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**IN THE COURT OF COMMON PLEAS
CUYAHOGA COUNTY, OHIO**

JOHN PAGANINI
Plaintiff

THE CATARACT EYE CENTER OF CLEVELAND,
INC., ET AL.
Defendant

Case No: CV-22-971901

Judge: TIMOTHY MCCORMICK

JOURNAL ENTRY

HEARING HELD ON 01/03/2023. PLAINTIFF'S MOTION FOR SANCTIONS AND MOTION AND IN LIMINE AND FOR AN ADVERSE INFERENCE INSTRUCTION ARE GRANTED IN PART. ORDER SEE JOURNAL.

Judge Signature

OSJ

Date

2024 JAN - 8 3 2: 14
CLERK OF COURTS
CUYAHOGA COUNTY

FILED

IN THE COURT OF COMMON PLEAS
CUYAHOGA COUNTY, OHIO

John Paganini,)	
)	Case No. CV 22 971901
Plaintiff;)	
)	Judge Timothy P. McCormick
)	
-v.-)	Opinion and Order
)	
The Cataract Eye Center of)	
Cleveland, Inc., et al.,)	
)	
Defendants.)	
)	

Plaintiff John Paganini had left eye cataract surgery performed by Dr. Gregory Louis of the Cataract Eye Center of Cleveland on December 9, 2021. The surgery appeared to have gone well, but Paganini began complaining of eye pain and other symptoms and contacted the office the next morning at 6:38 am. The call was received by a third party answering service, Map Communications, and relayed to the on-call doctor, Dr. Shafran through an app called Cognisent. Amanda Lazar, the patient experience manager Accessed the computer at 8:41 and made an appointment for Mr. Paganini for 10:15. Paganini was able to be seen by Dr. Louis at 9:44. He was initially evaluated by an ompthamalogic technician, Tammi Dawson. Dr. Louis diagnosed Paganini with a vitreous hemorrhage. His condition did not improve and he referred Paganini to a retinal specialist the next day. That specialist diagnosed Paganini with an infection and determined it was too late to save

vision in his left eye. Paganini brought suits against Dr. Louis and CEC for negligence for not diagnosing the infection.

The matter is now before the Court on Paganini's motion for sanctions and first motion in limine and for an adverse inference instruction. It generally claims that the Defendants withheld critical information in discovery until recently and that this delay prejudice Paganini's case.

Procedural Background

The timeliness of discovery is important in this case. Therefore, a comprehensive timeline of the relevant procedural history is instructive.

- November 29, 2022: complaint filed;
- January 9, 2023: the parties filed a stipulated leave to plead;
- January 31, 2023: Defendants filed their answer. At this point, Attorney Erin Hess from the Reminger Law firm began representing the Defendants;
- February 24, 2023: The parties filed their joint planning report under Civ. R. 26(F). The plan contemplated that initial disclosures would be completed by March 16, 2023;
- March 20, 2023: Court held a case management conference;
- March 23, 2023: Court issued its case management order adopting the parties' plan:
 - August 16, 2023: discovery cutoff;
 - September 2, 2023: Plaintiff's expert report due;
 - November 2, 2023: Defendants' expert report due;

- July 31, 2023 Dr. Louis's Deposition;
- August 18, 2023: Plaintiff's motion to compel;
- September 5, 2023: Attorney Christine Santoni of Perez Morris substitutes as counsel for Attorney Hess and the Reminger Law Firm;
- September 13, 2023: Pretrial held;
- October 17, 2023: Deposition of Tammi Dawson and Kerrie Wightman;
- November 20, 2023: Deposition of Amanda Lazar;
- December 4, 2023: Plaintiff's motion for Sanctions.
- January 3, 2023: Hearing on Plaintiff's motion for sanctions.

Hearing Facts

The Court heard testimony from Kerrie Wightman, the Chief Operating Officer of CEC and its company representative, Amanda Lazar, Dr. George Louis, M.D., Tammi Dawson, and Attorney Erin Hess. It also reviewed the written briefs and exhibits.

The testimony revealed that the Defendants' initial discovery responses were lacking. While the responses were timely in a sense, they were not truly responsive to the requests. The initial objections tendered were overly broad and mostly baseless in response to the most basic of questions. Answers tended to be obfuscatory and unhelpful. At Dr. Louis's deposition, Paganini learned significant information about relevant witnesses that the Defendants should have disclosed as part of their initial disclosures, provided in response to interrogatories, or supplemented as more information became available.

The testimony revealed that investigation required to satisfy Paganini's requests was minimal and could be done with relative ease. For instance, the guidelines to handling emergency calls were easily retrievable from the Defendants' systems yet were not provided to Paganini in response to his straightforward request for production. Wightman and Lazar testimony indicated that they began responding to requests to gather information in September. This is when Attorney Santoni substituted for Attoreny Hess and Reminger.

The delays and obfuscation had the most effect on Paganini's ability to investigate and proceed against Dr. Shafran. The delay in discovering the role of Dr. Shafran and others meant that Paganini could not add them as defendants because R.C. 2323.451 contains a 180-day deadline to add new parties in a medical claim after filing. Further, as to Doctor Shafran, he began a yearlong sabbatical in Israel in September of 2023, and was unavailable for deposition or trial.

None of the witnesses, including Attorney Hess, explained why the Defendants' initial discovery responses were lacking, why there was no supplementation, and why no serious efforts to investigate and respond to initials requests until September 2023.

Testimony also demonstrated that there was at one time a recording of Paganini's phone call to the office on December 10, 2021. Map Communications a third party answering service used by the Defendants recorded this call. This service only maintains recordings for 90 days unless otherwise requested. Yet,

there was no evidence presented at the hearing that the Defendants or Map anticipated or should have anticipated a lawsuit involving that recording prior to its deletion.

Analysis

I. Preliminary matters

The Court initially held the motion to compel in abeyance as the parties worked to resolve their issues. While Paganini has asked the Court to grant the motion to compel, it is apparent from the hearing that there is no more relevant information to turn over for discovery and the motion to compel is now moot.

Attorney Erin Hess filed a motion to quash Paganini's subpoena for her to testify. Attorney Hess testified at the hearing. Attorney Hess's objections to the subpoena were that she 1) was not properly served with the subpoena, 2) did not have sufficient time to respond to the subpoena, 3) the delivering the requested testimony would violate the attorney client privilege and work-product doctrines.

The motion to quash is denied. The Court concludes that the issue of service and response time are moot because Attorney Hess appeared with counsel and was able to testify. The Court was able to rule on objections based on attorney-client privilege or work product doctrines during her testimony.

II. Violations and Sanctions

Paganini has asked for sanctions under Civ. R. 37(B), (C), and (E). But, before proceeding to the specifics of the analysis, it is important to remember

the general proposition that the civil rules, "shall be construed and applied to effect just results by eliminating delay, unnecessary expense and all other impediments to the expeditious administration of justice." Civ. R. 1(B).

Regarding the discovery rules specifically, "[i]t is the policy of these rules (1) to preserve the right of attorneys to prepare cases for trial with that degree of privacy necessary to encourage them to prepare their cases thoroughly and to investigate not only the favorable but the unfavorable aspects of such cases and (2) to prevent an attorney from taking undue advantage of an adversary's industry or efforts." Civ. R. 26(A).

A. Sanctions under Civ. R. 37(B)

Under Civ. R. 37(B), "if a party or a party's officer, director, or managing agent or a witness designated under Civ.R. 30(B)(5) or Civ.R. 31(A) fails to obey an order to provide or permit discovery, including an order made under Civ.R. 35 or Civ.R. 37(A), the court may issue further just orders. They may include the following:

- (a) Directing that the matters embraced in the order or other designated facts shall be taken as established for purposes of the action as the prevailing party claims;
- (b) Prohibiting the disobedient party from supporting or opposing designated claims or defenses, or from introducing designated matters in evidence;
- (c) Striking pleadings in whole or in part;
- (d) Staying further proceedings until the order is obeyed;

- (e) Dismissing the action or proceeding in whole or in part;
- (f) Rendering a default judgment against the disobedient party; or
- (g) Treating as contempt of court the failure to obey any orders except an order to submit to a physical or mental examination.”

Defendants argue that this section is inapplicable because the Court held Paganini’s motion to compel in abeyance. Paganini’s argument is that the Defendants violated the Court’s order adopting the Parties’ Civ. R. 26(F) discovery plan on March 23, 2023. The Court declines to treat the discovery issues in this case as a violation of its simple scheduling order.

The Defendants in this case never violated a direct order of the Court regarding discovery. The Court declines to conclude that adopting and journalizing the proposed discovery plan and schedule in this case constitutes the type of order that justify sanctions under Civ. R. 37(B), at least in this case.

B. Sanctions under Civ. R. 37(C)

While the Defendants never violated a direct order of this Court, the Defendants did not participate in discovery in a forthright and timely fashion. Their conduct included violations of both the letter and spirit of the civil rules. Civ. R. 37(C) gives the Court authority to deal with issues of timely discovery responses, particularly as it relates to witnesses, which is the key point of contention in this case. Under Civ. R. 37(C) “[i]f a party fails to provide information or identify a witness in a timely manner as required by Civ.R. 26(A) or (E), the party is not allowed to use that information or witness to

supply evidence on a motion, at a hearing, or at a trial, unless the failure was substantially justified or is harmless. In addition to or instead of this sanction, the court, on motion and after giving an opportunity to be heard, may do any of the following:

- (a) Order payment of the reasonable expenses, including attorney's fees, caused by the failure;
- (b) Inform the jury of the party's failure;
- (c) Impose other appropriate sanctions, including any of the orders listed in Civ. R. 37(B)(1)(a) through (g)."

The Court declines to impose the drastic remedy of a default judgment in this case. While not timely, Paganini was able to get most of the information and ultimately was able to depose most relevant witnesses. Entering a default will not serve the purpose of having a case resolved on its merits.

The Court also declines to give an adverse inference instruction to the jury. Such a remedy is also quite drastic and Paganini's proposed instruction is unduly prejudicial to the Defendants. Instead, the Court will give the following explanatory instruction to the jury regarding Dr. Shafran's absence:

You have heard testimony from witnesses concerning the involvement of Dr. Tamar Shafran. Dr. Shafran did not testify at this trial and the Plaintiff did not take her deposition. This is because Defendants did not reveal the identity and role of Dr. Shafran to Plaintiff until August of this year. By that time, Dr.

Shafran was getting ready to leave on a yearlong sabbatical overseas and was unavailable for trial or deposition.¹

AS a sanction, the Court will also not allow the Defendants to use an “empty chair” defense by suggesting that Dr. Shafran or another unnamed party was the negligent party. The jury will be instructed that any negligence that they find was the result of Dr. Shafran or another employee will be imputed to Cataract Eye Centers.

Finally, the rules permit the Court to assess reasonable expenses including attorney’s fees against the Defendants as a sanction. The Court will reserve ruling on the appropriateness of this sanction at this time.

C. Sanctions under Civ. R. 37(E)

Finally, Paganini requests sanctions under Civ. R. 37(E) for failure to preserve the recording of the phone call he made to Cataract Eye Centers on December 10, 2021. The Court declines to sanction Defendants for failure to preserve Electronically Stored Information because a third party held the information and it was not under an obligation to preserve it unless requested. No evidence at the hearing suggested that the Defendants should have requested its preservation in anticipation of a lawsuit. The possibility that this information could have been retrieved through Dr. Shafran’s Cogniscent

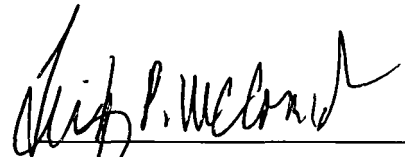
¹ This is a proposed instruction for now. The final form will be determined following the evidence presented at trial.

account goes more to timeliness of discovery responses than the duty to preserve ESI.

Conclusion and Order

Plaintiff's motion for sanctions and first motion in limine and request for an adverse inference instruction are granted in part. The Court will prevent the Defendants from making empty chair defenses, will instruct the jury on imputing negligence of unnamed parties to Cataract Eye Center, and provide the jury with an explanatory instruction regarding the absence of Dr. Shafran. Plaintiff's motion to compel is moot and Attorney Hess's motion to quash is overruled.

It is so ordered.



Judge Timothy P. McCormick

