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SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK
COUNTY OF NASSAU - PART 17

Present: HON. WILLIAM R. LaMARCA
Justice

IRA GOLDSMITH and DIANE GOLDSMITH,

Plaintiffs,

-against-

JOSEPH P. TAVERNI, M.D., JOSEPH P. TAVERNI, M.D., P.C., and JMS SPORTS MEDICINE & PHYSICAL THERAPY,

Defendants.

Motion Sequence #1
Submitted July 10, 2008

INDEX NO: 16201/07

The following papers were read on this motion:

Notice of Motion.....1
Affidavit in Opposition.....2
Reply Affirmation.....3

Defendants, JOSEPH P. TAVERNI, M.D., JOSEPH P. TAVERNI, M.D., P.C., and JMS SPORTS MEDICINE & PHYSICAL THERAPY, move for an order, pursuant to CPLR §3126, dismissing the plaintiffs' action for willfully failing to respond to the moving defendants' demands requesting pertinent items of discovery. *Pro se* plaintiffs oppose the motion, which is determined as follows:

In this medical malpractice action, commenced on September 12, 2007 with the filing of the summons and verified complaint, plaintiffs seek to recover for personal injuries, allegedly sustained by plaintiff, IRA GOLDSMITH, during his course of treatment with

defendants from April 13, 2004 through March 25, 2005. Plaintiffs allege that defendants failed to timely diagnose, failed to promptly and properly treat, failed to properly interpret tests and symptoms, failed to properly perform physical examinations and failed to order appropriate consultations, particularly with a neurologist.

Counsel for defendants states that, on February 7, 2008, a verified answer was interposed on the part of defendants, which included a demand for a bill of particulars, combined discovery demands, a notice of discovery and inspection, a demand for total damages, a demand for economic and other expert witnesses, a demand for medicaid/medicare liens and various notices, including a notice to take deposition upon oral examination. Counsel for defendants states that, despite correspondence to plaintiffs, by certified mail, return receipt requested, seeking compliance with the discovery demands, no responses whatsoever have been received from plaintiffs. Counsel for defendants points out that more that sixty (60) days have elapsed since service of the demands and the time to serve the bill of particulars has expired. Counsel urges that the action be dismissed because plaintiffs have willfully failed to provide the requested discovery and have not moved for a protective order or, in the alternative, that plaintiffs be directed to provide full and complete responses to the outstanding discovery within thirty (30) days.

In opposition to the motion, *pro-se* plaintiffs, in essence, contend that the motion be denied because they are presently seeking counsel and because IRA GOLDSMITH has been unable to normally use his right hand therefore making it difficult to produce items of discovery. It is Mr. GOLDSMITH's claim that he has had a disability to his right hand from August 2005 until the present time. In response, counsel for defendants points out that, despite his claimed disability, plaintiff was able to commence this action and Mrs.

GOLDSMITH, a plaintiff with a derivative claim, has no disability limiting her ability to provide the necessary discovery. Counsel for defendants asserts that plaintiffs cannot simply ignore discovery requests because, when appearing *pro se*, they are assuming the role of an attorney and must promptly comply with regular and necessary discovery. The Court agrees.

CPLR 3101(1) provides for "full disclosure of all matters material and necessary in the prosecution or defense of an action. . . .". This provision has been liberally construed to require disclosure of any information or material reasonably related to the issues "which will assist preparation for trial by sharpening the issues and reducing delay and prolixity. The test is one of usefulness and reason". (*Allen v Crowell-Collier Pub. Co.*, 21 NY2d 403, 288 NYS2d 449, 235 NE2d 430 [C.A. 1968]; *see also Titleserv, Inc. v Zenobio*, 210 AD2d 314, 619 NYS2d 769 [2nd Dept. 1994]). "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". (*Allen v Crowell-Collier Pub. Co., supra*, [citations omitted]). Defendants request authorizations for medical records maintained by a number of physicians who treated plaintiff in close proximity to the date of the alleged malpractice and who have recently treated plaintiff. The material requested by the attorneys for the defendants seek reports of specified attending or treating doctors concerning medical history, diagnosis and treatment. (*See, Hoenig v Westphal*, 52 NY2d 605, 439 NYS2d 831, 422 NE2d 491 [C.A. 1981]). It appears to the Court that the defendants are entitled to full disclosure of plaintiff's entire medical history to properly prepare for trial. When plaintiff places his

physical condition and ability to work into controversy, he cannot limit the controversy to the medical records he wishes to disclose. *Cf, Greuling v Breakey* 56 AD2d 540, 391 NYS2d 585 (1st Dept. 1977). By bringing an action and affirmatively placing his physical and mental condition in issue, a plaintiff waives the doctor/ patient privilege as said records are material and relevant to the issues in controversy. *See, St. Claire v Cattani*, 128 AD2d 766, 513 NYS2d 250 (2nd Dept. 1987); *Leichter v Cohen*, 124 AD2d 710, 508 NYS2d 222 (2nd Dept. 1986); *Pizzo v Bunora*, 89 AD2d 1013, 454 NYS2d 455 (2nd Dept.1982). Although the Courts grant *pro se* litigants some leeway in the prosecution of the case, they must abide by the Court procedures and calendar. *Stoves & Stones Ltd. v Rubens*, 237 AD2d 280, 655 NYS2d 385 (2nd Dept. 1997).

Under all of the circumstances of this case, the Court grants defendant a conditional order of preclusion, thereby giving plaintiffs one last opportunity to comply with defendants' demands. Plaintiffs are hereby directed to serve formal responses to all of defendants' discovery demands within twenty (20) days of service of a copy of this order. Should they fail to do so, plaintiffs will be precluded from supporting or opposing designated claims or defenses, from producing in evidence designated things or items of testimony, or from introducing any evidence of the physical, mental or blood condition sought to be determined, or from using certain witnesses at the time of trial, CPLR§ 3126[2], or the Court shall impose such other penalty as is appropriate pursuant to CPLR §3126.

It is therefore,

ORDERED, that defendants' motion is granted to the extent that *pro se* plaintiff's are directed to comply with all discovery demands served by the defendants as directed

above; and it is further

ORDERED, that the parties shall appear for a Preliminary Conference on November 5, 2008, at 9:30 A.M. in Differentiated Case Management Part (DCM) at 100 Supreme Court Drive, Mineola, New York, to schedule all discovery proceedings. A copy of this order shall be served on all parties and on DCM Case Coordinator Richard Kotowski. **There will be no adjournments**, except by formal application pursuant to 22 NYCRR §125.

All further requested relief not specifically granted is denied.

This constitutes the decision and order of the Court.

Dated: October 2, 2008

WILLIAM R. LaMARCA, J.S.C.

TO: Ira Goldsmith
Plaintiff Pro Se
37 Rose Avenue
Great Neck, NY 11021

Diane Goldsmith
Plaintiff Pro Se
37 Rose Avenue
Great Neck, NY 11021

Santangelo & Slattery, Esqs.
Attorneys for Defendants
1999 Marcus Avenue, Suite 200
Lake Success, NY 11042

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