Eisner v Gunn
2016 NY Slip Op 31256(U)
March 10, 2016
Supreme Court, New York County
Docket Number: 805052/13
Judge: Barbara Jaffe
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IAS PART 12

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TERI EISNER,

Plaintiff,

- against -

Index No. 805052/13

Motion seq. no. 003

DECISION AND ORDER

JACQUELINE SIMON GUNN, Psy. D., THE KAREN HORNEY CLINIC, and HENRY A. PAUL, M.D.,

Defendants.

---x

BARBARA JAFFE, J.:

For plaintiff:
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By notice of motion, defendant Jacqueline Simon Gunn, Psy. D. moves pursuant to CPLR 3126 for an order dismissing the complaint against her with prejudice. Plaintiff opposes.

I. BACKGROUND

On February 7, 2013, plaintiff commenced this action asserting claims against defendant Gunn for negligence, medical malpractice, and defamation, and alleging medical and psychological injuries. In her complaint, plaintiff alleges, in pertinent part, that but for defendant's negligence and medical and psychological malpractice, her various enumerated mental ailments, including depression, anxiety, and suicidal ideation, would have been cured or stabilized. (NYSCEF 1).

By decision and order dated August 11, 2014, plaintiff was ordered to provide defendants with the requested bill of particulars before September 22, 2014 and appear for deposition before October 11, 2014. (NYSCEF 16).

By order dated July 14, 2015, I granted defendant's motion to strike plaintiff's pleadings and dismiss this case and ordered as follows:

> unless plaintiff, within 30 days of the date of service on her of a copy of this order with notice of entry by regular mail at her last known address: 1) appears for deposition; and 2) responds to defendant Jacqueline Simon Gunn, Psy. D.'s October 2013 demand for a bill of particulars and combined discovery demands, including but not limited to medical authorizations; and . . .
>
> that if plaintiff fails to comply timely with this order, defense counsel may e-file an affidavit of noncompliance, and the case will be dismissed.

(NYSCEF 42).

That order was efiled with notice of entry on July 15, 2015. (NYSCEF 40). Consequently, plaintiff was required to comply on or before August 13, 2015.

On August 10 and 11, 2015, plaintiff was deposed. During her deposition, she refused, or was advised by counsel not to answer certain questions. (NYSCEF 54). Also at her deposition, plaintiff's counsel provided defense counsel with certain incomplete authorizations. Upon noticing the deficiencies the following day, by letter dated August 13, 2015, defense counsel so advised plaintiff's counsel and followed up by emails dated August 14 and August 19. On August 26, plaintiff's counsel responded by asking that the deficient authorizations be returned to her so that she could "fix" them. (NYSCEF 59-61).

Following plaintiff's deposition, on August 14, 2015, defense counsel sought additional authorizations for medical records from hospitals that plaintiff had mentioned in her deposition

relating to medical treatment she had received following a February 2015 domestic violence incident. Counsel also sought records from all of the schools plaintiff had ever attended as she claimed that her brother assaulted her while she was attending two of the schools. (NYSCEF 62).

By notice of discovery and inspection dated August 18, 2015, defendant sought documents relating to the domestic violence incident, any letter plaintiff wrote to the court about the criminal charges against her brother, and any emails between plaintiff and anyone concerning defendant. She also demanded authorizations for plaintiff's GED records and the records of her complaints against her former psychiatrist and other providers. (NYSCEF 63-64). Although plaintiff's counsel, by letter dated August 31, 2015, objected to all demands but the emails concerning defendant (NYSCEF 65), she has not furnished those emails, nor any of the authorizations.

Now, by notice of motion, defendant seeks, pursuant to CPLR 3216, an order dismissing the complaint based on plaintiff's refusal to answer certain questions at her deposition, and her failure to provide some medical authorizations and others for relevant educational and other records. (NYSCEF 53).

II. CONTENTIONS

Defense counsel alleges that while being deposed, plaintiff refused to divulge the identity of someone with whom she had a relationship, and with whom she stayed after moving from her family home due to the anxiety, stress, and tension she felt given the presence there of her brother, whom she accused of repeatedly raping her. She also refused to answer whether she received treatment as a result of her brother's abuse. After testifying that she was repeatedly sexually abused by a babysitter, she refused to provide the sitter's last name, or the name of the

sitter's former spouse, with whom she claimed to be friends. Plaintiff also testified that a friend drafted a complaint for her against a former psychiatrist which plaintiff filed, and called defendant's clinic due to her concern about plaintiff's drug use and defendant's care of her. Plaintiff refused to identify the friend. In February 2015, the friend was arrested for domestic violence, at a location plaintiff also refused to identify, and plaintiff was taken by ambulance to a hospital. (NYSCEF 54).

Defendant also complains of plaintiff's refusal to answer questions about a letter she wrote on her brother's behalf at a sentencing proceeding in an unrelated matter, and that her lawyer instructed her not to answer certain follow-up questions posed to clarify certain answers. Plaintiff also refused to state whether she had asked her mother to acknowledge that she had been raped by her brother, whether she stopped speaking to her brother during her treatment with defendant, and also during that time, whether her brother did not want her to spend time with his children. (*Id.*).

Defendant argues that having placed her medical and psychiatric condition in issue here, and having failed to comply with the July 2015 conditional order, plaintiff has prevented defendant from obtaining discovery of information pertinent to her defense. And in instructing her client not to answer questions at the deposition, defendant maintains, plaintiff's counsel violated the pertinent rules governing depositions. (*Id.*).

Plaintiff's counsel opposes the motion, alleging that defendant possesses numerous emails exchanged between her and plaintiff, and arguing that she mailed defense counsel authorizations on July 30, 2015, and when counsel denied receipt, she brought on the second day of plaintiff's deposition those authorizations in addition to authorizations for treating physicians

identified on the first day of depositions. After defense counsel reviewed the authorizations and advised that they were incomplete, she brought another set, duly completed, which defense counsel accepted as sufficient and in compliance with the court order, acknowledging that the address to which she had sent them was correct. The letter was eventually returned to her by the post office. Although she was under the impression that the authorizations were sufficient, she soon received an email from defense counsel advising that he had overlooked an additional insufficiency. When she asked that they be returned, he informed her that they had already been processed. She thus sent another complete set, which was again, not received. Plaintiff's counsel is now "perfectly willing to drop off another set" at defense counsel's Manhattan office "within 45 days." (NYSCEF 66-67).

Plaintiff's counsel objects to defendant's new demands, claiming that her school records are too remote to be material or relevant, are not necessary, and constitute an attempt to harass her. She also objects to disclosing records regarding the domestic violence incident and the identity of the person involved, and claims that "[i]t is reasonable to assume that the plaintiff fears the publication of the name of this person and the possible retribution," and maintains that given the allegation that an individual called defendant's clinic, "pursuant to HIPAA regulations, the name of this person would be within the records of the facility." (NYSCEF 66).

Plaintiff's counsel also justifies her failure to answer deposition questions about the identity of her babysitter, claiming that her client does not remember his name and that inquiry into the sitter's spouse constitutes a fishing expedition. She similarly characterizes inquiries into her client's brother's sentencing, and denies having instructed her client not to answer deposition questions relating thereto, arguing that she objected to the form of the question and directed her

client "not to answer in that form." She otherwise claims that counsel inappropriately questioned plaintiff about her intention in answering a question, put words in her mouth, and improperly asked her about how she felt about being at a deposition. (*Id.*).

In reply, defense counsel argues that plaintiff's refusal to divulge the name of her babysitter's ex-spouse deprives defendant of access to someone who could shed light on the subject matter of defendant's treatment of plaintiff, that plaintiff testified that she may have discussed with defendant the letter she wrote on her brother's behalf, that defendant's notes reflect that the brother's case was pertinent to the treatment, and that her brother, in general, was a major topic of discussion in treatment. Counsel also affirms that the identity of the individual who called the clinic about defendant's treatment of plaintiff appears nowhere in the records, which were only made available to him via authorizations he received the first day of the deposition, and otherwise argues that the availability of evidence from other sources is no justification for refusing to answer a question. Counsel also observes that it is improper to instruct a deponent not to answer on the basis of form. (NYSCEF 68).

In addressing the authorizations, defense counsel claims that he does not recall having seen the envelope plaintiff's counsel allegedly showed him at the deposition, but in any event observes that it was addressed to him individually, without the name of the firm of more than 150 lawyers. He also details the need for the school records. (*Id.*).

At oral argument, defense counsel observed that although plaintiff's counsel sought 45 days to provide him with proper authorizations, he still had not received them, along with collateral source records from hospitals with dozens of providers, for most of which he had no authorizations, although plaintiff's counsel advised that she sent him a complete set. She then

offered to hand deliver them to defense counsel, who agreed but observed that the demands were made in August and that it was his third motion for relief. (NYSCEF 72).

Plaintiff's counsel attempts to justify her client's refusal to answer questions due to her fear that defendant's access to her friends will be harmful, that she is very fragile, that defense counsel was "very aggressive" with her, and that plaintiff would comply if compelled. (*Id.*).

III. ANALYSIS

Pursuant to CPLR 3126(3), the court may issue an order striking a party's pleading if the party refuses to obey a discovery order or willfully fails to disclose information that "ought to have been disclosed." The party moving to strike a pleading must establish that the other party's failure to comply with a discovery order was willful, contumacious, or in bad faith. (*Williams v Shiva Ambulette Serv. Inc.*, 102 AD3d 598, 599 [1st Dept 2013]). Willful and contumacious behavior may be inferred from a failure to comply with court orders, "in the absence of adequate excuses." (*Henderson-Jones v City of New York*, 87 AD3d 498, 504 [1st Dept 2011]).

Pursuant to the Uniform Rules for the Conduct of Depositions, a "deponent shall answer all question at a deposition," unless it is "(a) to preserve a privilege or right of confidentiality; (b) to enforce a limitation set forth in an order of a court; or (c) when the question is plainly improper and would, if answered, cause significant prejudice to any person." (22 NYCRR 221.2). The deponent's attorney may not direct his or her client not to answer a question except as provided in CPLR 3115. (*Id.* 221.2[c]).

A. July 2015 order

While counsel timely produced her client for deposition, she improperly instructed her not to answer questions (*see O'Neill v Ho*, 28 AD3d 626, 626 [2d Dept 2006] [speaking

objections at deposition "not based on constitutional rights, privilege, or palpable irrelevance," and defendant's refusal to answer questions, deemed sanctionable]; *see generally* 22 NYCRR 221.1; 221.2), and she fails to support her allegations that her client is fearful or anxious with any affidavit or otherwise provide a factual basis (*cf. Gross v Johnson*, 102 AD3d 921, 923 [2d Dept 2013] [defendant's failure to appear at deposition excused due to emotional condition, as it was supported by affidavit of defendant's psychiatrist]). The deposition transcript reflects no such fear or difficulty, and "all cases involving psychiatric malpractice require evidence about the plaintiff's emotional make-up." (*Doe v Hirsch*, 2011 NY Slip Op 30689[U], *4 [Sup Ct, New York County 2011]). In any event, 22 NYCRR 221.2 provides no basis for counsel's conduct.

It is also immaterial whether the information sought at plaintiff's deposition is available from other sources. (*See generally* CPLR 3101).

Counsel also advances insufficient reasons for her delay, and her assertion that she repeatedly provided compliant authorizations is undermined by her carelessness. To the extent that carelessness may not constitute willfulness, here, all of the circumstances, including those preceding the July 2015 order, whereby plaintiff's counsel failed to authorize the release of mental heath records or provide requisite *Arons* authorizations despite repeated demands (NYSCEF 42), and following plaintiff's deposition, where counsel virtually ensured that the compliant authorizations would be lost in the mail, support the inference that plaintiff's conduct was calculated to frustrate court-ordered discovery. (*See Arpino v F.J.F. & Sons Elec. Co., Inc.*, 102 AD3d 201, 208 [2d Dept 2012] [while defendants characterized noncompliant discovery responses as "careless practice . . . (t)hey were, in fact, . . . interposed for the purpose of avoiding (their) obligation to provide timely and meaningful discovery responses"]).

However, given the seriousness of the allegations set forth in the complaint, and notwithstanding the delay entailed, I afford plaintiff a final chance to comply completely with the July 2015 order and provide all of the requested authorizations by hand, in person, at defense counsel's New York office, within 15 days of the date of service on her of a copy of this order with notice of entry by regular mail at her last known address, and defense counsel upon personal in-hand delivery, must sign a receipt indicating his satisfaction or dissatisfaction with the documents provided (*see Figueroa v City of New York*, 129 AD3d 596, 597 [1st Dept 2015] [court providently exercised discretion in denying motion to strike and warning defendants that failure to appear at depositions could result in additional sanctions; while defendants failed to comply with three discovery orders and to appear for depositions on multiple occasions, court did not abuse discretion in choosing not to exercise drastic remedy of striking answer]), with the proviso that should plaintiff fail to comply timely with this order, defense counsel may efile an affirmation of noncompliance, and the case will be dismissed. Additionally, plaintiff must complete her deposition, specifically answering those questions that she refused to answer as referenced herein, within 30 days of the date of service on her of a copy of this order with notice of entry by regular mail at her last known address.

B. August 2015 discovery demands

To the extent that the additional requested medical authorizations are encompassed within the existing directives set forth in the July 2015 order, plaintiff shall produce them.

However, absent an order compelling disclosure of the remainder of the August 2015 demands, plaintiff's failure to disclose those items does not serve as a basis for dismissal. (*See Zletz v Wetanson*, 67 NY2d 711, 713 [1986] [abuse of discretion striking pleading where

defendants had not previously sought order to compel disclosure]; *Roug Kang Wang v Chien-Tsang Lin*, 94 AD3d 850, 852 [2d Dept 2012] [same]; *Tower Ins. Co. of New York v Red Rose Rest., Inc.*, 77 AD3d 453, 454-455 [1st Dept 2010] [same]).

IV. CONCLUSION

Accordingly, it is hereby

ORDERED, that defendant Jacqueline Simon Gunn, Psy. D.'s motion to strike plaintiff's pleadings and dismiss this case as against said defendant is granted unless plaintiff, within 15 days of the date of service on her of a copy of this order with notice of entry by regular mail at plaintiff's last known address: 1) complies completely with the July 2015 order and provides all of the requested authorizations by hand, in person, at defense counsel's New York office, and defense counsel upon personal in-hand delivery, must sign a receipt indicating his satisfaction or dissatisfaction with the documents provided; and 2) appears to complete her deposition, specifically answering those questions that she refused to answer as referenced herein, within 30 days of the date of service on her of a copy of this order with notice of entry by regular mail at her last known address; it is further

ORDERED, that plaintiff shall comply with defendant Jacqueline Simon Gunn, Psy. D.'s August 2015 discovery demands, to the extent they seek additional medical authorizations and to the extent not already provided, within 30 days of the date of service on plaintiff of a copy of this order with notice of entry by regular mail at plaintiff's last known address; it is further

ORDERED, that if plaintiff fails to comply timely with this order, defense counsel may efile an affirmation of noncompliance, and the case will be dismissed; and it is further

ORDERED, that the parties shall appear at a compliance conference in Room 279, 80

Centre Street, on March 30, 2016 to resolve outstanding discovery issues.

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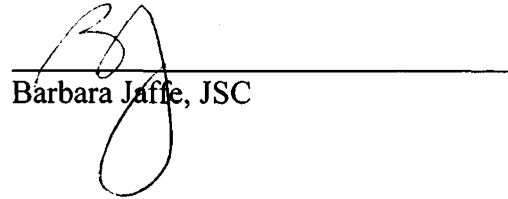

Barbara Jaffe, JSC

DATED: March 10, 2016
New York, New York