Russell v Colantonio
2016 NY Slip Op 32997(U)
December 6, 2016
Supreme Court, Nassau County
Docket Number: 4167/13
Judge: James P. McCormack
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[* 1]

SUPREME COURT - STATE OF NEW YORK

PRESENT:

HON. JAMES P. MCCORMACK,

Justice

TRIAL/IAS TERM, PART 29
NASSAU COUNTY

SCOTT RUSSELL and DANA RUSSELL,

Plaintiff(s),

Index No.: 4167/13

-against-

Motion Seq. No.: 004 & 005
Motion Submitted: 10/3/2016

ANTONY COLANTONIO, M.D., GENERAL and VASCULAR SURGERY OF LONG ISLAND, P.C., FRANKLIN HOSPITAL, NORTH SHORE-LONG ISLAND JEWISH HEALTH SYSTEM, INC.,

Defendant(s).

The following papers read on this motion:

Notice of Motion/Supporting Exhibits.....X
Notice of Cross Motion/Supporting Exhibits.....X
Affirmation in Opposition/Further Support.....X

Plaintiffs, Scott Russell (Scott) and Dana Russell (Dana), move this court for an order, pursuant to CPLR §3126, for various sanctions, including striking Defendants, Anthony Colantonio, M.D's. (Dr. Colantonio) and Vascular Surgery of Long Island, P.C.'s (VSLI), answer, for their failure to comply with discovery demands. Dr. Colantonio and VSLI cross move pursuant to CPLR §3103(a) for a protective order

preventing Plaintiff from seeking further responses to their Notice of Discovery and Inspection as well as Plaintiffs' request for Dr. Colantonio's own medical records.

Before a motion relating to discovery or a bill of particulars can be brought, the movant is required to submit an affirmation of good faith indicating "that counsel has conferred with counsel for the opposing party in a good faith effort to resolve the issues raised by the motion." 22 NYCRR 202.7(a). The affirmation of good faith is supposed to indicate that the parties consulted over the discovery issues and the "time, place and nature of the consultation and the issues discussed...". 22 NYCRR 202.7(c). Previously, Plaintiffs moved for the identical relief sought in their motion, and the moving Defendants moved for the identical relief sought in their motion, but both motions were denied, without prejudice, by short form order dated August 3, 2016, for failure to submit affirmations of good faith. Herein, each party submitted an affirmation of good faith, each of which, as far as this court is concerned, barely meets the requirements of 22 NYCRR 202.7, if at all. It still does not appear as if either party made diligent efforts to resolve these issues. However, the court, having now conferenced the matter a number of times dealing solely with these issues, will accept that any further discussion would be futile. 22 NYCRR 202.27(c).

The current tussle involves some of Scott's medical records, presumably in Dr. Colantonio's possession, and some of Dr. Colantonio's personal medical records. During his deposition, Dr. Colantonio testified that he kept certain of his office records in his

[* 3]

home attic, home basement or a neighbor's basement. Scott's post-surgery records, that according to Dr. Colantonio would have consisted of a half page to a page and half in total, were kept in one of these locations, but Dr. Colantonio was not sure which one. He further surmised that Scott's records, along with some others were damaged in a Sandy-related, or post-Sandy-related storm and/or flood. Though he had been using the neighbor's basement for storage of 30 years, he did not know the name of the neighbor. He said his wife would know because she took care of those details. Regarding the storm-related damage to his home, his records and his neighbor's home that damaged his records, he made no insurance claims. Plaintiffs therefore served a notice for discovery and inspection, dated and served October 30, 2015, seeking details regarding the arrangement with the neighbor and the use of his/her basement.

Plaintiffs further seek Dr. Colantonio's personal medical records because, during his deposition, Dr. Colantonio testified that he had multiple surgeries on his dominant right hand, with the last one occurring about eight years prior to Scott's surgery. While Dr. Colantonio testified that he still experienced some pain and weakness in the hand at times, he also unequivocally stated that the previous and current hand issues had no impact whatsoever on his ability to perform Scott's surgery. To be clear, Dr. Colantonio did not use his hand issues as an excuse as to what allegedly happened to Scott, but was merely answering questions being asked by Plaintiffs' counsel during the deposition. Unsatisfied with these responses, Plaintiffs sought Dr. Colantoio's personal medical

records regarding the hand issues, dating back 20 years, in the same October 30, 2015 demand. Also contained in that demand were requests for communications between Dr. Colantonio and other doctors who cared for Scott.

In a response dated March 1, 2016, Dr. Colantonio and VSLI largely interposed boilerplate objections, claiming the demands for information related to the neighbor to be vague, ambiguous and irrelevant and not reasonably calculated to lead to discovery of relevant information. Without waiving those objections, the response indicates that Dr. Colantonio did not have in his possession any information that detailed the arrangement under which he rented his neighbors' basement.

Regarding the demands seeking Dr. Colantonio's personal medical records, he asserted privilege. And as for the demands seeking communications between Dr. Colantonio and Scott's other providers, more boilerplate objections but with answers that Dr. Colantonio was not in possession of any of the requested materials.

Dissatisfied with these responses, and finding, in particular, the deposition testimony and responses regarding the neighbor to lack credibility, Plaintiffs now move for sanctions, including the striking of Dr. Colantonio's and VSLI's answer. Dr. Colantonio and VSLI cross move for a protective order preventing Plaintiffs from seeking any further responses to the October 30, 2015 demand and also a protective order for Dr. Colantonio's personal medical records.

CPLR 3101(a) mandates "full disclosure of all matter material and necessary in

the prosecution or defense of an action." The phrase "material and necessary" should be "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. The test is one of usefulness and reason" (*Allen v Crowell-Collier Publ. Co.*, 21 NY2d 403, 406 [1968]). "Unlimited disclosure is not mandated, however, and a court may issue a protective order pursuant to CPLR 3103 denying, limiting, conditioning or regulating the use of any disclosure device 'to prevent unreasonable annoyance, expense, embarrassment, disadvantage, or other prejudice to any person or the courts' " (*Ligoure v City of New York*, 128 AD3d 1027 [2d Dept 2015], citing CPLR 3103[a]; *Nimkoff v Central Park Plaza Assoc., LLC*, 123 AD3d 679 680–681; *Diaz v City of New York*, 117 AD3d 777; *County of Suffolk v Long Is. Power Auth.*, 100 AD3d 944, 946). Demands which seek irrelevant and/or confidential information, or are overbroad and burdensome are palpably improper and as such, are not permitted. *(Gilman & Ciocia, Inc. v Walsh*, 45 AD3d 531 [2d Dept 2007]).

CPLR § 3124 provides that the court has the discretion to compel discovery or to strike a pleading for failure to abide with discovery and disclosure orders. At the discretion of the court, a party's failure to comply with such requests may result in sanctions, pursuant to CPLR § 3126.

Pursuant to CPLR §3122, a party has 20 days from service of a notice for discovery and inspection to object to the notice. Any such objection must "state with

reasonable particularity" the reason for the objections. CPLR §3122(a)(1). "It has been consistently held that the failure to make a timely motion for a protective order under CPLR 3122 forecloses all inquiry concerning the propriety of a notice of discovery and inspection pursuant to CPLR 3120 and the information sought to be discovered thereunder, except as to requests which are palpably improper or as to privileged matter under CPLR 3101...". (*Cirpiano v. Righter*, 100 A.D.2d 923, 923 [2nd Dept. 1984](cites omitted)).

Herein, Dr. Colantonio and VSLI waited almost four months before responding to the demand for discovery and inspection, and almost six months before seeking a protective order. Even assuming the response to the demeand for discovery and inspection was timely, the court finds the objections did not contain reasonable particularity. As stated *supra,* the responses were boilerplate objects and were identical in wording for each category of demands. As such, the court finds Dr. Colantonio and VSLI have waived their objections and the right to seek a protective order. *Id.* The only inquiry the court will make it whether or not the demands are palpably improper or seek privileged information. *Id.*

Demands 1,2 and 3 were properly responded to[1]. Demands 3 and 4 were not responded to except for the boilerplate objections. The court finds they are neither palpably improper nor do they seek privileged information. Defendants will therefore

[1]Plaintiffs withdrew demands numbered 6,7,8,9,10,11, and 25

respond to demands 4 and 5 within ten days of being served notice of entry of this order.

Demands 12 and 13 seek Dr. Colantonio's personal medical records. To allow piercing of the shroud of privilege surrounding his personal medical records, Dr. Colantonio would have to affirmatively place his medical condition in controversy by including it in a counterclaim, or by using it as an excuse for the complained-of action. (*Lombardi v. Hall*, 5 A.D.3d 739 [2nd Dept. 2004]). Dr. Colantonio has not done so. He responded to questions regarding his medical condition, but never raised it himself nor used it as an excuse. As such, demands 12 and 13 seek privileged information, and Dr. Colantonio has not waived that privilege. Therefore, he does not have to respond to demands 12 and 13.

Demands 16, 19, 20 and 21 seek copies of communications Dr. Colantonio had with some of Scott's other doctors. After the boilerplate objections, Defendants indicate they do not have possession of the requested materials but "Defendant reserves the right to supplement this response up until, and including, the time of trial". The court rejects this language. Either Dr. Colantonio has copies of the written communications, emails, text messages etc. or he does not. He is directed to search his records for these documents and turn over whatever he has within 10 days of being served with notice of entry of this order. He shall submit an affidavit outlining in detail the efforts he made to find the requested information. Any doctor for whom he has no such information, he will be precluded at trial from offering evidence related to communications of any kind with

that particular doctor in his defense.

Like Plaintiffs, this court is troubled by the somewhat flip manner in which Dr. Colantonio describes the keeping, and losing, of Scott's medical records. He does not know exactly where he kept them, but believes it was one of three places. He does not know exactly how they were damaged, but believes it was either a flood caused by Sandy, a flood caused by a storm after Sandy, or a leak through a skylight.

Whether Scott's records were half a page or 500 pages, Dr. Colantonio was under an obligation to keep Scott's records for at least six years. 8 NYCRR 29.2(a)(3). By definition, failing to do so constitutes unprofessional conduct. *Id.* The mere failure to maintain the records is grounds to strike the answer. (*Gray v. Jaeger*, 17 A.D.3d 286 [1st Dept. 2005]). However, the striking of a pleading is severe, and missing half a page to a page and half of records does not seem to warrant such a sanction. However, a sanction is appropriate under the circumstances. Therefore, Plaintiffs will be entitled to an adverse inference at trial against Dr. Colantonio that the records were not maintained as required and that it is just as likely he intentionally destroyed them, or simply lost them, as it is they were somehow unintentionally destroyed.

Accordingly, it is hereby

ORDERED, that Plaintiffs' motion for sanctions and to compel is GRANTED in part, consistent with the terms of this order; and it is further

ORDERED, that Dr. Colantonio's and VSLI's motion for a protective order is

DENIED, except to the extent that Dr. Colantonio is not required to turn over his personal medical records.

This constitutes the Decision and Order of the Court.

Dated: December 6, 2016
Mineola, N.Y.

Hon. James P. McCormack, J. S. C.