

**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

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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)

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