

Mei Zhen wu v Mount Sinai Med. Ctr.

2017 NY Slip Op 30328(U)

February 17, 2017

Supreme Court, New York County

Docket Number: 805389/13

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
Mei Zhen Wu, as Administrator of the Estate of Sin
Loong Ng, deceased,

Plaintiff,

-against-

Mount Sinai Medical Center, et al,

Defendants.
-----X**Hon. Martin Shulman**

Index No. 805389/13

Decision & Order

Motion Seq. 003

In this medical malpractice action, defendant Mount Sinai Hospital s/h/a Mount Sinai Medical Center a/k/a Mount Sinai Hospital ("MSH" or "defendant") moves for an order pursuant to CPLR §3126 dismissing the complaint based upon plaintiff's alleged failure to respond to discovery demands or, alternatively, to preclude plaintiff from offering evidence at trial, or alternatively pursuant to CPLR 3124 to compel plaintiff to provide all outstanding discovery by a date certain and upon her failure to do so, automatically dismissing the complaint. Plaintiff, Mei Zhen Wu, as Administrator of the Estate of Sin Loong Ng, deceased ("Wu" or "plaintiff"), opposes the motion.

Plaintiff commenced this action on October 29, 2013 alleging causes of action for *inter alia*, negligence/medical malpractice, lack of informed consent and wrongful death (Motion at Exh. A). MSH served its answer and various discovery demands on January 24, 2014 (*id.* at Exhs. B, C). Thereafter, defendant served a demand for authorizations on June 9, 2014 (*id.* at Exh. D). Having received no response to their discovery demands, on or about December 24, 2014 MSH served a CPLR §3216(b) demand requiring plaintiff to resume prosecution of this case by filing a note of issue within 90

days upon penalty of dismissal. Upon Wu's failure to comply with that demand defendant moved to dismiss the complaint. Although this court's decision and order dated October 22, 2015 denied MSH's motion, it noted that Wu's excuse for the delay was "not overly compelling" and that her "continuing default was unjustified" (*id.* at Exh. F).

Counsel for the parties attended a preliminary conference on November 4, 2015. Although no preliminary conference order ("PCO") was entered at that time, this court directed plaintiff to furnish a bill of particulars. Four more conferences ensued on December 8, 2015, January 19, 2016, February 16, 2016 and March 22, 2016. Again, no PCO was entered, however, the parties entered into a stipulation and order on December 8, 2015¹ (*id.* at Exh. H). After each of these conferences, MSH's counsel followed up with plaintiff's counsel by letter confirming what had transpired in court (*id.* at Exhs. G through I).

Defendant received Wu's bill of particulars and other discovery responses on January 15, 2016 and a supplemental bill of particulars the next day (*id.* at Exh. J). MSH contends both the bill of particulars ("BP") and supplemental bill of particulars ("SBP") were improperly verified by plaintiff's counsel despite the fact that Wu resides in the same county where her counsel maintains his office. See CPLR §§ 3020(d)(3); 3021. Defense counsel advised plaintiff's counsel accordingly (*id.* at Exh. I).

¹ This stipulation/order provided in relevant part that Wu was to provide a bill of particulars and certificate of merit no later than one week prior to the next conference date of January 19, 2016.

MSH served a further demand for authorizations on or about March 4, 2016 (*id.* at Exh. K). Ultimately, an authorization Wu provided to obtain records from the Social Security Administration (SSA) was rejected.² By letters dated March 30, 2016 and May 26, 2016, defendant advised plaintiff accordingly, again requested a proper SSA authorization, verifications for the BP and SBP and medicare/medicaid lien information (*id.* at Exhs. L, M). At a September 6, 2016 status conference, this court issued an order directing plaintiff to produce these same items, together with specified properly executed authorizations (*id.* at Exh. O). As of the next court conference held on November 15, 2016, the same discovery remained outstanding and this court issued a discovery order virtually identical to the September 6, 2016 order (*id.* at Exh. Q). MSH demanded additional authorizations on December 9, 2016 (*id.* at Exh. S). On or about December 20, 2016 defense counsel received multiple authorizations from plaintiff; however, by letter dated December 27, 2016 defendant requested Wu to re-issue them, advising that the authorizations supplied were incomplete and likely to be rejected (*id.* at Exh. T).³

Discussion

With respect to penalties for failure to comply with discovery procedures, CPLR §3126 provides in relevant part as follows:

² It is unclear whether the SSA authorization was rejected because it was not dated properly or whether it was not on the requisite form.

³ Counsel for MSH advised that the authorizations were incomplete because they were not notarized and had not been initialed at section 9(a), which provides for the release of records pertaining to substance abuse, mental health and HIV. Further, a requested authorization for Flushing Medical Center was not provided.

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.

CPLR 3042 [d] provides that the foregoing penalties are also applicable to willful defaults in serving a bill of particulars.

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 (1st Dept 1990); *Kutner v. Feiden, Dweck & Sladkus*, 223 AD2d 488, 489 (1st Dept), *lv denied*, 88 NY2d 802 (1996) (disobedience of a series of court orders directing discovery warranted striking of pleading).

In *Wolfson v Nassau County Med. Ctr.*, 141 AD2d 815 (2d Dept 1988), the lower court granted defendant's motion to dismiss the complaint after plaintiff failed for two and a half years to respond to interrogatories. In affirming the dismissal, the Second Department found that even though the plaintiff had not violated a prior court order "the extensive nature of the plaintiff's delay in responding to the defendant's interrogatories permits an inference that they delay was willful." There, plaintiff's counsel failed to

proffer any excuse for the delay, other than to state that they had recently been substituted as counsel.

In opposition to MSH's motion, Wu denies any willful or contumacious conduct, claiming plaintiff has acted in good faith in responding to defendant's demands and court orders. Plaintiff points out that the BP, SBP and a certificate of merit were ultimately served and authorizations were provided, as defendant concedes. Plaintiff characterizes its responses as "imperfect compliance" not warranting any discovery sanctions.

With respect to the improperly verified BP and SBP, MSH correctly argues that the verifications fail to comply with CPLR §§ 3020 and 3021. Wu's opposition fails to address this argument or indicate whether or not proper verifications were ever provided. This court agrees that plaintiff has had more than sufficient time to provide a properly verified BP and SBP. Defendant argues they are entitled to treat these pleadings as a nullity based upon the improper verifications and requests an order of preclusion.

This court is mystified as to why Wu has not complied with this simple demand. Defendant notified plaintiff of the deficiency as early as January 26, 2016 (*id.* at Exh. I) then followed up on this issue in February, March and May of 2016 (*id.*). Moreover, no less than two conference orders issued in September 2016 and November 2016 required plaintiff to properly verify the BP and SBP (*id.* at Exhs. O, Q). Defense counsel's most recent letter to plaintiff's counsel is dated December 27, 2016, almost a full year after the deficiency was brought to counsel's attention.

Notwithstanding all of the foregoing and this court's frustration at the glacial pace at which discovery is being completed in this action, this court declines to strike the complaint or issue an order of preclusion, as Wu should be able to promptly comply with this request and MSH has obtained responses and has raised no objections to the substance of the BP and SBP. However, the portion of the motion seeking an order compelling plaintiff's compliance and requesting a self-executing order of dismissal in the event of plaintiff's default is granted in accordance with the directives set forth below.

As to the request for Medicare/Medicaid lien information, MSH first requested that plaintiff obtain such information by letter dated May 26, 2016 (*id.* at Exh. M). The demand was reiterated in multiple letters, e-mails and the conference orders dated September 9, 2016 and November 15, 2016. Although defendant claims no information was provided, both conference orders direct plaintiff to "provide Medicare/Medicaid lien letters **or status of request for same** in writing" within 30 days (emphasis added).

MSH's motion papers do not contain a copy of the authorizations Wu provided on or about December 20, 2016. However, attached to plaintiff's opposition are copies of two letters, together with authorizations, dated November 21, 2016 and addressed to Medicare Lien Repayment Data Collection and NYC HRA Medicaid Liens (see Shotkin Aff. in Opp. at Exh. N). Defendant does not address these letters in reply.

This court finds no willful or contumacious conduct on Wu's part with respect to this demand. By providing copies of plaintiff's counsel's aforementioned letters, plaintiff is in compliance with the letter and spirit of the September 6, 2016 and November 15, 2016 conference orders. Wu's counsel shall advise this court and opposing counsel at

the next court conference, scheduled for February 21, 2017, as to the status of these requests. Accordingly, this portion of defendant's motion is denied.

Addressing the SSA authorization, as previously noted, the cause of SSA's rejection of the authorization plaintiff provided is unclear. Wu's counsel acknowledges being notified of the rejection but does not indicate an updated SSA authorization was ever provided. Plaintiff did supply a completed SSA authorization with the December 20, 2016 submission, however, this form still contained no date and was not on the form defense counsel provided (*id.*).⁴

Again, plaintiff has attempted to comply and has not acted in bad faith justifying dismissal or preclusion. However, the portion of MSH's motion to compel compliance is granted, and plaintiff is directed to provide a new completed SSA authorization, dated and on the form defense counsel provided.

As to the medical authorizations, plaintiff's counsel correctly notes that the HIPAA form contains no requirement that it be notarized, nor does it require patients to consent to the release of records concerning treatment for substance abuse, mental health and HIV. Rather, the form instructs the signer that such records will only be released if section 9(a) is initialed, thus letting patients choose whether to release such records, in accordance with applicable law.

This court acknowledges that the medical malpractice defense bar has advised on several occasions during conferences that certain providers will not release medical

⁴ Plaintiff utilized a 2010 version of the SSA form while defendant provided a more current 2013 version. While the forms appear to be substantially similar, there are minor differences.

records if section 9(a) is not initialed, and there is no reason to doubt such representations. This court has consistently expressed its position that despite the burden placed on such providers, they are not in compliance with HIPAA's requirements and the insistence that all patients permit the release of these sensitive health records is wholly improper. The form itself is clear on this point. Further, on this record, MSH does not even attempt to establish the relevance of such records.

Finally, defendant advised plaintiff by letter dated December 27, 2016 (Motion at Exh. T) that they would attempt to process the authorizations in the form plaintiff provided. However, there is no indication in the motion papers that this was ever attempted. While MSH argues there is no requirement to process authorizations they have reason to believe are incomplete, it does not appear that all health care providers adhere to the policy of requiring notarized authorizations with section 9(a) initialed.

This matter will be discussed at the upcoming conference, at which time defense counsel shall advise whether they have attempted to process the provided authorizations, and which, if any authorizations listed in the September 6, 2016 and November 15, 2016 conference orders were not provided. Accordingly, on this point, notwithstanding plaintiff's inordinate delay in providing authorizations (from March 2016 to December 2016), this court cannot deem Wu to be in default of demands for authorizations which are contrary to law. Thus, the portion of MSH's motion regarding purportedly incomplete authorizations is denied pending the outcome of the February 21, 2017 conference.

Accordingly, it is

ORDERED that defendant MSH's motion is decided as follows:

(1) defendant's motion is granted to the extent that plaintiff is directed to serve a properly verified BP and SBP within ten (10) days of service of a copy of this decision and order with notice of entry, and upon plaintiff's failure to comply, defendant's counsel shall submit a proposed order striking the complaint directly to chambers, together with an affirmation detailing the default and proof of service of same upon plaintiff;

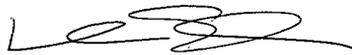
(2) defendant's motion is denied with respect to its request for Medicare/Medicaid lien information, however, plaintiff's counsel is directed to advise this court and opposing counsel as to the status of his request(s) for same at the February 21, 2017 status conference;

(3) defendant's motion is granted to the extent that plaintiff is directed to provide a new completed SSA authorization, dated and on the form defense counsel provided, within ten (10) days of service of a copy of this decision and order with notice of entry, and upon plaintiff's failure to comply, defendant's counsel shall submit a proposed order striking the complaint directly to chambers, together with an affirmation detailing the default and proof of service of same upon plaintiff; and

(4) defendant's motion is denied with respect to its demands for medical authorizations, subject to further discussion at the February 21, 2017 status conference as set forth herein.

The foregoing constitutes this court's decision and order.

Dated: New York, New York
February 17, 2017



Hon. Martin Shulman, J.S.C.