

Heerey-Bergin v Ophir
2014 NY Slip Op 31556(U)
June 18, 2014
Supreme Court, New York County
Docket Number: 400728/13
Judge: Joan B. Lobis
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: _____
Justice

PART _____

Index Number : 400728/2013
HEEREY-BERGIN, ROSEMARY
vs.
OPHIR, ORNA
SEQUENCE NUMBER : 003
PRECLUDE

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____

The following papers, numbered 1 to _____, were read on this motion to/for _____

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). 1-8

Answering Affidavits — Exhibits _____ | No(s). 9-17

Replying Affidavits _____ | No(s). 18-19

FILED

Upon the foregoing papers, it is ordered that this motion is

JUN 20 2014

NEW YORK
COUNTY CLERK'S OFFICE

THIS MOTION IS DECIDED IN ACCORDANCE
WITH THE ACCOMPANYING MEMORANDUM DECISION and
ORDER

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

Dated: 6/18/14

Joan B. Lobi, J.S.C.
JOAN B. LOBI

- 1. CHECK ONE: CASE DISPOSED NON-FINAL DISPOSITION
- 2. CHECK AS APPROPRIATE: MOTION IS: GRANTED DENIED GRANTED IN PART OTHER
- 3. CHECK IF APPROPRIATE: SETTLE ORDER SUBMIT ORDER
- DO NOT POST FIDUCIARY APPOINTMENT REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY: IAS PART 6

-----X
Rosemary Heerey-Bergin,

Plaintiff,

-against-

Orna Ophir,

Defendant.

FILED

Index No. 400728/13

Decision and Order

20 2014

NEW YORK
CLERK'S OFFICE

JOAN B. LOBIS, J.S.C.:

In this action for medical malpractice, defendant psychologist, Orna Ophir, seeks to preclude pro se plaintiff, Rosemary Heerey-Bergin, from presenting evidence at trial pursuant to Section 3042 of the Civil Practice Law and Rules, or in the alternative striking plaintiff's complaint pursuant to Section 3126 of the Civil Practice Law and Rules. A prior motion to dismiss led to an order dismissing a claim under HIPAA and directed defendant to answer. A preliminary conference was scheduled for October 8, 2013.

In support of the motion, defendant attaches all notices purportedly sent to the plaintiff in September 2013, at the time defendant answered the complaint. The notices include a Notice to Take Deposition Upon Oral Examination, Demand for the Names and Addresses of Witnesses, Demand for Accident Reports, Demand Pursuant to Sections 3101, 3102, and 4545, Demand for a Verified Bill of Particulars, Discovery Demand for Pursuant [sic] to CPLR 3101(3), Notice for Discovery and Inspection, Demand for Employment Record Authorizations, Demand for Collateral Source Information, Notice for Income Information and Authorization of IRS Records, Demand for Medical Information and Authorizations, and Demand Pursuant to CPLR 306-a ("Demand").

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Many of these requests were generic and not tailored to this litigation or readily understandable by a pro se litigant. A preliminary conference was scheduled for October 8, 2013 and adjourned to October 29, 2013, without completing a preliminary conference order. After discussions with the Court on October 29, plaintiff was given another copy of the Demand in the robing room and instructions to respond. By the next appearance, December 3, 2013, plaintiff had still not properly responded to the Demand. She was ordered to mail defendant answers to the Demand by January 15, 2014. In addition, defendant specifically requested any relevant audio material in plaintiff's possession and correspondence in a Notice to Produce dated November 20, 2013. That notice was particularized to the facts of this case.

The parties appeared again on January 28, 2014. Plaintiff had not complied and the matter was adjourned again. The parties did not complete a preliminary conference order. On February 4, 2014, plaintiff provided one audio disc of a therapy session to defendant. The next conference was March 4, 2014. By that date the defendant had filed the instant motion. The parties entered into an agreement to adjourn the return date of the motion. Dates for filing opposition papers and a reply were set. One further conference occurred on April 2, 2014. Plaintiff failed to produce the additional audio recordings in her possession or respond to the other requests. It appears that the plaintiff recorded multiple therapy sessions with defendant. Again, a preliminary conference order was not completed.

In opposition to defendant's motion, plaintiff argues that she provided responses. She attaches a letter to defense counsel dated March 11, 2014, wherein she offers to allow the defense to listen to her recording and make copies, stating that she had previously made this offer

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to the defense attorney. She asserted that she has provided HIPPA forms. She included several documents, including a letter from a current therapist, a portion of a newsletter with an abstract of a presentation to be made by defendant, a letter from John Jewell on the letter head of the Institute for Psychoanalytic Training and Research, a letter from a doctor at the Center for Psychoanalytic Training and Research at the College of Physicians and Surgeons of Columbia University, and the letter that she sent with the audio recording which she has provided. These items appear to be partially responsive to some of the requests in the Notice to Produce of November 20, 2013.

In reply, defendant highlights the incompleteness of the responses and argues that plaintiff has failed to respond completely to any of the demands. Defendant urges this court to reject the plaintiff's selective way of responding to discovery. She argues that by allowing the plaintiff to do so, plaintiff is determining what is relevant without a judicial determination of defendant's rights.

Whether a court shall order sanctions for the failure to comply with discovery requests is directed to the sound discretion of the court. Courts have been unwilling to strike a pleading unless there is a showing that the conduct is willful or contumacious. Hogin v. New York, 103 A.D.3d 419 (1st Dep't 2013). Here there has been partial compliance. It cannot be said that the plaintiff's conduct is willful or contumacious. Moreover, the pro se litigant cannot be expected to understand the legal process as well as an attorney. A strict adherence to the rules of discovery would be unjust. With the exception of an oral direction to produce audio tapes, as yet no court orders to produce have been entered. The defendant should have moved under Section 3124 of the Civil Practice Law and Rules for an order to compel responses, specifying which items

of discovery must be produced. In light of the extensive delay, I am directing the plaintiff to serve upon the defense attorney a written, detailed response to the notice dated November 20, 2013. The responses shall clearly identify by number the answer to each demand. If an item does not exist or cannot be found after a good faith diligent search, plaintiff shall state that in sworn statement. The plaintiff has 20 days to comply with this order after service of a copy of this decision and order with notice of entry.

This constitutes the decision and order of the Court.

Dated: *June 18*, 2014

ENTER:



JOAN B. LOBIS, J.S.C.

FILED
JUN 20 2014
NEW YORK
COUNTY CLERK'S OFFICE