Mesiti v Weiss
2018 NY Slip Op 33804(U)
October 31, 2018
Supreme Court, Sullivan County
Docket Number: 1179-2015
Judge: Mark M. Meddaugh

At a term of the Supreme Court of the State of New York, held in and for the County of Sullivan, at Monticello, New York, on August 15, 2018

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF SULLIVAN

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ANNAMARIA MESITI,

Plaintiff,

-against-

EVELYN WEISS AND LINDA KRAUS,

Defendants.

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DECISION/ORDER

Index # 1179-2015
RJI # 52-37966-2016

Present: **Hon. Mark M. Meddaugh,**
Acting Justice, Supreme Court

Appearances:

Basch & Keegan, LLP
By: Derek J. Spada, Esq.
Attorneys for the Plaintiff
307 Clinton Avenue, PO Box 4235
Kingston, New York 12402

Law Office of Bryan M. Kulak, Esq.
By: Bryan M. Kulak, Esq.
Attorney for the Defendants
90 Crystal Run Road, Suite 409
Middletown, New York 10941

MEDDAUGH, J.:

The Defendant has moved for an Order, pursuant to CPLR §3126(3), to strike the Plaintiff's complaint or, in the alternative, for an Order pursuant to CPLR §3126 (2) precluding the Plaintiff from offering any testimony or evidence regarding the claimed injuries of the Plaintiff at the trial in this matter, together with the costs of this motion pursuant to CPLR §8106 and §8202, and for sanctions.

It is asserted that the Defendants, by their attorney, served Notices to Produce upon the Plaintiff's counsel[1] on August 17, 2015, October 20, 2016, and April 4, 2018. Then on September 24, 2015 and October 12, 2015, Defendants' counsel sent Plaintiff's counsel a request to provide responses, in a good faith effort to resolve the discovery issues without Court intervention.

An initial discovery schedule was set forth in a Preliminary Conference Stipulation and Order dated May 31, 2016, which required that medical reports and authorizations be served on or before July 15, 2016, and that the end date for all discovery would be October 5, 2016.

A conference was held on November 16, 2016, and a letter order was issued on November 17, 2016, which directed that the Plaintiff's responses to the Defendants' demands for discovery be served by no later than December 16, 2016. In that letter order the Court warned counsel "that discovery needed to proceed promptly to avoid a standards and goals problem."

Thereafter, the Plaintiff's former counsel, Marc Orloff, Esq., moved to be relieved as Plaintiff's attorney asserting that "he is incapable of effectively communicating with Ms. Mesiti." The motion was granted by Order dated July 20, 2017, and the next conference was held on November 15, 2017, after several adjournments while the Plaintiff sought a new attorney.

At that conference, Plaintiff's counsel advised that he had not yet received the file from his predecessor, and the conference was adjourned until January 17, 2018. In the letter order issued from the conference, the Court directed that responses to all outstanding discovery

[1]At the time of the commencement of this action in 2015, the Plaintiff was represented by the Law Offices of Marc Orloff, P.C. Mr. Orloff was relieved as the Plaintiff's attorney, by Order dated July 21 ,2017.

demands be served by no later than February 23, 2018, and that depositions be conducted by April 30, 2018.

At the next conference, held on May 9, 2018, Defendant's counsel advised that responses to the Notices to Produce had not been received, which was holding up the scheduling of depositions. There was a specific discussion at the conference as to the missing items of discovery. The Court then directed, in a letter order dated May 11, 2018, that the Plaintiff would serve responses to all discovery demands by May 18, 2018, and depositions would be conducted on or before July 13, 2018.

Prior to that conference, the Defendants had filed a motion to strike the Plaintiff's complaint, which was originally returnable on May 18, 2018, but was adjourned until May 25, 2018. That motion resulted in a Decision/Order dated June 12, 2018, in which the Court found that the Plaintiff had failed to adequately respond to the three Notices to Produce, but the Court denied the Defendants' motion to strike the complaint, and provided the Plaintiff an additional thirty days to comply with all of the outstanding discovery requests.

The Defendants' counsel now asserts in the instant motion that the Plaintiff has not provided complete responses to the outstanding Notices to Produce, nor has she moved for a protective order or objected to the demands in the notice to Produce. Defendants' counsel further asserts that, at this point, any objections to the outstanding demands would be untimely, pursuant to CPLR §3122.

In response, Plaintiff's counsel, Derek Spada, Esq., advises that his predecessor had provided a Verified Bill of Particulars and authorizations for the Defendants to obtain the

Plaintiff's medical records on September 28, 2016, in the initial response to Defendants' discovery demands.

Plaintiff's counsel advises that he then sent additional discovery responses on February 26, 2018 and May 4, 2018, in which he provided a new verified Bill of Particulars, as he was unaware that his predecessor had already served one. The discovery responses included additional authorizations for Plaintiff's medical records which were not previously provided, a CD which reportedly contained the Plaintiff's medical records, and authorizations for two no-fault files of the Plaintiff. Thereafter, on May 21, 2018, Plaintiff's counsel also provided a CD containing a copy of the pleadings regarding a related pending action brought by the Plaintiff for personal injuries suffered in another accident on December 15, 2015.

Plaintiff's counsel also asserts that he wrote to defense counsel on May 15, 2018 and May 24, 2018, advising that it was his belief that he had complied with all outstanding demands, to which he received no response.

Mr. Spada indicated that it was not until his office attempted to schedule depositions that he first learned that the defense counsel was still claiming that there was outstanding discovery.

The Plaintiff also argues that the Defendants' attorney failed to comply with the good faith requirement established in Section 202.7 of the Court Rules. Plaintiff's attorney indicates that the letters from Defendants' counsel requesting compliance with the discovery demands, only addressed the first Notice to Produce, and there is no showing of a good faith effort by Defendants' counsel to resolve the discovery issues prior to making the motion.

In reply, defense counsel advises that, although the Plaintiff provided a Verified Bill of Particulars and provided responses to the Defendants' initial discovery demands, she failed to

provide responses to the Notices to Produce. It is further asserted that the CD of medical records provided by the Plaintiff's counsel, pertained to an entirely different person, and did not contain records of the Plaintiff.

The Court has also reviewed the requests made in the three Notices to Produce attached to the Defendants' motion, as well as the discovery responses provided by the Plaintiff.

In the first Notice to Produce, dated August 17, 2015, the Defendants requested authorizations for medical records for injuries resulting from accidents occurring on 5/1/2010, 1/8/2012, and 11/6/2012[2], as well as for No-Fault or Workers Compensation files for these accidents.

In the second Notice to Produce, dated October 20, 2016, the Defendants requested authorizations from eighteen (18) specifically named medical providers, as well as authorizations from "Facilitators conducting laser therapy, pool therapy, and massage therapy," "Facility and physicians for 2012 carpel tunnel release surgery," and for "Any and all providers for the plaintiff's motor vehicle accident occurring on 3/18/2010, 4/1/2010, 5/1/2010, 1/8/2012, and 5/14/2015." The Defendants also requested authorizations for No-Fault Files or Workers Compensation files from these four prior accidents and one subsequent accident, as well as copies of pleadings, Bills of Particulars, Discovery Responses, Transcripts of testimony, release and Stipulations of Discontinuance for any and all claims arising out of these accidents.

In Plaintiff's first response to the Defendants' discovery demands, dated September 28, 2016, she provided twenty-one (21) authorizations for "plaintiff's prior and subsequent medical

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[2]The accident which is the subject of the current action occurred on July 10, 2013. Subsequent to the accident which is the subject of the instant action, the Plaintiff was involved in two other accidents, on May 14, 2015, and on December 15, 2015. The Plaintiff commenced two other actions arising out of the accidents in 2015, which both remain pending at the current time.

records, concerning the same area of the body plaintiff injured in the subject accident." Plaintiff did not provide authorizations for No-Fault or Workers Compensation files for the prior specified accidents.

In the Plaintiff's second response to the Defendants' discovery demands, dated February 28, 2018, the Plaintiff provided twelve medical authorizations, of which six were duplicative of authorizations previously provided.

Therefore, as of February 28, 2018, the Plaintiff had provided a total of twenty-seven authorizations for medical records, but only six (6) of those authorizations were responsive to the Defendants' Notices to Produce. The Plaintiff also provided two authorizations for records from GEICO, which were presumably for two of the five other accidents.

In their third Notice to Produce, dated April 4, 2018, the Defendants sought additional authorizations for fifteen specifically named medical providers. Three of the authorizations requested by the Defendants had already been provided by the Plaintiff in the February 2018 response, but no further authorizations were provided in response to the third Notice to Produce, nor does it appear that the Plaintiff responded to the request for documents relating to the other accidents in which the Plaintiff was involved.

Therefore, of the total of thirty-three (33) medical authorizations requested by the Defendants, the Plaintiff produced only nine (9) authorizations which were responsive to the Defendants' Notice to Produce.

The Court notes that the Plaintiff failed to provide any discovery in response to the Court's Decision and Order, dated June 12, 2018, which directed that the Plaintiff comply with all outstanding discovery requests within thirty days of June 12, 2018.

Finally, the Court notes that the Total Standards and Goals in this action expired on July 18, 2018.

CONCLUSIONS OF LAW

CPLR 3126 provides that "[i]f any party ... refuses to obey an order for disclosure or wilfully fails to disclose information which the court finds ought to have been disclosed, pursuant to this article, the court may make such orders with regard to the failure or refusal as are just."

It has long been held that "the drastic remedy of striking a party's pleading pursuant to CPLR 3126 for failure to comply with a discovery order ... is appropriate only where the moving party conclusively demonstrates that the non-disclosure was willful, contumacious or due to bad faith" (*Henderson–Jones v. City of New York*, 87 A.D.3d 498, 504, 928 N.Y.S.2d 536 [1 Dept., 2011] [*internal quotation marks omitted*]). "Willful and contumacious behavior can be inferred by a failure to comply with court orders, in the absence of adequate excuses" (id.).

"Although actions should be resolved on the merits whenever possible, the efficient disposition of cases 'is not promoted by permitting a party ... to impose an undue burden on judicial resources to the detriment of ... other litigants. Nor is the efficient disposition of the business before the courts advanced by undermining the authority of the trial court to supervise the parties who appear before it' " (*Watson v. City of New York*, 157 A.D.3d 510, 512–13, 69 N.Y.S.3d 294 [1 Dept., 2018] [*internal quotation marks omitted*]).

In the case at bar, the parties initially stipulated in May of 2016, that all discovery would be completed by October 5, 2016. Since that time, there have been four conferences with the Court, on November 16, 2016, November 15, 2017, January 17, 2018, and May 9, 2018. On

each occasion, Defendants counsel advised that the responses to the Notices to Produce were either missing or incomplete, and deadlines were set for the Plaintiff to comply therewith.

Prior to the last conference, the Defendants filed a motion to strike the Plaintiff's complaint. The motion was denied, by Decision and Order dated June 12, 2018, and the Plaintiff was directed to comply with the outstanding Notices to Produce by July 12, 2018. Since June 12, 2018, the Plaintiff has failed to provide any further discovery, and her attorney instead asserted in letters to Defendants' counsel that all requested discovery had already been provided.

As set forth above, of the thirty-three (33) medical authorizations requested for specifically named medical providers, as well as authorizations from three other categories of providers, the Plaintiff provided nine (9) authorizations which were responsive to the Defendants' demands. The Defendants also sought authorizations from three categories of providers, to which there was no response.

In addition to the medical authorizations, the Defendants also sought authorizations for No Fault Files or Workers Compensation files for five other accidents in which the Plaintiff was involved, and in response the Plaintiff provided two authorizations.

Therefore, the Court finds that it is undisputed that the Plaintiff failed to comply with the Defendants' Notices to Produce, and that she failed to offer any excuse as to why she failed to provide the authorizations specifically requested by the Defendant, nor did she make any claim of privilege or filed any objections thereto.

The Defendants claim that the Plaintiff was involved in a number of prior accidents, as well as two subsequent accidents, and the Defendants have sought, through the Notices to Produce, the Plaintiff's medical records for injuries sustained in connection with these other

accidents, as well as no-fault files and copies of the pleadings and other papers from any other lawsuits in which the Plaintiff was involved.

"CPLR § 3126 provides that there shall be full disclosure of all evidence "material and necessary" in the prosecution or defense of an action, regardless of the burden of proof. The words "material and necessary" are to be interpreted liberally to require disclosure, upon request, of any facts bearing on the controversy which will assist in the preparation for trial by sharpening the issues and reducing delay and prolixity" (*Harrison v. Bayley Seton Hosp., Inc.*, 219 A.D.2d 584, 584, 631 N.Y.S.2d 182 [2 Dept.,1995]).

It is beyond question that the Defendants are entitled to discovery of the Plaintiff's medical history, as well of the history of no-fault claims and/or litigation brought by the Plaintiff in connections with post-accident treatment, as well as pre- accident treatment of the same anatomical parts to which the Plaintiff now claims injury (*Geraci v. National Fuel Gas Distribution Corp.*, 255 A.D.2d 945, 680 N.Y.S.2d 776 [4 Dept.,1998]; see, generally, *Cynthia B. v. New Rochelle Hosp. Medical Center*, 60 N.Y.2d 452, 470 N.Y.S.2d 122 [1983]).

At the time that the instant motion was made, this action had been pending for more than three years, and the Plaintiff's failure to comply with the Notices to Produce was discussed at the four separate Court conferences, and was the subject of a prior motion to compel. The Court notes that the Preliminary Conference Stipulation and Order plainly stated that the "[f]ailure to comply with any of these directives may result in the imposition of costs or sanctions or other action authorized by law " (see, *Fish & Richardson, P.C. v. Schindler*, 75 A.D.3d 219, 901 N.Y.S.2d 598 [1 Dept.,2010], in which the Court relied, in part, on this language to affirm the

Supreme Court's Order striking the Defendant's answer for failing to comply with multiple court orders and discovery deadlines).

Although this Court declined to sanction the Plaintiff in the Decision/Order dated June 12, 2018, the Plaintiff was directed to fully comply with the Notices to Produce by no later than July 12, 2018.

Despite the numerous discussions at Court conferences, in which Defendants' counsel advised Plaintiff's counsel that responses to the Notices to Produce were still needed, resulting in a number of Court ordered deadlines to comply with the outstanding discovery responses, the Plaintiff has failed to provide the required responses. In addition, the Court specifically found in the June 12th Order that "the Plaintiff had failed to adequately respond to three notices to produce, and the Plaintiff did not seek to appeal that order, nor did she seek a protective order, or otherwise challenge the order, but she has not, to date, provided complete responses to the Notices to Produce (see, *Watson v. City of New York*, 297–98, 157 A.D.3d 510, 69 N.Y.S.3d 294 [1 Dept., 2018]). Instead, her attorney merely asserted, without documentary proof, that he believed that there had been compliance with all outstanding discovery. Plaintiff claim that he asked the Defendants' counsel for confirmation that all discovery was complete was disingenuous, when the Defendant failed to confirm that he had provided the authorization specifically requested, and failed to provide any of the papers requested from prior litigation, or to otherwise affirmatively indicate that there were No-Fault or Workers Compensation files in connection with the prior incidents listed by the Defendant. Under these circumstances, it has been held to be an appropriate exercise of the Court's discretion to strike the complaint

(*Northfield Ins. Co. v. Model Towing and Recovery*, 63 A.D.3d 808, 881 N.Y.S.2d 135 [2 Dept.,2009]).

At the time that the instant motion was made, this action had been pending for more than three years, and the Plaintiff has failed to comply with multiple court orders, forcing the plaintiff to make multiple motions seeking discovery.

It has been held compliance with disclosure orders requires both a timely response and one that evinces a good-faith effort to address the requests meaningfully (*Kihl v. Pfeffer*, 94 N.Y.2d 118, 700 N.Y.S.2d 87 [1999]). It has also been emphasized by the Court of Appeals court ordered deadlines cannot be ignored without significant consequences, which include striking a pleading (see, *Brill v. City of New York*, 2 N.Y.3d 648, 781 N.Y.S.2d 261 [2004]; *Andrea v Arnone, Hedin, Casker, Kennedy & Drake, Architects & Landscape Architects, P.C. (Habiterra Assoc.)*, 5 N.Y.3d 514, NY,2005)5 N.Y.3d at 521, 806 N.Y.S.2d 453 [2005]; *Zletz v. Wetanson*, 67 N.Y.2d 711, 499 N.Y.S.2d 933 [1986]).

Accordingly, the Court finds that the Plaintiff's history of untimely, unresponsive and lax approach to complying with the court's previous orders warrants the striking of the complaint (*Elias v. City of New York*, 87 A.D.3d 513, 517, 928 N.Y.S.2d 543 [1st Dept. 2011]; *see also*, *Goldstein v. CIBC World Mkts. Corp.*, 30 A.D.3d 217, 817 N.Y.S.2d 19 [1st Dept. 2006]; *Figdor v. City of New York*, 33 A.D.3d 560, 823 N.Y.S.2d 385 [1 Dept.,2006]). In *BDS Copy Inks, Inc. v. International Paper*, 123 A.D.3d 1255, 999 N.Y.S.2d 234 [3d Dept., 2014), the Third Department affirmed an Order striking the complaint, where the Court met with counsel for the parties on at least six occasions during a period of twenty-one months, and issued at least two orders extending plaintiffs' time to comply with their disclosure obligations. The Court found that

it was insufficient for the Plaintiff to maintain that their discovery response was adequate after being told that it was not adequate. Finally the *BDS* court found that, even though the Plaintiff did provide some documents in response to the Defendants' disclosure demands, the Third Department ruled that "[t]his limited cooperation does not necessarily preclude a finding of willful and contumacious behavior" (*Id.* at 1256).

Accordingly, the Court finds that Plaintiff's failure to fully respond to the Defendant's Notices to Produce was willful and contumacious, and warrants striking the Plaintiff's complaint pursuant to Section 3126(3) of the CPLR.

The Court also finds that, although the Affirmation submitted by the Defendant's counsel lists only two letters requesting compliance with the first Notice to Produce, the Court finds that Defendants' counsel repeated requests that the Plaintiff respond to the Notice to Produce at Court conferences over a period of two years, together with the motion to compel in which the Defendant outlined the missing discovery that was missing, are sufficient to satisfy the requirements of 22 NYCRR 202.7(c) (*Loeb v. Assara New York I L.P.*, 118 A.D.3d 457, 987 N.Y.S.2d 365 [1 Dept.,2014]; *see, also, Rodriguez v. Nevei Bais, Inc.*, 158 A.D.3d 597, 73 N.Y.S.3d 135 [1 Dept., 2018]). In addition, even if plaintiff's motion papers were technically noncompliant with 22 NYCRR 202.7(c), the Court finds that any further attempt to resolve the dispute with the necessity of motion practice would have been futile" *(Northern Leasing Sys., Inc. v. Estate of Turner*, 82 A.D.3d 490 918 N.Y.S.2d 413 [1st Dept.2011];*Carrasquillo ex rel. Rivera v. Netsloh Realty Corp.*, 279 A.D.2d 334, 719 N.Y.S.2d 57 [1 Dept.,2001]).

Finally, the Court shall award the Defendants the cost of this motion, pursuant to CPLR §8106 and §8202.

WHEREFORE, based on the foregoing, it is hereby

ORDERED that the Defendant's motion to strike the Plaintiff's complaint, pursuant to CPLR §3126(c) is granted; and it is further

ORDERED that the Defendants are awarded cost of the motion in the amount of $100.00, which shall be paid by the Plaintiff within 10 days after service of a copy of this order with notice of entry.

This memorandum shall constitute the Decision and Order of this Court. The original Decision and Order, together with the motion papers have been forwarded to the Clerk's office for filing. The filing of this Order does not relieve counsel from the obligation to serve a copy of this order, together with notice of entry, pursuant to CPLR § 5513(a).

Dated: October 31, 2018
Monticello, New York

ENTER: Mark M Meddaugh
HON. MARK M. MEDDAUGH
Acting Supreme Court Justice

Papers Considered:

1. Notice of Motion to Strike the Plaintiff's Complaint, dated July 12, 2018
2. Affirmation in Support of Bryan M. Kulak, Esq., dated July 12, 2018
3. Affirmation in Opposition of Derek J. Spada, Esq., dated August 7, 2018
4. Reply Affirmation of Bryan M. Kulak, Esq. dated August 9, 2018