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

PRESENT : DONNA M. MILLS PART 58
Justice

HOLLY MCMUNN, INDEX NO. 115262/01

Plaintiff, MOTION DATE ____

-v-

MOTION SEQ. NO. 006, 007

THE CITY OF NEW YORK,
Defendant. MOTION CAL NO. ____

The following papers, numbered 1 to ___ were read on this motion for ____

	PAPERS NUMBERED
Notice of Motion/Order to Show Cause-Affidavits– Exhibits....	1, 4
Answering Affidavits– Exhibits	2, 5
Replying Affidavits	3, 6

CROSS-MOTION: ____ YES √ NO

Upon the foregoing papers, it is ordered that this motion is:

DECIDED IN ACCORDANCE WITH ATTACHED MEMORANDUM.

FILED
MAY 29 2012
NEW YORK
COUNTY CLERK'S OFFICE

Dated: 5/17/12

J.S.C.
DONNA M. MILLS, J.S.C.

Check one: √ FINAL DISPOSITION ____ NON-FINAL DISPOSITION

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 58

HOLLY MCMUNN,

Plaintiff,

- against -

THE CITY OF NEW YORK, THE LILLIAN GOLDMAN FAMILY, LLC, and MARION ALEXANDER,

Defendants.

INDEX NO. 115262/01

DECISION/ORDER

FILED

MAY 29 2012

NEW YORK COUNTY CLERK'S OFFICE

DONNA MILLS, J.:

Motion sequence numbers 006 and 007 are consolidated for disposition. In motion sequence 006 plaintiff seeks an Order for additur increasing the amount of damages awarded by the jury in the instant action. In sequence 007 defendant City of New York seek an order striking plaintiff's complaint, dismissing her claims, and entering judgment against her.

These post-trial motions are submitted after a jury trial of this action before this Court that proceeded on September 6, 2011. After a full trial on liability and damages, the jury awarded plaintiff $50,000 for past pain and suffering, $75,000 for future pain and suffering, and $750,000 for future medical expenses. The jury further apportioned 70% to the City and 30% to the plaintiff as the respective parities' apportionment of fault.

The City contends that the plaintiff willfully failed to provide discovery that was demanded in its discovery requests which was pertinent to its defense. It is undisputed that over ten years ago, the City demanded from plaintiff discovery relating to prior injuries. For example, the City's General Demand No. 23 states:

23. Please furnish a copy of each medical provider's report referring to any

physical, psychiatric or psychological examination of plaintiff(s) conducted before the occurrence of the injuries alleged in the complaint and reasonably related thereto.

The City's General Demand No. 27 states:

27. Please furnish the names of the parties, the court, and the index number of each other action, if any, commenced by or on behalf of plaintiff(s) concerning any of the injuries (or damages) alleged in the complaint.

It is clear that plaintiff failed to comply with these demands. In its preparation for trial, the City claims to have discovered that plaintiff had previously sued the New York City Transit Authority concerning a bus accident in which she was involved prior to the instant action against the City. The City claims to have been unable to access the records in the earlier matter because the case file had been archived and was unavailable for the City's review. The City attempted to reconstruct plaintiff's accident from the public files of her various other cases. For example, in a case where the plaintiff was being sued by her former divorce attorney for nonpayment of fees, plaintiff submitted as an exhibit a letter from 1996 in which she described the bus accident that she withheld from the City in discovery. In the letter plaintiff wrote:

> I was recently in a bus accident in which my arms, shoulders and hands were caught in the doors causing difficulty in movement, pain, stiffness and which requires physical therapy and chiropractic intervention; my rheumatologist in New York plans to put me on steroids because both my right hip and right/left shoulder pain have made it extremely difficult to ambulate. I am currently using a cane.

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Also in the divorce action plaintiff submitted a brief in which she concedes that in 1994, she was "continuing to be treated for," among other conditions, "cervical disc herniation," "carpal tunnel syndrome," and "osteoarthritis." Despite the City's discovery requests, plaintiff never disclosed to the City any medical records or authorizations for medical records concerning her treatment for these conditions, which relate to the alleged injuries at issue in this case.

At trial, plaintiff initially denied ever having been involved in a prior accident or having sustained prior personal injuries (apart from alleged domestic abuse by her ex-husband). After more questioning, plaintiff eventually admitted that she had been involved in a bus accident. Afer being confronted with her July 12, 1996 letter, in which she admitted to hip and shoulder pain and difficulty ambulating, she acknowledged writing the letter.

Although the City impeached plaintiff with her own words at trial, plaintiff's counsel mitigated the damage during his summation, arguing that the City did not introduce into evidence any medical records regarding her admitted prior injuries:

> Plaintiff's counsel argued that there was no evidence of prior injuries;
>
> Plaintiff's counsel argued that there was no medical evidence of prior osteoarthritis;
>
> Plaintiff's counsel argued that Plaintiff was not hiding anything from the City;
>
> Plaintiff's counsel argued that if the City had something to contradict her claims, the City had every opportunity to bring it into Court.

Plaintiff's counsel's comments were technically correct that the City did not have medical evidence regarding plaintiff's prior injuries. However, they were disingenuous at best, because the reason the City did not possess this evidence was because plaintiff wrongfully withheld that evidence during discovery and caused the possible spoliation of the medical records.

In opposition to the motion, plaintiff admits that prior to the July 2000 trip and fall in the instant matter, she was in a bus accident involving a bus door shutting on her hand and/or arms. It is undisputed that the information pertaining to the accident on the bus was not revealed during discovery. Plaintiff's position is that the prior accident with the bus resulted in injuries unrelated to the injuries she supposedly sustained in this case. Second, plaintiff argues that the City is at fault for not accessing the records in her previous case against the Transit Authority.

Although actions should be resolved on the merits whenever possible (see Gillen v. Utica First Ins. Co., 41 A.D.3d 647, 839 N.Y.S.2d 155; Cruzatti v. St. Mary's Hosp., 193 A.D.2d 579, 597 N.Y.S.2d 457), the court may, among other things, issue an order "striking out pleadings or parts thereof" CPLR 3126[3]) when a party "refuses to obey an order for disclosure or wilfully fails to disclose information which the court finds ought to have been disclosed" (CPLR 3126). Under the common-law doctrine of spoliation, "when a party negligently loses or intentionally destroys key evidence, thereby depriving the non-responsible party from being able to prove its claim or defense, the responsible party may be sanctioned by the striking of its pleading" (Baglio v. St. John's Queens Hosp., 303 A.D.2d 341, 342, 755 N.Y.S.2d 427; see Denoyelles v. Gallagher, 40 A.D.3d 1027, 834 N.Y.S.2d 868).

To establish that plaintiff's conduct was wilful and contumacious by not revealing the prior accident and failing to provide the documents related thereto, the City argues that this is not the first time that plaintiff has attempted to deceive a party in a lawsuit by

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withholding discovery. The City points to a federal lawsuit brought by plaintiff against her former employer, wherein a federal judge wrote in McMunn v Memorial Sloan-Kettering Cancer Ctr., 191 F. Supp 2d at 446-447:

> We find that Ms. McMunn lied at her deposition when she denied having any other credit cards, that she did so intentionally and in bad faith, and that her false testimony directly and irrevocably destroyed potentially critical evidence that, in light of her actions, can reasonably be assumed would have been harmful to her case. As the extant records establish that Ms. McMunn used the Visa Card less than two weeks before she testified to its non-existence, any claim that she merely forgot about the Visa Card is incredible. Moreover, we are also concerned about Ms. McMunn's willingness to testify truthfully going forward given that she has responded to the documentary evidence produced by Memorial by falsely claiming that her husband forged her signature to obtain the Visa Card, and, apparently, that it was he who used it regularly for years.

Because of this, as well as other sanctionable misconduct by plaintiff, the court dismissed plaintiff's complaint against her former employer.

Here, I find the plaintiff's willful and contumacious conduct can be inferred from her failure to provide responses to the City's discovery demands over a more than a ten year period; similar conduct in an unrelated prior court proceeding; unsupported, inconsistent excuses for her failure to produce documents, and the absence of any reasonable excuse for these failures (see Martin v. City of New York, 46 A.D.3d 635, 847 N.Y.S.2d 621, Maiorino v. City of New York, 39 A.D.3d 601, 834 N.Y.S.2d 272). Concealing the existence of the prior accident with the bus and not turning over the medical records regarding her treatments which appear to have been very relevant, prejudiced the City which I find was done intentionally, and in bad faith. Without these medical records, the City's attack on plaintiff's pain and suffering, future medical expenses, and overall credibility was not as successful as it could have been. This Court will not countenance the plaintiff's behavior in prosecuting this action.

Accordingly, it is

ORDERED that the motion of defendant City of New York to dismiss the complaint herein is granted and the complaint is dismissed in its entirety as against said defendant, with costs and disbursements to said defendant as taxed by the Clerk of the Court, and the Clerk is directed to enter judgment accordingly in favor of said defendant; and it is further

ORDERED that plaintiff's motion for additur is denied as moot.

FILED

MAY 29 2012

NEW YORK COUNTY CLERK'S OFFICE

dated: 5/17/12

ENTER:

J.S.C.

DONNA M. MILLS, J.S.C.