SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. DORIS LING-COHAN **PART** IAS MOTION 36

Justice

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INDEX NO. 156574/2017

NYU HOSPITALS CENTER

MOTION DATE 05/09/2018

Plaintiff,

MOTION SEQ. NO. 001

- v -

ELAINE LORA,

Defendant.

DECISION AND ORDER

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 29, 51

were read on this motion to/for DISCOVERY

Upon the foregoing documents, it is

ORDERED that defendant's motion to compel discovery pursuant to CPLR 3124 and that portion of plaintiff's cross-motion which seeks a protective order pursuant to CPLR 3103 with respect to defendant's discovery demands (first interrogatories, requests for production and requests for admission) are denied, as the moving and cross-moving papers fail to contain affirmations of good faith, which comply with the Uniform Rules for Trial Courts, as required on these discovery related motions (*see* 22 NYCRR 202.7 [a] & [c]).

Specifically, neither party's counsel has indicated that they "conferred", with each other, prior to the filing of the within motion and cross-motion, in a "good faith effort to resolve the

[discovery] issues raised" herein (*id.*). Notably, sending a "deficiency" letter, as alleged by defendant's counsel is insufficient (Lauren J. Talan Reply Affirmation, at 2).[1]

That portion of plaintiff's cross-motion which seeks to dismiss defendant's second through eighteenth affirmative defenses,[2] pursuant to CPLR 3211(b), is granted, as no facts are supplied to support any of the mere boilerplate, conclusions of law contained in defendant's answer (*see Foley v* D'Agostino, 21 AD2d 60, 63 [1st Dept 1964]["statements in pleadings are...required to be factual, that is, the essential facts required to give 'notice' must be stated" (citations omitted)]; *170 West Village Assoc. v G & E Realty, Inc.*, 56 AD3d 372, 372-73 [1st Dept 2008][affirmative defenses consisting of mere conclusions of law without supporting facts, properly dismissed]; *Bel Paese Sales Co. Inc. v Macri*, 99 AD2d 740 [1st Dept 1984]; *Robbins v Growney*, 229 AD 2d 356, 357 [1st Dept 1996][bare legal conclusions and mere titles of defenses are insufficient to raise an affirmative defense]; Siegel, Practice Commentaries, McKinney's

[1] It is noted that, the within action seeks $27,275.51, based upon alleged hospital services rendered to defendant. There is no indication by moving, nor cross-moving counsel of any efforts made to resolve this relatively small matter, prior to discovery, or with the assistance of limited discovery. Instead, defendant's counsel served lengthy discovery demands (including extensive interrogatories and requests to admit), and the parties have engaged in motion practice, prior to even requesting a preliminary discovery conference/order, in violation of New York County Supreme Court, Civil Branch, Rules of the Justices. In particular, Rule 10 provides as follows: "Disclosure Disputes. Prior to making a discovery motion, counsel shall consult one another in a good faith effort to resolve any discovery disputes (*see* Uniform Rule 202.7). If a dispute is not thus resolved, the party seeking disclosure, unless otherwise directed in the Background Information section above, is advised to contact the Part Clerk promptly, and within any applicable deadline, for the purpose of arranging a conference, in court or by telephone" (emphasis supplied0.

[2] Defendant's second through eighteenth affirmative defenses are as follows: (1) failure to mitigate damages; (2) plaintiff has suffered no damages attributable to conduct by defendant; (3) plaintiff's claim is barred by the doctrine of waiver; (4) plaintiff's claim is barred by the doctrine of payment; (5) accord and satisfaction; (6) equitable estoppel; (7) unjust enrichment if plaintiff is granted requested relief; (8) the subject contract is unenforceable and against public policy as an oppressive contract of adhesion; (9) the subject contract is unenforceable and against public policy since obtained through coercion; (10) contract unenforceable because executed while defendant under duress; (11) plaintiff's claims are barred based on lack of material terms in the contract; (12) contract unenforceable because no meeting of the minds; (13) contract not supported by consideration; (14) plaintiff's recovery limited to *quantum meruit*, already paid; (15) plaintiff's claims barred by doctrine of unconscionability; (16) plaintiff's claims barred because violate implied covenant of good faith; and (17) lack of jurisdiction and case should be transferred to County Court pursuant to CPLR 325 (d).

Cons Laws of NY, Book 7B, CPLR C3018:19, at 320 ["An affirmative defense is subject to the same basic pleading rules that apply to a claim. It must give notice and cover the material elements that the defense substantively embraces"]). Moreover, in opposition, defendant failed to supply any affidavit in opposition to plaintiff's cross-motion, containing facts to support her alleged affirmative defenses and to cure their factual insufficiencies (*see WDF Inc. v Trustees of Columbia Univ. in the City of N.Y.*, 156 AD3d 530 [1st Dept 2017]). Nevertheless, in the interest of justice, this court will permit defendant to serve an amended answer, with particularized affirmative defenses, as appropriate, provided that an amended answer is served and filed, within 30 days of service of a copy of this order with notice of entry.

Based upon the above, it is

ORDERED that the motion and cross-motion are denied with respect to the relief requested pertaining to discovery; it is further

ORDERED that the portion of plaintiff's cross-motion which seeks to dismiss defendant's affirmative defenses numbered 2-18 is granted; it is further

ORDERED that, **on or before October 29, 2018, counsel for the parties shall confer with each other, in a telephone call initiated by plaintiff's counsel, and attempt to resolve any outstanding discovery issues, as well as settlement of the within case. On or before October 31, 2018**, counsel shall supply the court with a letter (which may be a joint letter), detailing the results of such telephone conference, outlining any remaining discovery issues, and updating this Court as to the status of settlement negotiations. Such letter shall be mailed or hand-delivered to this Court, in an envelope, with a copy of this letter attached to the outside of the envelope; it is further

ORDERED that **this case is scheduled for November 1, 2018, no appearances (submission only)**, for receipt of the above letter from counsel;[3] it is further

ORDERED that all discovery shall be completed and a note of issue filed by Feb. 28, 2019; and it is further

ORDERED that within 30 days of entry of this order, plaintiff shall serve a copy upon defendant, with notice of entry.

October 9, 2018

DATE

DORIS LING-COHAN, J.S.C.

CHECK ONE:		CASE DISPOSED		X	NON-FINAL DISPOSITION		
		GRANTED	DENIED	X	GRANTED IN PART		OTHER
APPLICATION:		SETTLE ORDER			SUBMIT ORDER		
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN			FIDUCIARY APPOINTMENT		REFERENCE

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[3] The court notes that, upon the parties' failure to resolve the within documentary discovery issues, the appointment of a Special Referee to supervise the completion of discovery will be considered by the Court.