

Coffman-Tvedt v Morales
2018 NY Slip Op 34163(U)
September 12, 2018
Supreme Court, Westchester County
Docket Number: Index No. 66971/2017
Judge: Joan B. Lefkowitz
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.
This opinion is uncorrected and not selected for official publication.

To commence the statutory time period for appeals as of right [CPLR 5513(a)], you are advised to serve a copy of this order, with notice of entry upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER-COMPLIANCE PART

-----X
HELEN COFFMAN-TVEDT,

Plaintiff,

-against-

ISAIAS MORALES and CROSS COUNTY TAXI
COMPANY, INC.,

Defendants.

-----X
ISAIAS MORALES and CROSS COUNTY TAXI
COMPANY, INC.,

Third-Party Plaintiffs,

-against-

JAMES R. KOZEE,

Third-Party Defendant.

-----X
LEFKOWITZ, J.

The following papers were read on the motion by third-party defendant for an order dismissing plaintiff's complaint and any cross claims for failure to comply with the court's orders and directives; compelling plaintiff to respond to his discovery demands; costs and sanctions; and for such other and further relief as this court deems just and proper.

Order to Show Cause dated August 6, 2018; Affirmation in Support; Exhibits A-D
Affirmation in Opposition; Exhibits A and B

Upon the foregoing papers and proceedings held on September 12, 2018, this motion is determined as follows:

This is a personal injury action commenced on October 23, 2017, whereby plaintiff seeks damages as a result of an automobile accident that occurred on June 17, 2017. A third-party

DECISION and ORDER
Index No. 66971/2017
Motion Date: Sep. 12, 2018
Seq. No. 2

action was commenced on or about November 15, 2017. In his third-party answer dated January 15, 2018, third-party defendant denied the essential allegations asserted against him, alleged several affirmative defenses against plaintiff, and a counterclaim for the apportionment of damages against defendants/third-party plaintiffs. Along with the third-party answer, third-party defendant served a demand for plaintiff's bill of particulars, combined demands, and a notice to depose plaintiff and defendants/third-party plaintiffs.

A preliminary conference stipulation dated February 7, 2018, and so-ordered by this court (Lefkowitz, J.), directed, among others things, all prior discovery to be provided to third-party defendant.

The compliance conference referee report and order dated June 7, 2018, and so-ordered by this court (Lefkowitz, J.), directed, among other things, plaintiff to respond to third-party defendant's demands for discovery and inspection, authorizations, and a bill of particulars, on or before June 21, 2018.

The compliance conference referee report and order dated July 11, 2018, and so-ordered by this court (Lefkowitz, J.), directed, among other things, plaintiff to respond to third-party defendant's demands for discovery and inspection, authorizations, and a bill of particulars, on or before July 25, 2018. It stated that no further extensions would be granted and admonished plaintiff to timely comply with the directives set forth therein.

By notice dated July 10, 2018, plaintiff moved for an order amending the complaint to permit her to allege claims directly against third-party defendant. This motion was returnable on August 13, 2018.

Presently third-party defendant seeks an order dismissing plaintiff's complaint and any cross-claims, or an order compelling plaintiff to respond to his discovery demands and this court's orders. He also seeks costs and sanctions. Third-party defendant asserts that to date plaintiff has failed to provide him with the outstanding discovery and that this failure demonstrates plaintiff's willful disregard for three court orders. Third-party defendant further asserts that plaintiff has unreasonably neglected to proceed in this action. Third-party defendant also asserts that plaintiff's conduct in this matter has caused him to sustain significant expenses in order to obtain relevant discovery.

Plaintiff opposes this motion. She alleges that she was waiting for the decision and order determining her motion to amend the complaint before providing confidential HIPAA protected medical records. However, because she does not intend to be in violation of this court's orders, plaintiff states that she provided HIPAA compliant authorizations to third-party defendant permitting him to obtain her medical records.¹

¹Exhibit B attached to plaintiff's moving papers states that these authorizations were served by mail but copies thereof were not e-filed.

CPLR 3101(a)(1) provides that there shall be full disclosure of all matter material and necessary in the prosecution or defense of an action. It is the burden of the party seeking disclosure to demonstrate that the method of discovery sought will result in the disclosure of relevant evidence or is reasonably calculated to lead to the discovery of information bearing on the claims (*Quinones v 9 East 69 Street, L.L.C.*, 132 AD3d 750 [2d Dept 2015]).

CPLR 3126 provides that if any party “wilfully fails to disclose information which the court finds ought to have been disclosed,” the court may issue an order, inter alia, dismissing the action. “The nature and degree of the penalty to be imposed on a motion pursuant to CPLR 3126 is a matter generally left to the discretion of the Supreme Court” (*Carbajal v Bobo Robo*, 38 AD3d 820 [2d Dept 2007]). To invoke the drastic remedy of striking a pleading a court must determine that the party’s failure to disclose is wilful and contumacious (*Greene v Mullen*, 70 AD3d 996 [2d Dept 2010]; *Maiorino v City of New York*, 39 AD3d 601 [2d Dept 2007]). “Wilful and contumacious conduct can be inferred from repeated noncompliance with court orders ... coupled with no excuses or inadequate excuses” (*Russo v Tolchin*, 35 AD3d 431, 434 [2d Dept 2006]; see also *Prappas v Papadatos*, 38 AD3d 871, 872 [2d Dept 2007]).

In this matter, plaintiff has failed to provide discovery to third-party defendant despite three court orders directing her to do so. There is no evidence on the record that plaintiff has responded to third-party defendant’s demands for discovery and inspection, authorizations, and a bill of particulars. Although plaintiff asserts she provided HIPAA compliant authorizations for her medical records, she has failed to upload to the NYSCEF website copies of those authorizations. Moreover, plaintiff’s excuse for her failure to provide the discovery demanded by third-party defendant, and as directed by the court, is inadequate. Although a decision and order pertaining to her motion to amend her complaint is pending, this does not effect her obligation to proceed with discovery, and her failure in this regard constitutes willful and contumacious conduct. Furthermore, the court finds that the imposition of motion costs pursuant to CPLR 8202 in the amount of \$100.00, is proper.

In light of the foregoing it is:

ORDERED that the branch of the motion by third-party defendant for an order dismissing plaintiff’s complaint and any cross claims is granted unless on or before September 26, 2018, plaintiff provides to third-party defendant all outstanding discovery; and it is further,

ORDERED that the branch of the motion by third-party defendant for an order granting costs is granted and plaintiff shall pay motion costs to third-party defendant in the amount of \$100.00, no later than September 26, 2018, and shall upload proof of payment to NYSCEF no later than that date; and it is further,

ORDERED that all other branches of the motion by third-party defendant are denied; and it is further,

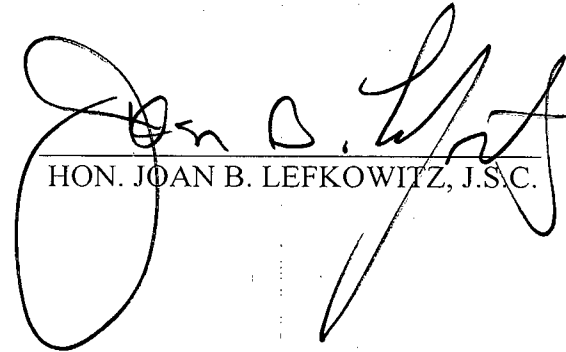
ORDERED that in the event plaintiff fails to provide all outstanding discovery to third-party defendant, third-party defendant shall upload to the NYSCEF website, on or before October 3, 2018, a detailed affidavit/affirmation of noncompliance, outlining what discovery is still outstanding and a Proposed Order striking the complaint in its entirety, upon notice to all parties; and it is further,

ORDERED that all parties shall appear for a conference in the Compliance Part, Courtroom 800, on October 10, 2018, at 9:30 A.M.

ORDERED that counsel for third-party defendant shall serve a copy of this decision and order, with notice of entry, upon all parties within five days of entry.

The foregoing constitutes the decision and order of this court.

Dated: White Plains, New York
September 12, 2018



HON. JOAN B. LEFKOWITZ, J.S.C.

To:

Joseph M. Cammarata, Esq.
Cammarata & DeMeyer, P.C.
Plaintiff's Attorneys
Rory T. Mulholland, Esq.
Abrams, Fensterman
Attorneys for Defendants/Third-Party Plaintiffs
Brent Golisano, Esq.
Law Office of Thomas K. Moore
Movant and Attorneys for Third-Party Defendant
All counsel to be served via NYSCEF

cc: Compliance Part Clerk
Chambers of the Hon. Joan B. Lefkowitz, J.S.C. (IAS Part)