

Rudansky v City MD

2024 NY Slip Op 31508(U)

April 24, 2024

Supreme Court, New York County

Docket Number: Index No. 805384/2021

Judge: John J. Kelley

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This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. JOHN J. KELLEY PART 56M

Justice

-----X

ALISON RUDANSKY,

Plaintiff,

- v -

CITY MD and JANETTE NESHEIWAT, M.D.,

Defendants.

-----X

INDEX NO. 805384/2021

MOTION DATE 04/08/2024

MOTION SEQ. NO. 001

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 001) 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47

were read on this motion to/for DISCOVERY/DISMISS/X-MOTION
DISCOVERY/DISMISS.

In this action to recover damages for medical malpractice, the defendants move pursuant to CPLR 3124 to compel the plaintiff to respond to outstanding demands for particulars and discovery, and to comply with prior case management orders or, in the alternative, pursuant to CPLR 3126 for the imposition of sanctions for the plaintiff's alleged failure to provide those particulars and discovery, and failure to comply with those orders. The plaintiff opposes the motion and, although she did not serve a notice of cross motion, she requests, in her opposition papers, that she be granted relief pursuant to CPLR 3126 striking the defendants' answer for their failure to schedule firm deposition dates. The motion and cross application are granted only to the extent that the parties shall appear for a remote status conference order on May 14, 2024, at 11:00 a.m., at which time all outstanding discovery issues shall be resolved. The motion and cross application are otherwise denied.

In a preliminary conference order dated June 9, 2022, the court scheduled the plaintiff's deposition for September 16, 2022, the defendant City MD's deposition for October 14, 2022, and the defendant Janette Nesheiwat, M.D.'s deposition for November 11, 2022. That order

further provided that “[a]ll dates listed . . . are dates certain and may NOT be adjourned unless the time is extended by a ‘so-ordered’ OR court-approved written stipulation.” It further provided that the

“[i]nability to obtain medical records prior to the deposition dates shall NOT be cause for adjournment of the deposition. If the records obtained reveal the need for additional information, a further limited deposition may be held by agreement of the parties or by Order of the Court.”

The preliminary conference order also directed that “THE DEPOSITION OF EACH DEFENDANT SHALL BE CONDUCTED ON THE DATE SET FORTH ABOVE EVEN THOUGH AN EARLIER SCHEDULED DEPOSITION OR (sic) ANOTHER DEFENDANT WAS NOT CONDUCTED.” Further, the order directed that, on or before July 11, 2022, the plaintiff was to provide a response to the defendants’ March 8, 2022 notice to produce and discovery demands, and to inform the defendants whether she intended to pursue a claim for lost earnings.

The depositions were not conducted on the scheduled dates and, according to the defendants, the plaintiff did not respond to the March 8, 2022 notice and demands within the time fixed by the preliminary conference order. In a compliance conference order dated November 28, 2022, the court fixed the following discovery schedule, which extended the deadlines for producing several items of discovery, as well as the deadlines for conducting party depositions, as follows:

“(1) Plaintiff shall respond to Defendants’ demands dated 3/8/22 and 6/13/22 o/o/b 12/5/22;

“(2) Plaintiff shall respond to Defendants’ Notice of Discovery & Inspection dated 3/8/22 o/o/b 12/5/22;

“(3) Plaintiff shall respond to Defendants’ letters dated 9/7/22, 8/25/22, 8/11/22, and 8/4/22 o/o/b 12/5/22;

“(4) Plaintiff shall provide HIPAA-compliant authorizations for all pain management physicians, mental health professionals, hand surgeons, internists, physical and occupational therapists, pharmacies, and hospitals, to the extent not previously provided, o/o/b 12/5/22;

“(5) Deposition of Plaintiff to be held on or before 2/15/23;

“(6) Deposition of Defendant Janette Nieshwat, M.D. (sic) to be held on or before 3/15/23;

“(7) Deposition of a witness on behalf of CityMD to be held on or before 4/15/23;

“(8) Plaintiff to designate institutional witness(s) 45 days prior to deposition;

“(9) Defendant shall respond to Plaintiff’s combined demands dated 11/28/22 within 30 days; and

“(10) Defendants reserve right for IME to be conducted after completion of all depositions.”

With respect to the next discovery conference, the court directed that,

“Court shall provide plaintiff with fill-in PDF status conference order form. Plaintiff shall consult with defendants, complete form, and submit it to court at smwilkin@nycourts.gov, in accordance with schedule set forth below. If parties cannot agree on terms of status conference order, they shall request a status conference.”

In this regard, the court ordered the parties to submit a proposed status conference order on April 28, 2023.

As of April 28, 2023, depositions had still yet to be conducted and, according to the defendants, the plaintiff failed to provide certain items of discovery concerning, among other things, a power of attorney and her claim for lost earnings. Rather than submitting a proposed status conference order on April 28, 2023 that addressed those items of discovery, or requesting a status conference at which the parties could discuss all outstanding items of discovery with the court, the defendants made the instant motion on August 25, 2023, asserting that they unilaterally adjourned the plaintiff’s deposition. In this regard, they asserted that they were obligated to do so because the plaintiff had failed to respond to their demands for any and all documents pertaining to all powers of attorney that have been appointed for her, any and all documents pertaining to the appointment proceedings for her power of attorney, her tax documentation, including, but not limited to, W-2 forms, tax schedules, attachments, or otherwise from 2015 to the present, her employment records from 2015 to the present, and law school payments, invoices, transcripts, proof of attendance, and other related documentation.

The defendants further asserted that they could not conduct the plaintiff's deposition without those documents, and that the plaintiff should be compelled to provide those items of discovery or, in the alternative, that her complaint should be dismissed or that she be precluded from offering evidence in support of her claims at trial.

In opposition, the plaintiff asserted that, in December 2022 and January 2023, she had provided authorizations permitting the defendants to obtain all of her employment records for 2015 to the present, inclusive of the time that she was a law student, which included her W2 forms, and that she did not have tax records in her possession. She further contended that, on January 9, 2023, she had provided the defendants with authorizations permitting them to obtain her law school records, and that the defendants confirmed in writing that they had received both employment and law school authorizations. The plaintiff also stated there are no records in existence with respect to any powers of attorney referable to her. The plaintiff further argued that the defendants' answer should be stricken because they willfully delayed her deposition for no reason, and that their own depositions had also been delayed as a consequence.

This court encourages parties to resolve all discovery disputes either by stipulation or at a conference held before the court, and discourages parties from making discovery motions. CPLR 3126 authorizes the court to sanction parties who "refuse[] to obey an order for disclosure or willfully 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]). A failure to comply with discovery obligations, particularly after a court order has been issued, "may constitute the dilatory and obstructive, and thus contumacious, conduct warranting the striking of" a pleading (*id.*; see *CDR Creances S.A. v Cohen*, 104 AD3d 17 [1st Dept 2012]; *Reidel v Ryder TRS, Inc.*, 13 AD3d 170 [1st Dept 2004]). "[T]he drastic remedy of striking [a pleading] is not appropriate where there is no clear showing that the failure to comply with discovery demands was willful or contumacious" (*Walter B. Melvin, Architects, LLC v 24 Aqueduct Lane Condominium*, 51 AD3d 784, 785 [2d Dept 2008]). To impose a sanction pursuant to CPLR

3126 under this standard, a party's behavior must constitute a "pattern of noncompliance g[iving] rise to an inference of willful and contumacious conduct" sufficient to warrant the drastic sanction of striking a pleading (*Cooper v Metropolitan Transp. Auth.*, 186 AD3d 1150, 1151 [1st Dept 2020] [failure to comply with seven discovery orders over three-year period]; see *Rodriguez v United Bronx Parents, Inc.*, 70 AD3d 492 [1st Dept 2010] [failure to comply with five orders over two years]; *Goldstein v CIBC World Mkts. Corp.*, 30 AD3d 217, 217 [1st Dept 2006] [year-long pattern of noncompliance with repeated compliance conference orders]; *Reidel v Ryder TRS, Inc.*, 13 AD3d 170 [1st Dept 2004] [failure to comply with three discovery orders over two-year period]; cf. *Figuroa v City of New York*, 129 AD3d 596, 597 [1st Dept 2015] [party's failure to comply with three discovery orders was not willful and contumacious where that party evinced willingness to provide outstanding discovery]). The plaintiff, however, established that she responded to the defendants' demands and notices, and ultimately complied with the preliminary conference order and compliance conference order. Hence, the defendants failed to demonstrate that the plaintiff failed to comply with her discovery obligations, let alone that any such failure was willful and contumacious, and the branches of their motion seeking sanctions must be denied.

The court notes that the plaintiff did not make a formal cross motion for the imposition of sanctions. A motion court has discretion as to whether or not to consider an affirmative request for relief set forth only in opposition papers, even in the absence of a formal notice of cross motion or notice of a separate motion (see CPLR 2215; *Wimbledon Fin. Master Fund, Ltd. v Laslop*, 169 AD3d 550, 551 [1st Dept 2019]; *Fried v Jacob Holding, Inc.*, 110 AD3d 56, 64-65 [2d Dept 2013]). The court exercises its discretion and considers the plaintiff's application for the imposition of sanctions, as set forth in her opposition papers, but denies it on the merits, as she did not establish that the defendants' failure to proceed with depositions was willful and contumacious. The court concludes that, at most, the defendants were confused as to what authorizations they had received, which had been processed, what documentation they had

obtained, and whether they were obligated to proceed with her deposition even in the absence of employment, tax, and law school records, as opposed to medical records.

Nonetheless, the depositions have been delayed for too long a period of time to escape judicial scrutiny. Hence, the court directs the parties to appear remotely for a status conference on May 14, 2024, at 11:00 a.m., at which time the court shall set firm dates for the parties' depositions, regardless of whether the defendants have obtained all of the records they ultimately wish to obtain, and a schedule for the provision of any additional documents and authorizations.


Accordingly, it is,

ORDERED that the defendants' motion is granted only to the extent that the parties shall appear remotely for a status conference on May 14, 2024, at 11:00 a.m., at which time the court shall set firm dates for the parties' depositions, regardless of whether the defendants have obtained all of the records they ultimately wish to obtain, and a schedule for the provision of any additional documents and authorizations, and the motion is otherwise denied; and it is further,

ORDERED that the plaintiff's cross application is granted only to the extent of scheduling the status conference, as set forth above, and the cross application is otherwise denied.

This constitutes the Decision and Order of the court.

4/24/2024
DATE


JOHN J. KELLEY, J.S.C.

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| MOTION: | <input type="checkbox"/> | CASE DISPOSED | <input type="checkbox"/> | DENIED | <input checked="" type="checkbox"/> | NON-FINAL DISPOSITION | <input type="checkbox"/> | OTHER |
| | <input type="checkbox"/> | GRANTED | <input type="checkbox"/> | DENIED | <input checked="" type="checkbox"/> | GRANTED IN PART | <input type="checkbox"/> | OTHER |
| APPLICATION: | <input type="checkbox"/> | SETTLE ORDER | <input type="checkbox"/> | | <input type="checkbox"/> | SUBMIT ORDER | <input type="checkbox"/> | REFERENCE |
| CHECK IF APPROPRIATE: | <input type="checkbox"/> | INCLUDES TRANSFER/REASSIGN | <input type="checkbox"/> | | <input type="checkbox"/> | FIDUCIARY APPOINTMENT | <input type="checkbox"/> | REFERENCE |
| CROSS MOTION: | <input type="checkbox"/> | CASE DISPOSED | <input type="checkbox"/> | DENIED | <input checked="" type="checkbox"/> | NON-FINAL DISPOSITION | <input type="checkbox"/> | OTHER |
| | <input type="checkbox"/> | GRANTED | <input type="checkbox"/> | DENIED | <input checked="" type="checkbox"/> | GRANTED IN PART | <input type="checkbox"/> | OTHER |
| APPLICATION: | <input type="checkbox"/> | SETTLE ORDER | <input type="checkbox"/> | | <input type="checkbox"/> | SUBMIT ORDER | <input type="checkbox"/> | REFERENCE |
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