VIRGINIA: IN THE CIRCUIT COURT FOR THE CITY OF NORFOLK

RICHARD J. ROBBINS,

Plaintiff,

v. Civil Docket No. CL19-6344

SENTARA HOSPITALS, d/b/a
SENTARA VIRGINIA BEACH
GENERAL HOSPITAL,

Defendant.

**ORDER ON MOTION FOR SANCTIONS**

This is a medical malpractice action against Sentara Virginia Beach General Hospital alleging negligence by Sentara's nurses associated with bladder management in conjunction with Plaintiff's knee surgery. Sentara seeks sanctions against Plaintiff and his lawyer "for conduct undermining the discovery process and in violation of Virginia Code § 8.01-271.1 and Virginia Supreme Court Rules 4:1(e) and 4:12(d)."

**FACTUAL BACKGROUND**

Sentara issued written discovery to Plaintiff on July 15, 2019, including an interrogatory asking him to identify all health care providers seen since the incident involved in this case and to state the dates of such treatment, the nature of the treatment, and the prognosis or diagnosis made.

Plaintiff provided in his answer to interrogatory number 6, the names, addresses, and telephone numbers of eight treating providers. His answer did not state the dates or nature of any treatment nor any prognosis or diagnosis made, as the interrogatory had requested. Sentara does not complain about the incompleteness of the answer in those respects. Sentara does note, however, that the answer provided no reference to Plaintiff's June 2018 visit to a Johns Hopkins physician in Baltimore for a second opinion on his bladder issues. An office note contained in medical records that Plaintiff produced to Sentara on August 8, 2019, indicates that he reported to

his urologist on July 18, 2019, that he had been to Johns Hopkins for a second opinion and was told there was nothing that could be done.

Defense counsel sought information about this visit by requesting Plaintiff to sign an authorization to allow Johns Hopkins to release its records. That authorization included the following: "this Authorization is valid for one year from date signed, unless I revoke/withdraw this Authorization or unless an earlier date is specified here: 12/1/2020." The "12/1/2020" date is crossed out and replaced by a handwritten "10/1/19." Plaintiff signed the Authorization on September 9, 2019.

The first Johns Hopkins location to which Sentara sent the Authorization was incorrect and did not yield any records. By the time the Authorization arrived at the location where Plaintiff had been seen, the October 1, 2019, expiration date had passed; and Johns Hopkins refused to provide any records. Defense counsel requested more information about that visit by letter dated December 9, 2019:

> As you can see, Johns Hopkins Bayview had no records. When we provided the release to Johns Hopkins Clinics it could not be processed as the expiration date of the release had been changed by your client to October 1, 2019 and that time had passed. ... Enclosed is an additional release that I ask be signed by your client and returned so that we can provide it to Johns Hopkins Clinics for records. **If you can provide any additional specifics to the "Johns Hopkins provider," that would be helpful.**

(Ex. A to Hr'g of March 4, 2020 (emphasis added).)

Sentara ultimately received a new signed Authorization that finally yielded the records, which arrived on January 21, 2020. The late receipt of the records caused the cancellation of Plaintiff's deposition, scheduled for January 22, and mediation. scheduled for January 23, 2020. Sentara filed this motion on February 7, 2020.

At no time following the issuance of the original answers to interrogatories through the filing of the motion for sanctions did Plaintiff supplement his original answer to interrogatory 6 to disclose that he saw Dr. Michael Hiroshi Johnson at Johns Hopkins Outpatient Center on June 26, 2018, for a second opinion on his bladder condition. The record includes this note from Dr. Johnson: "We discussed the pathophysiology of a neurogenic bladder, as well as treatment options. Discussed that his enlarged bladder capacity has likely occurred over the span of many years and that this is not the result of a bladder injury sustained from surgery and spinal anesthesia." (Ex. E to Br. Supp. Mot. Sanctions.)

Sentara's counsel has concluded that this record, obviously quite harmful to Plaintiff's theory that Sentara caused his bladder problems, was deliberately withheld and concealed by Plaintiff, his counsel, or both. Defense counsel writes that Plaintiff's counsel had previously made "specific representations to Defendant's counsel that this was only 'one visit' and there was nothing 'of substance/interest' in the records worth holding up Plaintiff's deposition and/or mediation." *Id.* ( Br. Supp. Mot. Sanctions 6.) Sentara urges: "What is clear is that these records are in fact highly relevant, and Plaintiff and/or his counsel deliberately gave evasive and incomplete responses to discovery to avoid production of case dispositive evidence. This is a blatant abuse of the discovery process and necessitates the imposition of sanctions." (*Id.*)

In opposition to the motion, both Plaintiff and Plaintiff's counsel have submitted Affidavits to which Sentara did not object. Plaintiff's counsel states in his Affidavit that "the failure to include the identifying information as to Dr. Johnson in answers to interrogatories was an oversight, not an attempt to hide the visit or its outcome." He says that his client told him that Dr. Johnson advised that there was nothing that could be done for him but did not tell him about Dr. Johnson's statements about the cause of his problems. Counsel also attests that he never had or

saw the records of the Johns Hopkins visit until after the Motion for Sanctions was filed and Sentara provided them. *(See* Ex. 1 to Br. Opp'n. Mot. Sanctions.)

Similarly, the Affidavit from Plaintiff states that he read his answers to the interrogatories before signing them and did not notice that Dr. Johnson was not listed as a physician he had seen after the surgery. He states, "I did not attempt to hide from anyone that I had been seen by Dr. Johnson nor what I had been told by Dr. Johnson." The Affidavit states he does "not believe" that he told his lawyer and does not remember telling his lawyer about anything that Dr. Johnson said regarding the cause of his problems. He also attests that he saw Dr. Johnson for no more than ten to fifteen minutes, not the forty-five minutes that Dr. Johnson recorded as the length of time that he had spent with the patient. (*See* Ex. 2 to Br. Opp'n Mot. Sanctions.)

Sentara's counsel voiced the suspicions that she felt should surround the explanation offered for the failure to disclose this document: how unlikely it is that Plaintiff would forget the more than 400-mile round trip to Baltimore for a second opinion about the very condition that forms the subject matter of this lawsuit; how coincidental it is that the medical provider whom they both forgot about is the one who expressed an opinion squarely contradictory to the claims asserted in this lawsuit; how Plaintiff's counsel never actually saw or sought to obtain a record from a visit that his client told him about and that is mentioned both in the records of his client's family practice doctor and his local urologist; and that Plaintiff's counsel failed to supplement the earlier incomplete answer even knowing that Sentara had learned of the existence of the record and was trying assiduously to get it. As Plaintiff argues in opposition to the motion for sanctions, "Sentara has chosen to assume or conclude the worst, but it is submitted that those conclusions were the result of a willingness to believe that everything said or done, or not said or done ... was evidence of intentional concealment." (Br. Opp'n 8.)

## ANALYSIS

The only facts before the Court in support of the motion are those recited in the pleadings and in the Affidavits. Sentara did not object to the Affidavits and did not cross-examine either Plaintiff or Plaintiff's counsel, both of whom attended the hearing. The facts stated in the Affidavits are not inherently incredible. It might be suspicious and uncannily coincidental that this particular harmful record was the one that both the client and the lawyer forgot about, but the Affidavits state that the omission was inadvertent. The Court therefore has no basis to conclude otherwise.

Even inadvertent discovery failures such as this can support a motion for sanctions, which the Court holds is warranted in this case. Although Plaintiff's counsel did not intend to exclude Dr. Johnson from the answer to interrogatory number 6, he did not supplement that answer to provide the information regarding the visit when Sentara brought it to his attention in late August. Had he done so with the requested identification of the name and address of the physician seen, Sentara would not have had to guess about which Johns Hopkins facility was referenced and where it should send the Authorization. As late as December, when Plaintiff and his counsel still had not supplemented Plaintiff's answers to interrogatories, Sentara counsel specifically asked, "If you can provide any additional specifics to the 'Johns Hopkins provider,' that would be helpful." (Ex. A to Hr'g of Mar. 4, 2020.)

Plaintiff's counsel's Affidavit includes no representation that he asked his client for the details surrounding the Johns Hopkins visit once Sentara asked for the Authorization. The Plaintiff's Affidavit likewise contains nothing to indicate that he or his attorney made any effort to provide the information that had been omitted once Sentara learned that Plaintiff had been seen at Johns Hopkins. Although both affiants say that they had not possessed or seen the Johns

Hopkins record until Sentara provided it to them in January, Plaintiff's counsel never outlines any attempt that he made to obtain that record despite his knowledge that it existed.

Rule 4:1(e)(1) provides that a "party is under a duty promptly to amend and/or supplement all responses to discovery requests directly addressed to (A) the identity and locations of persons having knowledge of discoverable matters ... when additional or corrective information becomes available." The Scheduling Order in this case requires each party to "seasonably supplement and amend discovery responses pursuant to Rule 4:1(e). Seasonably means as soon as practical." A scheduling order setting discovery deadlines and requiring parties to supplement is a court order to provide discovery; and Rule 4:12(b)(2) authorizes sanctions when a party fails "to obey an order to provide or permit discovery."

Sentara also contends that the Court may award sanctions under Code § 8.01-271.1 because Plaintiff and his counsel both signed an answer to an interrogatory that was not honest or complete. The Virginia Supreme Court has held, however, that "there is nothing in Code § 8.01-271.1 that gives a trial judge authority to impose monetary sanctions on an attorney for what she found was an inadvertent mistake." *Ragland v. Soggin*, 291 Va. 282, 292 (2016). Given the facts established by the Affidavits, the Court denies the request for relief under Code § 8.01-271.1. The Court's award of sanctions relates not to the original misleading answer to the interrogatory, based on the representations in the Affidavits about the oversight, but on the failure thereafter to provide the information about the Johns Hopkins visit once the omission came to everybody's attention.

Plaintiff's counsel argues that the Court should deny this motion for Sentara's counsel's failure to certify that she had attempted to resolve the motion, as required by Rule 4:15. He states, however, that he attempted without success to resolve the motion after it was filed. Sentara argues that Plaintiff has waived any Rule 4:15 objection, citing *Hutchison v. Hagadone*, 78 Va. Cir. 185

(Loudoun Cir. Ct. 2009). In *Hutchison*, the trial court reasoned that an appropriate remedy for a violation of the reasonable-effort-to-confer requirement would be to delay consideration of the motion until the Rule's requirements were satisfied. Given that the parties have now conferred and attempted to resolve the motion for sanctions, and that the Court has already conducted the hearing, the Court sees no reason to defer consideration of this motion.

The Richmond Circuit Court has noted that: "Discovery is one of the integral processes of our judicial system. Litigants must not be allowed to toy with that process or to provide anything other than honest and good faith responses to discovery. Anything less destroys the very purpose of discovery and is unacceptable." *Mayfield v. S. Ry. Co.*, No.LS-3923-4, 1993 WL 946129, at *5 (Richmond Cir. Ct. 1993). Litigants need to take the discovery process seriously from start to finish. Plaintiff and his counsel did not here. They should have disclosed a visit to a world-renowned hospital for a second opinion about the very condition that caused Plaintiff to bring this malpractice suit; and once the omission came to Plaintiff's attention he and his counsel should have addressed the oversight immediately. They did not.

**SANCTIONS**

Sentara asks for the following sanctions:

> (E)ntry of an Order: (1) that the facts established by the Johns Hopkins record are to be taken as established for purposes of the action, pursuant to Rule 4:12(b)(2)(A); (2) that Plaintiff is prohibited from challenging the statements set forth in the Johns Hopkins record and/or presenting evidence at trial that the alleged injury was caused by or related to the hospital admission and/or surgery in any way, pursuant to Rule 4:12(b)(2)(B); or (3) dismissing the Plaintiff's case with prejudice, in its entirety, pursuant to Rule 4:12(b)(2)(C).

(Br. Supp. Mot. Sanctions 14.) These requested sanctions, however, should be reserved for intentional concealment or misconduct, which is not presented here. The Court does not consider taking an issue away from the jury an appropriate sanction for failing to supplement discovery.

The Court intends to award the attorneys' fees that relate to Plaintiff's failure to disclose the Johns Hopkins record, including Sentara's costs in preparing and submitting the instant motion for sanctions to the Court. The Court directs Sentara's counsel to prepare and submit a summary of those costs to the Court within 21 days. Plaintiff may file any challenge or response within 10 days thereafter.

The Court directs the parties to file any written objections to this Order within ten days. Further endorsements are waived pursuant to Rule 1:13.

The Clerk is directed to mail a copy of this motion to attorneys Mary Elizabeth Sherwin, Carlton F. Bennett, and Alan B. Rashkind.

It is so ORDERED.

Entered: 9 March 2020

Mary Jane Hall

Mary Jane Hall, Judge