SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. HASA A. KINGO** **PART** **05M**

Justice

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NAKEMIA STANLEY,

Plaintiff,

- v -

THE CITY OF NEW YORK, OFFICE OF THE CHIEF MEDICAL EXAMINER, OFFICE OF THE CHIEF MEDICAL EXAMINER DEPUTY DIRECTOR OF FORENSIC INVESTIGATIONS ADEN NAKA, OFFICE OF THE CHIEF MEDICAL EXAMINER SPECIAL COUNSEL, LITIGATION AND POLICY LESLIE KAMELHAR,

Defendant.

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INDEX NO. 151098/2020

MOTION DATE N/A

MOTION SEQ. NO. 009

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 009) 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202

were read on this motion to DISMISS.

Defendants, the City of New York and associated parties ("the City"), move pursuant to CPLR § 3126 to dismiss with prejudice all claims in the verified complaint related to Plaintiff Nakemia Stanley's ("Plaintiff") alleged twin pregnancy, complications during that pregnancy, and stillbirths, including but not limited to paragraphs 28, 40, 42, 62, 64, and 73 of the complaint. In the alternative, Defendants seek (i) preclusion under CPLR §§ 3124, 3126, and 3042 of Plaintiff's evidence in support of certain bill of particulars items, or (ii) a conditional order of preclusion requiring Plaintiff to serve a supplemental bill of particulars and to provide HIPAA-compliant authorizations within thirty (30) days, failing which preclusion will result.

BACKGROUND AND PROCEDURAL HISTORY

This case arises out of Plaintiff's allegation that Defendants interfered with her right of sepulcher, causing her severe emotional distress, which she claims contributed to the loss of a twin pregnancy culminating in stillbirths. Plaintiff previously obtained summary judgment on liability

for the loss of sepulcher claim, a determination affirmed by the Appellate Division, First Department (*see Stanley v. City of New York,* 238 AD3d 682, 683 [1st Dept 2025]).

Discovery has been protracted and contentious. Defendants have repeatedly sought HIPAA-compliant authorizations for obstetrical, prenatal, labor, and delivery records. They assert that despite Plaintiff providing numerous authorizations, no medical provider has produced any record confirming pregnancy or delivery. Defendants highlight records from Sun River Health and St. Barnabas Hospital that, despite being contemporaneous with the alleged pregnancy, contain no mention of a pregnancy.

Plaintiff has submitted a *Jackson* affidavit[1] documenting extensive but unsuccessful efforts to obtain such records. The affidavit annexes photographs of Plaintiff while visibly pregnant, purported sonogram screenshots, and records from the Department of Social Services indicating pregnancy. Plaintiff maintains that the absence of medical records reflects circumstances beyond her control rather than discovery misconduct.

ARGUMENTS

Defendants argue that Plaintiff has failed to comply with repeated discovery orders requiring HIPAA authorizations for prenatal and delivery records, and that their inability to obtain certified medical records fundamentally prejudices their ability to mount a defense, including securing expert testimony on causation. Relying on *Cynthia B. v. New Rochelle Hosp. Med. Ctr*., 60 NY2d 452, 456 (1983), they contend that once Plaintiff placed her physical condition in controversy, she was required to provide authorizations for her medical records. Defendants urge dismissal, or alternatively, preclusion or a conditional order of preclusion.

Plaintiff counters that sanctions are unwarranted because the medical records sought are outside her possession and control. She relies on *Vaz v. New York City Tr. Auth*., 85 AD3d 902, 903 (2d Dept 2011) (a party cannot be sanctioned for failing to produce information not in its possession or control). Plaintiff underscores that she has provided a *Jackson* affidavit, which is an established substitute when records cannot be obtained (*DiMaggio v. Port Auth. of NY & NJ*, 228 AD3d 426, 426 [1st Dept 2024]). She stresses that Defendants have not demonstrated that her conduct was willful or contumacious, which is a prerequisite for sanctions under CPLR § 3126 (*Delgado v. City of New York*, 47 AD3d 550 [1st Dept 2008]).

Defendants respond that the *Jackson* affidavit is inadequate, as screenshots and shelter notes are insufficient substitutes for certified medical records necessary to evaluate causation. They argue that without medical records, they cannot retain an expert obstetrician to contest Plaintiff's novel claim that emotional distress from sepulcher interference caused stillbirths.

[1] A *Jackson* affidavit is a sworn statement used in New York legal proceedings to explain a party's good-faith efforts to find documents requested during discovery. It is submitted when a party claims that responsive documents do not exist or cannot be located. The affidavit gets its name from the 1992 case *Jackson v. City of New York*, 185 AD2d 768 (1st Dept 1992), which established the standard for proving a diligent search for missing records.

Defendants insist they need not prove Plaintiff acted willfully or in bad faith, but only that she has failed to provide critical authorizations despite multiple court orders.

DISCUSSION

The court is tasked with determining whether dismissal, preclusion, or conditional preclusion is warranted under CPLR § 3126, given the absence of medical records substantiating Plaintiff's claimed pregnancy and stillbirths. It has consistently been held that sanctions under CPLR § 3126 are "drastic remedies" and may only be imposed where the moving party conclusively demonstrates that the non-disclosure was willful, contumacious, or in bad faith (*Henderson-Jones v. City of New York*, 87 AD3d 498, 504 [1st Dept 2011]; *Delgado*, 47 AD3d 550, *supra*). Lesser remedies, such as conditional orders of preclusion, are generally favored over outright dismissal unless a clear record of dilatory, obstructive conduct exists.

Here, it is undisputed that the prenatal and delivery records are not in Plaintiff's possession. Defendants themselves acknowledge that they are "not seeking records under [P]laintiff's control." Under settled precedent, "a party may not be compelled to produce or sanctioned for failing to produce information which he does not possess" (*Vaz*, 85 AD3d at 903, *supra*; *Corriel v. Volkswagen of Am*, 127 AD2d 729, 731 [2d Dept 1987]).

Where records are unavailable, a *Jackson* affidavit describing the efforts undertaken suffices (*DiMaggio*, 228 AD3d at 426, *supra*; *Robinson v. Highbridge House Ogden, LLC*, 124 AD3d 472, 473 [1st Dept 2015]). Plaintiff has provided such an affidavit, supported by circumstantial documentation (photographs, DSS records, subpoenas, and storage searches). While the affidavit may not carry the same evidentiary weight as certified records, its submission fulfills Plaintiff's discovery obligations in the absence of control.

Defendants persuasively argue that without medical records they are unable to obtain expert testimony on causation, which prejudices their defense. Indeed, complex medical causation issues—such as whether sepulcher-related emotional distress could physiologically result in stillbirths—are beyond the ken of the ordinary juror and require expert testimony (*De Long v. County of Erie*, 60 NY2d 296, 306 [1983]; *Mosberg v. Elahi*, 80 NY2d 941 [1992]). For such testimony to be admissible, experts must ground their opinions in reliable medical records (*Guzman v. 4030 Bronx Blvd. Assoc*., *LLC*, 54 AD3d 42 [1st Dept 2008]).

Defendants' prejudice is not abstract. Without records, they cannot retain an expert obstetrician to assess causation or mount a meaningful defense. This distinguishes these circumstances from cases where discovery lapses are immaterial to the merits. The court thus recognizes Defendants' legitimate and pressing need for reliable medical documentation.

Yet, prejudice alone does not substitute for the statutory requirement that Plaintiff's conduct be willful or contumacious before dismissal or preclusion may issue. Here, the record reflects efforts at compliance, not defiance. Plaintiff has repeatedly provided authorizations, albeit fruitlessly, and produced a *Jackson* affidavit. This distinguishes her conduct from parties who stonewall discovery.

Dismissal, even simply of an individual claim, is an extreme sanction, warranted only where the noncompliance is willful, contumacious or in bad faith. Defendants have not demonstrated such conduct here.

Nor is unconditional preclusion warranted. Preclusion would effectively determine the outcome of Plaintiff's damages claim, an improper remedy absent willful defiance (*see Ewadi v. City of New York*, 66 AD3d 583, 583 [1st Dept 2009]).

Furthermore, the remedy Defendants seek is premature. Although Plaintiff has testified at a 50-h hearing, she has not yet been deposed. Depositions are a cornerstone of discovery, and testimony often reveals new providers, treatment details, or leads that were not apparent earlier. Post-deposition demands frequently yield new authorizations and corresponding records.

This principle counsels caution. To dismiss or preclude Plaintiff's claims now would short-circuit the discovery process and foreclose avenues of information that may yet be revealed. Indeed, the very authorities Defendants invoke underscore that sanctions are appropriate where a party "frustrates the disclosure scheme set forth in the CPLR" (*Ewa v. City of New York*, 186 AD3d 1195, 1196), not where the process remains incomplete. Here, the ordinary progression of discovery—including deposition testimony—has not yet run its course.

The court therefore concludes that, while Defendants' concerns are not without merit, the present application for dismissal of Plaintiff's pregnancy-related claims is premature and would perhaps be more suitably addressed, if at all, on a motion for summary judgment following the completion of discovery.

In keeping with that sentiment, the best course here is to deny the motion without prejudice to renewal following Plaintiff's deposition and subsequent discovery efforts. Should Plaintiff's testimony or subsequent document production fail to yield further information, and should Plaintiff fail to comply with subsequent demands for relevant and discoverable information, Defendants may renew their application at that time, when the record will be more fully developed to assess prejudice and compliance. Additionally, the court notes that Defendants reserve the right to move for summary judgment, or to seek any other appropriate relief, at the proper time.

For the foregoing reasons, it is hereby

ORDERED that Defendants' motion to dismiss or preclude Plaintiff's pregnancy-related claims is denied, without prejudice to renewal after Plaintiff's deposition and any post-deposition discovery, if Plaintiff does not comply with subsequent demands for relevant and discoverable information; and it is further

ORDERED that Defendants' motion for unconditional preclusion is denied; and it is further

ORDERED that the parties shall promptly schedule Plaintiff's deposition, and that the deposition date must be set no later than October 10, 2025; and it is further

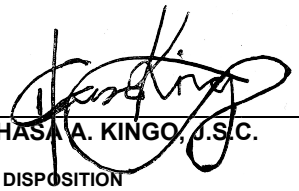
ORDERED that the parties are directed to appear for an in-person settlement conference before this court on November 5, 2025, at 12:00 P.M. at 80 Centre Street, Room 320, New York, New York; and it is further

ORDERED that counsel for both parties shall appear at the settlement conference with full authority to negotiate and resolve the action; and it is further

ORDERED that Plaintiff is welcome to attend the conference in person, or alternatively, Plaintiff shall be available to correspond with her counsel by telephone during the conference; and it is further

ORDERED that all other relief sought by Defendants is denied.

This constitutes the decision and order of the court.



9/23/2025
DATE

HASA A. KINGO, J.S.C.

CHECK ONE:		CASE DISPOSED			X	NON-FINAL DISPOSITION	
		GRANTED	X	DENIED		GRANTED IN PART	OTHER
APPLICATION:		SETTLE ORDER				SUBMIT ORDER	
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN				FIDUCIARY APPOINTMENT	REFERENCE