SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 10

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DANUTA MICHALUK, as Administratrix of the Estate of JAN MICHALUK, Deceased, and DANUTA MICHALUK, Individually,

Plaintiff,

-against-

Index № 805304/2013
Motion Seq. 002

NEW YORK CITY HEALTH AND HOSPITALS CORPORATION

Defendant.

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GEORGE J. SILVER, J.S.C.:

In this medical malpractice action defendant New York City Health and Hospitals Corporation ("defendant") moves, pursuant to CPLR § 3126(3), for an order dismissing this action for plaintiff's failure to comply with this court's prior orders, including discovery obligations.

This action sounds in medical malpractice and centers on allegations of negligence relative to the treatment received by the decedent plaintiff, Jan Michaluk, at Bellevue Hospital Center from on or about August 15, 2010 through August 16, 2010; and thereafter from August 18, 2010 through January 26, 2011. The action was commenced by the filing of a Summons and Complaint on or about August 23, 2013. Issue was joined by defendant on or about September 18, 2013. Defendant included a demand for a Bill of Particulars in its answer. Plaintiff's counsel then moved to amend plaintiff's notice of claim to include a cause of action for wrongful death. That application was granted on May 20, 2014. Thereafter, scheduled court conferences on June 24, 2014; August 5, 2014; October 14, 2014; November 18, 2014; December 9, 2014; and March 3, 2015 were adjourned due to plaintiff's failure to provide a Bill of Particulars. Notably, defendant sent plaintiff good faith letters on November 25, 2014 and December 20, 2014, respectively, requesting that plaintiff provide all outstanding discovery, including a Bill of Particulars and responses to defendant's demands for Discovery and Inspection that were served along with its answer. On June 5, 2015, four days prior to the next scheduled court conference on June 9, 2015, plaintiff's counsel provided defendant with a Bill of Particulars.

On June 9, 2015, a preliminary conference was held and an Order was produced that scheduled plaintiff's deposition for on or before September 4, 2015. In addition, the preliminary conference Order directed plaintiff's counsel to designate institutional witnesses to be deposed on behalf of defendant within thirty days of the completion of plaintiff's deposition.

Subsequent court conferences resulted in further discovery Orders dated October 20, 2015 and February 9, 2016. Notably, plaintiff's deposition had not taken place on or before September 4, 2015, as directed at the preliminary conference. As such, the successive Orders dated October 20, 2015 and February 9, 2016 directed plaintiff's deposition to be held on or before December 15, 2015 and then March 16, 2016, respectively. In each of those Orders, plaintiff again was instructed to designate institutional witnesses. In addition, as per the court's February 9, 2016 Order, the deposition of a non-party witness, decedent plaintiff's son Michal Michaluk, was to be completed on or before March 16, 2016. On March 14, 2016, plaintiff's deposition was held and completed at defense counsel's office. On April 19, 2016, the parties entered into a further discovery Order that directed the deposition of non-party Michal Michaluk be completed on or before May 31, 2016; and that plaintiff was to designate institutional witness to be deposed within thirty days' time. On May 5, 2016, the deposition of non-party witness Michal Michaluk was held and completed at defense counsel's office.

On June 28, 2016, a further compliance conference was held. It was at this conference that plaintiff's counsel finally designated witnesses plaintiff wished to depose – namely, Dr. Anna Nolan ("Dr. Nolan"), and Dr. Jeffrey Manko ("Dr. Manko"). On January 24, 2017, the parties entered into another discovery Order whereby the depositions of Dr. Nolan and Dr. Manko were to be held on or before April 7, 2017.

On March 20, 2017, defense counsel sent a letter to plaintiff's counsel confirming that the deposition of Dr. Nolan was scheduled for April 6, 2017. A further letter was sent out on March 27, 2017, confirming the deposition of Dr. Manko for April 17, 2017. On the morning of April 6, 2017, defense counsel was contacted by plaintiff's counsel's office and was told that due to a medical emergency the deposition of Dr. Nolan could not go forward. On April 17, 2017, the deposition of Dr. Manko was completed.

On April 18, 2017, the parties entered a further discovery Order. The deposition of Dr. Nolan was directed to be completed on or before June 2, 2017. The deposition did not take place within that time frame. On June 13, 2017, the parties entered into yet another discovery Order. The deposition of Dr. Nolan, was directed to be held on or before August 18, 2017. Again, the deposition did not take place. On September 19, 2017, the parties returned before me and entered into a further Order that directed the deposition of Dr. Nolan to be completed on or before November 28, 2017. Despite the court's Order, the deposition did not take place. On December 5, 2017, a further Order was entered directing that the deposition of Dr. Anna Nolan on December 28, 2017. Notably, this Order specifically stated that there would be **no adjournment of the deposition without the court's permission**. On the afternoon of December 27, 2017, one day prior to the scheduled completion of

Dr. Nolan's deposition, defense counsel received a phone call indicating that plaintiff's counsel needed to cancel the deposition. The court was not apprised of this, notwithstanding the language in the December 5, 2017 Order.

On January 9, 2018, the court held yet another conference. At that conference, it was established that plaintiff's counsel, Barry Huston, was reportedly involved in an automobile accident on December 13, 2017, and that because of this automobile accident, the deposition of Dr. Nolan was not completed. However, defense counsel indicated to me that plaintiff did not communicate with defense counsel about rescheduling the deposition at any point between the reported accident date of December 13, 2017, up until December 27, 2017.

DISCUSSION

Although striking a pleading pursuant to CPLR §3126 is a drastic remedy, it is warranted where a party's conduct is shown to be willful, contumacious or due to bad faith (*see Beneficial Mtge. Corp. v. Lawrence*, 5 AD3d 339; *Mateo v. City of New York*, 274 AD2d 337 [1st Dept. 2000]). Willful and contumacious conduct, warranting the striking of a pleading, may be inferred from a party's repeated failure to comply with a court order, coupled with inadequate explanations for the failure to comply (*Duncan v. Hebb*, 47 AD3d 871 [2nd. Dept. 2008]). Willful and contumacious conduct may also be inferred from a party's repeated, unexcused, failure to comply with multiple orders and directives over an extended period (*Rawlings v. Gillert*, 78 AD3d 806 [2d Dept. 2010]).

Here, plaintiff willfully failed to comply with numerous court orders pertaining to discovery deadlines, including setting dates for depositions. Indeed, the record before the court evinces a history of plaintiff's noncompliance that dates back to the filing of this action in August of 2013. After plaintiff was granted leave to file an amended notice of claim, plaintiff waited over a year before providing defendant with a verified Bill of Particulars. In addition, while plaintiff's deposition was originally scheduled to be held on or before September 14, 2015, pursuant to the preliminary conference Order of June 9, 2015, the deposition was not completed until March 4, 2016. In the same vein, the deposition of non-party witness Michal Michaluk was to be completed on or before September 18, 2015, as specified in the preliminary conference Order. However, this deposition, like that of plaintiff, was not completed until over seven months lapsed, finally taking place on May 5, 2016. Most recently, at plaintiff's request, the deposition of Dr. Nolan was originally ordered to be completed on or before April 7, 2017. It did not take place. The deposition was then scheduled to take place on April 6, 2017, and defense counsel sent out a letter on March 20, 2017 to plaintiff's counsel confirming that the deposition would be held on that date. Claiming a medical emergency, Dr. Nolan's deposition was cancelled by plaintiff's attorney on the eve of

April 6, 2017. Thereafter, nearly seven months lapsed before plaintiff's counsel again sought to schedule Dr. Nolan's deposition. The deposition was then rescheduled for December 28, 2017. Again, on the eve of the deposition, defense counsel received a communication from plaintiff's attorney indicating that the deposition could not be held due to a medical emergency.

The picture that this protracted procedural history paints is one of plaintiff's continuous refusal to comply with this court's discovery orders. Time and time again, plaintiff has avoided the deposition of Dr. Nolan – a deposition that plaintiff initially requested for the successful prosecution of plaintiff's own case. Were this the only instance of plaintiff's willful and contumacious behavior, perhaps dismissal of this action would be unwarranted. However, as illustrated above, plaintiff's recurrent failure to comply with court-ordered discover spans over several years. As such, there is a clear history and pattern of plaintiff's willful and contumacious failure to fulfill discovery obligations.

The fact that plaintiff's counsel offers medical records attesting to his inability to proceed with Dr. Nolan's deposition does not excuse the willful and contumacious nature in which plaintiff's counsel failed to timely communicate to the court and defense counsel information about his potential unavailability.[1] Moreover, plaintiff's recent medical emergencies do not excuse the persistent noncompliance that plaintiff has evidenced throughout the history of this case (*see Powell v. Cipollaro*, 34 AD3d 551 [2d Dept. 2006]; *Sowerby v. Camarda*, 20 AD3d 411 [2d Dept. 2005]; *Frost Line Refrig. v. Frunzi*, 18 AD3d 701 [2d Dept. 2005]). Therefore, pursuant to CPLR §3126 and the numerous judicial precedents cited, dismissal of the complaint is the appropriate remedy in this matter (*see, e.g., Sanchez v. City of New York*, 266 AD2d 127 [1999]).

Accordingly, it is hereby

ORDERED that defendant's motion to dismiss this action pursuant to CPLR § 3126(3) is granted in its entirety for plaintiff's failure to comply with this court's directives; and it is further

ORDERED that the clerk is directed to enter judgment accordingly.

This constitutes the decision and order of the court.

Dated: May 15, 2018

ENTER:

George J. Silver

HON. GEORGE J. SILVER

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[1] It is also noteworthy that plaintiff's affirmation in opposition to defendant's motion was untimely submitted pursuant to CPLR 2014 (b). Nevertheless, the court has considered plaintiff's submission in the interest of deciding this motion on its merits (*see Cooper v. Hodge*, 13 AD3d 1111 [4th Dept. 2004]).