

**Filip v Johnson**

2019 NY Slip Op 34256(U)

December 18, 2019

Supreme Court, Nassau County

Docket Number: Index No. 605121/18

Judge: Arthur M. Diamond

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This opinion is uncorrected and not selected for official publication.

**SUPREME COURT - STATE OF NEW YORK**

**Present:**

**HON. ARTHUR M. DIAMOND**  
**Justice Supreme Court**

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**ANCA FILIP,**

**Plaintiff,**

**-against-**

**LISA JOHNSON, M.D., STEVEN SFERLAZZA, M.D.,  
MONA DARWISH, M.D., LENOX HILL  
RADIOLOGY, LENOX HILL RADIOLOGY &  
MEDICAL IMAGING ASSOCIATES, P.C., and IVY  
OBSTETRICS AND GYNECOLOGY, LLC,  
Defendants.**

**TRIAL PART: 6**  
**NASSAU COUNTY**  
**INDEX NO: 605121/18**

**MOTION SEQ #: 3, 4**  
**SUBMIT DATE: 11/15/19**

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**The following papers having been read on this motion:**

<b>Order of Motion</b>	<b>1</b>
<b>Notice of (Cross-Motion)</b>	<b>2</b>
<b>Affirmation (Plaintiff)</b>	<b>3</b>

Defendant Johnson MD and Ivy Obstetrics move for an order, pursuant to CPLR §3126, to dismiss Plaintiff’s complaint for failure to comply with this Court’s order dated July 8, 2019; in the alternative, Defendants Johnson MD and Ivy Obstetrics have requested Plaintiff be compelled to comply with the subject order within ten (10) days from the date of this order. The remaining Defendants, Sferlazza MD, Darwish MD, Lenox Hill, and Lenox Hill Associates have cross-moved for the same relief. Plaintiff has submitted an affirmation, not opposing the motion, but rather in support of a motion to be relieved not properly before the Court. After review and consideration, both the motion and the cross-motion are hereby denied in their entirety, respectively.

As a preliminary matter, a review of the NYSCEF system for this matter indicates that Plaintiff’s current counsel has attempted to file an order to show cause to be relieved. These papers appear to have been filed on or about November 13, 2019, just a few days before the instant application was scheduled to be submitted. It also appears that this proposed order to show cause failed to include any temporary relief for Plaintiff in this matter, such as a stay of all proceedings. Nevertheless, and of greater significance, a working copy of this order to show

cause and supporting papers has never been presented to the Court for signature and consideration; thus, the matter as filed is still noted in the NYSCEF system as “pending” rather than “processed”. Accordingly, in the absence of any such properly filed application for Plaintiff’s counsel to be relieved, the Court will not consider any arguments before it on that issue, as same is not properly before the Court at the present time.

The within action was commenced by the filing of a Summons and Complaint on or about April 18, 2018. At that time, Plaintiff was represented by counsel; furthermore, her complaint contained an appropriate affidavit in accordance with CPLR §3012-a. Plaintiff’s counsel was then relieved as of the decision and order of this Court dated April 23, 2019, leaving Plaintiff *pro se*. Plaintiff then appeared on June 4, 2019, and July 8, 2019, wherein respective counsel for Defendants raised the issue that it has not been disclosed who Plaintiff’s expert is and the absence of an affidavit of merit in the case. In response to these statements, this Court issued an order, directing Plaintiff to either obtain counsel and appear with him on July 31, 2019, or to obtain an affidavit of merit on or before August 30, 2019. The matter was then adjourned to September 5, 2019, for further conference.

On September 5, 2019, Plaintiff appeared with new counsel in this matter; however, the directed affidavit had not yet been filed. This Court provided Plaintiff’s incoming counsel one week to file a notice of appearance in the case, which was done on September 9, 2019. On September 12, 2019, on the next conference date, a motion briefing schedule was provided to the parties for the instant motion practice.

The drastic sanction to strike a pleading is not available unless a party has shown that the opposing party’s default is willful and contumacious, and prejudicial to the moving party. Nudelman v. New York City Transp. Auth., 172 AD2d 503, 567 NYS2d 503 (2<sup>nd</sup> Dept., 1991). Before a Court may impose the drastic remedy of striking a pleading or preclusion of evidence for discovery violations, it must determine that the offending party’s actions were the result of willful, deliberate, and contumacious behavior. Tung Wa Ma v. New York City Transit Authority, 113 AD3d 839, 979 NYS2d 162 (2<sup>nd</sup> Dept., 2014).

CPLR §3101 requires that each party provide full disclosure of all evidence material and necessary. Harrison v. Bayley Seton Hosp., Inc., 219 AD2d 584, 631 NYS2d 182 (2<sup>nd</sup> Dept., 1995). The words “material and necessary” are to be liberally interpreted. Allen v. Crowell-

Collier Pub. Co., 21 NY2d 403, 288 NYS2d 449 (1968). Evidence which includes any facts bearing on the controversy which will assist preparation for trial by sharpening the issues and reducing delay is considered material and necessary. Id. However, discovery demands cannot be overly broad and burdensome. Rabinowitz v. St. John's, 24 AD3d 530, 808 NYS2d 280 (2<sup>nd</sup> Dept., 2005).

Defendants, in their respective motions, have failed to demonstrate to this Court that Plaintiff's failure to respond was the result of willful, deliberate, and contumacious behavior. Aside from the Court's order dated July 8, 2019, the respective motions have failed to demonstrate for this Court that they requested an affidavit or certificate of merit from Plaintiff whatsoever or that same was absent from the summons and complaint. Plaintiff's pleading clearly contains the requisite filing as required under CPLR §3012-a, signed by her prior counsel. This Court's order appears to be an unnecessary demand upon Plaintiff and thus her conduct in failing to comply with this Court's order cannot reasonably be determined to be the result of willful, deliberate, and contumacious behavior. Accordingly, the respective applications in the motion and cross-motion by Defendants to strike the complaint is hereby denied in its entirety.

Coinciding with the foregoing, it is important to note that this Court's order dated July 8, 2019, is a complete nullity under these case facts. At the date of the subject conference that gave rise to this order, Plaintiff was *pro se*. Pursuant to CPLR §3012-a(f), the provisions of the statute requiring an affidavit or certificate of merit are inapplicable to a plaintiff that is not represented by an attorney. Thus, the order dated July 8, 2019, is hereby vacated in its entirety, *sua sponte*.

Turning now to the portions of the motion and cross-motion which seek to compel Plaintiff to comply with the order, in light of this Court's vacatur of said order, same is denied as moot. However, even assuming, *arguendo*, the order was still in effect, the Court is not satisfied that an order to compel is necessary. As stated in the foregoing, Plaintiff's complaint already contains the requisite certificate of merit, and to compel same is unnecessary at the current juncture. Once again, the Court cannot speak to outstanding discovery owed to Defendants by Plaintiff in the form of a CPLR §3101(d) expert witness disclosure, as the papers do not indicate that same was demanded and has yet to be provided by Plaintiff. Nonetheless, in the absence of

a demonstration by Defendants that Plaintiff is not in compliance with certain demands, the respective requests to compel discovery from Plaintiff contained in the motion and cross-motion are hereby denied.

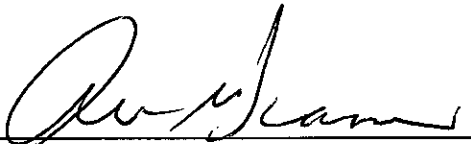
This Court would be remiss if it did not address the static nature of this case currently. By all appearances, since the preliminary conference order was entered into by the parties on October 16, 2018, no discovery has been exchanged by the parties and the matter has now stalled for nearly one year following the withdrawal of Plaintiff's original counsel. The Court will not be able to allow this matter to continue to linger in discovery without progress, and the parties and their respective counsel should be prepared to move forward in expedited fashion beginning on the next conference date.

Plaintiff shall file and serve a copy of the within order with notice of entry upon Defendants on or before January 10, 2020. The parties are currently scheduled to appear for a certification conference on January 17, 2020, at 9:30 am, and shall be prepared to discuss any outstanding paper discovery as well as scheduled depositions.

This hereby constitutes the decision and order of this Court.

**ENTER**

DATED: December 18, 2019

  
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**HON. ARTHUR M. DIAMOND**  
J.S.C.

**ENTERED**  
DEC 19 2019  
NASSAU COUNTY  
COUNTY CLERK'S OFFICE