

Connors v ASM Global Parent, Inc.
2024 NY Slip Op 35613(U)
December 23, 2024
Supreme Court, Albany County
Docket Number: Index No. 904203-23
Judge: Thomas Marcelle
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STATE OF NEW YORK
SUPREME COURT COUNTY OF ALBANY

MARGARET CONNORS,

Plaintiff,

-against-

**DECISION, ORDER
AND JUDGMENT**
Index No.: 904203-23

ASM GLOBAL PARENT, INC.,
ALBANY COUNTY

Defendants.

APPEARANCES: Elefterakis, Elefterakis & Panek (Udeyveer Singh Brar, of counsel),
New York, for plaintiff

Goldberg Segalla, LLP (Jessica A. Rounds, of counsel),
Albany, for defendants

Thomas Marcelle, J.

This is a slip and fall case. Presently pending before the court is Defendants ASM Global Parent, Inc.'s and Albany County's (collectively, "defendants") motion requesting sanctions—up to and including dismissal—against Plaintiff Margaret Connors ("plaintiff") for alleged violations of multiple court orders and for purportedly failing to comply with her discovery obligations.

Determining whether to grant sanctions against a party is serious business and so the court enters upon the inquiry with a careful and cautious eye. In doing so, an otherwise mundane and tedious rundown of the relevant procedural history is, here, quite important in informing the court's analysis.

Discovery began in earnest in June 2023 when defendants served combined discovery demands and a demand for a bill of particulars on plaintiff. Specifically, defendants demanded executed authorizations to permit defendants to obtain "all medical and hospital records and diagnostic films by and at which plaintiff was treated as a result of the occurrence complained

of..." Defendants also demanded authorizations for federal and state tax returns and W-2s going back three years prior to the incident (see defendants' discovery demand dated June 1, 2023 at NYSCEF No. 50).¹

In August 2023, plaintiff served defendants with a bill of particulars and discovery responses. Plaintiff provided defendants with a number of authorizations but only from the date of the incident forward, which, in fairness, was all defendants asked for, at least implicitly. Plaintiff did not turn over the executed authorizations for plaintiff's taxes or for the records of plaintiff's primary care doctor (see plaintiff's discovery response dated August 31, 2023 at NYSCEF No. 50). Three weeks later, in September 2023, defendants renewed their request for authorizations and this time asked for authorizations that date back a period of five years prior to the incident (defendants' letter dated September 20, 2023 at NYSCEF No. 53).

With no response being made to their September 20 letter, a month later, defendants made additional requests for authorizations, enumerating the exact authorizations they were seeking and asking that the authorizations be "non-restricted and unlimited to date." Among the authorizations defendants requested was one for Dr. Raha Bhatia, plaintiff's primary care doctor (defendants' discovery demand dated October 24, 2023 at NYSCEF No. 54). Defendants also requested a supplemental bill of particulars at this time (defendants' letter dated October 24, 2023 at NYSCEF No. 55).

In December 2023, having still no response to their September and October requests, defendants sent plaintiff a good faith letter asking for responses (defendants' letter dated December 19, 2023 at NYSCEF No. 56). In January 2024, plaintiff still had not responded to the

¹ The alleged slip and fall occurred on October 1, 2022.

September and October demands, so defendants sent plaintiff another good faith letter (defendants' letter dated January 8, 2024 at NYSCEF No. 57).

Then, on February 14, 2024, rather than respond to defendants' demands, plaintiff asked the court to hold a preliminary conference (NYSCEF No. 35). Attached to plaintiff's request for a conference, plaintiff's attorney included an affirmation of good faith, representing that "your affirmant contacted defendants in a good faith effort to resolve the issues raised by this request, without the intervention of the Court, and have been unable to do so" (NYSCEF No. 36).

Defendants aver that plaintiff's counsel's affirmation is not accurate and that plaintiff's counsel never contacted defendants to resolve the discovery issue (see defendants' attorney affirmation dated June 10, 2024 at NYSCEF No. 46). Plaintiff has neither answered nor disputed this allegation.

In any event, the court scheduled the requested preliminary conference for March 5, 2024. Defendants' counsel appeared for the conference, but plaintiff's attorney did not—without any notice to the court. As a result of plaintiff's failure to appear, the court rescheduled the conference for March 20. This time, both parties appeared through their respective counsel.

Pursuant to the March 20 conference, and on consent of both parties, the court issued an order directing that plaintiff, by April 19, "shall provide executed authorizations pursuant to defendants' prior demands that allow defendants to obtain records dating back at least five years prior to the date of the alleged accident," which of course included the authorizations specifically enumerated in defendants' October 2023 demand (Order signed on March 20, 2024 at NYSCEF No. 43).

In a discovery response dated April 22, 2024, plaintiff objected to many of the authorizations defendants set forth in their October demand, including the authorization related

to Dr. Raha Bhatia (see plaintiff's discovery response dated April 22, 2024 at NYSCEF No. 60).

Notably, the objections raised by plaintiff in plaintiff's April 22 response were not raised during the court conference when plaintiff consented to providing the executed authorizations pursuant to defendants' previous requests.

On April 29, 2024, defendants made a good faith demand asking plaintiff to comply with the court's March 20 order and defendants' demand for authorizations—reiterating the authorizations defendants had previously listed in their October 2023 demand.

On May 21, 2024, the court held a compliance conference, which had been previously scheduled. As of this time, plaintiff still had not followed through with providing the authorizations it promised at the prior conference and pursuant to the court's order. As a result of the May 21 conference, the court issued another order mandating plaintiff's compliance with providing defendants with the authorizations, directing that plaintiff "shall respond fully ... to defendants' deficiency letter dated April 29, 2024, by June 7" (Order signed on May 21, 2024 at NYSCEF No. 44). Plaintiff did not object or take exception to the court's order.

Yet, on June 7, plaintiff sent a letter to defendants, standing on its objections raised in plaintiff's April 22 response and declined to provide defendants with the authorizations it had objected to (see plaintiff's letter dated June 7, 2024 at NYSCEF No. 69).

On June 10, defendants brought a motion to compel discovery or, alternatively, for sanctions and an order precluding plaintiff from offering evidence at trial. As of plaintiff's motion, the following authorizations (going at least five years back from the date of injury) still had not been provided: Emblem Health, Social Security, IRS, NYS Department of Taxation and Finance, Pain Management, Neurologists, any and all providers who treated plaintiff's exacerbated degenerative condition, any and all psychiatrist and/or psychologists, Dr. Raha

Bhatia, Mohawk Ambulance and Huntington Union Free School District. Also, plaintiff still withheld the supplemental bill of particulars defendants first requested in October 2023.

However, on the eve of oral argument, scheduled for August 7, the parties arrived at a settlement of defendants' motion, which the court "so ordered." Specifically, the consent order, signed by the parties' attorneys, set forth that plaintiff would have 30 days to provide defendants with the requested authorizations dating back five years from the date of injury, as well as a supplemental bill of particulars. The order specified the exact authorizations plaintiff was to provide defendants, including one for Dr. Bhatia. Further, during this 30 day period, defendants' motion would be held in abeyance. The consent order concluded with an admonition: "if plaintiff fails to comply with this Order, the parties stipulate and agree that plaintiff will be subject to sanctions at the discretion of the court including dismissal" (Order signed on August 7, 2024 at NYSCEF No. 72).

In their letter dated September 10—more than 30 days since the signing of the court's consent order—defendants apprised the court that plaintiff had not fully complied with the consent order and thus defendants renewed their prior motion. Specifically, defendants claimed that plaintiff was still retaining executed authorizations related to plaintiff's primary care doctor (Dr. Bhatia), Mohawk Ambulance, as well as the supplemental bill of particulars. The court allowed further briefing regarding the alleged failure to comply.

Plaintiff, in an attorney affirmation, attests that plaintiff has "responded to all of Defendants' Discovery Demands," without qualification. Defendants contend, most significantly, that although plaintiff has now made a belated attempt—after the court ordered 30 day deadline—to comply with the court's August order, plaintiff is yet refusing to provide an authorization for Dr. Bhatia. Certainly, an unreserved vow of compliance, as plaintiff appears to

make, is not consistent with holding back the executed authorization for Dr. Bhatia, which the court ordered and plaintiff agreed to supply. A closer inspection of plaintiff's papers is called for.

Now, looking beneath the surface of plaintiff's attorney affirmation to an exhibit attached to the affirmation reveals something different than what plaintiff's counsel attests in the affirmation. Included as an exhibit to the attorney affirmation is plaintiff's latest discovery response to defendant, which was spurred by the court's August consent order. This discovery response maintains its objection to providing the Dr. Bhatia authorization to defendants (see Exhibit A attached to plaintiff's attorney affirmation dated September 25, 2024 at NYSCEF No. 77). Thus, contrary to plaintiff's attorney affirmation, plaintiff still has not complied with defendants' demands and the court's August 2024 order.²

CPLR 3126 provides in relevant part that: "If any party, or a person who ... is an officer, director, member, employee or agent of a party or otherwise under a party's control, refuses to obey an order for disclosure or willfully fails to disclose information which the court finds ought to have been disclosed pursuant to this article, the court may make such orders with regard to the failure or refusal as are just..." (id.).

Here, plaintiff has violated each of the court's last three orders directing plaintiff to turn over specific items of discovery. Plaintiff never took exception to any of the court's orders and two out of the three orders were with plaintiff's express consent. Three times—In March, May, and August—plaintiff nodded to the court in agreement or acquiescence regarding the authorizations to be turned over to defendants, the court would then issue an order directing the agreed upon disclosure, and plaintiff each time turned around and sent defendants a letter

² As of the date of the issuance of this decision, order and judgment, plaintiff has had well over two months to provide defendants with the authorization related to Dr. Bhatia, since defendant's last affirmation advising the court (and plaintiff) of this failure—but plaintiff, even so, has not.

objecting to some or another of the authorizations plaintiff had previously agreed to provide and the court ordered plaintiff to supply. Indeed, there has been no real room for interpretation of the court's three orders. The March and May orders referred back to defendants' demands that listed—by name—the authorizations plaintiff was to provide and the August order listed the specific authorizations in the order itself. Plaintiff's conduct amounts to a refusal to obey the court's orders regarding disclosure and, after three times, the court believes plaintiff is acting "willfully and contumaciously," "which can be inferred from a pattern of noncompliance" (*Doherty v Schuyler Hills, Inc.*, 55 AD3d 1174, 1176 [3d Dept 2008]; CPLR 3126).

This leaves the remedy to be meted out. The court may issue an "order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or any part thereof, or rendering a judgment by default against the disobedient party" (CPLR 3126 [3]). A trial court has discretion to dismiss a complaint as a sanction against a plaintiff who fails to comply with a court order and frustrates the disclosure process (see *id.*; *Kihl v. Pfeffer*, 94 NY2d 118, 122–123 [1999]). This sanction is generally only justified when the party seeking dismissal demonstrates that the failure to comply with the request and order for disclosure was "willful and contumacious" (see *Doherty*, 55 A.D.3d at 1176).

Here, plaintiff's repeated failures to adequately respond to defendant's discovery demands and transgressing the court's discovery orders, willfully and contumaciously, is blameworthy enough. But this is only part of the story. Plaintiff's discovery failures and order violations have been marked with a certain duplicity—of plaintiff routinely telling the court it would do one thing and then doing something different than what plaintiff agreed to do. This modus operandi has foiled the court's efforts to resolve the discovery issues before it and has

wasted judicial time and resources—leaving the court scarce of consolation that anything will be different if plaintiff is given a fourth chance to comply with the court's discovery orders.

As such, the court will grant the sanction plaintiff consented to be subject to for its non-compliance (see Order signed on August 7, 2024 at NYSCEF No. 72).

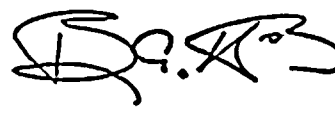
Therefore, it is

ORDERED, plaintiff's complaint is dismissed, without prejudice; and it is further

ORDERED, defendants shall be awarded reasonable costs and attorneys fees in an amount to be determined by the court. Defendants shall submit an attorney affirmation supported by proof of its relevant costs and fees by January 23, 2025; opposition papers shall be submitted by February 6.

Dated: 12/23/24


Hon. Thomas Marcelle
SUPREME COURT JUSTICE



12/24/2024