SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. JOHN J. KELLEY **PART** IAS MOTION 56EFM

Justice

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ANNABELLA MURPHY, as Administrator of the Estate of CHARLES MURPHY, a/k/a CHARLES WILLIAM MURPHY,

Plaintiffs,

- v -

AARON METRIKIN, M.D.,

Defendant.

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INDEX NO. 805387/2018

MOTION DATE 09/18/2020

MOTION SEQ. NO. 004

DECISION AND ORDER

The following e-filed documents, listed by NYSCEF document number 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, and 106 (Motion 004)

were read on this motion to/for COMPEL DISCOVERY/IMPOSE DISCOVERY SANCTIONS/COMPEL SECURITY FOR COSTS.

In this action to recover damages for wrongful death and medical malpractice, the defendant moves pursuant to 3124 to compel the plaintiff to respond to the defendant's post-deposition notice to produce or, in the alternative, pursuant to CPLR 3126, to (a) dismiss the complaint with prejudice on the basis of the plaintiff's failure to respond to outstanding discovery demands or (b) preclude the plaintiff from adducing evidence at trial regarding her claims. The defendant also seeks an award of costs incurred in making the instant motion. In addition, the defendant moves pursuant to CPLR 8501, 8502, and 8503 to compel the plaintiff to give security for costs, as of right, and thereupon to grant a stay of all proceedings until the security is posted in an amount to be determined by the court. The plaintiff opposes the motion. The motion is granted to the extent that the plaintiff is directed to post an undertaking in the sum of $500, all proceedings are stayed pending the posting of the undertaking. The plaintiff is further directed, within 45 days of the dissolution of the stay, to produce complete bank statements for the checking, credit card, and Bank of America accounts for the years 2015 and 2016, as

detailed in the decedent's family finance spreadsheet, or a properly subscribed and notarized *Jackson* affidavit (*Jackson v City of New York,* 185 AD2d 768 [1st Dept 1992]) attesting that she has no such documents or cannot find documents related to the subject demands after a diligent search. The defendant's motion otherwise is denied.

On January 28, 2019, the defendant served the plaintiff with a second notice to produce. On March 6, 2019, the defendant served a third and fourth notice to produce, which contained separate demands. On March 26, 2019, the defendant moved to compel the plaintiff to respond to the second, third, and fourth notices to produce (SEQ 001). On October 16, 2019, the Supreme Court, New York County (Shulman, J.), granted the motion in part and directed the plaintiff to respond to several of the defendant's demands within 30 days of that order. In a preliminary conference order dated November 26, 2019, the court (Shulman, J.) directed the plaintiff to provide authorizations permitting the defendant to obtain her decedent's insurance records with United Healthcare. That order also scheduled the plaintiff's deposition for on or before January 30, 2020, and the defendant's deposition for on or before February 20, 2020. In a subsequent compliance conference order dated February 4, 2020, the court (Shulman, J.) scheduled the continued deposition of the plaintiff for March 16, 2020, and scheduled March 31, 2020 as the new deposition date for the defendant.

On February 14, 2020, the defendant submitted a proposed order to show cause, pursuant to which he requested permission to move to compel the plaintiff to produce additional documents and to stay his own deposition until such documents were produced (SEQ 002). On that same date, the plaintiff provided the discovery in question via email and by hand. On February 18, 2020, the defendant withdrew his proposed order to show cause. On that same date, the defendant served a notice to admit, to which the plaintiff responded on February 28, 2020.

On March 17, 2020, however, the court was closed down due to the COVID-19 pandemic. On March 22, 2020, the courts suspended filings in all actions. On May 2, 2020, the

Chief Administrative Judge of the New York State Courts issued Administrative Order 88/20, providing that New York courts "shall not order or compel, for a deposition or other litigation discovery, the personal attendance of physicians or other medical personnel . . . who perform services at a hospital or other medical facility that is active in the treatment of COVID-19 patients." The Administrative Order also provided that "parties are encouraged to pursue discovery in cooperative fashion to the fullest extent possible." Electronic filings were resumed on May 5, 2020, and in-person filings with the court in connection with non-electronically filed actions were resumed on June 10, 2020. On that same date, the Supreme Court, New York County, reopened for justices and judicial staff. On June 22, 2020, Administrative Order 88/20 was rescinded, although the Chief Administrative Judge continued to urge parties "to pursue discovery in a cooperative fashion and to employ remote technology in discovery wherever possible."

On August 5, 2020, the plaintiff was deposed for the second time in response to the defendant's motion to compel an additional deposition (SEQ 003) that he withdrew when the deposition was scheduled and conducted. On August 11, 2020, the defendant served a second post-deposition notice to produce, requesting HIPAA-compliant authorizations for medical and hospital records pertaining to the decedent's cancer treatment, and invoices and financial records for numerous items for the years 2015 and 2016. In addition, the defendant sought checking and credit card statements and tax returns. On that same date, the plaintiff responded to that notice to produce, and stated that the authorizations and invoices would be provided to the extent that she could identify the decedent's health-care providers and to the extent that the invoices and records existed. The plaintiff nonetheless generally objected to the remainder of this second post-deposition request as "irrelevant, abusive, and offensive," and stated that she would not respond without a clear court order. The plaintiff also stated that she had already provided the defendant with checking and credit card statements and tax returns.

The defendant made the instant motion on September 18, 2020, asserting that he never received the documents that the plaintiff claims to have provided.

On October 12, 2020, the plaintiff served the defendant with three authorizations permitting him to obtain the decedent's medical records from Dr. Joseph Felder, Dr. Michael Brodherson, and Dr. Michael Zelefsky.

The action thereafter was reassigned to this court.

CPLR 3126 authorizes the court to sanction parties who "refuse[ ] to obey an order for disclosure or wilfully fail[ ] to disclose information which the court finds ought to have been disclosed" (*Kutner v Feiden, Dweck & Sladkus*, 223 AD2d 488, 489 [1st Dept 1998]). "The nature and degree of the penalty to be imposed pursuant to CPLR 3126 lies within the sound discretion of the Supreme Court" (*Lazar, Sanders, Thaler & Assoc., LLP v Lazar*, 131 AD3d 1133, 1133 [2d Dept 2015]; *see Maxim, Inc. v Feifer*, 161 AD3d 551, 554 [1st Dept 2018]).

> "Although not expressly set forth as a sanction under CPLR 3126, . . . the imposition of a monetary sanction under CPLR 3126 may be appropriate to compensate counsel or a party for the time expended and costs incurred in connection with an offending party's failure to fully and timely comply with court-ordered disclosure"

(*Lucas v Stam*, 147 AD3d 921, 926 [2d Dept 2017]; *see Maxim, Inc. v Feifer*, 161 AD3d at 554). A party's failure to satisfy his or her discovery obligations, particularly after a court order has been issued, "may constitute the dilatory and obstructive, and thus contumacious, conduct" (*Kutner v Feiden, Dweck & Sladkus*, 223 AD2d at 489; *see CDR Creances S.A. v Cohen*, 104 AD3d 17 [1st Dept 2012]; *Reidel v Ryder TRS, Inc.*, 13 AD3d 170 [1st Dept 2004]).

The defendant, however, failed to establish that the plaintiff's conduct during discovery was willful, contumacious, or in bad faith (*see Lee v 13th St. Entertainment LLC*, 161 AD3d 631, 632 [1st Dept 2018]; *Palmenta v Columbia Univ.*, 266 AD2d 90, 91 [1st Dept 1999]). At the time that this motion was made, there were three court orders that had been issued directing the plaintiff to produce discovery items. After the issuance of those orders, or after the defendant made a motion to compel, the plaintiff served discovery responses upon the defendant, and a

review of the parties' submissions warrant the conclusion that she attempted in good faith to comply with the orders. The plaintiff's conduct thus does not constitute a "pattern of disobeying court orders and failing to comply with disclosure obligations" (*Amini v Arena Constr. Co., Inc.*, 110 AD3d 414, 415 [1st Dept 2013]; *see Butler v Knights Collision Experts, Inc.*, 165 AD3d 406, 407 [1st Dept 2018]).

Where, as here, the party from whom discovery is sought ultimately complies with the disputed discovery order, and satisfies his or her discovery obligations within a reasonable time after the issuance of the order, the imposition of sanctions is rarely warranted (*see Marte v City of New York*, 102 AD3d 557, 558 [1st Dept 2013]; *Sau Ting Cheng v Prime Design Realty, Inc.*, 44 AD3d 644, 645 [2d Dept 2007]; *Resnick v Schwarzkopf*, 41 AD3d 573, 573 [2d Dept 2007] [substantial compliance with discovery obligations, even where tardy, does not warrant imposition of sanction]; *Nussbaum v D'Amico*, 29 AD3d 449 [1st Dept 2006]). The imposition of a monetary sanction is warranted only where an unexcused delay is significant (*see Knoch v City of New York*, 109 AD3d 459, 459 [2d Dept 2013] [three-year delay]; F*riedman, Harfenist, Langer & Kraut v Rosenthal*, 79 AD3d 798, 801 [2d Dept 2010] [more than one-year delay]) or a party willfully refuses to comply with its discovery obligations (*see Maxim, Inc. v Feifer*, 161 AD3d at 554). The delay here was not significant and, in any event, was attributable, in part, to the vagaries of the COVID-19 pandemic. Hence, there is no basis for the imposition of discovery sanctions upon the plaintiff.

Moreover, the fact that a party serves discovery materials during the pendency of a CPLR 3126 motion to strike his or her pleading does not render the party's prior failure to make discovery willful or contumacious (*see Chamberlain, D'Amanda, Oppenheimer & Greenfield v Beauchamp*, 247 AD2d 858, 859 [4th Dept 1998]; *see also Butler v Knights Collision Experts, Inc.*, 165 AD3d at 407). "[A]ny mere lack of diligence in furnishing certain requested materials is not a ground for dismissal" or other sanctions (*Moon 170 Mercer, Inc. v Vella*, 146 AD3d 537,

539 [1st Dept 2017]; *see Bueno v 562 W. 174th St. Equities, LLC*, 2020 NY Slip Op 30223[U], 2020 NY Misc LEXIS 374 [Sup Ct, N.Y. County, Jan. 28, 2020 [Kelley, J.]).

Nonetheless, CPLR 3124 provides that

> "If a person fails to respond to or comply with any request, notice, interrogatory, demand, question or order under this article, except a notice to admit under section 3123, the party seeking disclosure may move to compel compliance or a response."

It is thus appropriate for the court to fix a firm deadline for the production of the discovery requested by the defendant (see CPLR 3124). Hence, that branch of the defendant's motion seeking to compel that disclosure is granted (*see Willam J. Jenack Estate Appraisers & Auctioneers, Inc. v Rabizadeh*, 131 AD3d 960, 963-964 [2d Dept 2015]; *Rocco v Family Foot Ctr.*, 94 AD3d 1077, 1080 [2d Dept 2012]), and the plaintiff is directed, in accordance with the schedule set forth below, to provide the defendant with complete bank statements for the checking, card, and Bank of America accounts for the years 2015 and 2016, as detailed in the family finance spreadsheet created by the decedent or a properly subscribed and notarized *Jackson* affidavit.

The plaintiff submits an affirmation under the penalties for perjury, in which she states that she does not keep receipts, that all payments on behalf of her decedent were basically made through credit cards or checks, and that she does not have receipts for the period from March 2015 to March 27, 2017. She asserts that, "a long time ago," she had provided defense counsel with all credit card records and all of the checking account records, as well as tax returns. The plaintiff contends that

> "[t]here was no rational reason for keeping receipts when all our expenses were documented on credit cards or checks. Not every transaction begets a receipt. In addition, when my husband was alive, he took care of our financial records. He is unfortunately now deceased. To my knowledge, my husband did not keep receipts for expenses such as what was demanded."

She asserts that she cannot provide receipts for every "burdensome request made by defense counsel, with requests ranging from groceries to restaurants and flowers," that "[s]ome of the

requests are absurd such as item y: 'other/cash' whatever that might mean." The plaintiff concludes that, to her knowledge, "these records simply do not exist."

While the contents of that affirmation may satisfy the standards applicable to a *Jackson* affidavit (*see Jackson v City of New York,* 185 AD2d at 770), pursuant to which a party asserts that he or she has no documents responsive to a demand or cannot find documents related to the subject demands after a diligent search, the plaintiff affirms that she signed the affirmation outside of the United States. Moreover, although a declarant who is neither an attorney nor a physician may employ an affirmation in lieu of an affidavit if he or she has religious objections to swearing an oath (*see Slavenburg Corp. v Opus Apparel,* 53 NY2d 799 [1981]), the affirmation must still be notarized (*see id.*; *Diaz v Tumbiolo*, 111 AD3d 877 [2d Dept 2013]; *People v Eisenstadt*, 48 Misc 3d 56 [App Term, 9th & 10th Jud Dists 2015]; CPLR 2300). There is no indication that the plaintiff is submitting an affirmation in lieu of an affidavit for religious reasons, and the affirmation is not notarized. Hence, the affirmation is without evidentiary value in establishing the facts that the plaintiff alleges therein. The court further notes that the plaintiff's statement, executed as it was outside of the State of New York, was not accompanied by a certificate of conformity (*see* CPLR 2309), pursuant to which an attorney or other official is required to attest in writing that the format of the affirmation or affidavit that is being employed conforms with the format required in the jurisdiction in which the statement is subscribed. To satisfy her discovery obligations, the plaintiff must either produce the documents claimed by the defendant to be outstanding or provide a properly subscribed and notarized *Jackson* affidavit along with the required certificate of conformity.

The defendant correctly contends, however, that the plaintiff should be compelled to provide security for costs pursuant to CPLR 8501(a). That statute mandates the court, "upon motion by the defendant," to "order security for costs to be given by the plaintiffs where none of them is a domestic corporation, a foreign corporation licensed to do business in the state *or a resident of the state* when the motion is made" (emphasis added) (*see Clement v Durban*, 32

NY3d 337, 344-345 [2018]). The rule provides an exception where the plaintiff has been allowed to proceed as a poor person or is the petitioner in a habeas corpus proceeding (*see id.* at 344).

In the instant case, the plaintiff testified at her August 5, 2020 deposition that she was moving to London, United Kingdom, with her two of her sons, and that her children were enrolled in school in London. She also testified that she would be "renting a place" in London. Furthermore, in the plaintiff's affirmation in opposition to this motion, dated October 13, 2020, she stated that she was currently residing in London, and affirmed pursuant to CPLR 2106(b) that she was located outside the geographic boundaries of the United States at the time that she signed her affirmation. Lastly, the plaintiff does not meet the exceptions to CPLR 8501, as she has not been granted permission to proceed as a poor person and this is not a habeas corpus proceeding in which she is a petitioner. Hence, it is appropriate for this court to order the plaintiff to give security for costs as of right (*see Garrett v Community Gen. Hosp.*, 288 AD2d 928, 929 [4th Dept 2001] [where administrator of estate did not reside in New York when defendants moved to compel the court to order security for costs, trial court "properly granted defendants' cross motion for an order directing plaintiff, a nonresident, to provide security for costs pursuant to CPLR 8501[a]"); *cf.* CPLR 8501[b] ["Upon motion by the defendant with notice, or upon its own initiative, the court may order the plaintiff to give security for costs in an action by . . . an executor or administrator," regardless of domicile]).

CPLR 8503 provides that

> "Security for costs shall be given by an undertaking in an amount of five hundred dollars in counties within the city of New York, and two hundred fifty dollars in all other counties, or such greater amount as shall be fixed by the court that the plaintiff shall pay all legal costs awarded to the defendant."

The court, in its discretion, thus may determine that an amount greater than $500 should be paid into the court by an out-of-state plaintiff, based on the facts and circumstances of the particular action (*see Beatty v Williams*, 227 AD2d 912, 912 [4th Dept 1996]; *Howell v Rothberg*,

197 AD2d 815 [3d Dept 1993]). Consequently, while the minimum security required is $500 with respect to an action in which the venue is placed in a county within the City of New York, the court, in fixing the amount of the undertaking, may fix an increased amount in consideration of the amount of costs likely to be expended (*see Manente v Sorecon Corp.*, 22 AD2d 954 [2d Dept 1964] [security for costs was appropriately fixed at $4,500 where disbursements were likely to reach that amount in light of appellate printing costs and other disbursements likely to be incurred in the case (*see also Beatty v Williams*, 227 AD2d at 912 [requiring non-resident to post security for costs in the amount of $5,000]; *Howell v Rothberg*, 197 AD2d 815 [3d Dept 1993][security for costs in the amount of $2,000 was reasonable]).

Here, the defendant argues that the plaintiff should be compelled to post an undertaking in the sum of $5,000.00, based primarily on the attorneys' fees that he has already incurred in making at least four motions to compel discovery. "Costs," as defined in CPLR article 81, however, do not include an award of attorneys' fees. Rather, were the defendant to prevail in this action after a trial, he would be entitled to costs in the sum of $300.00 (*see* CPLR 8201[3]). Giving the defendant the benefit of doubt by assuming that he might move for summary judgment at the close of discovery, he would be entitled to costs on a motion, which the CPLR fixes at $100 (*see* CPLR 8202). Although a party entitled to an award of costs is also entitled to tax his or her disbursements on both an action and a motion (*see* CPLR 8301[a], [b]), the statute requiring a nondomiciliary to post security for costs does not, by its terms, necessarily require the nondomiciliary to post security for disbursements, although, as noted above, several courts have considered taxable disbursements in arriving at an appropriate amount for the security. The court concludes, based on the future costs and disbursements that the defendant is likely to incur, that the undertaking should be fixed in the amount of $500.

The court notes that, pursuant to CPLR 8502,

> "[u]ntil security for costs is given pursuant to the order of the court, all proceedings other than to review or vacate such order shall be stayed. If the plaintiff shall not have given security for costs at the expiration of thirty days from

the date of the order, the court may dismiss the complaint upon motion by the defendant, and award costs in his favor."

Accordingly, it is

ORDERED that the defendant's motion is granted to the extent that

(a) the plaintiff shall give security for costs in the amount of $500 within 30 days of the entry of this order, by posting an undertaking, which undertaking may be in the form of a surety bond or a deposit of cash, money order, or bank check with the County Clerk of the County of New York, and such undertaking shall remain in effect until further order of this court;

(b) pursuant to CPLR 8502, all proceedings in this case are stayed pending the posting of the undertaking, and if the plaintiff fails to post the undertaking, at the expiration of 30 days from the date of entry of this order, the court may dismiss the complaint upon motion by the defendant, and award costs in his favor; and

(c) within 45 days of the vacatur and dissolution of the stay by virtue of the posting of the undertaking, the plaintiff shall provide complete bank statements for the checking, credit card, and Bank of America accounts for the years 2015 and 2016, as detailed in the family finance spreadsheet created by the decedent, or provide a properly subscribed and notarized *Jackson* affidavit (*Jackson v City of New York,* 185 AD2d 768 [1st Dept 1992]) attesting that she has no such documents or cannot find documents related to the subject demands after a diligent search, along with the required certificate of conformity,

and the defendant's motion is otherwise denied; and it is further,

ORDERED that the parties shall appear remotely for a status conference on August 17, 2021, at 10:15 a.m., and the court shall send an e-mail invitation to counsel for all parties to participate in said conference via the Microsoft Teams application, at which conference a new note of issue filing deadline will be established.

This constitutes the Decision and Order of the court.

4/6/2021
DATE

JOHN J. KELLEY, J.S.C.

CHECK ONE:		CASE DISPOSED		X	NON-FINAL DISPOSITION		
		GRANTED	DENIED	X	GRANTED IN PART		OTHER
APPLICATION:		SETTLE ORDER			SUBMIT ORDER		
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN			FIDUCIARY APPOINTMENT		REFERENCE