudiced by the plaintiff's repeated failure to timely serve responsive bills of particulars. Accordingly, the plaintiff shall be given one final opportunity to comply and serve responsive supplemental bills of particulars for each separate defendants and the outstanding Arons authorizations. If the plaintiff has not served supplemental bills of particulars on or before June 21, 2024, responsive to the defendants' good faith letters dated October 26 and November 14, 2023 (NYSCEF Doc. Nos. 38, 40), and has not provided the outstanding Arons authorizations demanded by defendants, the defendants shall file a detailed affidavit/affirmation enumerating the specific deficiencies, and a proposed order precluding plaintiff from offering any evidence at trial or in support or opposition to a dispositive motion on the issue of liability.

As noted by the Court of Appeals, “[t]he failure to comply with deadlines not only impairs the efficient functioning of the courts and the adjudication of claims, but it places jurists unnecessarily in the position of having to order enforcement remedies to respond to the delinquent conduct of members of the bar, often to the detriment of the litigants they represent. Chronic noncompliance with deadlines breeds disrespect for the dictates of the Civil Practice Law and Rules and a culture in

¹ It should be noted that also pending before this Court in another action (*Romero v St. John's Riverside, et al.*, Ind No. 51245/2021) is another motion to dismiss pursuant to CPLR 3216 for the plaintiff's failure to timely respond to discovery and comply with this Court's orders where Cornelius Redmond, Esq. is also the plaintiff's counsel.

which cases can linger for years without resolution (*Gibbs v St. Barnabas Hospital*, 16 NY3d at 81).

The court is disturbed by plaintiff's counsel's cavalier attitude towards the discovery deadlines set forth in multiple orders. As noted by the Court of Appeals in *Kihl v Pfeffer* (94 NY2d 118 [1999]), 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*, at 123; *see Gibbs v St. Barnabas Hospital*, 16 NY3d at 81). The failure to comply with deadlines not only impairs the efficient functioning of the courts and the adjudication of claims, but it places jurists unnecessarily in the position of having to order enforcement remedies to respond to the delinquent conduct of members of the bar, often to the detriment of the litigants they represent. Chronic non-compliance with deadlines also breeds disrespect for the dictates of the Civil Practice Law and Rules and a culture in which cases can linger for years without resolution (*Gibbs*, 16 NY3d at 81). This Court, therefore, admonishes plaintiff's counsel to respond to all future discovery demands in a timely manner and vigilantly comply with all court orders to avoid any adverse impact upon plaintiff.

All other arguments raised on this motion and evidence submitted by the parties in connection therewith have been considered by this Court, notwithstanding the specific absence of reference thereto.

Lastly, on the Court's own motion pursuant to Uniform Civil Rules for Supreme and County Courts [22 NYCRR] § 202.5(e)(2), Exhibit 1 to the plaintiff's counsel's affirmation in opposition (NYSCEF Doc. No. 43) must be sealed since the plaintiff improperly failed to redact her own confidential personal information contained therein, to wit, her date of birth and social security number, in violation of 22 NYCRR § 202.5(e)(1)(iv). Counsel is cautioned to review and fully comply with 22 NYCRR 202.5(e) in the future.

Accordingly, in light of the foregoing, it is hereby

ORDERED that the defendants' motion is granted to the extent that plaintiff shall serve supplemental bills of particulars for each separate defendant, as directed herein, and outstanding Arons authorizations on or before June 21, 2024; and it is further

ORDERED that in the event the plaintiff fails to serve supplemental bills of particulars and Arons authorizations, as directed herein, defendants shall upload to the NYSCEF website, no later than June 28, 2024, a detailed affidavit/affirmation of noncompliance enumerating the specific deficiencies, and a proposed order of preclusion, upon notice to plaintiff; and it is further

ORDERED that the Westchester County Clerk is directed to seal NYSCEF Document No. 43; and it is further

ORDERED that plaintiff's counsel is directed to file on NYSCEF a redacted copy of Document No. 43, within three (3) days of entry of this Order; and it is further

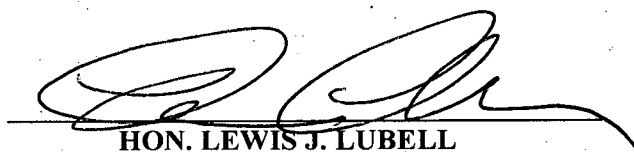
ORDERED that within three (3) days of the date of this decision and order, the defendants shall serve a copy of this decision and order on the plaintiff with notice of entry; and it is further

ORDERED that proof of service of the order with notice of entry shall be filed with the court within three (3) days after service has been completed; and it is further

ORDERED that all parties shall appear for an in-person **Compliance Conference** on July 31, 2024, at 9:30 AM, at which time it is anticipated that the case will be certified as trial ready.

The foregoing constitutes the decision and order of this Court.

Dated: White Plains, New York
June 11, 2024



HON. LEWIS J. LUBELL
JUSTICE OF THE SUPREME COURT