SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. JOHN J. KELLEY** **PART** **56M**

Justice

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KIMBERLY M. MOORE,

Plaintiff,

- v -

MOUNT SINAI HOSPITAL and EMPIRE BLUE CROSS BLUE SHIELD,

Defendants.

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INDEX NO. 805229/2023

MOTION DATE 09/25/2025

MOTION SEQ. NO. 004

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 004) 38, 39, 40, 41, 42, 43, 44, 45, 46

were read on this motion to/for DISMISS/DISCOVERY.

In this action, inter alia, to recover damages for medical malpractice, the defendant Mount Sinai Hospital (Mount Sinai) moves pursuant to CPLR 3126 and 3216 to dismiss the complaint insofar as asserted against it on the respective grounds that the plaintiff has failed to respond to outstanding discovery demands and comply with this court's prior discovery orders, and for failure to prosecute the action. The plaintiff opposes the motion. The motion is denied.

CPLR 3216(a) provides that

> "[w]here a party unreasonably neglects to proceed generally in an action or otherwise delays in the prosecution thereof against any party who may be liable to a separate judgment, or unreasonably fails to serve and file a note of issue, the court, . . . upon motion, with notice to the parties, may dismiss the party's pleading on terms. Unless the order specifies otherwise, the dismissal is not on the merits."

To secure a dismissal pursuant to CPLR 3216, issue must have been joined, and either one year must have elapsed since the joinder of issue, or six months must have elapsed since the issuance of any preliminary court conference order, whichever is later (*see* CPLR 3216[b]). In addition, a defendant must have served a written demand upon the plaintiffs by registered or certified mail, directing the plaintiffs to resume prosecution of the action and to serve and file a

note of issue within 90 days after receipt of such demand (*see id.*). The demand also must give notice to the plaintiffs that a default in complying with such demand within that 90-day period will serve as a basis for a motion dismissing the complaint as against that defendant for unreasonable neglect to proceed (*see id.*). If the defendant has satisfied these conditions precedent, and the plaintiff fails to serve and file a note of issue within 90 days, the court may grant a motion by the party seeking dismissal, unless the plaintiffs show justifiable excuse for the delay and a meritorious cause of action (*see* CPLR 3216[e]).

> "The plain language of CPLR 3216 provides that no court may dismiss an action, and no party may make a motion seeking dismissal of an action unless a written demand has been served on the party prosecuting the action to serve and file a note of issue within 90 days after receipt of such demand. The demand must also state that failure to serve and file a note of issue within the 90-day period may serve as a basis for a motion to dismiss the action (CPLR 3216[b][3])"

(*Chase v Scavuzzo*, 87 NY2d 228, 230 [1995]). Hence, "[g]eneral delay is not a ground for dismissal of the complaint where a plaintiff has not been served with a 90-day demand to serve and file a note of issue" (*Grant v Rattoballi*, 57 AD3d 272, 273 [1st Dept 2008]). Since Mount Sinai did not serve a CPLR 3216 90-day notice upon the plaintiff, let alone serve it by certified or registered mail, and there is no basis upon which the court may dismiss the complaint insofar as asserted against Mount Sinai for any "general delay" in completing disclosure and filing the note of issue, that branch of Mount Sinai's motion which sought to dismiss the plaintiff pursuant to CPLR 3216 must be denied. Moreover, Mount Sinai made the instant motion on August 7, 2025, which was prior to the lapse of six months after this court had issued the June 23, 2025 preliminary conference order. That branch of the motion must be denied on that ground as well.

Moreover, although Mount Sinai's counsel asserted that either she or another attorney at her firm spoke with the plaintiff on February 10, 2025 to discuss the plaintiff's delay in providing responses to Mount Sinai's discovery demands, the issues discussed in that telephone call were resolved by this court's issuance of a preliminary conference order on June 23, 2025. Since that time, however, Mount Sinai's counsel has not attested to conducting any further

telephone calls with the plaintiff to address the latter's purported noncompliance with that order. Hence that branch of Mount Sinai's motion which sought dismissal pursuant to CPLR 3126 must also be denied, inasmuch as Mount Sinai's counsel failed to establish that she satisfied a condition precedent to the submission of the motion, as set forth in 22 NYCRR 202.20-f(b), which requires that she 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 this respect, Mount Sinai may not rely on the fact that it dispatched 11 letters to the plaintiff between October 18, 2024 and July 17, 2025 requesting or demanding that the plaintiff respond to outstanding discovery requests, of which the final 2 also demanded that the plaintiff comply with the June 23, 2025 preliminary conference order.

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, the dismissal of a complaint may be appropriate where that "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, partially or fully complies with his or her discovery obligations during the pendency of a CPLR 3126 motion to dismiss the complaint, that party's prior failure to make discovery generally should not be deemed willful or contumacious (s*ee Chamberlain, D'Amanda, 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]; *Tanriverdi v United Skates of Am., Inc*., 164 AD3d 858, 860 [2d Dept 2018]; *Walter B. Melvin, Architects, LLC v 24 Aqueduct Lane Condominium*, 51 AD3d 784, 785 [2d Dept 2008]), and there is thus no basis for imposing a sanction upon the plaintiff here.

Additionally, the court notes that, in the June 23, 2025 preliminary conference order, it directed the parties to submit a proposed compliance conference order to the court on December 30, 2025, and instructed them as follows:

> "NEXT DISCOVERY CONFERENCE:
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> "Court shall provide plaintiff with fill-in PDF compliance conference order form. Plaintiff shall consult with defendants, complete form, and submit it to court at SFC-Part56-Clerk@nycourts.gov, in accordance with schedule set forth below. If parties cannot agree on terms of compliance conference order, they shall request a compliance conference."

Rather than waiting until December 30, 2025 to address outstanding discovery issues in the proposed compliance conference order, or requesting the court to schedule a compliance conference due to purported delays in production of discovery items, as directed by the court, Mount Sinai instead made the instant motion. This court discourages parties from making discovery motion when there is a discovery dispute or a delay in the discovery process, and encourages the parties to contact the court to schedule a conference prior to making such a motion.

In light of the foregoing, it is,

ORDERED that the motion is denied; and it is further,

ORDERED that the parties shall submit a proposed compliance conference order to the court on December 30, 2025, in accordance with the June 23, 2025 compliance conference order, in which all outstanding issues concerning discovery shall be addressed.

This constitutes the Decision and Order of the court.

12/17/2025
DATE

JOHN J. KELLEY, 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