Tavarez-Quintano v Betancourt
2013 NY Slip Op 33801(U)
July 2, 2013
Supreme Court, Bronx County
Docket Number: 307956/11
Judge: Laura G. Douglas
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX
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BLAS TAVAREZ-QUINTANO,

Plaintiff(s),

- against -

LOVE BETANCOURT AND DOMINGO FELIZ,

Defendant(s).

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DECISION AND ORDER

Index No: 307956/11

Defendant LOVE BETANCOURT (Betancourt) moves seeking an order striking plaintiff's complaint pursuant CPLR § 3126 or in the alternative compelling plaintiff to provide HIPAA compliant medical authorizations and appear for a deposition pursuant to CPLR § 3124. Betancourt also seeks an order compelling defendant DOMINGO FELIZ (Feliz) to appear for a deposition. Betancourt seeks the aforementioned relief on grounds that while plaintiff has provided HIPAA complaint authorizations they contained incorrect addresses for plaintiff's medical providers. Accordingly, Betancourt argues that she has been unable to procure plaintiff's medical records and has therefore been unable to depose plaintiff. For this very reason Betancourt has also been unable to depose Feliz.

For the very same reasons averred by Betancourt, Feliz cross-moves seeking an order precluding plaintiff from testifying about or introducing any evidence related to his injuries at the time of

trial. With respect to the portion of Betancourt's motion seeking to compel Feliz' appearance at a deposition, Feliz opposes such relief on grounds that he was already deposed by plaintiff and was not deposed by Betancourt solely because Betancourt failed to appear and depose him. Accordingly, Feliz argues that he should not be required to appear for another deposition.

Plaintiff opposes Betancourt's motion and Feliz' cross-motion averring that it has provided all defendants with HIPAA complaint authorizations for all relevant medical treatment he received. Plaintiff further argues that the addresses listed for the providers within the authorizations were obtained from plaintiff's medical records. Accordingly, plaintiff argues that neither striking his pleadings nor precluding him from offering evidence at trial is warranted. To the extent that Betancourt seeks to depose him, plaintiff avers that insofar as he appeared and was deposed by Feliz and was ready, willing, and able to appear for depositions on multiple dates that Betancourt repeatedly adjourned, Betancourt has waived his deposition.

For the reasons that follow hereinafter, Betancourt's motion and Feliz' cross-motion are hereby denied.

The instant action is for personal injuries allegedly sustained by plaintiff on April 13, 2011. Within his complaint, plaintiff alleges that he was involved in a motor vehicle accident when the vehicle within which he was a passenger, said vehicle

owned and operated by Feliz, came into contact with a vehicle owned and operated by Betancourt. Plaintiff alleges that defendants were negligent in the operation of their respective vehicles and that he was injured as a result.

On December 7, 2011, shortly after issue was joined by the service of defendants' answer, plaintiff provided responses to Betancourt's Combined Demands. Included therewith, were HIPAA complaint authorizations authorizing the release of plaintiff's medical records from Ram Nair Medical (where plaintiff purportedly underwent physical therapy), Dr. Mark McMahon (plaintiff's orthopedic surgeon), and Lenox Hill Radiology (where plaintiff had an MRI). On January 19, 2012, pursuant to Betancourt's demand, plaintiff provided all medical records in his possession. On January 17, 2012, all parties appeared for a Preliminary Conference. Notwithstanding that plaintiff had already provided authorizations, pursuant to the Preliminary Conference Order, plaintiff was ordered to provide HIPAA compliant authorizations for all medical providers who treated him for injuries sustained in this accident within thirty days. Additionally, all parties were ordered to appear for depositions on March 20, 2012. On January 17, 2012, in his Response to the Preliminary Conference Order, plaintiff provided another HIPAA compliant authorization authorizing Dr. Mark McMahon to release all intra-operative photos taken of the plaintiff.

Despite the foregoing, Betancourt, claiming that plaintiff had not provided HIPPA complaint authorizations asked that depositions be adjourned first to May 3, 2012 and then again to June 21, 2012. In between those two dates, on May 11, 2012, Betancourt served a Notice for Discovery and Inspection upon plaintiff seeking HIPAA compliant authorizations for medical records from United Medical Offices of Long Island, Khavinson & Associates, Alpha Physical Therapy, New Way Massage Therapy, and Austin Diagnostic Medical PC. On June 25, 2012, after Betancourt again, via letter, asked for the aforementioned authorizations, plaintiff provided them[1]. Because Betancourt claimed that he needed time to process the authorizations provided by plaintiff, depositions were adjourned first to July 19, 2012 and then to August 31, 2012. On August 30, 2012, insofar as Betancourt still had not received records pursuant to the authorizations provided by plaintiff, the depositions were adjourned without a date. On September 10, 2012, all parties appeared for a Compliance Conference, where as per the Compliance Conference Order, all parties were ordered to comply with all outstanding discovery and ordered to appear for depositions on November 15, 2012. On November 14, 2012, Betancourt sought to once again adjourn the court-ordered depositions alleging for the first

[1] Plaintiff objected to and did not provide records from Khavinson & Associates. Nothing in the motion or cross-motion indicates that defendants took issue with plaintiff's failure to provide records from this entity.

time that the addresses listed within the authorizations for plaintiff's medical providers were incorrect. Plaintiff refused to adjourn the depositions and on November 15, 2012, plaintiff was deposed by Feliz and Feliz was deposed by the plaintiff. Betancourt was not present at the depositions.

It is well settled that "[t]he nature and degree of a penalty to be imposed under CPLR 3126 for discovery violations is addressed to the court's discretion" (*Zakhidov v Boulevard Tenants Corp.*, 96 AD3d 737, 738 [2d Dept 2012]). However, since striking a party's pleading for failure to provide discovery is an extreme sanction, it is only warranted when the failure to disclose is willful and contumacious (*Bako v V.T. Trucking Co.*, 143 AD2d 561, 561 1st Dept 1999]). Similarly, since the discovery sanction imposed must be commensurate with the disobedience it is designed to punish, the sanction of preclusion is also only appropriate when there is a clear showing that a party has willfully and contumaciously failed to comply with court-ordered discovery (*Zakhido* at 739; *Assael v Metropolitan Transit Authority*, 4 AD3d 443, 444 [2d Dept 2004]; *Pryzant v City of New York*, 300 AD2d 383, 383 [2d Dept 2002]). Accordingly, where the failure to disclose is neither willful nor contumacious, and instead constitutes a single instance of non-compliance for which a reasonable excuse is proffered, the extreme sanction of striking of a party's pleading is unwarranted (*Palmenta v. Columbia University*, 266 AD2d 90, 91 [1st Dept 1999]). Nor is

the striking of a party's pleadings warranted merely by virtue of "imperfect compliance with discovery demands" (*Commerce & Industry Insurance Company v Lib-Com, Ltd*, 266 AD2d 142, 144 [1st Dept 1999]). Because willful and contumacious behavior can be readily inferred upon a party's repeated non-compliance with court orders mandating discovery (*Pryzant v City of New York*, 300 AD2d 383, 883 [2d Dept 202]), only when a party adopts a pattern of willful non-compliance with discovery demands (*Gutierrez v Bernard*, 267 AD2d 65, 66 [1st Dept 1999]) and repeatedly violates discovery orders, thereby delaying the discovery process, is the striking of pleadings warranted(*Moog v City of New York*, 30 AD3d 490, 491 [2d Dept 2006]; *Helms v Gangemi*, 265 AD2d 203, 204 [1st Dept 1999]).

Here, a review of the papers submitted in support and in opposition to defendants' motion and cross-motion seeking discovery sanctions evinces that plaintiff provided defendants with HIPAA complaint authorizations on three separate occasions. First, on December 7, 2011, plaintiff provided responses to Betancourt's Combined Demands, which included HIPAA complaint authorizations authorizing the release of plaintiff's medical records from Ram Nair Medical (where plaintiff purportedly underwent physical therapy), Dr. Mark McMahon (plaintiff's orthopedic surgeon), and Lenox Hill Radiology (where plaintiff had and MRI). Second, on January 17, 2012, in his Response to the Preliminary Conference Order, plaintiff provided another HIPAA compliant authorization

authorizing Dr. Mark McMahon to release all intra-operative photos taken of the plaintiff. Lastly, on June 25, 2012, plaintiff provided HIPAA complaint authorizations for United Medical Offices of Long Island, Alpha Physical Therapy, New Way Massage Therapy, and Austin Diagnostic Medical PC. Thus, far from behaving willfully or contumaciously, a prerequisite for any discovery sanction, plaintiff provided all the discovery requested and ordered by the court.

To the extent that defendants seek discovery sanctions on grounds that plaintiff has provided authorizations with incorrect addresses, they have failed to establish their assertion. Defendants fail to tender any evidence establishing that the authorizations could not be processed using the addresses listed, e.g., returned mail or a letter indicating that the medical providers did not have offices at the addresses listed. Accordingly, defendants have failed to establish that plaintiff provided the wrong addresses within the authorizations. Based on the foregoing, defendants' motion seeking to strike plaintiff's complaint and/or preclude him from offering certain evidence at trial is denied. Had defendants met their burden, plaintiff's substantial compliance with discovery demands and court orders would have nonetheless precluded the extreme discovery sanction sought by defendants (*Commerce & Industry Insurance Company* at 144).

Betancourt's motion seeking an order compelling plaintiff to provide new HIPAA compliant authorizations with proper addresses is also denied. CPLR § 3124 allows a court to issue an order compelling disclosure "[i]f a person fails to respond to or comply with any request, notice, interrogatory, demand, question, or order." Thus, when a party responds to discovery demands but provides inadequate responses, the proper remedy is a motion to compel pursuant to CPLR § 3124 as opposed to a motion to strike or preclude pursuant to CPLR § 3126 (*Double Fortune Property Investors Corp. v Gordon*, 55 AD3d 406, 407 [1st Dept 2008] ["Plaintiff having responded to defendant's discovery requests, the proper course for defendant, rather than moving to strike the complaint pursuant to CPLR 3126, was first to move to compel further discovery pursuant to CPLR 3124."]). Here, however, for the same reasons discussed above, an order to compel is unwarranted since Betancourt, as noted above, fails to establish that the authorizations provided by plaintiff were deficient in any way.

Betancourt's motion seeking to compel depositions of plaintiff and Feliz is also denied insofar as it is well settled that when discovery responses are deficient and a court-ordered deposition is pending, "[t]he proper course [is] to proceed with the ordered depositions, determine at that time whether or not other documents [are] available, [and] request their production pursuant to CPLR 3120" *Barber v Ford Motor Co.*, 250 AD2d 552, 552 [1st Dept 1998]).

In the case at bar, Betancourt should have also proceeded with the court ordered depositions inasmuch as he was provided with copies of plaintiff's records from Ram Nsir Medical, which plaintiff represents included the very records which Betancourt avers he has been unable to obtain, namely, records from United Medical Offices of Long Island, Alpha Physical Therapy, New Way Massage Therapy, and Austin Diagnostic Medical PC. Moreover, this court finds Betancourt's claim that the addresses within the medical authorizations are incorrect, rather incredible and disingenuous inasmuch as it was raised for the first time almost five months after plaintiff provided the authorizations.

It is hereby

ORDERED that plaintiff serve a copy of this Decision and Order with Notice of Entry upon defendant within thirty (30) days hereof.

This constitutes this Court's decision and Order.

Dated : 7-2, 2013
Bronx, New York

Laura G. Douglas, J.S.C.