

**Johnson v Willis**

2025 NY Slip Op 30912(U)

March 14, 2025

Supreme Court, New York County

Docket Number: Index No. 805180/2017

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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SHAWNTAE JOHNSON and MICHAEL JOHNSON, as  
Administrators of the Estate of Taeden M. Johnson,

Plaintiff,

INDEX NO. 805180/2017

MOTION DATE 12/17/2024

MOTION SEQ. NO. 006

- v -

VELEKA WILLIS, M.D., AMY MAGNESON, M.D., GALIT  
STEINBERG, M.D., KIM CARAWAY, C.N.M., NEW YORK-  
PRESBYTERIAN-THE UNIVERSITY HOSPITAL OF  
COLUMBIA AND CORNELL, THE NEW YORK  
PRESBYTERIAN HOSPITAL, NEW YORK-  
PRESBYTERIAN HEALTH CARE SYSTEM, INC., and  
"DOES 1-20" being fictitious names, true names unknown,  
persons and/or entities intended to be agents, servants  
and/or employees of defendants, and/or independent  
medical pharmaceutical providers, who provided  
medical/pharmaceutical services to plaintiffs' decedent,

Defendants.

**DECISION + ORDER ON  
MOTION**

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The following e-filed documents, listed by NYSCEF document number (Motion 006) 103, 104, 105, 106,  
107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120

were read on this motion to/for DISMISS.

In this action to recover damages for medical malpractice, the defendants Veleka Willis,  
M.D., Amy Magneson, M.D., Galit Steinberg, M.D., Kim Caraway, C.N.M., New York-  
Presbyterian-The University Hospital of Columbia and Cornell, The New York Presbyterian  
Hospital, and New York-Presbyterian Health Care System, Inc. (collectively the NYPH  
defendants), move pursuant to CPLR 3126 to dismiss the complaint insofar as asserted against  
them for the plaintiffs' refusal to comply with case management orders and discovery demands,  
and refusal to submit to depositions. The plaintiffs cross-move to "deny" the motion, and their  
attorney cross-moves pursuant to CPLR 321(b) for leave to withdraw as the plaintiffs' counsel.  
The NYPH defendants' motion is granted, the complaint is dismissed insofar as asserted  
against them, and the cross motion of the plaintiffs and their attorney is denied.

In the most recent status conference order entered in this action, dated July 30, 2024, the court directed the plaintiffs, Shawntae Johnson and Michael Johnson, respectively to submit to a deposition on or before September 11, 2024 and September 12, 2024. That order was the tenth status conference order issued between October 18, 2018 and July 30, 2024. In a decision and order dated January 29, 2024 (SEQ 005), this court denied the plaintiffs' attorney's motion for leave to withdraw as counsel, explaining that a mere disagreement between a client and an attorney over the likelihood of success of an action is not a proper basis for permitting the attorney to withdraw from representing the client. In that same decision and order, the court denied the NYPH defendants' cross motion pursuant to CPLR 3126 to dismiss the complaint insofar as asserted against them, on the ground that they failed to satisfy a condition precedent to submission of the motion, as set forth in 22 NYCRR 202.20-f(b), which required that their attorney attest to having had a telephonic conference with the plaintiffs' attorney in an attempt to resolve the outstanding discovery dispute prior to making such a motion.

The NYPH defendants' attorney has now submitted proof that, on September 10, 2024, he received a telephone call from the plaintiffs' counsel, confirming that her clients would be produced over the following two days for their depositions, and he arranged to email the plaintiffs' counsel a remote conference link to be forwarded to the plaintiffs so that they could appear remotely for their depositions. As the NYPH defendants' attorney described it, at approximately 10:00 a.m. on September 11, 2024, when a partner from his firm appeared virtually for the deposition of Shawntae Johnson, and indicated his readiness to proceed therewith, the plaintiffs' counsel appeared virtually and stated, "the plaintiffs informed me that they do not want to go forward, and I will be making a motion to withdraw on behalf of myself and the Law Offices of Tanya Gendelman." The plaintiffs have yet to submit to a deposition.

CPLR 3126 authorizes the court to sanction parties who "refuse[ ] to obey an order for disclosure or wilfully fail[ ] to disclose information which the court finds ought to have been disclosed" (*Kutner v Feiden, Dweck & Sladkus*, 223 AD2d 488, 489 [1st Dept 1998]). A failure

to comply with discovery obligations, particularly after a court order has been issued, “may constitute the dilatory and obstructive, and thus contumacious, conduct warranting the striking of” a pleading (*id.*; 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 NYPH defendants have established that the plaintiffs willfully have refused to proceed with discovery, have violated numerous prior court orders directing them to appear for depositions, have compelled the NYPH defendants to make three separate motions to compel discovery, and, as described above, have indicated that they do not wish to proceed with the prosecution of the action. Hence, the motion is granted.

That branch of the plaintiffs’ cross motion, purportedly seeking “to deny” the NYPH defendants’ motion, does not seek affirmative relief, and must be denied on that ground (see *Stevens v Cutler*, 2021 NY Slip Op 32465[U], \*3, 2021 NY Misc LEXIS 6082, \*4 [Sup Ct, N.Y. County, Jul. 29, 2021] [Kelley, J.]; *Koegler v Amraly*, 68 Misc 3d 1204[A], 2020 NY Slip Op 50858[U], \*1, 2020 NY Misc LEXIS 3518, \*3-4 [Sup Ct, N.Y. County, Jul. 22, 2020]). Rather, the court has considered the papers submitted by the plaintiffs as their opposition to the NYPH defendants’ motion and, as set forth above, concludes that the plaintiffs’ papers are insufficient to oppose the relief sought by the NYPH defendants.

The denies that branch of the cross motion pursuant to which the plaintiffs’ attorney seeks leave to withdraw as counsel for the same reason as it denied her prior application to be relieved as counsel. Moreover, CPLR 321(b)(2) provides that

“[a]n attorney of record may withdraw or be changed by order of the court in which the action is pending, upon motion *on such notice* to the client of the withdrawing attorney, to the attorneys of all other parties in the action or, if a party appears without an attorney, to the party, and to any other person, *as the court may direct*”

(emphasis added). Where a statute requires notice to be given in such manner as the court may direct, the underlying request for relief must be initiated by order to show cause, not by notice of motion (see *Smith v Smith*, 291 AD2d 828 [4th Dept 2002]; *Wong v Wong*, 213 AD2d 399, 400 [2d Dept 1995]; *Bynoe v Riverside Church in City of N.Y.*, 13 Misc 3d 628 [App Term,

1st Dept 2006]; *Aiello v Adar*, 193 Misc 2d 649, 654 [Sup Ct, Bronx County 2002]; *People of State of N.Y. v ELRAC, Inc.*, 192 Misc 2d 78, 82 [Sup Ct, N.Y. County 2002]; *Universal Elevator Co. v Jordan Elevator Co.*, 110 Misc 2d 670, 672 [Sup Ct, N.Y. County 1981] [explaining reasons for requiring order to show cause]; McKinney's Cons Laws of NY, Book 7B, CPLR C321:2 [2001]). Hence, that branch of the cross motion also must be denied on the ground that the relief was not sought via order to show cause.

With respect to the defendants denominated as “DOES 1-20’ being fictitious names, true names unknown, persons and/or entities intended to be agents, servants and/or employees of defendants, and/or independent medical pharmaceutical providers, who provided medical/ pharmaceutical services to plaintiffs’ decedent,” the plaintiffs made no showing of any efforts that they made to identify these fictitious defendants. Since they never were identified, the plaintiffs are precluded from relying on CPLR 1024 to maintain this action against those parties (see generally *Fountain v Ocean View II Assocs., L.P.*, 266 AD2d 339 [2d Dept 1999]), and the complaint must be dismissed as against them.

Accordingly, it is,

ORDERED that the motion of the defendants Veleka Willis, M.D., Amy Magneson, M.D., Galit Steinberg, M.D., Kim Caraway, C.N.M., New York-Presbyterian-The University Hospital of Columbia and Cornell, The New York Presbyterian Hospital, and New York-Presbyterian Health Care System, Inc., to dismiss the complaint insofar as asserted against them is granted, and the complaint is dismissed insofar as asserted against the defendants Veleka Willis, M.D., Amy Magneson, M.D., Galit Steinberg, M.D., Kim Caraway, C.N.M., New York-Presbyterian-The University Hospital of Columbia and Cornell, The New York Presbyterian Hospital, and New York-Presbyterian Health Care System, Inc.; and it is further,

ORDERED that, on the court’s own motion, the action is severed against the defendants Veleka Willis, M.D., Amy Magneson, M.D., Galit Steinberg, M.D., Kim Caraway, C.N.M., New


York-Presbyterian-The University Hospital of Columbia and Cornell, The New York Presbyterian Hospital, and New York-Presbyterian Health Care System, Inc.; and it is further,

ORDERED that the Clerk of the court is directed to enter judgment dismissing the complaint insofar as asserted against the defendants Veleka Willis, M.D., Amy Magneson, M.D., Galit Steinberg, M.D., Kim Caraway, C.N.M., New York-Presbyterian-The University Hospital of Columbia and Cornell, The New York Presbyterian Hospital, and New York-Presbyterian Health Care System, Inc.; and it is further,

ORDERED that, on the court's own motion, the complaint is dismissed insofar as asserted against the defendants "DOES 1-20," being fictitious names, true names unknown, persons and/or entities intended to be agents, servants and/or employees of defendants, and/or independent medical pharmaceutical providers, who provided medical/pharmaceutical services to plaintiffs' decedent.

This constitutes the Decision and Order of the court.

3/14/2025  
DATE

  
JOHN J. KELLEY, J.S.C.

MOTION:	<input checked="" type="checkbox"/>	CASE DISPOSED	<input type="checkbox"/>	NON-FINAL DISPOSITION	<input type="checkbox"/>	OTHER
	<input checked="" type="checkbox"/>	GRANTED	<input type="checkbox"/> DENIED	<input type="checkbox"/>	<input type="checkbox"/>	GRANTED IN PART
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER		<input type="checkbox"/>	<input type="checkbox"/>	SUBMIT ORDER
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN		<input type="checkbox"/>	<input type="checkbox"/>	FIDUCIARY APPOINTMENT
CROSS MOTION:	<input checked="" type="checkbox"/>	CASE DISPOSED	<input type="checkbox"/>	NON-FINAL DISPOSITION	<input type="checkbox"/>	REFERENCE
	<input type="checkbox"/>	GRANTED	<input checked="" type="checkbox"/> DENIED	<input type="checkbox"/>	<input type="checkbox"/>	GRANTED IN PART
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER		<input type="checkbox"/>	<input type="checkbox"/>	SUBMIT ORDER
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN		<input type="checkbox"/>	<input type="checkbox"/>	FIDUCIARY APPOINTMENT
					<input type="checkbox"/>	REFERENCE