

**Michael v Schlegel**

2016 NY Slip Op 32305(U)

November 16, 2016

Supreme Court, New York County

Docket Number: 805388/13

Judge: Martin Shulman

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK  
 COUNTY OF NEW YORK: PART 1

-----X  
 MEDHAT MICHAEL and ANGELA MICHAEL,

Plaintiffs,

-against-

PETER SCHLEGEL, M.D. and NEW YORK  
 PRESBYTERIAN HOSPITAL,

Defendants.  
 -----X

Index No. 805388/13

**Decision & Order**

Motion Seq. 003

**Hon. Martin Shulman**

In this medical malpractice action, plaintiffs move for a protective order pursuant to CPLR §3103(a) denying any further deposition of plaintiff, Angela Michael (Mrs. Michael). Defendants oppose the motion and cross-move pursuant to CPLR §3126(3) to dismiss this action due to plaintiffs' failure to provide discovery as required by multiple court orders or, alternatively, pursuant to CPLR 3124 compelling plaintiffs to provide outstanding discovery by a date certain. Plaintiffs oppose the cross-motion.

**Protective Order**

CPLR §3103(a) states:

Prevention of abuse. The court may at any time on its own initiative, or on motion of any party or of any person from whom discovery is sought, make a protective order denying, limiting, conditioning or regulating the use of any disclosure device. Such order shall be designed to prevent unreasonable annoyance, expense, embarrassment, disadvantage, or other prejudice to any person or the courts.

Trial courts have broad power to regulate discovery to prevent abuse and a protective order is necessary and proper when the disclosure process is used to harass a party. *Seaman v Wyckoff Heights Med. Ctr., Inc.*, 25 AD3d 598, 599 (2d Dept), *lv denied* 7

NY3d 864 (2006). The moving party bears the burden of persuasion in seeking a protective order.

Mrs. Michael's deposition commenced on January 29, 2016. In support of their motion, plaintiffs argue that a protective order is needed to "prevent unreasonable annoyance, embarrassment, and prejudice" because defense counsel's conduct in deposing her was "reprehensible, egregious and abusive." Bloomfield Aff. in Supp. at ¶6. Plaintiffs characterize defense counsel's questions to Mrs. Michael regarding her husband, co-plaintiff Medhat Michael's (Mr. Michael) medical license as unreasonably annoying and embarrassing since the claims in this action are limited to medical malpractice based upon defendants performing an allegedly unwarranted testicular excision upon Mr. Michael and a derivative claim on Mrs. Michael's behalf. As no claim for lost wages has been interposed, plaintiffs argue that such questions are improper. Plaintiffs also cite as improper defense counsel's questioning Mrs. Michael as to the identity of her husband's friends and his failure to question her as to the specific claims in this action.

Defense counsel contends, and plaintiffs' counsel does not deny, that Mrs. Michael's deposition began at the end of the third day of Mr. Michael's deposition testimony and lasted only for an hour. The deposition ended at Mrs. Michael's request and the parties agreed to adjourn it to a later date. Subsequently, plaintiffs' counsel failed to respond to defense counsel's requests to schedule Mrs. Michael's continued deposition and this motion ensued.

Here, plaintiffs fail to demonstrate that a protective order is necessary to "prevent unreasonable annoyance, expense, embarrassment, disadvantage, or other prejudice".

See CPLR §3103(a). Defense counsel's line of questioning simply does not rise to the level of being egregious or abusive. Questioning Mrs. Michael as to Mr. Michael's medical license is in all respects proper in this action. While the relevance of defense counsel's questions as to Mr. Michael's friends is not readily apparent, counsel explains in opposition that the goal was to identify potential non-party witnesses. Finally, where only an hour of testimony was elicited from Mrs. Michael, defendants would be unduly prejudiced if not permitted to continue this vital party deposition. For the foregoing reasons, plaintiffs' motion is denied in its entirety.

### **Cross-Motion**

Defendants' cross-motion requests an order pursuant to CPLR §3126(3) dismissing this action due to plaintiffs' failure to provide discovery as required by multiple court orders or, alternatively, pursuant to CPLR 3124 compelling plaintiffs to provide outstanding discovery by a date certain. The discovery claimed to be outstanding, primarily authorizations, is listed at paragraph 25 of the cross-motion's supporting affirmation and was demanded after plaintiffs' depositions by letters dated February 17, 2016, March 14, 2016, May 11, 2016, May 27, 2016, June 8, 2016 and July 27, 2016 (Exh. F to Cross-Motion).

In opposition, plaintiffs deny that they have acted wilfully and argue that this post-deposition discovery was never the subject of prior court orders. Plaintiffs do not deny that they are in default and fail to proffer any excuse for their default. Nor do they object to or otherwise challenge the specific authorizations defendants seek.

With respect to penalties for failure to comply with discovery procedures, CPLR

§3126 provides in relevant part as follows:

If any 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, among them:

1. an order that the issues to which the information is relevant shall be deemed resolved for purposes of the action in accordance with the claims of the party obtaining the order; or
2. an order prohibiting the disobedient party from supporting or opposing designated claims or defenses....; or
3. an order striking out pleadings or parts thereof,...or dismissing the action or any part thereof, or rendering a judgment by default against the disobedient party.

While the penalty of striking a pleading for failure to comply with disclosure is extreme, courts have nonetheless held that dismissing the pleading is the appropriate remedy where the failure to comply has been "clearly deliberate or contumacious."

*Henry Rosenfeld, Inc. v Bower & Gardner*, 161 AD2d 374 (1<sup>st</sup> Dept 1990); *Kutner v Feiden, Dweck & Sladkus*, 223 AD2d 488, 489 (1<sup>st</sup> Dept), *lv denied*, 88 NY2d 802 (1996) (disobedience of a series of court orders directing discovery warranted striking of pleading).

That the outstanding discovery was not the subject of a prior court order is not dispositive as to whether plaintiffs have acted wilfully. Plaintiffs have failed to respond to defendants' repeated letter demands and offer no excuse for their default. Despite such conduct, this court declines to strike the complaint at this juncture and instead grants defendants' alternatively requested relief, to wit, an order compelling plaintiffs to

comply. In the event plaintiffs fail to comply, the complaint shall be stricken and the action dismissed, as set forth below.

For the foregoing reasons, it is hereby

ORDERED that plaintiffs' motion is denied in its entirety; and it is further

ORDERED that defendants' motion is granted to the extent that plaintiffs shall provide the discovery listed at paragraph 25 of the cross-motion's supporting affirmation within thirty (30) days of the date this decision and order is electronically filed; and it is further

ORDERED that in the event that plaintiffs fail to comply with the foregoing, defendants' counsel shall electronically file and submit a proposed order striking the complaint directly to chambers, together with an affirmation detailing the default and an affidavit of service of same upon plaintiffs' counsel.

The foregoing constitutes this court's decision and order.

Dated: New York, New York  
November 16, 2016



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Hon. Martin Shulman, J.S.C.