SUPREME COURT - STATE OF NEW YORK

PRESENT:

Honorable James P. McCormack

Justice

_____X

SUSAN JASKOLSKI,

Plaintiff(s),

-against-

ST. FRANCIS HOSPITAL,

Defendant(s).

_____X

TRIAL/IAS, PART 21
NASSAU COUNTY

Index No. 610509/17

Motion Seq. No.: 001
Motion Submitted: 1/4/19

The following papers read on this motion:

Notice of Motion/Supporting Exhibits.....X
Affirmation in Opposition/Supporting Exhibits.....X
Reply Affirmation.....X

Defendant, St. Francis Hospital (St. Francis), moves this court for an order, pursuant to CPLR §3126, dismissing the complaint, or precluding Plaintiff from offering evidence at trial, or, in the alternative, vacating the note of issue and directing certain discovery to continue. Plaintiff, Susan Jaskolski (Jaskolski) opposes the motion.

Before a motion relating to discovery or bill of particulars can be brought, the movant is required to submit an affirmation of good faith indicating "that counsel has conferred with counsel for the opposing party in a good faith effort to resolve the issues

raised by the motion." 22 NYCRR 202.7(a). The affirmation of good faith is supposed to indicate that the parties consulted over the discovery issues and the "time, place and nature of the consultation and the issues discussed...", or that such conferral would be futile. 22 NYCRR 202.7(c). The parties are to make a diligent effort to resolve the discovery dispute. (*Deutsch v. Grunwald*, 110 A.D.3d 949 [2nd Dept. 2013]; *Murphy v. County of Suffolk*, 115 A.D.3d 820 [2nd Dept. 2014]; *Chichilnisky v. Trustees of Columbia University in City of New York*, 45 A.D.3d 393 [1st Dept. 2007]). While the affirmation of good faith herein is inadequate, the court's notes indicate these issues were discussed at a prior conference and the court therefore acknowledges that any further conferral would be futile. .

CPLR § 3124 provides that the court has the discretion to compel discovery or to strike a pleading for failure to abide with discovery and disclosure orders. At the discretion of the court, a party's failure to comply with such requests may result in sanctions, pursuant to CPLR § 3126. "Although actions should be resolved on the merits where possible, a court may strike [a pleading] for failure to comply with court-ordered discovery where there is a clear showing that the noncompliance is willful and contumacious" (*Rawlings v. Gillert*, 78 AD3d 806 [2d Dept 2010]; *see also* CPLR 3126[3]; *Moray v. City of Yonkers*, 76 AD3d 618 [2d Dept 2010]; *Palomba v. Schindler El. Corp.*, 74 AD3d 1037 [2d Dept 2010]; *Rini v. Blanck*, 74 AD3d 941 [2d Dept 2010]). The determination of whether to strike a pleading is addressed to the sound discretion of

the trial court (*see Raville v. Elnomany*, 76 AD3d 520 [2d Dept 2010]; *Pirro Group, LLC v. One Point St., Inc.*, 71 AD3d 654, 655 [2d Dept 2010]; *Workman v. Town of Southampton*, 69 AD3d 619, 620 [2d Dept 2010]).

Herein, St. Francis complains that Jaskolski has failed to respond to certain discovery demands, and should be compelled to appear for an neurological independent medical examination (IME). Further, St. Francis seeks to have the note of issue vacated to allow discovery to continue. Jaslolski states that the case has certified ready for trial which is an indication that all discovery is complete. The court disagrees with Jaslolski's interpretation. The case was certified ready for trial, over objection, because the parties showed little interest in moving the case forward or abiding by the court's schedule and orders. For example, the preliminary conference order directed all depositions to occur on June 22, 2018, and were not to be adjourned without court approval. At the July 18, 2018 conference, the parties informed the court that the depositions were not done, yet could not explain why no one sought court approval. The court then directed the depositions be completed by August 24, 2018. At the September 12, 2018 conference, the parties again informed the court the depositions did not go forward, yet again the court was not contacted to seek approval to adjourn them.

Parties to litigation are entitled to "full disclosure of all evidence material and necessary in the prosecution or defense of an action, regardless of the burden of proof" (CPLR § 3101[a]). This provision has been liberally construed to require disclosure "of

any facts bearing on the controversy which will assist the parties' preparation for trial by sharpening the issues and reducing delay *(Allen v. Crowell–Collier Publ. Co.*, 21 NY2d 403, 406 [1968]). "If there is any possibility that the information is sought in good faith for possible use as evidence-in-chief or in rebuttal or for cross-examination, it should be considered evidence material ... in the prosecution or defense" (*Id.* at 407, quoting CPLR § 3101). Nonetheless, litigants do not have carte blanche to demand production of any documents or other tangible items that they speculate might contain useful information (*see Geffner v. Mercy Med. Ctr.*, 83 AD3d 998 [2d Dept 2011]; *Foster v. Herbert Slepoy Corp.*, 74 AD3d 1139 [2d Dept 2010]; *Gilman & Ciocia, Inc. v. Walsh*, 45 AD3d 531 [2d Dept 2007]; *Vyas v. Campbell*, 4 AD3d 417 [2d Dept 2004]). A party will not be compelled to comply with disclosure demands that are unduly burdensome, lack specificity, seek privileged material or irrelevant information, or are otherwise improper (*see e.g. Geffner v. Mercy Med. Ctr.*, 83 AD3d 998 [2d Dept 2011]; *Gilman & Ciocia, Inc. v. Walsh*, 45 AD3d 531 [2d Dept 2007]; *Astudillo v. St. Francis–Beacon Extended Care Facility, Inc.*, 12 AD3d 469 [2d Dept 2004]; *Crazytown Furniture v. Brooklyn Union Gas Co.*, 150 A.D.2d 420 [2d Dept 1989]).

St. Francis specifically complaints that Jaskolski failed to respond to two demands, one dated September 18, 2018 that sought 11 authorizations and one dated September 28, 2018, that sought a video, cancelled checks, and four more authorizations. Jaskloski states that the September 28, 2018 demand was complied with, and the September 18,

2018 demand was objected to. In reply, St. Francis denies receiving the response to the September 28, 2018 demand. Therefore, Jaskloski will re-serve the response to the September 28, 2018 demand within 10 days of the date of this order, to the extent it has not already been re-served.

As for the purported response to the September 18, 2018 demand, the court finds it either did not actually respond to that demand, and to the extent it did, it was insufficient. Therefore, Jaskloski has waived all objections other than privilege and that the demands were palpably improper. (*Sprague v. International Business Machines Corp.*, 114 A.D.2d 1025 [2nd Dept. 1985]). Of the 10 doctors contained in the demand for authorizations, only one, Dr. Paval Romano, is discussed in Jaskloski's deposition. He is a neurologist, and the court agrees with Jaskloski that the neurological records and prior treatment has no connection to this case. While she had been treated for dizziness in the past, there is no evidence or even supposition that dizziness in any way played a role in this accident. Instead, she states she hit the side of a bench when rushing back into the hospital during heavy rain. Therefore, Jaskloski does not have to provide an authorization for Dr. Romano, and does not have to appear for the neurological IME.

As for the nine remaining doctors, it appears Jaskloski has left it up to the court to guess how she is connected to them. Other than stating in conclusory manner that they seek discovery for "unrelated medical conditions", the court has no way to determine who they are or for what reasons they treated her. As Jaskloski has waived all objections other

than privilege and palpably improper, and as she has not established that these demands were privileged or palpably improper, she will be given 20 days from being served with notice of entry of this order to provide the authorizations. Failure to comply will result in the complaint being dismissed.

Despite directing authorizations be provided, the court will not vacate the note of issue. It is anticipated in the certification order that post certification authorizations will be sought and provided.

Accordingly, it is hereby

ORDERED, that St. Francis' motion to vacate the note of issue is DENIED; and it is further

ORDERED, the St. Francis' motion to compel responses to their September 18 and September 28, 2018 discovery demands is GRANTED, consistent with the terms of this order. Failure to comply will result in the complaint being dismissed.

This constitutes the decision and order of the court.

Dated: February 15, 2019
Mineola, New York

Hon. James P. McCormack, J. S. C.

ENTERED
FEB 15 2019
NASSAU COUNTY
COUNTY CLERK'S OFFICE