

Feliciano v Obedian

2018 NY Slip Op 34262(U)

December 5, 2018

Supreme Court, Nassau County

Docket Number: Index No. 608891/17

Judge: James P. McCormack

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT - STATE OF NEW YORK

PRESENT:

Honorable James P. McCormack

Justice

_____ x
**RAFAEL FELICIANO and MELANIE
FELICIANO,**

Plaintiff(s),

**TRIAL/IAS, PART 23
NASSAU COUNTY**

Index No. 608891/17

-against-

**RICHARD S. OBEDIAN, M.D., RICHARD S.
OBEDIAN, PLLC, WILLIAM J. SONSTEIN,
M.D., WILLIAM J. SONSTEIN, M.D. PC,
NEUROLOGICAL SURGERY, PC AND NYU
WINTHROP HOSPITAL f/k/a WINTHROP
UNIVERSITY HOSPITAL,**

Defendant(s).

**Motion Seq. No.: 001 & 002
Motion Submitted: 10/25/18**

The following papers read on this motion:

Notices of Motion/Supporting Exhibits.....XX
Affirmation in Opposition.....X
Reply Affirmation.....X

Defendant, NYU Winthrop Hospital f/k/a Winthrop University Hospital
(Winthrop), moves this court for an order, (Motion Seq. 001), pursuant to CPLR §§3101,
3124, 3126 and 3042, for an order dismissing Plaintiffs' complaint for failure to comply

with discovery. In the alternative, Winthrop seeks to either preclude Plaintiffs from offering evidence at trial, or compelling Plaintiffs to comply with discovery demands. Plaintiffs, Rafael Feliciano (Rafael) and Melanie Feliciano (Melanie) oppose the motion. Defendants, Richard S. Obedian, M.D., Richard S. Obedian, PLLC, William J. Sonstein, M.D., William J. Sonstein, M.D. PC, and Neurological Surgery, PC (collectively “the Obedian/Sonstein Defendants”). separately move this court (Motion Seq. 002), also pursuant to CPLR §§ 3042, 3124 and 3126, to dismiss Plaintiffs’ complaint, or to compel Plaintiffs to comply with discovery. Plaintiffs oppose the motion.

Before a motion relating to discovery or a bill of particulars can be brought, the movant is required to submit an affirmation of good faith indicating “that counsel has conferred with counsel for the opposing party in a good faith effort to resolve the issues raised by the motion.” 22 NYCRR 202.7(a). The affirmation of good faith is supposed to indicate that the parties consulted over the discovery issues and the “time, place and nature of the consultation and the issues discussed...,” unless it would have been futile to do so. 22 NYCRR 202.7(c). The parties are to make a diligent effort to resolve the discovery dispute. (*Deutsch v. Grunwald*, 110 A.D.3d 949 [2nd Dept. 2013]; *Murphy v. County of Suffolk*, 115 A.D.3d 820 [2nd Dept. 2014]; *Chichilnisky v. Trustees of Columbia University in City of New York*, 45 A.D.3d 393 [1st Dept. 2007]). Herein, neither movant submits a sufficient affirmation of good faith. Winthrop’s counsel states their good faith efforts consists of three letters. First, the affirmation contains none of the required information. Second, letters alone do not satisfy the rule. (*See Eaton v. Chahal*, 146

Misc.2d. 977, 983 [N.Y.Sup. 1990] (“...the court interprets a ‘good faith effort’ to mean more than an exchange of computer generated form letters or cursory telephone conversation.”); *Santiago v. Park Ambulance Serv., Inc.*, 53 Misc.3d 1201(A)[N.Y.Sup. 2016] (“Merely sending letters...is not sufficient to satisfy the requirement of 22 NYCRR §202.7(c).”); *Amherst Synagogue v. Schuele Paint Co.*, 30 A.D.3d 1055, 1057 [4th Dept. 2006](sending only letters “failed to demonstrate that they made a diligent effort to resolve this discovery dispute.”, quoting *Baez v. Sugrue*, 300 A.D.2d 519, 521 [2nd Dept. 2002]). Further, the referenced letters were sent to Plaintiffs’ prior counsel, and there is no proof of any efforts, much less diligent efforts, made with Plaintiffs’ current counsel.

The Obedian/Sonstein Defendants’ counsel claims there were “phone calls” made, but there is nothing in the affirmation explaining the date, time and content of those discussions, as required by the rule. For those reasons, both motions will be denied as defective.

The court notes that Plaintiffs allege in their opposition papers that they have supplied all outstanding discovery except for Plaintiffs’ tax returns. In letters sent to the court, Plaintiffs argue they should not have to turn over their tax returns because employment authorizations and W-2 forms are enough to substantiate Plaintiffs’ income for the lost wages claim. Defendants, in a responsive letter, argue they are entitled to tax returns as they are the only proper way to determine all of Plaintiffs’ income. Though the issue is not before the court or contained in these motions, in general this court is loathe

to direct the release of tax returns where the information is available from other sources.

Generally, a W-2 should suffice, and a Defendant's supposition that a tax return might show other income is not grounds to overcome this court's reluctance.

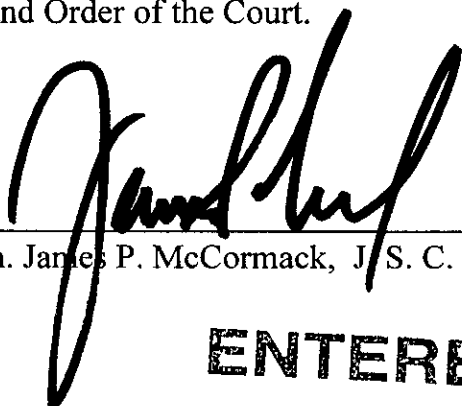
Accordingly, it is hereby

ORDERED, that Winthrop's motion (Motion Seq. 001) pursuant to CPLR §§3101, 3124, 3126 and 3024 is DENIED without prejudice, with leave to renew upon proper compliance with 22 NYCRR 202.7(c); and it is further

ORDERED, that the Obedian/Sonstein Defendants' motion (Motion Seq. 002) pursuant to CPLR §§ 3126, 3124 and 3042 is DENIED, with leave to renew upon proper compliance with 22 NYCRR 202.7.

The foregoing constitutes the Decision and Order of the Court.

Dated: December 5, 2018
Mineola, N.Y.



Hon. James P. McCormack, J/S. C.

ENTERED

DEC 07 2018

NASSAU COUNTY
COUNTY CLERK'S OFFICE