

Bigwood v Lenox Hill Hosp.

2025 NY Slip Op 32632(U)

July 9, 2025

Supreme Court, New York County

Docket Number: Index No. 805387/2020

Judge: John J. Kelley

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

PRESENT: HON. JOHN J. KELLEY **PART** **IAS MOTION 56EFM**

Justice

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MICHAEL BIGWOOD, as Administrator of the Estate of BEULAH
BIGWOOD, and MICHAEL BIGWOOD, Individually,

Plaintiff,

- v -

LENOX HILL HOSPITAL,

Defendant.

INDEX NO. 805387/2020

MOTION DATE 04/09/2025

MOTION SEQ. NO. 003

**DECISION AND ORDER ON
MOTION**

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The following e-filed documents, listed by NYSCEF document number (Motion 003) 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 97

were read on this motion to/for DISCOVERY/CPLR 3126.

In this action to recover damages for medical malpractice based on alleged departures from good and accepted practice and wrongful death, the defendant moves pursuant to CPLR 3042 and 3126 to dismiss the complaint for the plaintiff’s alleged failure to comply with prior discovery orders and to respond to outstanding demands and requests for particulars and items of discovery. The plaintiff opposes the motion. The motion is denied. The parties shall appear for a remote status conference on July 28, 2025, at 11:00 a.m.

In a preliminary conference order dated June 23, 2022, the court directed the plaintiff to provide the defendant with authorizations permitting it to obtain the plaintiff’s decedent’s medical and hospital records from all healthcare providers and facilities with whom the decedent consulted in connection with the injuries set forth in the plaintiff’s bill of particulars, including, but not limited to, primary care physicians, physical and occupational therapists, rehabilitation facilities and centers, hospital admissions and emergency department presentations, visiting nurse services, radiologists, pharmacies, pain management specialists, physical and rehabilitation medicine specialists, and neurologists. The plaintiff also was directed to provide the defendant with authorizations permitting it to obtain relevant collateral source records,

including records from Medicare, Medicaid, and Empire Blue Cross/Blue Shield. Additionally, The court further directed the plaintiff, on or before July 25, 2022, to provide responses to the defendant's May 7, 2021 combined demands, its demands for authorizations dated March 16, 2022 and April 4, 2022, and a new unrestricted authorization for the decedent's Medicare records, as well as a copy of all of the decedent's medical records in the plaintiff's possession, including, but not limited to, records from Mount Sinai Luke's Hospital and The Riverside Premier Rehabilitation and Healing Center. In addition, the court directed the plaintiff to provide proof of special damages, as well as all relevant lien information in his possession.

The defendant alleged that the plaintiff failed to comply with the preliminary conference order and that, despite sending his attorney numerous good faith letters, the plaintiff, as of December 5, 2022, neither fully complied with that order nor fully responded to those letters, instead serving a "wholly incomplete and insufficient response." In a compliance conference order dated December 19, 2022, the court directed, as relevant here, that:

"(1) plaintiff to respond to defendant's letter dated 11/28/22 within 30 days; (2) plaintiff to respond to demand for authorizations for decedent's primary care physician, physical therapists and facilities, pain management/physical and rehabilitation medicine, and neurologists within 30 days; (3) plaintiff to respond to defendant's demand for authorizations for Medicare and Medicaid, including unrestricted Medicare authorization pursuant to the PC order within 30 days; (4) plaintiff to respond to defendant's demand for authorizations dated 3/16/22 within 30 days; (5) plaintiff to provide proof of special damages within 30 days; (6) plaintiff is to provide lien information within 30 days; (6) plaintiff to provide response to defendant's combined demands filed 5/7/21 within 30 days."

That order scheduled the plaintiff's deposition for on or before March 30, 2023, and the defendant's deposition for on or before April 28, 2023. As of May 16, 2023, those depositions had yet to be conducted, and, apparently, some of the discovery previously directed by the court had yet to be provided by the plaintiff. In a follow-up compliance conference order dated May 16, 2023, the court directed that

"(1) P to respond to D's letter demands dated 11/28/22, 1/3/23 & 3/2/23 within 30 days; (2) plaintiff to respond to demand for authorizations for decedent's primary care physician, therapists and facilities, pain management/physical and rehabilitation medicine, and neurologists within 30 days; (3) plaintiff to respond to

defendant's demand for authorizations for Medicare and Medicaid, including unrestricted Medicare authorization pursuant to the PC order within 30 days; (4) P to respond to D's demand for authorizations dated 3/16/22 & 4/6/23 within 30 days; (5) plaintiff to provide proof of special damages within 30 days; (6) plaintiff is to provide lien information within 30 days; (6) plaintiff to provide response to defendant's combined demands filed 5/7/21 within 30 days"

The parties' depositions were adjourned until September 7, 2023, and November 9, 2023, respectively.

According to the defendant, the plaintiff continued to delay in providing outstanding items of discovery, despite its delivery of numerous good-faith letters requesting that he respond. On October 6, 2023, the defendant moved pursuant to CPLR 3126 to dismiss the complaint (MOT SEQ 002). On November 16, 2023, and, thus, during the pendency of the motion, the plaintiff, as part of his opposition to the motion, served a 122-page response to the defendant's demands, including a December 22, 2021 email forwarding seven authorizations, all dated December 22, 2021, permitting the defendant to obtain the decedent's Medicare and Medicaid records, as well as records from Dr. Aviva Lubin, Visiting Nurse Service of New York, Fox Rehabilitation, Blue Cross, CVS Pharmacy, Mount Sinai St. Luke's Hospital, and The Riverside Premier Rehabilitation and Healing Center. In addition, the plaintiff attached to his submission both the defendant's April 4, 2022 demand for authorizations, and his August 8, 2022 response thereto, which included authorizations, all dated August 8, 2022, permtting the defendant to obtain the decedent's records from Dr. Gabriel Sara, Dr. Lance Brown, Dr. John McKnight, Anna Kanishcheva, NP, of Optum Care, Dr. Laurie B. Meckler, Dr. Leslie Seecommar, Dr. Olga Petryna, Dr. Vincci Ngan, Dr. Anthony Apigo of Mount Sinai Morningside, Dr. Deepa Ravikumar of Northwell Health, NYU Langone Hospital, Dr. Ina S. Itzkovitz, Dr. Richard Shepard, Dr. Chang Jiang, Dr. Ariana Gluck, and Dr. Oliver Frankenberger.

On March 28, 2024, the court issued a status conference order which, despite the plaintiff's responses to the defendant's prior demands, directed the plaintiff to respond to the defendant's November 28, 2022, January 3, 2023, and March 2, 2023 letter demands within 30

days, as well as to the defendant's demands to identify his decedent's primary care physician, therapist, rehabilitation facilities, pain management/physical and rehabilitation medicine specialists and neurologists, along with the decedent's Mt. Sinai St. Lukes and Riverside Premier rehabilitation records in the plaintiff's possession. The parties' depositions were again adjourned, this time to March 29, 2024 and April 29, 2024, respectively. In an order dated March 28, 2024, the court denied the defendant's CPLR 3126 motion as academic, in light of the entry of the March 28, 2024 status conference order.

According to the defendant, as of September 12, 2024, the plaintiff had yet to comply with the March 28, 2024 status conference order. Consequently, in the follow-up September 13, 2024 status conference order, the court set a new deadline for the discovery directives set forth in the March 28, 2024 status conference order, and directed the parties to submit a proposed follow-up status conference order on April 9, 2025 to reschedule any discovery that remained outstanding, and to schedule any new discovery that needed to be conducted. Prior to submitting the proposed status conference order, however, the defendant did not contact the court to request a remote or in-person status conference, and instead made the instant motion on March 21, 2025 (see CPLR 2211). In a status conference order issued on April 16, 2025, and, thus, during the pendency of this motion, the court again rescheduled the plaintiff's deadline for compliance with the March 28, 2024 status conference order. Upon the plaintiff's consent, the court directed that, on or before April 30, 2025, the plaintiff was to comply with all prior discovery orders and respond to 10 good-faith letters sent by the defendant during 2024 and 2 good-faith letters sent during 2025 and that, if the plaintiff "fails to do so, defendant's motion to dismiss (Motion Sequence 3) shall be deemed unopposed." On April 30, 2025, the plaintiff served the defendant with a response to the April 16, 2025 order, reciting as follow:

- "1. All demanded authorizations were previously provided.
- "2. The decedent was not a Medicaid nor a Medicare beneficiary.
- "3. There are no special damages.

“4. There is no lost income.

“5. There are no liens.

“6. Plaintiff is not in possession of medical records of Mount Sinai St. Luke's Hospital and The Riverside Premier Rehabilitation and Healing Center at this time.

“7. The Identity of the decedent's primary care physician is Dr. Richard Shepard 355 West 52nd Street, 7th Floor, New York, NY 10019 (authorization previously provided).

“8. The decedent underwent physical therapy, pain management/physical and rehabilitation medicine at Mount Sinai St. Luke's Hospital, 419 W 114th St, New York, NY 10025 and The Riverside Premier Rehabilitation and Healing Center, 150 Riverside Dr, New York, NY 10024 (authorizations previously provided).

“9. The Identity of the decedent's neurologist is Dr. Laurie B Meckler 1090 Amsterdam Ave Ste 16C, New York, NY 10025 (authorization previously provided).

“10. The plaintiff will voluntarily produce the decedent's children, Michael Huntington Bigwood and Colby Bigwood for non-party witness depositions.”

The defendant argued in its motion that its attorneys had sent the plaintiff “twenty-four good faith letters,” and made “at least a dozen phone calls” between 2021 and 2025, but that the plaintiff “has failed to provide discovery dating back to 2021.” Nonetheless, the defendant's counsel failed to establish that he satisfied a condition precedent to the submission of the instant motion, as set forth in 22 NYCRR 202.20-f(b), which requires that he attest to “having conducted an in-person or telephonic conference, setting forth the date and time of such conference, persons participating, and the length of time of the conference.” In other words, with respect to the alleged failure of the plaintiff to comply with the September 13, 2024 status conference order, upon which this motion is essentially premised, or to respond to demands made since that date, counsel has simply failed to identify or describe the telephone conversation or conversations that would satisfy the court rule. Hence, the motion must be denied on that ground alone.

In any event, the statement of the defendant's counsel is disingenuous at best, and demonstrably untrue, since the plaintiff has established that he did, in fact, provide the

outstanding items of discovery, even though it required numerous case management orders, many letters, and two motions to compel his responses to the defendant's demands and his compliance with prior court orders. CPLR 3126 authorizes the court to sanction only 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 Créances S.A. v Cohen*, 104 AD3d 17, 26-27 [1st Dept 2012]; *Reidel v Ryder TRS, Inc.*, 13 AD3d 170, 171 [1st Dept 2004]). Hence, dismissal may be appropriate where "a party is found to have engaged in a protracted pattern of delay and noncompliance with numerous court orders, willful and contumacious conduct may be inferred, and it is a provident exercise of discretion under such circumstances to reject the party's excuse for such conduct" (*Transasia Commodities Inv. Ltd. v NewLead JMEG, LLC*, 169 AD3d 591, 592 [1st Dept 2019]). Such a "drastic remedy is not appropriate, however, "where there is no clear showing that the failure to comply with discovery demands was willful or contumacious" (*Walter B. Melvin, Architects, LLC v 24 Aqueduct Lane Condominium*, 51 AD3d 784, 785 [2d Dept 2008]).

In this respect, a party should be afforded "reasonable latitude" before "imposing the ultimate sanction" (*CDR Créances S.A. v Cohen*, 62 AD3d 576, 577 [1st Dept 2009]). Consequently, where a party, such as the plaintiff here, serves discovery materials during the pendency of a motion to dismiss the complaint, that party's prior failure to make discovery generally should not be deemed willful or contumacious (see *Chamberlain, D'Amada, Oppenheimer & Greenfield v Beauchamp*, 247 AD2d 858, 859 [4th Dept 1998]; see also *Butler v Knights Collision Experts, Inc.*, 165 AD3d 406, 407 [1st Dept 2018]).

The court concludes that the plaintiff's conduct here was not willful and contumacious, that he complied with the April 16, 2025 status conference order on or before April 30, 2025,

and that, consequently, the defendant’s motion is not deemed to be unopposed. Moreover, the court notes that, in its preliminary conference order, it directed that the defendant’s “[i]nability to obtain medical records prior to the deposition dates shall NOT be cause for adjournment of the deposition. If the records obtained reveal the need for additional information, a further limited deposition may be held by agreement of the parties or by Order of the Court.” Despite this directive, and despite the fact that the plaintiff had provided the defendant with two sets of numerous authorizations during 2021 and 2022, the defendant had yet to conduct the plaintiff’s deposition until after March 29, 2024, suggesting that the delay in completing discovery here cannot be laid solely at the plaintiff’s doorstep.

Since it is apparent that nonparty depositions remain outstanding, and that there might be some additional discovery that needs to be scheduled, the court is itself scheduling a remote discovery conference for July 28, 2025 at 11:00 a.m.

Accordingly, it is

ORDERED that the defendant’s motion is denied; and it is further,

ORDERED that, on the court’s own motion, the parties shall appear for a remote Microsoft Teams status conference before the court on July 28, 2025, at 11:00 a.m., and the court shall provide the attorneys for the parties via email with a link to provide them with access to that conference

This constitutes the Decision and Order of the court.

JOHN J. KELLEY, J.S.C.

7/9/2025
DATE

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: