

Calandrella v Hospital for Special Surgery
2018 NY Slip Op 31861(U)
July 31, 2018
Supreme Court, New York County
Docket Number: 805183/2014
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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PETER J. CALANDRELLA and LUCINDA
CALANDRELLA,

Plaintiffs,

Index No.
805183/2014

**DECISION and
ORDER**

- against -

Mot. Seq. 005

HOSPITAL FOR SPECIAL SURGERY and RILEY J.
WILLIAMS, III, M.D.,

Defendants.

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

On June 9, 2014, Plaintiffs Peter (“Peter”) and Lucinda (“Lucinda”) Calandrella (collectively “Plaintiffs”) commenced this medical malpractice action against Defendants Hospital For Special Surgery (“HSS”) and Riley J. Williams, III, M.D., (“Williams”) (collectively “Defendants”). Peter alleges that HSS and Williams departed from accepted standards of medical practice by failing to properly apply and monitor Peter’s Bledsoe brace. (Calandrella complaint at 4) Peter’s wife, Lucinda, claims loss of her husband’s services. On October 28, 2015, HSS and Williams interposed their Answers.

Presently before the Court is Defendants’ Order to Show Cause pursuant to CPLR 3216 (3) for an order dismissing the complaint in its entirety for Plaintiffs’ failure to comply with Court orders.

Background and Factual Allegations

On February 28, 2017, the Honorable Joan B. Lobis, J.S.C. (“Justice Lobis”) issued a compliance conference order directing Plaintiffs’ depositions to be held on or before April 18, 2017. (defendants’ exhibit O) Defendants allege that they were

informed by Plaintiffs on the day before April 18, 2017 that the deposition “could not go forward.” (affirmation of Rikhye at 11) On May 16, 2017, Justice Lobis issued another compliance conference order directing Plaintiffs’ depositions to be held on or before May 26, 2017. (defendants’ exhibit P) Defendants claim that they were informed shortly before May 26, 2017 that the depositions needed to be adjourned. (affirmation of Rikhye at 12)

On July 11, 2017, this Court issued a compliance conference order directing Plaintiffs’ depositions to be held on or before August 31, 2017. (defendants’ exhibit Q) Defendants allege that prior to August 31, 2017, Plaintiffs indicated that Peter was scheduled to undergo surgery and therefore the deposition was adjourned to October 16, 2017. However, Defendants allege that this surgery did not occur until March 12, 2018. (affirmation of Rikhye at 13)

On September 19, 2017, this Court issued another compliance conference order directing Plaintiffs’ depositions to be held on or before November 10, 2017. (defendants’ exhibit R) Defendants allege that at approximately 2:00 PM on November 8, 2017, Plaintiffs informed Defendants that Peter’s mother-in-law was hospitalized and Plaintiffs were unavailable. (affirmation of Rikhye at 14)

On December 5, 2017, this Court issued another compliance conference order directing Plaintiffs’ depositions to be held on or before January 12, 2018. (defendants’ exhibit S) Defendants allege that the depositions were not held on or before January 12, 2018 despite Defendants’ efforts to schedule the depositions on six possible dates.

On February 20, 2018, this Court issued another compliance conference order directing that Peter’s conduct would be deemed willful and contumacious if he failed to appear for a deposition on or before March 23, 2018. Defendants allege that Peter did not appear for his deposition.

Peter and Lucinda oppose. They argue that Peter made himself available on certain dates such as October 16, 2017 and January 12, 2018, but Defendants were allegedly unavailable. They argue that the parties attempted to schedule February 16, 2018 as a deposition date but Peter needed to appear for oral argument because he is a practicing attorney. (affirmation of Panarella at 5) Plaintiffs also note that Peter underwent surgery on March 12, 2018. (affirmation of Panarella at 6) Lastly, they request that Peter be granted “one final opportunity to appear for a deposition.” (affirmation of Panarella at 7)

CPLR 3126 Standard

“If the credibility of court orders and the integrity of our judicial system are to be maintained, a litigant cannot ignore court orders with impunity.” (*Fish & Richardson, P.C. v. Schindler*, 75 AD3d 219, 220 [1st Dept 2010].) “Although actions should be resolved on the merits whenever possible, the efficient disposition of cases is not advanced by hindering the ability of the trial court to supervise the parties who appear before it and to ensure they comply with the court’s directives.” (*id.*) Accordingly, CPLR 3126 provides,

“If any party . . . refuses to obey an order for disclosure or willfully 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.*) A “plaintiff’s pattern of noncompliance with discovery demands and a court-ordered stipulation supports an inference of willful and contumacious conduct . . .” (*Jackson v OpenCommunications Omnimedia, LLC*, 147 AD3d 709, 709 [1st Dept 2017].) Although Plaintiff may “tender a reasonable excuse to overcome defendants’ showing of willfulness” (*Menkes v Delikat*, 50 NYS3d 318, 319 [1st Dept 2017]), “failure to offer a reasonable excuse for . . . noncompliance with discovery requests gives rise to an inference of willful and contumacious conduct that warrant[s] the

striking of the answer.” (*Turk Eximbank-Export Credit Bank of Turkey v Bicakcioglu*, 81 AD3d 494, 494 [1st Dept 2011].)

Discussion

Approximately a year and five months have passed since Peter and Lucinda were first ordered to be deposed, and yet neither of their depositions have been commenced. Indeed, Peter and Lucinda’s failure to appear for their depositions over the course of this year and five months contravenes *six* compliance conference orders that directed their appearance. By violating *six* compliance conference orders, Plaintiffs have engaged in a “pattern of noncompliance . . . support[ing] an inference of willful and contumacious conduct.” (*Jackson v OpenCommunications Omnimedia, LLC*, 147 AD3d 709, 709 [1st Dept 2017].) These *six* compliance conference orders afforded Plaintiffs multiple extensions to accommodate for any scheduling conflicts. To note that Peter made himself available for a deposition 3 times in the span of a year and five months is not reasonable and does not account for Lucinda’s failure to appear. Additionally, the surgery scheduled for March 12, 2018 is not a reasonable excuse for failing to comply with the February 20, 2018 compliance conferenced order that afforded Peter approximately 1 month to appear for his deposition. Even if the March 12, 2018 surgery justified Peter’s failure to comply with the February 20, 2018 order, it does not provide a reasonable excuse for why Plaintiffs failed to appear for their depositions in contravention of the February 28, 2017 order, the May 16, 2017 order, the July 11, 2017 order, the September 19, 2017 order, and the December 5, 2017 order.

Wherefore, it is hereby

ORDERED that Defendants Hospital For Special Surgery and Riley J. Williams, III, M.D.’s Order to Show Cause for an Order dismissing the complaint in its entirety is granted unless Plaintiffs Peter and Lucinda Calandrella appear for their depositions on or before August 13, 2018; and it is further

ORDERED that the parties are directed to appear for a compliance conference on August 14, 2018 at 9:30 AM in Part 6 at 71 Thomas Street, New York, NY 10013; and it is further

ORDERED that the judgment clerk is directed to enter judgment accordingly.

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

Dated: July 31, 2018



Eileen A. Rakower, J.S.C.