

**Carey v Acosta**

2012 NY Slip Op 30677(U)

March 15, 2012

Supreme Court, New York County

Docket Number: 107053/2010

Judge: Saliann Scarpulla

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

PRESENT: SALIANN SCARPULLA  
Justice

PART 19

Index Number : 107053/2010  
**CAREY, ALISON**  
vs.  
**ACOSTA, JAMES P.**  
SEQUENCE NUMBER : 001  
STRIKE ANSWER

INDEX NO. \_\_\_\_\_

MOTION DATE \_\_\_\_\_

MOTION SEQ. NO. \_\_\_\_\_

motion to/for \_\_\_\_\_

\_\_\_\_\_ No(s). \_\_\_\_\_

\_\_\_\_\_ No(s). \_\_\_\_\_

\_\_\_\_\_ No(s). \_\_\_\_\_

Upon the foregoing papers, It is ordered that this motion is

motion and cross-motion are decided in accordance  
with accompanying memorandum decision.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE  
FOR THE FOLLOWING REASON(S):

## FILED

MAR 20 2012

NEW YORK  
COUNTY CLERK'S OFFICE

Dated: 3/15/12

Saliann Scarpulla  
S.S.C.  
**SALIANN SCARPULLA**

- 1. CHECK ONE: .....  CASE DISPOSED  NON-FINAL DISPOSITION
- 2. CHECK AS APPROPRIATE: ..... MOTION IS:  GRANTED  DENIED  GRANTED IN PART  OTHER
- 3. CHECK IF APPROPRIATE: .....  SETTLE ORDER  SUBMIT ORDER
- DO NOT POST  FIDUCIARY APPOINTMENT  REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: CIVIL TERM: PART 19

-----X  
ALISON CAREY,

Plaintiff,

Index No.: 107053/2010  
Submission Date: 10/05/12

- against-

JAMES P. ACOSTA,

**DECISION AND ORDER**

Defendant.  
-----X

For Plaintiff:  
Galluzzo & Johnson LLP  
48 Wall Street, 11<sup>th</sup> Floor  
New York, NY 10005

For Defendant:  
Day Pitney LLP  
7 Times Square  
New York, NY 10036

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Papers considered in review of this cross motion to dismiss:

- Notice of Cross Motion . . . . . 1
- Aff in Support . . . . . 2
- Aff in Opp . . . . . 3

HON. SALIANN SCARPULLA, J.:

In this action to recover damages between plaintiff Alison Carey (“Carey”) and defendant James P. Acosta (“Acosta”), who were previously involved in a romantic relationship, Acosta cross moves<sup>1</sup> to dismiss Carey’s cause of action for intentional infliction of emotional distress; precluding Carey from introducing evidence as to medical treatment and/or lost wages in connection with the causes of action for intentional

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<sup>1</sup>Carey initially moved to strike Acosta’s answer “for failure to participate in meaningful discovery” (seq. 001). However, as the parties were able to resolve their discovery issues, the motion is denied as moot.

infliction of emotional distress and assault and battery; and for sanctions against Carey and her prior counsel Leonard Zack, Esq. (“Zack”).<sup>2</sup>

In her verified complaint, Carey alleges a cause of action pursuant to Article 15 of Real Property Actions and Proceedings (“RPAL”) relating to property located at 301 9<sup>th</sup> Avenue, Belmar, New Jersey, as well as causes of action for breach of contract and unjust enrichment stemming from her assertion that Acosta owes her money. Carey also alleges that she was physically injured by Acosta, and as a result asserts a cause of action for assault and battery, as well as a cause of action for intentional infliction of emotional distress.

The fourth cause of action for assault and battery alleges that Carey “sustained serious psychological and emotional injuries with accompanying pain . . . that some of the injuries may be permanent; and that plaintiff has, as a result thereof, for some time been confined to her house and has required medicines and medical attention and has been prevented and will be prevented from pursuing her usual and ordinary vocations and has expended or incurred large sums and will be required to expend and incur further sums for medical and other attention.”

As her fifth cause of action for intentional infliction of emotional distress, Carey alleges that the events alleged in the preceding paragraphs of the verified complaint have

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<sup>2</sup> Zack was counsel to Carey on the motion to strike, but subsequently moved to withdraw as counsel. The motion to withdraw (seq. 002) is denied as moot pursuant to a notice of substitution of counsel, dated August 16, 2011.

“caused considerable hardship on the plaintiff, including severe and permanent emotional distress,” and that as a result she has “suffered severe emotional disturbance requiring medical attention.”

During the course of discovery, Acosta requested, among other things, Carey’s medical records, medical authorizations for her treating physicians, and authorizations for employment records. On April 13, 2011 the parties appeared before the Court for a Preliminary Conference, and as a result a Preliminary Conference Order (“PC Order”) was entered. Pursuant to the PC Order, Carey was to provide medical authorizations within thirty (30) days of the PC Order, and to provide authorizations for Carey’s employment records for November 1, 2009 through June 1, 2010 on or before May 13, 2011. By letter dated May 26, 2011, Acosta’s counsel informed Zack that he had not yet received either medical authorizations for Carey’s treating physicians or authorizations for Carey’s employment records.

In a letter dated June 6, 2011 from Zack to Acosta’s counsel, Zack stated, “Alison Carey did not lose any time from work; nor did she seek medical treatment for the damage from the brutal beating she sustained. Therefore, I am not sending you any authorizations for release of same.”

In response, Acosta’s attorney sent repeated correspondence to Zack, requesting that he withdraw Carey’s causes of action for intentional inflictions of emotional distress

and assault and battery in light of Zack's statement that, in contrast to the verified complaint, Carey received no medical care and missed no time from work.

Acosta now cross-moves to dismiss Carey's cause of action for intentional infliction of emotional distress. Acosta asserts that Carey's allegations "of emotional distress, medical care, lost wages, and expenses related to same are clearly false and incapable of being proven in light of Carey's admission that she saw no medical professionals and lost no time at work as a result of the alleged injury." Acosta also argues that because Carey failed to produce the requested authorizations, combined with Zack's statements that Carey required no medical care and lost no time from work, Carey should be precluded, pursuant to CPLR 3124 and 3126, from offering testimony or evidence deemed medical or relating to lost wages or her inability to work.

In opposition, Zack submitted an affirmation asserting that the cross-motion is untimely. He also states that he received notice from Zachary H. Johnson, Esq. of Galluzo & Johnson, LLP that they would be replacing him as counsel for Carey. Zack states that as Carey terminated his services "thereby exhibiting a breakdown in the attorney client relationship . . . [t]he response to the cross motion should be responded to by plaintiff's new counsel in accordance with her wishes." Zack's opposition papers have not been supplemented by Carey's new counsel.

[\* 6]

**Discussion**

To maintain a cause of action for intentional infliction of emotional distress, the plaintiff must allege that the defendant engaged in “extreme and outrageous” conduct. *Lau v. S&M Enters.*, 72 A.D.3d 497, 498 (1<sup>st</sup> Dept. 2010). The behavior complained of must rise to the level of conduct so “outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency” to establish intentional infliction of emotional distress. *Rogin v. Rogin*, 90 A.D.3d 507, 508 (1<sup>st</sup> Dep’t 2011) ( quoting *Howell v. New York Post Co.*, 81 N.Y.2d 115, 122 (1993)). Moreover, severe emotional distress “must be supported by medical evidence, not the mere recitation of speculative claims.” *Walentas v. Johnes*, 257 A.D.2d 352, 353 ( 1st Dep’t 1999) (citing *Leone v. Leewood Serv. Sta.*, 212 AD2d 669, 672, lv denied 86 NY2d 709).

It is not disputed that Carey failed to provide authorizations for her medical records. This, combined with Zack’s concession that she received no medical care for her alleged injuries, leaves nothing but the “mere recitation of speculative claims” as support for Carey’s claim of intentional infliction of emotional distress. As such, the cause of action for intentional infliction of emotional distress is dismissed.

Acosta also moves to preclude Carey from introducing any evidence as to medical treatment and/or lost wages in connection with Carey’s cause of action for assault and

battery.<sup>3</sup> The First Department “encourage[s] the IAS courts to employ a more proactive approach” and to take necessary steps to ensure an orderly discovery process when faced with repeated failure to comply with discovery orders. *See Figdor v City of New York*, 33 A.D.3d 560, 560 (1<sup>st</sup> Dep’t 2006). The degree and the scope of the penalty to be imposed on a non-complying party pursuant to CPLR 3126 rests with the sound discretion of the court. *See Pascarelli v City of New York*, 16 A.D.3d 472, 472 (1<sup>st</sup> Dep’t 2005).

Here, Carey has had ample opportunity to provide the requested authorizations. The original request was made in July 2010, almost a year and a half ago, and the PC Order was entered almost one year ago, and neither Carey’s prior nor current counsel have done so. As such, Carey will be precluded from offering any testimony or evidence relating to her medical care or lost time from work in connection with her assault and battery cause of action.

Lastly, Acosta’s cross-motion for sanctions is also denied. Pursuant to 22 NYCRR §130-1.1, the court, in its discretion may impose financial sanctions upon any party or attorney in a civil action or proceeding who engages in frivolous conduct. *See also Llantin v. Doe*, 30 A.D.3d 292 (1<sup>st</sup> Dept. 2006). Sanctions are within the sound discretion of the trial court and are reserved for serious transgressions. It appears there may have been some time wasted while Carey was in the process of changing attorneys. However, the

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<sup>3</sup> As the cause of action for intentional infliction of emotional distress is dismissed, the portion of Acosta’s motion seeking to preclude evidence as to intentional infliction of emotions distress is denied as moot.

\* 8]

dismissal of the cause of action of intentional infliction of emotional distress and the preclusion of any evidence or testimony regarding medical care and/or lost time from work is a sufficient remedy for Carey's failure to provide the requested authorization, and no additional sanctions to Carey or Zack are appropriate.

In accordance with the foregoing, it is hereby

ORDERED that plaintiff Alison Carey's motion to strike defendant James P. Acosta's answer is denied as moot as the parties resolved the discovery dispute at issue in the motion; and it is further

ORDERED that defendant James P. Acosta's cross motion to dismiss Carey's cause of action for intentional infliction of emotions distress is granted; and it is further

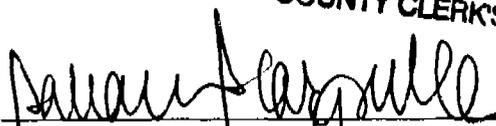
ORDERED that defendant James P. Acosta's motion to preclude plaintiff from introducing evidence as to medical treatment and/or lost wages in connection with Carey's cause of action for assault and battery is granted; and it is further

ORDERED that defendant James P. Acosta's motion for sanctions against Leonard Zack, Esq. and plaintiff Alison Carey is denied.

This constitutes the decision and order of the Court.

Dated: New York, New York  
March 15, 2012

ENTER:

  
Saliann Scarpulla, J.S.C.

**FILED**

**MAR 20 2012**

**NEW YORK  
COUNTY CLERK'S OFFICE**