

Bashian & Farber, LLP v Syms
2015 NY Slip Op 32670(U)
August 24, 2015
Supreme Court, Westchester County
Docket Number: 60595/2014
Judge: Joan B. Lefkowitz
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To commence the statutory time period for appeals as of right [CPLR 5513(a)], you are advised to serve a copy of this order, with notice of entry upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER-COMPLIANCE PART

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BASHIAN & FARBER, LLP and GARY E. BASHIAN, P.C.,

Plaintiffs,

DECISION and ORDER

Index No. 60595/2014
Motion Date: August 24, 2015
Seq. No. 7

-against-

RICHARD SYMS; RICHARD SYMS AS TRUSTEE OF THE SYMS FAMILY REVOCABLE TRUST DATED MARCH 11, 2014; INEVA SYMS aka I. EVE SYMS aka EVE SYMS; INEVA SYMS aka I. EVE SYMS aka EVE SYMS AS TRUSTEE OF THE SYMS FAMILY REVOCABLE TRUST DATED MARCH 11, 2014; THE SYMS FAMILY REVOCABLE TRUST DATED MARCH 11, 2014; AND John Does #1-10,

Defendants.

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LEFKOWITZ, J.

The following papers were read on this motion by plaintiffs for an order striking defendants' answer or, alternatively, precluding, defendants, Richard and Ineva Syms, from entering evidence pertaining to the affirmative defenses and claims raised in defendants' answer and defending the claims raised in plaintiffs' complaint; sanctioning defendants and defendants' counsel for a sum to be determined by this court; and granting such other and further relief as this court may deem just and proper. Defendants oppose the motion.

- Order to Show Cause - Affirmation in Support -Exhibits A-J
- Memorandum of Law in Support
- Affirmation in Opposition -Memorandum of Law in Opposition
- Letter from Plaintiff's Counsel dated August 10, 2015 - Exhibits A-B¹

¹ The Discovery Motion Briefing Schedule dated July 20, 2015 directed, inter alia, that opposition papers be filed on NYSCEF on or before August 10, 2015 at 12 p.m. Plaintiffs' August 10, 2015 letter advising the Court that defendants' filed their Affirmation in Opposition and Memorandum of Law on August 10, 2015 at 12:06 p.m. and 1:28 p.m., respectively, is duly noted. The Court deems these delays in filing as non-prejudicial and in its discretion has considered these documents in its determination of this motion.

Upon the foregoing papers and oral argument heard on August 24, 2015, this motion is determined as follows:

The facts and procedural history of this case were recently set forth in the June 29, 2015 Decision and Order of this Court (Lefkowitz, J.), which, inter alia, directed defendants to produce HIPAA compliant authorizations for the physicians and health care providers who provided cardiac care and treatment to Mr. Syms from January, 2011 to June, 2015. In reaching this conclusion the Court reasoned that although plaintiffs' demands for all of Mr. Syms's medical records for a five-year period were overbroad, by alleging that the real estate transactions at issue were prompted by his recent cardiac health issues, Mr. Syms had put his cardiac health in controversy, and accordingly, plaintiffs were entitled to discovery "limited to the physicians and health care providers who provided cardiac care and treatment to Mr. Syms from January, 2011 to June 2015.

"The nature and degree of the penalty to be imposed on a motion pursuant to CPLR 3126 is a matter generally left to the discretion of the Supreme Court" (*Carbajal v Bobo Robo*, 38 AD3d 820 [2d Dept 2007]). To invoke the drastic remedy of striking a pleading a court must determine that the party's failure to disclose is willful and contumacious (*Greene v Mullen*, 70 AD3d 996 [2d Dept 2010]; *Maiorino v City of New York*, 39 AD3d 601 [2d Dept 2007]). "Willful and contumacious conduct can be inferred from repeated noncompliance with court orders, inter alia, directing depositions, coupled with no excuses or inadequate excuses" (*Russo v Tolchin*, 35 AD3d 431, 434 [2d Dept 2006] [cites omitted]; see also *Prappas v Papadatos*, 38 AD3d 871, 872 [2d Dept 2007]).

In the motion presently before the Court, plaintiffs seek to strike defendants' answer or alternatively preclude them from offering evidence, on the grounds that defendants have failed to comply with this Court's June 29, 2015 Decision and Order and subsequent Compliance Conference Referee Report and Order dated July 14, 2015. Specifically, plaintiffs argue that: (1) defendants failed to provide the HIPAA authorizations by July 9, 2015 as directed by the June 29, 2015 Decision and Order; (2) when defendants did provide the authorizations, defendants improperly failed to include Mr. Syms's social security number; (3) defendants improperly limited plaintiffs' access to the records in question until September 14, 2015 for the records of Dr. Valentin Fuster and September 15, 2015 for the other two authorizations provided; (4) defendants limited the authorizations to medical records for "cardiac care/treatment from 01/2011-06/2015 ONLY" (emphasis in original); and (5) defendants did not initial the three lines in section 9(a) of the authorizations which allow for the production of records relating to Alcohol/Drug Treatment, Mental Health Information and HIV-Related Information. Plaintiffs contend that defendants and their counsel have engaged in a patten of behavior sufficient to warrant the imposition of sanctions against them.

In opposition, defendants concede that the authorizations were not provided in a timely manner and counsel avers that the delay was due to what appears to have been a severe allergic reaction to some medication he had taken which caused him to be incapacitated for several days. Defense counsel asserts that plaintiffs' failure to extend any professional courtesy between

counsel for something of this sort, is regrettably typical of the tone of this litigation from the outset. Defendants also concede that the authorizations were provided without Mr. Syms's social security number and with the aforementioned end dates of access. However, defendants aver, and plaintiffs concede in their papers, that in the course of discussions which occurred during compliance conferences defendants offered to provide authorizations with Mr. Syms's social security number and to extend the expiration of the authorization until the end of the instant litigation. Moreover, defendants contend that plaintiffs rejected defendants' offer to provide authorizations updated with Mr. Syms's the social security number and new expiration date as insufficient because their objections extended to the very interpretation of this Court's June 29, 2015 Decision and Order. Contrary to plaintiffs' position that they are entitled to all records from the physicians and health care providers who provided cardiac care and treatment to Mr. Syms from January, 2011 to June, 2015, defendants argue that plaintiffs are entitled only to those records pertaining to Mr. Syms's cardiac care and treatment. Defendants are correct.

As set forth in the June 29, 2015 Decision and Order, Mr. Syms has put *only* his cardiac health in controversy and as such, plaintiffs are *only* entitled to authorizations for records concerning the cardiac health care provided to Mr. Syms by his health care providers who provided such cardiac care and treatment. Simply, plaintiffs are not entitled to any additional health records of Mr. Syms beyond those relating to his cardiac care. Plaintiffs are not entitled to authorizations for records relating to alcohol or drug treatment, mental health information or HIV information, to the extent they exist, for Mr. Syms. Defendants have not engaged in conduct which would justify striking their answer or precluding them from offering evidence. This court finds no basis for an award of sanctions against defendants or their counsel. Plaintiffs are strongly cautioned to refrain from unnecessary motion practice in the future, especially where the issues appear to have been settled during compliance conferences.

Accordingly it is:

ORDERED that the branch of plaintiffs' motion seeking to strike defendants' answer or precluding defendants from offering evidence is denied; and it is further

ORDERED that the branch of plaintiffs' motion seeking sanctions against defendants and defendants' counsel is denied; and it is further

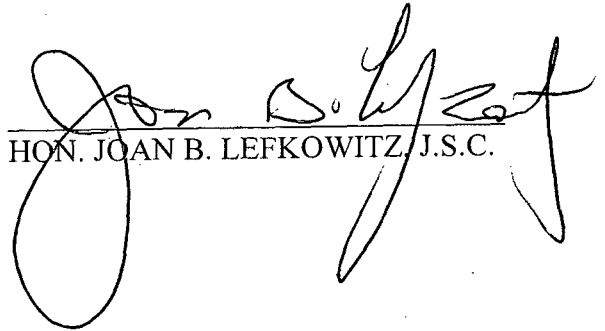
ORDERED that defendants are directed to produce on or before August 31, 2015, newly executed authorizations. These authorizations are only for records pertaining to cardiac care and treatment provided to Mr. Syms from his cardiac health care providers for cardiac care and treatment for the time period of January, 2011 through June, 2015. These authorizations will include Mr. Syms's social security number and will expire at the end of the instant litigation; and it is further

ORDERED that plaintiffs are directed to serve a copy of this order with notice of entry on defendants within seven days of notice of entry; and it is further,

ORDERED that counsel for all parties are directed to appear for a conference in the Compliance Part, Courtroom 800 on September 21, 2015, at 9:30 A.M.

The foregoing constitutes the Decision and Order of this Court.

Dated: White Plains, New York
August 24, 2015


HON. JOAN B. LEFKOWITZ, J.S.C.

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cc: Compliance Part Clerk