

SUPREME COURT OF THE STATE OF NEW YORK, APPELLATE DIVISION,
SECOND DEPARTMENT

Zakhidov v. Boulevard Tenants Corp.

96 A.D.3d 737, 945 N.Y.S.2d 756 (2d Dep't 2012) · Decided June 6, 2012

SUMMARY

The appellate court reversed a judgment awarding the plaintiff \$50,000 in damages for past pain and suffering and nothing for future pain and suffering. It held that precluding the plaintiff’s hospital records for failure to provide updated HIPAA-compliant authorizations was an improvident exercise of discretion because the record did not show willful and contumacious noncompliance or prejudice to the defendants. The matter was remitted for a new trial on damages.

CASE DETAILS

COURT	Supreme Court of the State of New York, Appellate Division, Second Department
WRITING FOR THE COURT	Rivera, J.P.; Balkin, J.; Belen, J.; Chambers, J.
JURISDICTION	New York
DECIDED	June 6, 2012
DISPOSITION	reversed_and_remanded
PROCEDURAL POSTURE	Plaintiff appealed from a judgment entered after a bifurcated personal-injury trial and jury verdict awarding \$50,000 for past pain and suffering and nothing for future pain and suffering.
STANDARD OF REVIEW	The nature and degree of a CPLR 3126 discovery sanction are reviewed for abuse of discretion; preclusion of evidence requires a clear showing that the noncompliance was willful and contumacious.
PRECEDENTIAL VALUE	published
PARTIES	Zakhidov v. Boulevard Tenants Corp.

TOPICS

- discovery dispute
- sanctions
- evidence
- damages
- appellate procedure

PRACTICE AREAS

- Civil procedure
- Personal injury
- Evidence
- Discovery sanctions
- Damages

QUESTIONS PRESENTED

1. Whether the trial court abused its discretion under CPLR 3126 by precluding plaintiff's hospital records and preventing his expert from referring to them based on the failure to provide updated HIPAA-compliant authorizations.
2. Whether the judgment should be reversed and the matter remitted for a new trial on damages.

HOLDINGS

1. The preclusion of plaintiff's hospital records and the prohibition on expert reference to those records were an improvident exercise of discretion because the record did not show that plaintiff's failure to provide updated HIPAA-compliant authorizations was willful and contumacious.
2. The judgment was reversed and the matter remitted to the Supreme Court, Queens County, for a new trial on the issue of damages.

KEY QUOTATIONS

“The nature and degree of a penalty to be imposed under CPLR 3126 for discovery violations is addressed to the court’s discretion” (96 A.D.3d at 738)

“Before a court invokes the drastic remedy of striking a pleading, or even of precluding evidence, there must be a clear showing that the failure to comply with court-ordered discovery was willful and contumacious” (96 A.D.3d at 739)

FACTUAL BACKGROUND

Plaintiff was injured and initially hospitalized, and defendants obtained the hospital records through previously supplied HIPAA-compliant authorizations. Plaintiff did not seek additional treatment after the initial hospitalization but failed to provide updated authorizations despite two court orders. The trial court consequently precluded the hospital records and prohibited plaintiff's expert from referring to them during the damages phase, after which the jury awarded \$50,000 for past pain and suffering and nothing for future pain and suffering.

PROCEDURAL HISTORY

During the damages phase, the Supreme Court, Queens County, precluded plaintiff from introducing hospital records and barred his expert from referring to them because plaintiff had not supplied updated HIPAA-compliant authorizations required by two discovery orders. The jury returned a damages verdict, plaintiff moved to set it aside and sought a new damages trial, and the trial court denied the motion and entered judgment for \$50,000. The Appellate Division reversed and remitted for a new trial on damages.

DISPOSITION

reversed_and_remanded

REMAND INSTRUCTIONS

Remanded to the Supreme Court, Queens County, for a new trial on the issue of damages.

CASES CITED

- Romeo v. Barrella, 82 A.D.3d 1071, 1075 (2d Dep't 2011)
- Isaacs v. Isaacs, 71 A.D.3d 951, 952 (2d Dep't 2010)
- Duncan v. Hebb, 47 A.D.3d 871 (2d Dep't 2008)
- Carbajal v. Bobo Robo, Inc., 38 A.D.3d 820, 821 (2d Dep't 2007)
- Gibbs v. St. Barnabas Hosp., 16 N.Y.3d 74, 79 (2010)
- Moog v. City of New York, 30 A.D.3d 490, 490-91 (2d Dep't 2006)
- Assael v. Metropolitan Tr. Auth., 4 A.D.3d 443 (2d Dep't 2004)
- Kelleher v. Mt. Kisco Med. Group, 264 A.D.2d 760, 761 (2d Dep't 1999)
- Allen v. Calleja, 56 A.D.3d 497, 498 (2d Dep't 2008)
- Wagner v. 119 Metro, LLC, 59 A.D.3d 531, 533 (2d Dep't 2009)

OPINION

PER CURIAM.

*738In an action to recover damages for personal injuries, the plaintiff appeals from a judgment of the Supreme Court, Queens County (Weiss, J.), entered January 24, 2011, which, upon, inter alia, a jury verdict, among other things, awarding him damages in the principal sums of only \$50,000 for past pain and suffering and \$0 for future pain and suffering, is in favor of him and against the defendants in the principal sum of only \$50,000.

Ordered that the judgment is reversed, on the law and in the exercise of discretion, with costs, and the matter is remitted to the Supreme Court, Queens County, for a new trial on the issue of damages. At the damages phase of this bifurcated trial, the defendants' attorney asked the trial court to preclude the plaintiff from introducing his hospital records, since the plaintiff had not complied with two court orders requiring him to provide updated authorizations compliant with the Health Insurance Portability and Accountability Act of 1996 (42 USC § 1320d et seq.; hereinafter HIPAA).

The plaintiffs attorney admitted that he had failed to provide "fresh" HIPAA-compliant authorizations, but stated that the plaintiff had never sought additional treatment after his initial hospitalization, so the defendants, who had obtained the hospital records earlier, were not prejudiced by this failure to provide updated authorizations. Nevertheless, the trial court granted the defendants' application, and it precluded the plaintiff from introducing the hospital records and precluded the plaintiff's expert from referring to the hospital records.

The jury rendered a verdict, inter alia, awarding damages to the plaintiff in the principal sums of \$50,000 for past pain and suffering and \$0 for future pain and suffering. The plaintiff moved to set aside the verdict on the issue of damages as contrary to the weight of the evidence or as inadequate and for a new trial on the issue of damages.

The trial court denied the motion, and entered a judgment in favor of the plaintiff and against the defendants in the principal sum of \$50,000. The plaintiff appeals, contending, among other things, that the trial court erred in precluding him from introducing the medical records and not allowing his expert to refer to them.

The nature and degree of a penalty to be imposed under CPLR 3126 for discovery violations is addressed to the court's discretion (see *Romeo v Barrella*, 82 AD3d 1071, 1075 [2011]; *Isaacs v Isaacs*, 71 AD3d 951, 952 [2010]; *Duncan v Hebb*, 47 AD3d 871 [2008]; *Carbajal v Bobo Robo, Inc.*, 38 AD3d 820, 821 [2007]). *739CPLR 3126 permits courts to fashion such orders "as are just" (see *Gibbs v St. Barnabas Hosp.*, 16 NY3d 74, 79 [2010]; *Carbajal v Bobo Robo, Inc.*, 38 AD3d 820 [2007]).

The general rule is that a court must impose a sanction commensurate with the particular disobedience it is designed to punish (see *Connors*, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR C3126:8).

Before a court invokes the drastic remedy of striking a pleading, or even of precluding evidence, there must be a clear showing that the failure to comply with court-ordered discovery was willful and contumacious (see *Moog v City of New York*, 30 AD3d 490, 490-491 [2006]; *Assael v Metropolitan Tr. Auth.*, 4 AD3d 443 [2004]; *Kelleher v Mt. Kisco Med. Group*, 264 AD2d 760, 761 [1999]).

Here, nothing in the record supports a conclusion that the plaintiffs failure to provide updated HIPAA-compliant authorizations in violation of the court orders was willful and contumacious. The plaintiff had earlier provided HIPAA-compliant authorizations, and the defendants had obtained the records of the plaintiffs hospitalization, which they were able to utilize fully.

Moreover, under the circumstances of this case, where the plaintiff did not seek additional treatment after his initial hospitalization, there is no indication that the plaintiff failed to comply with the court orders in order to gain an advantage in the litigation (see *Moog v City of New York*, 30 AD3d at 490-491).

Accordingly, the Supreme Court's preclusion of the plaintiffs hospital records was an improvident exercise of discretion (see *Allen v Calleja*, 56 AD3d 497, 498 [2008]; cf. *Wagner v 119 Metro, LLC*, 59 AD3d 531, 533 [2009]), and we remit the matter to the Supreme Court, Queens County, for a new trial on the issue of damages.

In light of our determination, the plaintiffs remaining contentions have been rendered academic. Rivera, J.P., Balkin, Belen and Chambers, JJ., concur.