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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: Hon Joan A. Madden Justice

PART 11

Index Number : 100160/2010
KEMPER INDEPENDENCE INS. CO.
vs.
WERT, SANFORD
SEQUENCE NUMBER : 002
STRIKE ANSWER

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

The following papers, numbered 1 to _____, were read on this motion to/for _____

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). _____

Answering Affidavits — Exhibits _____ | No(s). _____

Replying Affidavits _____ | No(s). _____

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the annexed Memorandum Decision and order.

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

FILED

MAY 07 2012

COUNTY CLERK'S OFFICE
NEW YORK

Dated: April 25, 2012

_____, J.S.C.

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: IAS PART 11

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KEMPER INDEPENDENCE INSURANCE COMPANY,

Plaintiff,

-against-

SANFORD WERT, SANFORD WERT, M.D., ET AL,

Defendants.

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Index No. 100160/10

JOAN A. MADDEN, J.:

Plaintiff, Kemper Independence Insurance Company, moves for an order (i) pursuant to CPLR 3126, striking the answers of defendants Sanford Wert, Sanford Wert, P.C., W.H.O. Acupuncture, P.C., Avenue I. Medical, P.C., and Vega Chiropractic, P.C., and granting a default judgment against these defendants, (ii) pursuant to CPLR 2201, staying the arbitration of Sanford Wert and Sanford Wert, M.D., P.C., and (iii) discontinuing the action against defendant Woodhull Medical, P.C. Defendants Sanford Wert and Sanford Wert, P.C. (together "the Wert defendants") oppose the motion.

Background

In this action, Kemper, an automobile insurer, seeks, *inter alia*, a declaration that it is not obligated to pay No-Fault claims of any of the defendants arising out of February 2, 2009 accident, in which defendant William Flores ("Flores"), was allegedly hit by an automobile. Flores claimed to have sustained substantial injuries in the accident, and Kemper received several

claims from medical providers, including defendants seeking to recover No-Fault benefits as alleged assignees of Flores. To verify these claims, Kemper sought Examinations Under Oath ("EUO") of Flores and various medical providers. According to Kemper, the medical provider defendants failed to appear for the EUOs and Kemper denied the claims.

On January 7, 2010, Kemper commenced this action seeking a declaration that it properly disclaimed coverage. The Wert defendants, Woodhull, W.H.O. Acupunture P.C. ("W.H.O."), Avenue I Medical (Avenue I), and Vega Chiropractic, P.C. ("Vega") filed an answer to the complaint (together "the answering defendants"). Plaintiff moved for a default judgment against the non-answering defendants and against W.H.O., Avenue I., and Vega on the grounds that their answer was served late.

By decision, order and judgment dated December 20, 2010, this court granted Kemper's motion for a default judgment against the non-answering defendants and issued an order and judgment declaring that Kemper owed no duty to pay No-Fault coverage or benefits to the non-answering defendants.

Kemper now seeks to strike the answers of the answering defendants and/or an order granting a default judgment against the answering defendants based on their alleged failure to comply with discovery and to appear for court ordered discovery conferences. In particular, according to the affirmation of Kemper's counsel, and based on documentary evidence attached

thereto, Woodhull was only answering defendant that appeared for a preliminary conference held on January 20, 2011, and none of the answering defendants responded to the discovery demands and deposition notices served prior to the preliminary conference. On June 16, 2011, a compliance conference was held and the only of the answering defendants, only the attorney for W.H.O., Avenue I, and Vega appeared. The compliance conference order directed the answering defendants to comply with the preliminary conference order and set a status conference date for September 15, 2011. Plaintiff served new notices of depositions in accordance with the order, and also served a copy of the compliance conference order on the answering defendants.

The Wert defendants appeared for deposition but did not provide any documentary discovery. W.H.O., Avenue I, and Vega provided discovery responses but did not appear for depositions.

On September 15, 2011 a status conference was held and none of the answering defendants appeared. The court issued an order scheduling a status conference for October 6, 2011, providing that upon defendants' "failure to appear at the next [status conference], the court will consider imposing sanctions and against the answering defendants who do not appear." On or about September 19, 2011, the Wert defendants filed an arbitration with the American Arbitration Association seeking to recover No-Fault benefits in connection with the medical treatment they provided to Flores.

Only the Wert defendants oppose the motion, noting that Dr.

Wert appeared for a deposition on August 15, 2011, and asserting that the Wert defendants responded to the request for document discovery and attached this response. The Wert defendants also assert that Kemper has participated in two prior arbitrations "dealing with the same issue" and that the current arbitration which Kemper seeks to stay is pending before the AAA and the discovery sought in this action should be resolved before the arbitrator.

In reply, Kemper asserts that the discovery response provided by the Wert defendants was first served with their opposition, and that the response is inadequate as it provides only claim forms and not documents relating to the action and the Wert defendants' response to most items was "not available or deemed appropriate." Kemper also contends that the arbitration should be stayed until the coverage issued raised in this action are resolved.

CPLR 3126(3) provides that if a party "refuses to obey an order for disclosure or willfully fails to disclose information which the court finds ought to have been disclosed pursuant to this article, the court may make such orders with regard to the failure or refusal as are just," including "an order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or any part thereof, or rendering a judgment by default against the disobedient party." Under CPLR 3126 (1)(2), the court is authorized to order that the issues encompassed by the disclosure

demand "be deemed resolved," or that the party be precluded from introducing certain evidence or from supporting or opposing certain claims.

"The drastic sanction of striking pleadings is justified only when the moving party shows conclusively that the failure to disclose was wilful, contumacious or in bad faith" Roman v. City of New York, 38 AD3d 442 (1st Dept 2007)(citation omitted); see also, Marks v. Vigo, 303 AD2d 306 (1st Dept 2003)(noting that "[i]n view of the strong preference in our law that actions be decided on their merits... a court should not resort to the drastic remedy of striking a pleading for failure to comply with discovery directives unless the noncompliance is established to be both deliberate and contumacious"); cf, Couri v. Siebert, 48 AD3d 370 (1st Dept 2008)(holding that plaintiff's "dilatory, evasive, obstructive, and ultimately contumacious conduct" warranted striking his complaint)(internal citations omitted).

In this case, Kemper has not shown that the answering defendants' conduct in connection with discovery was such as to warrant striking their answer. In particular, the record shows that the answering defendants have responded to certain discovery requests. That being said, however, the failure of defendants W.H.O., Avenue I, and Vega to appear at several court conferences, including a status conference which they were directed to attend by court order, or to appear for a deposition or to respond to this motion, warrants the issuance of an order determining the issues upon which the deposition were relevant

and material according to Kemper's claims. Garfield v. Done Fashion, Inc., 227 AD2d 128 (1st Dept 1996); Goldstein v. Janecka, 172 AD2d 463 (1st Dept 1991).

As for the Wert defendants, the court finds that its response to Kemper's document demands is insufficient. The Wert defendants must comply with CPLR 3122(a) which requires a party objecting to discovery and inspection "to serve a response which shall state with reasonable particularity the reasons for each specific objection." Furthermore, if the Wert defendants do not have responsive documents, they must provide an affidavit from a person with knowledge providing a "detailed statement" as to "the past and present status" of the documents sought, the record keeping methodology with respect to the documents, and the nature and extent of the search conducted for such documents. Longo v. Armor Elevator, Co., Inc., 278 AD2d 127 (1st Dept 2000); Fugazy v. Time Inc., 24 AD2d 443 (1st Dept 1965)(requiring plaintiff to produce documents where objection that he did not have the requested documents was not supported by an affidavit from plaintiff or a person with knowledge). The Wert defendants' failure to comply with this order will result in an order resolving the issues upon which the documents are material and relevant in accordance with Kemper's claims.

Next, as Kemper has not provided a basis for staying the arbitration under article 75, its request for such relief is denied. At the same time, the Wert defendants have not provided

grounds for staying this action pending the outcome of the arbitration.

In view of the above, it is

ORDERED that defendants W.H.O., Avenue I, and Vega shall appear for a deposition by June 1, 2012, or the issues upon which the deposition were relevant and material will be determined according to Kemper's claims; and it is further

ORDERED that the Wert defendants shall provide a further response to plaintiff's notice for discovery and inspection dated March 8, 2010 in accordance with this decision and order by May 18, 2012, or the issues which are material and relevant to the documents will be determined in accordance with Kemper's claims; and it is further

ORDERED that the action is discontinued as against defendant Woodhull Medical Care, P.C.; and it is further

ORDERED that the remaining parties shall appear for a status conference in Part 11, room 351, on June 7, 2012 at 9:30 am.

A copy of this decision and order is being mailed by my chambers to counsel to the parties.

DATED: April 25, 2012

J.S.C.