

Perkins v Freedman
2024 NY Slip Op 35497(U)
September 10, 2024
Supreme Court, Westchester County
Docket Number: Index No. 58259/2023
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
LAKIA PERKINS,

DECISION & ORDER

Plaintiff,

-against-

Index No. 58259/2023
Seq. Nos. 1, 2

BETH FREEDMAN, M.D., NORTHERN WESTCHESTER
HOSPITAL d/b/a NORTHWELL HEALTH, MT. KISCO
MEDICAL GROUP, P.C., CAREMOUNT MEDICAL,
P.C., a/k/a CAREMOUNT MEDICAL, VIRNA LISI-
DEMARTINO, M.D., KIMBERLY CHU, M.D., and
JENNIFER A. ELEAZAR, M.D,

Defendants.
-----X

LUBELL, J.

The following papers were considered on this motion by the defendants Beth Freedman, M.D., Caremount Medical, P.C. f/k/a Mount Kisco Medical Group, Virna Lisi-Demartino, M.D., Kimberly Chu, M.D. and Jennifer Eleazer, M.D. (hereinafter "Caremount defendants") for an order, inter alia, pursuant to CPLR 3126 dismissing the plaintiff's verified complaint for repeated willful and contumacious failure to provide discovery, serve a responsive bill of particulars and comply with multiple court orders; or, alternatively, for an order precluding plaintiff from offering testimony or adducing evidence at the time of trial in support of the allegations contained in the complaint; or, alternatively, pursuant to CPLR 3124 compelling the plaintiff to provide all outstanding discovery within 20 days or the plaintiff's complaint will be dismissed; for costs and sanctions; and for such other and further relief as this court may deem to be just and proper (Motion Seq. No. 1).

Notice of Motion

Affirmation in Support of Adam T. Brown, Esq.

Affirmation in Opposition of Ilya Novofastovsky, Esq.¹

Reply Affirmation of Adam T. Brown, Esq.

NYSCEF File

¹ While the briefing schedule provided that any opposition papers were to be filed on or before June 7, 2024, plaintiff filed her opposition papers on July 8, 2024.

The following papers were considered on this motion by the defendant Northern Westchester Hospital d/b/a Northwell Health (hereinafter "NWH") for an order, inter alia, pursuant to CPLR 3126 dismissing the plaintiff's verified complaint for repeated failure to provide discovery, and comply with three court orders; or, alternatively, for an order, pursuant to CPLR 3126 and 3042(d), precluding plaintiff from introducing any evidence against defendants at trial or in opposition to any dispositive motions with respect to any of the information set forth in the outstanding discovery demands and demand for verified bill of particulars; and for such other and further relief as this court may deem to be just and proper (Motion Seq. No. 2).

Notice of Motion

Affirmation in Support of Lauren C. Santucci, Esq.

Affirmation of Good Faith of Lauren C. Santucci, Esq.

Exhibits A through J

Affirmation in Opposition of Ilya Novofastovsky, Esq.²

Reply Affirmation of Lauren C. Santucci, Esq.

Exhibits A through B

NYSCEF File

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

Factual & Procedural Background

This action was commenced on or about March 20, 2023, when the plaintiff filed her summons with verified complaint seeking to recover damages against the defendants as a result of allegations of medical malpractice. Issue was joined on or about April 24, 2023 when the Caremount defendants filed their answer. NWH served and filed its answer on or about May 8, 2023.

A Preliminary Conference Stipulation and Order was entered on July 19, 2023, wherein counsel for the plaintiff and the defendants stipulated that the plaintiff was to serve verified bills of particulars and authorizations within 20 days of entry of the order, all responses to the Caremount defendants' outstanding initial combined demands dated April 24, 2023, and responses to NWH's combined demands dated May 8, 2023, demand for authorizations dated May 23, 2023 and notice to produce dated June 14, 2023, within 30 days of entry of the order (NYSCEF Doc. No. 21). Thereafter, the court entered Compliance Conference Referee Reports & Orders on December 8, 2023, January 24 and March 25, 2024 directing the exchange of outstanding discovery by the plaintiff (NYSCEF Doc. Nos. 25, 26, 32).

More specifically, by Compliance Conference Referee Report & Order dated December 7, 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 & Or-

² As in Motion Sequence No. 1, while the briefing schedule provided that any opposition papers were to be filed on or before June 7, 2024, plaintiff again filed her virtually identical opposition papers on July 8, 2024.

der entered January 24, 2024, the plaintiff was again directed to serve verified bills of particulars, responses to all combined demands, all outstanding authorizations, and responses to all good faith 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" (NYSCEF Doc. No. 26). The plaintiff yet again failed to comply. When the plaintiff failed to appear at the next scheduled compliance conference, the court issued a notice advising that the matter had been scheduled for a dismissal conference due to the plaintiff's failure to appear (NYSCEF Doc. No. 30). By Compliance Conference Referee Report & Order entered March 25, 2024, the plaintiff was again directed to serve all outstanding authorizations, responses to combined demands and supplemental bills of particulars responsive to the defendants' deficiency letters. This order contained the same warning language as was provided in the January 25, 2024, order and specifically provided that no further adjournments will be granted (NYSCEF Doc. No. 32). After the plaintiff failed to comply with the Court's order and failed to appear at the April 24, 2024, compliance conference, the defendants requested and were issued a briefing schedule for this motion. This motion ensued.

Parties' Contentions

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 Caremount defendants note that to date, the plaintiff never served bills of particulars for Caremount and all the individually named defendants other than defendant Freedman, as directed in this Court's Compliance Conference Orders. WPH also argues that the plaintiff's bill of particulars are wholly deficient, and the plaintiff has failed to supplement in compliance with the court's orders. Moreover, according to WPH, this bill of particulars was improperly directed to "DEFENDANT NORTHERN WESTCHESTER HOSPITAL D/B/A NORTHWELL HEALTH AND THEIR M.D.'S" without identifying who "THEIR M.D.'S" referenced. 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 his untimely 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 acknowledges that some discovery "remains outstanding due to delays beyond the plaintiff's control" (Novofastovsky Affirmation, at ¶4 [NYSCEF Doc. No. 57, 58]). Counsel contends that his inability to timely provide discovery responses was a result of both the death of plaintiff's prior counsel "from a protracted bout with dementia" in March 2024 and defendants' alleged delay in providing their records. Counsel argues that the motions are moot since he has now either provided the outstanding discovery or intends to do so within 20 days. Further, plaintiff argues that public policy strongly favors the resolution of action on the merits.

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 more than 30 days late, having been filed on July 8 and not on June 7 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 bills of particulars and outstanding authorizations and discovery responses. Further, 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, and costs should be awarded.

Analysis

As an initial matter, the court observes that the plaintiff's counsel's untimely affirmations in opposition to each motion do not contain certificates of compliance regarding length and word count as required by the Rules for New York State Trial Courts that went into effect on February 1, 2021 (see 22 NYCRR § 202.8-b). Although this omission will be overlooked in this instance, counsel is advised that compliance with this rule is expected for all future motions.

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]). Willful 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. The plaintiff’s disregard for court-imposed deadlines is highlighted by her failure to timely oppose the defendants’ motions. This court’s briefing schedule provided that any opposition was to be filed on or before June 7. By letter dated May 16, 2024, but uploaded on June 7, 2024, counsel requested a one-week extension to provide the outstanding discovery.³ Notably, even though the application was not granted, and counsel sought a “one-week extension,” he did not file his opposition until more than 30 days later.

In any event, even if the plaintiff’s untimely opposition to these motions was considered, this court finds unpersuasive the explanation offered by counsel as to the reason for the repeated untimeliness in his service of responsive discovery. While counsel blames the death of plaintiff’s prior counsel, Morton Povman, as the primary reason he could not timely comply with the court’s orders and discovery demands, it is notable that the Novo Law Firm, PC, and specifically plaintiff’s counsel, Ilya Novofastovsky, Esq., and not Mr. Povman, signed and filed the summons, complaint, verification and certificate of merit on March 20, 2023, and the notice of medical malpractice and request for judicial intervention on June 23, 2023. In fact, Mr. Povman never appeared before this court on behalf of the plaintiff in this matter. It is unclear how the death of an attorney who never appeared in this action affected Mr. Novofastovsky’s ability to comply with court orders and provide overdue discovery.

Further, counsel argues that he has mostly responded to outstanding discovery, but does acknowledge, without specification, that some discovery remains outstanding but avers that he intends to provide the outstanding discovery within 20 days. Notably, plaintiff’s counsel contends that he responded to the defendants’ demands as evidenced by his “Notice of Medical Malpractice (52 pages) that includes extensive authorizations for the defendants” (Novofastosky Affirmation in Opposition, at ¶ 3a [NYSCEF Doc. Nos. 57, 58]). While counsel failed to attach any exhibits to his opposition papers demonstrating that he indeed served original responses and authorizations, a review of this filing in NYSCEF reveals that what is described as “extensive authorizations” is a gross overstatement of what was served. Of the 52 pages-- which include copies of pleadings, affidavits of service of the underlying complaint and discovery demands-- only **four** authorizations are attached

³ Notably, while this letter is dated May 16, 2024, and indicates that it was served “VIA NYSCEF” on that date, the letter was actually not uploaded to NYSCEF on May 16, but was uploaded on June 7, 2024 (NYSCEF Doc. No. 54).

in duplicate, one for defendant Caremount's records, one for Blue Cross, one for the City of Mount Vernon and only one authorization for a nonparty treating provider (NYSCEF Doc. No. 16). Accordingly, this is far from the meaningful discovery required of a plaintiff to prosecute her action.

Further, 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. Here, the bills of particulars that were served are wholly improper and deficient. The only bills of particulars that were initially served on February 22, 2024, were served on defendants Beth Freedman, M.D. and NWH "and their M.D.'s" and are nearly identical in their allegations of negligence. No individualized bills were served related to defendants Caremount, Virna Lisi-Demartino, M.D., Kimberly Chu, M.D. and Jennifer A. Eleazar, M.D., and yet plaintiff served what he purports to be a "First Supplemental Bill of Particulars" allegedly responsive to defendants Freedman, Caremount, Lisi-Demartino, Chu and Eleazar. Moreover, both the initial bills of particulars and the "first supplemental" bill of particulars are still wholly deficient and assert improper objections. The defendants have been prejudiced by the plaintiff's repeated failure to timely serve responsive bills of particulars.

Accordingly, plaintiff's counsel's sloppy discovery practices cannot be countenanced by this Court. 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. However, 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. Accordingly, the plaintiff shall be given one final opportunity to comply. Plaintiff is directed to serve responsive bills of particulars for each separate defendant that were never served--- defendants Caremount, Virna Lisi-Demartino, M.D., Kimberly Chu, M.D. and Jennifer A. Eleazar, M.D.-- and supplemental bills of particulars on all remaining defendants, including but not limited to, particularizing individualized allegations of negligence for each defendant, particularizing claims for lost earnings and wages, particularizing special damages and providing all supporting documentation related thereto, and responsive to NWH's February 22 and April 10, 2024 deficiency letters and the Caremount defendants' deficiency letters dated February 28, April 1 and April 9 2024. Plaintiff shall also serve all outstanding authorizations for additional treatment providers and facilities for all prior and subsequent treatment, including but not limited to all authorizations delineated in the Preliminary Conference Order and for all providers, facilities and pharmacies specifically identified by plaintiff in her "First Supplemental Bill of Particulars". Further, plaintiff shall serve meaningful and complete responses to all outstanding combined discovery demands and notices to produce. More particularly, plaintiff shall serve organized, complete responses to defendants' Beth Freedman, M.D., Caremount Medical, P.C. f/k/a Mount Kisco Medical Group, Virna Lisi-Demartino, M.D., Kimberly Chu, M.D. and Jennifer Eleazar, M.D.'s April 24, 2023 notices for discovery and inspection and combined demands. Plaintiff shall also serve organized, complete responses to defendant Northern Westchester Hospital's May 8, 2023, combined demands and complete responses to defendant Northern Westchester Hospital's June 14, 2023, notice to produce. Further, plaintiff shall fully comply with this court's Preliminary Conference Order and all compliance conference orders. All responses must be organized pur-

suant to CPLR 3122 (c). If the plaintiff fails to serve any of the above, the defendants shall file detailed affidavits/affirmations enumerating the specific deficiencies, and proposed order(s) of dismissal.

Significant judicial resources have been expended on this case. Six separate court conferences and four court orders have been entered, the RJI was filed over one year ago and not a single deposition has been conducted. All these delays are clear examples of the dilatory tactics that adversely impact the timely disposition of cases. Plaintiff's conduct has also wasted the resources of defendants' counsel. This court finds unpersuasive the plaintiff's argument that the defendants are not entitled to any relief because their motions are moot. This Part's Rules were designed to ensure the timely prosecution of cases from inception to trial. As implemented, they limit adjournments and delays and require that the parties actively pursue the prosecution and defense of actions. Here, plaintiff has engaged in an ongoing pattern of noncompliance with court orders and has thwarted the discovery process and frustrated not just her adversaries ability to defend this action but this court's ability to effectively manage its already demanding caseload. Accordingly, defendants are entitled to a monetary award for costs associated with bringing the present motions.

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 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). 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.

Accordingly, in light of the foregoing, it is hereby

ORDERED that the defendants' motions are granted to the extent that on or before September 27, 2024, plaintiff shall serve: (1) bills of particulars and supplemental bills of particulars for each separate defendant, as directed herein (*supra*); (2) original authorizations for prior and subsequent treating providers, including but not limited to, all authorizations delineated in the Preliminary Conference Order and all providers, facilities and pharmacies identified by plaintiff in ¶¶ 8 and 9 of her "First Supplemental Bill of Particulars;" (3) complete, organized responses to defendants' Beth Freedman, M.D., Caremount Medical, P.C. f/k/a Mount Kisco Medical Group, Virna Lisi-

Demartino, M.D., Kimberly Chu, M.D. and Jennifer Eleazer, M.D.'s April 24, 2023 notices for discovery and inspection and combined demands; and (4) complete, organized responses to defendant Northern Westchester Hospital's May 8, 2023, combined demands and complete responses to defendant Northern Westchester Hospital's June 14, 2023, notice to produce; and it is further

ORDERED that in the event the plaintiff fails to comply as directed herein, defendants shall upload to the NYSCEF website on or before October 4, 2024, detailed affidavits/affirmations of noncompliance enumerating the specific deficiencies, and proposed order(s) of dismissal; and it is further

ORDERED that defendants are each separately awarded costs in the sum of \$250 to be paid by plaintiff within ten days of entry of this order; and it is further

ORDERED that, in the event that plaintiff fails to pay the sum of \$250 costs to each defendant within ten days of entry of this order, defendants shall upload to the NYSCEF website on or before October 4, 2024, affidavits/affirmations of noncompliance and proposed order(s) dismissing the complaint, and it is further

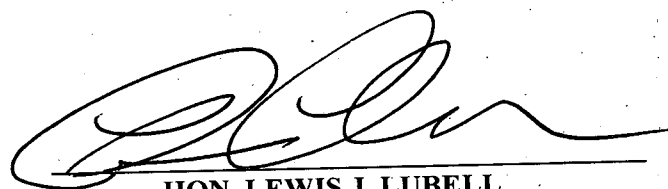
ORDERED that within three (3) days of the date of this decision and order, the defendants shall serve a copy of this decision and order on the plaintiff with notice of entry; and it is further

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, in the event the complaint is not dismissed, all counsel shall appear for an in-person **Compliance Conference** on October 24, 2024, at 9:30 AM.

The foregoing constitutes the decision and order of this Court.

Dated: White Plains, New York
September 10, 2024



HON. LEWIS J. LUBELL
JUSTICE OF THE SUPREME COURT