

Kornblau v Sauter

2019 NY Slip Op 33658(U)

December 9, 2019

Supreme Court, New York County

Docket Number: 805344/2015

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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LYNN SARE KORNBLAU, as Executrix of the
Estate of JEFFREY M. KORNBLAU, and LYNN
KORNBLAU, Individually,

Index No.
805344/2015

Plaintiff,

-against-

**DECISION
and ORDER**

CRAIG SAUTER, M.D., MEMORIAL SLOAN-
KETTERING CANCER CENTER and
MEMORIAL HOSPITAL FOR CANCER AND
ALLIED DISEASES, FATIMA CONTEH, N.P.,
ROSINA ROSARIO, P.A., JAMES YOUNG, M.D.,
ANN JAKUBOWSKI, M.D., and JENNA
GOLDBERG, M.D.,

Mot. Seq. 03

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

Lynn Sare Kornblau (“Plaintiff”), as Executrix of the Estate of Jeffrey M. Kornblau (hereinafter, “Decedent”), and Lynn Kornblau, individually moves for an Order pursuant to CPLR § 3126 for the production of and for sanctions against Defendants Craig Sauter, M.D. (“Sauter”), Memorial Sloan-Kettering Cancer Center and Memorial Hospital For Cancer and Allied Diseases, Fatima Conteh, N.P., Rosina Rosario, P.A., James Young, M.D. (“Young”), Ann Jakubowski, M.D., and Jenna Goldberg, M.D. (collectively, “Defendants”) for their failure to produce discovery pursuant to the October 8, 2019 Court Order (the “Order”). Additionally, Plaintiff seeks an Order directing Defendants to bear the costs of Sauter’s deposition. Defendants oppose.

Background

Plaintiff commenced this medical malpractice and wrongful death action by filing a Summons and Complaint on November 11, 2015 against Defendants. Defendants interposed their Answers on July 20, 2016.

In June 2019, Plaintiff's counsel was discharged. On September 10, 2019, Ms. Kornblau, an attorney in the state of Pennsylvania, was deemed to be proceeding *Pro se* in this action. The parties appeared before the Court on October 8, 2019, and Defendants were to provide Plaintiff with Sauter's written memos, emails, or text messages regarding Plaintiff and the Decedent up to the date of Decedent's death, and the personal and professional calendar of Sauter for February 2013 to November 2013. (Court Hearing Tr. October 8, 2019 at 19-20).

Parties' Contentions

Plaintiff argues that the Court has the broad discretion to impose sanctions for Defendants' violation of the Order. Plaintiff asserts that imposing additional sanctions requiring Defendants to pay the costs related to Sauter's deposition is appropriate.

In opposition, Defendants argue that they have been complying with Plaintiff's discovery demands and the Order in good faith and to the best of their ability. Defendants further argue that Plaintiff is not entitled to an order directing Defendants to pay the costs related to the deposition of Sauter. Defendants assert that Plaintiff has not demonstrated that the demanded emails at issue prejudiced Plaintiff in deposing Sauter. Defendants contend that Plaintiff can move for an additional deposition of Sauter if she needs to ask questions related to the demanded emails. Defendants assert that on October 8, 2019, the Court stated on the record, "[b]ut to the extent that there are other things that you would like in proving your case, you can take the deposition; and if something comes up in discovery after that deposition that you have additional questions, we can make the witness appear again for an additional deposition so that you can get answers to those questions..." (Exhibit "C" to Motion, p.5). Defendants argue that on October 22, 2019, the Court further stated that a further deposition of a witness could be ordered if Plaintiff can demonstrate to the Court that the "subsequent production 'would have changed something in the deposition...' (Exhibit "C". p. 29)." (Defendants' Aff. in Opp. at 6).

Moreover, Defendants assert that Plaintiff has not demonstrated improper conduct, misrepresentation or failure to appear for depositions by Defendants that would warrant sanctions. Defendants argue that Plaintiff's own conduct has delayed Plaintiff's prosecution of the case. Defendants assert that Plaintiff cannot seek sanctions when she has not complied with discovery orders.

In reply, Plaintiff argues that Defendants do not provide in their papers "any good faith attempts to locate and produce" the outstanding discovery. Plaintiff contends there is no "legitimate hardships" involved in producing the outstanding

discovery. Plaintiff argues that the Court's statements permitting additional depositions of Defendants if new information is revealed during discovery had nothing to do with potential sanctions but was related to other discovery that was not ordered by the Court. Plaintiff asserts that the sanction will "commensurate with the particular disobedience it is designed to punish." Lastly, Plaintiff argues that Defendants assertions against Plaintiff have no basis in fact.

Legal Standard

CPLR § 3126 provides as follows:

If any party, or a person who at the time a deposition is taken or an examination or inspection is made is an officer, director, member, employee or agent of a party or otherwise under a party's control, refuses to obey an order for disclosure or willfully 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, among them:

1. an order that the issues to which the information is relevant shall be deemed resolved for purposes of the action in accordance with the claims of the party obtaining the order; or
2. an order prohibiting the disobedient party from supporting or opposing designated claims or defenses, from producing in evidence designated things or items of testimony, or from introducing any evidence of the physical, mental or blood condition sought to be determined, or from using certain witnesses; or
3. an order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or any part thereof, or rendering a judgment by default against the disobedient party.

"The nature and degree of the penalty to be imposed pursuant to CPLR § 3126 lies within the sound discretion of the trial court." *Sav. v Morgan Chase Bank, N.A.*, B&K, 2010 N.Y. Slip Op. 30589[U] [N.Y. Sup Ct, null 2010] (citations omitted). "The willful[l] and contumacious conduct can be inferred by a

party's repeated failure to respond to demands or to comply with discovery orders, absent a reasonable excuse." *Id.* (citation omitted). "The Court will not impose a sanction under CPLR s 3126 unless the party's omission to disclose was wil[l]ful." *Rodriguez v Sklar*, 56 AD2d 537, 538 [1st Dept 1977].

Discussion

Plaintiff has failed to demonstrate that Defendants willfully failed to disclose the outstanding discovery. Defendants have responded to a substantial number of demands. To date, Defendants have provided:

- Defendants' Response dated September 11, 2017 to Plaintiff's Combined Discovery Demand dated August 18, 2017;
- A CD with Decedent's Memorial records to Plaintiff's counsel on March 8, 2018;
- Photographs and insurance information to Plaintiff's counsel on September 21, 2018;
- Defendants' Response dated March 8, 2019 to Plaintiff's Notice for Discovery and Inspection dated February 13, 2019;
- An Adult Transplantation Service Rounds spreadsheet to Plaintiff's counsel on October 9, 2018;
- Photographs taken by Myskowski to Plaintiff's counsel on April 5, 2019;
- Defendants' Response dated September 18, 2019 to Plaintiff's Notice for Discovery and Inspection dated June 12, 2019;
- Defendants' First Amended Response dated September 24, 2019 to Plaintiff's Notice for Discovery and Inspection dated June 12, 2019;
- Discs of radiology images with a Certification for the Memorial Hospital chart to Plaintiff on September 25, 2019;
- Defendants' Response dated October 1, 2019 to Plaintiff's Notice for Discovery and Inspection dated September 20, 2019;

- Defendants' Response dated October 3, 2019 to Amended Notice to Take Deposition Upon Oral Examination of Sauter dated September 27, 2019;
- Defendants' Response dated October 10, 2019 to Notice to Take Deposition Upon Oral Examination of Young dated September 20, 2019;
- Defendants' First Amended Response dated October 10, 2019 to Plaintiff's Notice for Discovery and Inspection dated September 20, 2019;
- Defendants' First Amended Response dated October 10, 2019 to Amended Notice to Take Deposition Upon Oral Examination of Sauter dated September 27, 2019;
- The Curriculum vitae and Bibliography of Young and Young's Outlook Calendar to Plaintiff on October 24, 2019;
- A copy of Defendants' copies of minutes from the Transplant Board Meetings to Plaintiff on October 25, 2019;
- An Email dated October 29, 2019 advising Plaintiff that there are no NP Progress notes for October 19, 2013 in the electronic medical records; and
- Medical Staff bylaws and infection control manual policies to Plaintiff on October 31, 2019.

Moreover, the parties are still engaged in discovery. Plaintiff has shown no prejudice in taking Sauter's deposition without receiving the outstanding discovery. As stated on the record on October 8, 2019, Plaintiff can ask the Court for a continued deposition of Sauter if she learns of any new information. Based on the foregoing, Plaintiff's motion for sanctions is denied.

Wherefore, it is hereby

ORDERED that Plaintiff's motion for sanctions is denied; and it is further

ORDERED that Defendants shall provide Plaintiff with Sauter's written memos, emails, or text messages regarding Plaintiff and the Decedent up to the date of Decedent's death, and the appropriately redacted personal and professional

calendars of Sauter for February 2013 to November 2013 within 14 days from the date of this Order.

The parties are reminded that the next compliance conference was moved to March 31, 2020 to accommodate Plaintiff's schedule.

This constitutes the decision and order of the court. All other relief requested is denied.

DATED: DECEMBER 9, 2019


EILEEN A. RAKOWER, J.S.C.