

Paredes v Bedani

2018 NY Slip Op 30181(U)

January 31, 2018

Supreme Court, New York County

Docket Number: 805308/2015

Judge: Eileen A. Rakower

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

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Carlos Paredes,

Plaintiff,

Index No.
805308/2015

**DECISION and
ORDER**

- against -

Mot. Seq. 003

Ketan Bedani, M.D., Benjamin Spencer, M.D.,
Joel DeCastro, M.D., Peter Stahl, M.D., Columbia
Doctors and The Allen Hospital,

Defendants.

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HON. EILEEN A. RAKOWER, J.S.C.

Plaintiff Carlos Paredes ("Paredes") commenced this medical malpractice action by summons and complaint on August 7, 2005. Defendants Peter Stahl, M.D., and The New York and Presbyterian Hospital s/h/a The Allen Hospital interposed answers on September 10, 2015. Defendants Benjamin Spencer, M.D., and Guarvionex DeCastro, M.D., s/h/a Joel DeCastro, M.D., interposed answers on September 14, 2015. Defendant Ketan Badani, M.D., interposed an answer on December 9, 2015.

By Notice of Motion files on December 18, 2017, defendants Ketan Bedani, M.D., Benjamin Spencer, M.D., Joel DeCastro, M.D., Peter Stahl, M.D., Columbia Doctors and The Allen Hospital (collectively, "Defendants") move for an Order pursuant to CPLR § 3042(d) and § 3126, dismissing Paredes' complaint and rendering judgment in favor of Defendants on the grounds that Paredes failed to appear for Court two mandated appearances and failed to respond to Defendants' initial discovery demands including demands for Verified Bills of Particulars in a timely fashion, which should be deemed willful and contumacious.

Defendants served various demands on Paredes on September 10, 2015, September 14, 2015, and December 9, 2015. By letters dated January 29, 2016,

March 22, 2016, and June 27, 2016, Defendants made three separate good faith efforts to obtain outstanding discovery items and made multiple phone calls to Paredes' then counsel inquiring about such outstanding discovery.

On February 10, 2017, due to lack of response from Paredes, Defendants moved for an Order (a) dismissing the Complaint and rendering judgment in favor of Defendants on the grounds that Paredes has willfully failed to respond to Defendants' demands for Verified Bills of Particulars in a timely fashion; or, in the alternative, (b) precluding Paredes from introducing evidence at trial in the nature of that which Paredes has failed to provide; or in the alternative, (c) compelling Paredes to provide Verified Bills of Particulars.

On March 6, 2017, Paredes' then counsel cross-moved to be removed as counsel and requested that the matter be stayed for 45 days to provide plaintiff time to find new counsel or appear pro-se. Defendants partially opposed the motion to limit the time to stay the case for 30 days. On April 4, 2017, Justice Joan B. Lobis granted Paredes' counsel's cross motion to withdraw as counsel and oral argument for Defendants' motion was adjourned.

On August 29, 2017, Paredes, pro se or by a new attorney, failed to appear for oral argument on Defendants' motion to compel and did not provide responses to Defendants' initial discovery demands including the demand for Bills of Particulars. In the minutes, this Court directed Paredes to provide responses to the Bills of Particulars and Defendants' initial demands within thirty days and to appear on October 24, 2017 for a conference. This Court stated that Paredes' failure to comply would be deemed willful and contumacious. Defendants served a copy of the court minutes of the August 29, 2017 appearance on Paredes by letter dated August 31, 2017.

On October 24, 2017, Paredes failed to appear pro se and no attorney appeared on his behalf. The Court executed an Order which documented that Paredes "failed to respond to the Court's Decision and minutes of the appearance of August 29, 2017 and did not appear in Court on October 24, 2017, as directed by the Court on August 29, 2017."

Defendants' attorney states that to date Paredes has failed to provide Verified Bills of Particulars or initial discovery responses, which were served by Defendants in 2015.

Standards

CPLR 3126 provides in relevant:

“If any party . . . refuses to obey an order for disclosure or wilfully fails to disclose information which the court finds ought to have been disclosed . . . the court may make such orders with regards to the failure or refusal as are just, among them: . . .

2. an order prohibiting the disobedient party from supporting or opposing designated claims or defenses, from producing in evidence designated things or items of territory . . . or from using certain witnesses: or

3. an order striking out pleadings or parts thereof . . . or dismissing the action or any part thereof, or rendering a judgment by default against the disobedient party.

“CPLR 3126 provides various sanctions for violations of discovery orders, the most serious of which are striking a party’s pleadings or outright dismissal of the action.” (*Corner Realty 30/7, Inc. v Bernstein Management Corp.*, 249 AD2d 191, 193 [1st Dept 1998].) “However . . . the extreme sanction of dismissal is warranted only where a clear showing has been made that the noncompliance with a discovery order was willful, contumacious or due to bad faith.” (*id.*) However, Plaintiff may “tender a reasonable excuse to overcome defendants’ showing of willfulness.” (*Menkes v Delikat*, 50 NYS3d 318, 319 [1st Dept 2017])

22 NYCRR 202.27 (b) provides in relevant part that,

“At any scheduled call of a calendar or at any conference, if all parties do not appear and proceed or announce their readiness to proceed immediately or subject to the engagement of counsel, the judge may note the default on the record and enter an order as follows: . . .

if the defendant appears but the plaintiff does not,

the judge may dismiss the action and may order a severance of counterclaims or cross-claims.”

With respect to this provision, the First Department of the Appellate Division stated that “Supreme Court has the authority to dismiss an action based on a plaintiff’s failure to attend a scheduled court appearance . . . and may do so without providing notice to the parties of its intention in that respect.” (*Grant v Rattoballi*, 57 AD3d 272, 273 [1st Dept 2008])

Here, Paredes failed to appear for two court mandated conferences pro se or by a new attorney on August 29, 2017 and October 24, 2017, and failed to provide Verified Bills of Particulars or initial discovery responses, which were served by Defendants in 2015. On August 29, 2017, this Court specifically provided that Defendants’ failure to provide the outstanding discovery and appear for the October 24, 2017 conference would be deemed willful and contumacious. The record before the court demonstrates that Paredes has made no attempt to respond to Defendants’ discovery requests or comply with this court’s August 29, 2017 order. Paredes’ conduct demonstrates a willful and contumacious delay in prosecuting this action and illustrates a complete disregard for Paredes’ discovery obligations and this Court’s Orders. Furthermore, Paredes does not oppose Defendants’ motion.

Wherefore it is hereby,

ORDERED that Defendants Ketan Bedani, M.D., Benjamin Spencer, M.D., Joel DeCastro, M.D., Peter Stahl, M.D., Columbia Doctors and The Allen Hospital’s motion to dismiss the Complaint is granted without opposition and the action is dismissed in its entirety and the Clerk is directed to enter judgment accordingly.

This constitutes the Decision and Order of the Court. All other relief requested is denied.

Dated: JANUARY 31, 2018



Eileen A. Rakower, J.S.C.