

Carbone v Mt. Sinai Beth Israel Med. Ctr.
2020 NY Slip Op 34325(U)
December 23, 2020
Supreme Court, New York County
Docket Number: 805347/2018
Judge: John J. Kelley
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. JOHN J. KELLEY PART IAS MOTION 56EFM

Justice

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JAMES CARBONE,

Plaintiff,

- v -

MT. SINAI BETH ISRAEL MEDICAL CENTER,
MT. SINAI HEALTH SYSTEMS, MAY LI, M.D.,
and ROBERT ZIETS, M.D.,

Defendants.

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The following e-filed documents, listed by NYSCEF document number 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, and 88 (Motion 003)

were read on this motion to/for

EXTEND NOTE OF ISSUE DEADLINE/COMPEL
DISCOVERY/IMPOSE DISCOVERY SANCTION

In this action to recover damages for medical malpractice, the plaintiff moves pursuant to CPLR 2004, 3124, and 3126 to extend his deadline for filing the note of issue, compel the defendants Mt. Sinai Beth Israel Medical Center and Mt. Sinai Health Systems (together the Mt. Sinai defendants) to produce a witness for a deposition, and compel the defendant Robert Ziets, M.D., fully to respond to post-deposition demands for discovery and inspection or, in the alternative, to strike those defendants' answers for failure to respond to discovery demands. The Mt. Sinai defendants and Ziets oppose the motion, except as to the request to extend the note of issue filing deadline. The motion is granted to the extent of directing the Mt. Sinai defendants to produce a witness for a deposition on or before January 29, 2021, if that deposition has not already been scheduled or conducted, and enlarging the time for filing the note of issue until April 9, 2021, and the motion is otherwise denied.

CPLR 3101(a) provides that "there shall be full disclosure of all matter material and necessary in the prosecution or defense of an action." This language is "interpreted liberally to

require disclosure, upon request, of any facts bearing on the controversy which will assist preparation for trial by sharpening the issues and reducing delay and prolixity” (*Osowski v AMEC Constr. Mgt., Inc.*, 69 AD3d 99, 106 [1st Dept 2009], quoting *Allen v Crowell-Collier Publ. Co.*, 21 NY2d 403, 406-407 [1968]). CPLR 3126 authorizes the court to sanction parties who “refuse[] to obey an order for disclosure or wilfully fail[] to disclose information which the court finds ought to have been disclosed” (*Kutner v Feiden, Dweck & Sladkus*, 223 AD2d 488, 489 [1st Dept 1998]). A sanction is only appropriate, however, where the failure to provide discovery is willful and contumacious (see *CEMD El. Corp. v Metrotech LLC I*, 141 AD3d 451 [1st Dept 2016]). A party’s failure to satisfy his or her discovery obligations, particularly after a court order has been issued, “may constitute the dilatory and obstructive, and thus contumacious, conduct warranting the striking of the[] [pleading]” (*Kutner v Feiden, Dweck & Sladkus*, 223 AD2d at 489; see *CDR Creances S.A. v Cohen*, 104 AD3d 17 [1st Dept 2012]; *Reidel v Ryder TRS, Inc.*, 13 AD3d 170 [1st Dept 2004]).

Although the court has issued numerous discovery orders in this action, the depositions of all of the parties had been adjourned by the parties themselves on numerous occasions, and the post-deposition demands for discovery and inspection addressed to Dr. Ziets has yet to be the subject of a discovery order; in fact, those demands were only served on August 31, 2020. Thus, the plaintiff “failed to establish that defendants’ conduct during discovery was willful, contumacious or in bad faith” (*Butler v Knights Collision Experts, Inc.*, 165 AD3d 406, 407 [1st Dept 2018]). In addition, the plaintiff sought no conditional order pertaining to discovery compliance prior to making this motion (see *Westchester Med. Ctr. v Amoroso*, 110 AD3d 580, 580 [1st Dept 2013]).

Moreover, the fact that a party serves discovery materials during the pendency of a CPLR 3126 motion to strike its pleading does not render its prior failure to make discovery willful or contumacious (see *Chamberlain, D’Amanda, Oppenheimer & Greenfield v Beauchamp*, 247 AD2d 858, 859 [4th Dept 1998]; see also *Butler v Knights Collision Experts, Inc.*, 165 AD3d at

407). “[A]ny mere lack of diligence in furnishing certain requested materials is not a ground for dismissal” or other sanctions (*Moon 170 Mercer, Inc. v Vella*, 146 AD3d 537, 539 [1st Dept 2017]; see *Bueno v 562 W. 174th St. Equities, LLC*, 2020 NY Slip Op 30223[U], 2020 NY Misc LEXIS 374 [Sup Ct, N.Y. County, Jan. 28, 2020 [Kelley, J.]).

Hence, the plaintiff failed to establish that the defendants engaged in a pattern of willful noncompliance with discovery obligations sufficient to warrant the drastic penalty of striking their answer or precluding them from adducing evidence at trial (see *Butler v Knights Collision Experts, Inc.*, 165 AD3d at 407; see also *Aegis SMB Fund II, L.P. v Rosenfeld*, _____ AD3d _____, 2020 NY Slip Op 07309 [1st Dept, Dec. 8, 2020] [defendant’s failure to appear at court-ordered mediation session was “neither willful nor part of a pattern of dilatory behavior”]).

Nonetheless, it is appropriate for the court to fix a firm deadline for the deposition of physician’s assistant Michael Jones, the witness that the plaintiff designated to appear on behalf of the Mt. Sinai defendants (see CPLR 3124). Hence, that branch of the plaintiff’s motion seeking to compel that disclosure is granted (see *William J. Jenack Estate Appraisers & Auctioneers, Inc. v Rabizadeh*, 131 AD3d 960, 963-964 [2d Dept 2015]; *Rocco v Family Foot Ctr.*, 94 AD3d 1077, 1080 [2d Dept 2012]). Consequently, if Jones’s deposition has yet to be conducted, or a date for that deposition has otherwise yet to be scheduled, the court directs the Mt. Sinai defendants to produce Jones for a deposition on or before January 29, 2021. Any post-deposition demands referable to that deposition must be served on or before March 1, 2021, and any responses thereto must be served on or before April 2, 2021.

The parties’ submissions reflect that the Dr. Ziets has responded to the plaintiff’s demands for post-deposition discovery and inspection in an appropriate manner by producing relevant documentation and explaining that certain requested documentation does not exist or cannot be located. To the extent that the plaintiff seeks an “audit trail” or other metadata referable to his medical and hospital charts and records, that information is not material, relevant, or necessary to the prosecution or defense of this action, unless the plaintiff shows,

“beyond mere conjecture, that there is relevant information to be gleaned from metadata and audit trails which cannot be obtained from other sources, including the medical records and deposition testimony,” a showing that he has not made here (*Punter v New York City Health and Hosps. Corp.*, 2019 NY Slip Op 31065[U], 2019 NY Misc LEXIS 1906, *16 [Sup Ct., N.Y. County, Apr. 12, 2019] [Silver, J.]; see *Dennehy v Harlem Hosp. Cent.*, 2018 NY Slip Op 32496[U], 2018 NY Misc LEXIS 4370, *13 [Sup Ct, N.Y. County, Oct. 2, 2018]; *Czyz v Scherl*, 2017 NY Slip Op 31465[U], 2017 NY Misc LEXIS 2651, *8 [Sup Ct, N.Y. County, Jul. 10, 2017] [Shulman, J.]; *Vargas v Lee*, 2015 NY Slip Op 31048[U], 2015 NY Misc LEXIS 2176 [Sup Ct, Kings County, Jun. 10, 2015]; see generally *Aguilar v Immigration & Customs Enforcement Div. of U.S. Dept. of Homeland Sec.*, 255 FRD 350, 354 [SD NY 2008]).

The court extends the note of issue filing deadline until April 9, 2021 to permit the plaintiff to conduct the deposition of Michael Jones and allow for the service of post-deposition demands referable to the Jones deposition, as well as a response thereto.

Accordingly, it is

ORDERED that the plaintiff’s motion is granted to the extent that, if the deposition of Physician’s Assistant Michael Jones has yet to be conducted, or a date for that deposition has otherwise yet to be scheduled, the defendants Mt. Sinai Beth Israel Medical Center and Mt. Sinai Health Systems shall produce Michael Jones for a deposition on or before January 29, 2021, and the note of issue deadline is extended until April 9, 2021, and the motion is otherwise denied; and it is further,

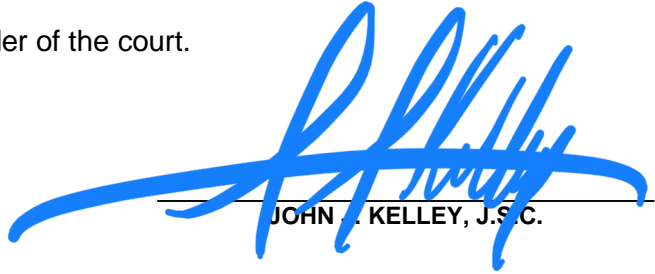
ORDERED that the deposition of Michael Jones shall be conducted remotely, unless all parties stipulate otherwise, provided that the deponent’s attorneys may be in same room as the deponent during his deposition; and it is further,

ORDERED that the plaintiff shall serve any post-deposition demands referable to the deposition of Michael Jones on or before March 1, 2021, and the defendants Mt. Sinai Beth

Israel Medical Center and Mt. Sinai Health Systems shall serve a response to any such demands on or before April 2, 2021.

This constitutes the Decision and Order of the court.

12/23/2020
DATE



JOHN J. KELLEY, J.S.C.

CHECK ONE:

CASE DISPOSED

GRANTED

SETTLE ORDER

INCLUDES TRANSFER/REASSIGN

DENIED

NON-FINAL DISPOSITION

GRANTED IN PART

SUBMIT ORDER

FIDUCIARY APPOINTMENT

OTHER

REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: