

Whetstone v Breton
2021 NY Slip Op 33049(U)
December 9, 2021
Supreme Court, Bronx County
Docket Number: Index No. 24870/2020E
Judge: Ben R. Barbato
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX

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PATRICIA WHETSTONE

DECISION and ORDER
Index No. 24870/2020E

Plaintiff,

- against -

SANTIAGO BRETON, et al.

Defendants.
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HON. BEN R. BARBATO

Upon the foregoing papers, the defendants Norma L. Murillo and MJM Travel Group, Inc. (“Defendants”) move for an order (1) pursuant to CPLR 3126, precluding the plaintiff Patricia Whetstone (“Plaintiff”) from offering any evidence regarding the alleged injury to her left shoulder for spoliation of critical evidence; (2) for such other sanctions as the Court may deem appropriate, including dismissal of Plaintiff’s complaint; and (3) for such other and further relief as this Court deems just and proper. Plaintiff opposes the motion.

The motion is being entertained by this Court due to the unavailability of the Hon. Mary Ann Briganti, J.S.C.

Background

This matter arises out of a motor vehicle accident that occurred on January 31, 2020. Defendants’ answer included combined discovery demands, and a “Notice of Defense Medical Examination (Pre-Surgery)” (hereinafter “IME”) designating orthopedic surgeon Andrew N. Bazos, M.D. The notice included explicit language warning that the IME was to be conducted before Plaintiff underwent any further non-emergency surgery. The notice further provided: “[t]o the extent Plaintiff undergoes any further non-emergency surgery before attending the examination, Defendants

will make the appropriate spoliation motion, seeking dismissal of plaintiff's Complaint and other relief, based on case law from Bronx County and Queens County and CPLR 3126."

Defendants' counsel states that just after answering, in the beginning of July 2020, he reached out to Plaintiff's counsel regarding a settlement offer, but her voicemail was full. He followed up via e-mail. Plaintiff's counsel responded to the e-mail saying that the offer (\$20,000) was denied, and further e-mailed settlement negotiations followed. At that time, Plaintiff's counsel advised that her client was scheduled for left shoulder surgery on July 22, 2020. Defendants' counsel then reminded Plaintiff of the above notice. Defendants' counsel stated that this was clearly non-emergency surgery, and subject to spoliation sanctions. Plaintiff's counsel then served a letter rejecting Defendants' notice of defense medical examination. Plaintiff's counsel, in follow-up e-mails, explained that her client had surgery scheduled which couldn't go forward because of COVID. Counsel also stated that her client "cannot be asked to stay in physical anguish because you demand an examination." Defendant again responded saying that Plaintiff must appear for a pre-surgery medical examination under these circumstances. Plaintiff underwent left shoulder arthroscopic surgery on July 22, 2020.

In support of their motion, Defendants submit *inter alia* an affirmation from Dr. Bazos, their orthopedist. Dr. Bazos states that he reviewed Plaintiff's medical records, including ambulance report and emergency room records, MRI reports (he is awaiting the actual imaging for review), and surgery records. Dr. Bazos states that he was never contacted by Plaintiff to attend a physical examination before she underwent the left shoulder surgery. He claims that "[i]n order to make a full medical assessment of a person's condition, including a determination of whether or not surgery was needed or preferred treatment, it would be necessary for me to examine a person before a surgical alteration or repair has been performed. Being given the opportunity to examine a person only after surgery has been performed is analogous to altering a crime scene before detectives have had an opportunity to investigate it." Dr. Bazos alleges that it would have been necessary to examine Plaintiff prior to

surgery, in order for him to opine as to whether the surgery was medically necessary or appropriate. Among things that would be available before surgery, but not available now, would be Plaintiff's physical status including range-of-motion, and whether she was putting in effort, or whether her complaints correlated with imaging studies and any signs of impingement or other etiology.

Defendants thus claim that they have been irreparably prejudiced as a result of Plaintiff's spoliation of critical evidence. Accordingly, they seek an order imposing the appropriate sanctions, including dismissal of the complaint.

In opposition, Plaintiff alleges that the motion should be denied because Plaintiff's actions were not willful or in bad faith. In an affirmation, Plaintiff's counsel asserts that her adversary did not remind her about the pre-surgery examination notice until after she rejected a settlement demand and advised that her client was scheduled for surgery. Plaintiff notes that, if Defendants had believed that the IME was of such importance, they would have provided a date. Plaintiff's counsel states that she had no objection to complying with the request for a physical examination, but counsel cannot demand, after rejection of a settlement offer, that Plaintiff reschedule an already-scheduled appointment. Plaintiff notes that she provided medical records to Defendants, and Defendants will not be prejudiced since they will have those records including authorizations for additional materials to assess Plaintiff's pre-surgery status.

Applicable Law and Analysis

Under CPLR 3126, sanctions may be imposed "when a party intentionally, contumaciously, or in bad faith fails to comply with a discovery order or destroys evidence prior to an adversary's inspection" (*see Melcher v. Apollo Medical Fund Management LLC.*, 105 AD3d 15 [1st Dept. 2013], *citing Sage Realty Corp. v. Proskauer Rose*, 275 AD2d 11, 17 [1st Dept. 2000]; *lv. dismissed*, 96 NY2d 937 [2001]). The First Department has recently held that "the condition of one's body is not

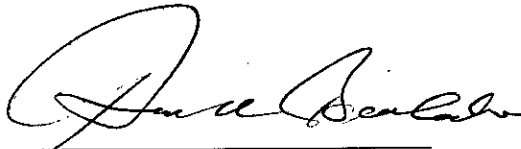
the type of evidence that is subject to a spoliation analysis” and directed that lower court decisions holding otherwise should not be followed (*Gilliam v. Uni Holdings*, ___ A.D.3d ___ 2021 N.Y. Slip Op. 06798 [1st Dept. Dec. 7, 2021]). The Court further stated, “[t]o so hold would improperly subject a plaintiff’s health condition to an unsuitable legal analysis. Instead, a failure to appear for an ME, regardless of whether the failure to appear is preceded by medical treatment for the condition at issue, should be analyzed the same as other failures to comply with court-ordered discovery” (*id.*).

In light of the above precedent, Defendants’ motion is denied.

This constitutes the Decision and Order of this Court.

ENTER

Dated: 12/9/2021



Ben R. Barbato, J.S.C.