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SUPERIOR COURT OF NEW JERSEY

ERNEST M. CAPOSELA, A.J.S.C.
Assignment Judge

Chambers: 973-247-8141
Fax: 973-247-8409

COURTHOUSE

77 Hamilton Street
Paterson, New Jersey 07505-2018

July 12, 2017

Via Facsimile:
Michael Ridenour, Esq.
JACKSON LEWIS
FAX: (973) 540-9015

David B. Lichtenberg, Esq.
FISHER & PHILLIPS LLP
FAX: (908) 516-1051

Joseph C. Nuzzo, Esq.
FAX: (973) 628-008406

Re: *Eastern Nursing Services I, Inc. v. Amedisys, Inc. et al. – Docket No. PAS-L-4306-14*

Dear Counsel,

Plaintiff Eastern Nursing Services I filed the above-referenced complaint on November 24, 2014. By Order of November 18, 2016, certain counts of plaintiff's complaint were dismissed with prejudice. By Orders of February 6, 2017, the remaining counts of plaintiff's complaint were dismissed without prejudice. On March 31, 2017, plaintiff filed a motion to vacate the dismissal orders and restore its complaint. On May 26, 2017, defendant Kelly Services filed a cross motion for final dismissal with prejudice of all claims as to Kelly Services. I have thoroughly reviewed the papers submitted with this application and heard the arguments of all parties.

MATERAL FACTS AND PRODEDURAL HISTORY

1. Plaintiff Eastern Nursing Services I, Inc. (hereafter "Eastern Nursing") is a New Jersey corporation in the business of placing home health aids in various settings on a contractual basis.

2. Cheryl S. Oaks and Patricia J. Flowers were Certified Home Health Aides (CHHAs) employed by plaintiff and primarily charged with handling home care cases in Hudson County.

3. Amedisys is a corporation operating in New Jersey and the purchaser of the Medicare home care staffing business previously owned by Hackensack University Medical Center (HUMC). The function of this staffing business is to supply home health aides for assignment once the medical center discharges patients to home care.

4. In November 2011, plaintiff and Amedisys entered a Staffing Agreement, which provided for plaintiff to supply home health aides for Amedisys' HUMC cases.

5. Thereafter, Amedisys hired Defendant Kelly Services (hereafter "Kelly") as its vendor manager with suppliers, such as with plaintiff.

6. In 2013, subsequent to the signing of the Staffing Agreement between plaintiff and Amedisys, CHHAs Oaks and Flowers resigned from their employment with plaintiff and began working directly for Amedisys.

7. Resulting from Defendant Amedisys' hire of Oaks and Flowers, plaintiff filed a complaint and jury demand on November 24, 2014, alleging wrongful violation of

restrictive covenants, inevitable disclosure of proprietary information, unfair competition, and tortious interference with contractual relations and prospective economic advantage.

8. Defendants Amedisys, Oaks, and Flowers (hereafter "the Amedisys Defendants") [1] filed an answer and jury demand on March 5, 2015. Thereafter the Amedisys Defendants propounded initial discovery requests upon plaintiff.

9. Defendant Kelly filed its answer and jury demand on February 10, 2016. Thereafter Kelly propounded initial discovery requests upon plaintiff.

10. After several months of communications between plaintiff and Defendant Kelly, Kelly filed a motion to dismiss on August 2, 2016, addressing continuing deficiencies in plaintiff's discovery responses. The motion turned on plaintiff's failure to properly certify responses, pursuant to R. 4:18-1(c), and alleged incompleteness of plaintiff's responses to initial requests 39, 43, 44, and 45.

11. On August 3, 2016, after several months of communications between plaintiff and the Amedisys Defendants, the latter filed a motion to dismiss counts I-V of the complaint as to Defendant Oaks and derivatively as to Amedisys, as well as a motion to compel discovery. The motion to dismiss raised a frivolous litigation argument, pursuant to R. 1:4-8, stemming from plaintiff's failure to produce any evidentiary support that Defendant Oaks signed a restrictive covenant during the course of her employment with plaintiff. The motion to compel was premised on plaintiff's failure to sign or verify its

[1] Law firm Fisher Phillips LLP has provided legal representation for Defendant Amedisys, Defendant Oaks, and Defendant Flowers throughout this litigation. For the purposes of this opinion, wherever all three parties' interests are implicated, these defendants shall be referred to collectively as the Amedisys Defendants.

discovery responses and failure to provide fully responsive answers to interrogatories 1, 6, 10, 11, 12, 15, 16, 17, 18, 19, 20, and 21.

12. On October 6, 2016, prior to hearing or decision on Kelly's motion, plaintiff and Kelly entered into a Consent Order through which their respective discovery deficiencies were to be resolve via supplemental responses due by the end of October 2016. The Consent Order disposed on Kelly's motion to dismiss, as well as a cross motion by plaintiff against Kelly seeking to compel alleged discovery due plaintiff. Plaintiff then failed to meet its obligations under the Consent Order.

13. On November 18, 2016, the court entered two orders, resolving all then-pending motions. Namely, the court dismissed counts I-V of the complaint against Oaks and all derivative claims against both Amedisys and Kelly. The court granted The Amedisys Defendants' request to submit a fee petition following the dismissal. By separate order, the court compelled plaintiff to supplement its responses to the Amedisys Defendants on interrogatory requests 1, 6, 10, 11, 12, and 16-21, by December 1, 2016. The order also compelled plaintiff to produce documents referenced in its complaint and previous interrogatory responses by December 1, 2016. Further, the court again ordered plaintiff to comply with outstanding discovery obligations to Kelly, per the October Consent Order, by December 1, 2016. The order also addressed legitimate concerns of plaintiff concerning confidentiality of patient names and medical information and ordered the Amedisys Defendants to provide a copy of a protective order for entry by the court.

14. After plaintiff failed to properly certify its discovery responses and provide fully responsive answers, Kelly filed another motion to dismiss on December 13, 2017. At oral argument, the court dismissed the entirety of the complaint as to Kelly, without

prejudice, as memorialized in an order dated February 6, 2017. The court adjourned Kelley's related request for fees and costs.

15. After plaintiff failed to produce all outstanding documents or adequately supplement its interrogatory responses, the Amedisys Defendants filed a motion to dismiss without prejudice on December 21, 2017. At oral argument, the court dismissed the entirety of the complaint as to the Amedisys Defendants, as memorialized in an order dated February 6, 2017.

16. On March 31, 2016, plaintiff filed a motion to vacate the dismissal with prejudice of counts I-V of the complaint after having located the missing signed restrictive document. By the same motion plaintiff moved to vacate the dismissal without prejudice as to the remaining claims.

17. On May 26, 2017, Defendant Kelly filed a cross motion in opposition to plaintiff and in support of dismissal of all claims, with prejudice. The Amedisys Defendants similarly opposed plaintiff's request.

18. On June 1, 2017, oral argument was held on the motion to vacate and cross motion.

ANALYSIS

DISMISSAL

Order of November 18, 2016 – Dismissal with Prejudice as to Cheryl Oaks and Derivatively, the Amedisys Defendants and Kelly

On August 3, 2017, the Amedisys Defendants filed a frivolous litigation motion seeking dismissal of counts I-V of plaintiff's complaint, each of which were premised on a restrictive covenant allegedly signed by Defendant Oaks. Specifically, counts I-V of the complaint alleged: (1) breach of restrictive covenant agreement; (2) breach of

covenant of good faith and fair dealing implied by law in the restrictive covenant agreement; (3) breach of duty of loyalty via breach of restrictive covenant agreement; (4) breach of fiduciary duty via breach of restrictive covenant agreement and; (5) inevitable disclosure of trade secrets and/or confidential information. As of the filing of the motion to dismiss, no document signed by Defendant Oaks had been produced to the defendants during discovery, despite numerous demands. At oral argument plaintiff explained that plaintiff's custom and practice was to have all certified home health aides (CHHAs) sign restrictive covenant/non-compete agreements. Plaintiff hypothesized that the actual signed document, or a copy thereof, existed but could not be located. At various stages throughout the litigation, plaintiff's counsel referred to challenges in responding to discovery due to files becoming disorganized following the moving of plaintiff's headquarters. Upon filing its motion to vacate the Order of November 18, 2017, plaintiff attached the previously misplaced restrictive covenant document signed by Defendant Oaks. Plaintiff also posed another theory for how the document was lost, hypothesizing that after counsel retrieved the document for the purpose of filing of the lawsuit, it was not properly returned to Defendant Oaks' personnel file.

Despite the court's important gatekeeping and oversight role in the discovery process, discovery should occur outside of the courtroom rather than within. When asking for leniency in timelines to respond to discovery requests, the court is empowered with discretion to allow deviation from the rules in the interest of justice. Alternatively, the court is under no obligation to accept nor should it entertain arguments relating to crucial factual allegations of any case without proper evidentiary support. Rule 1:4-8, which addresses frivolous litigation, not only encompasses this concept, but also lays a

clear multi-step process by which a party may cure obvious deficiencies in or relating to its pleadings. The purpose of raising R. 1:4-8 is to seek elimination of wholly unsubstantiated or fraudulent complaints against a party, with prejudice, as well as to seek sanctions. R. 1:4-8(b)(1) wisely includes a safe harbor period of twenty-eight days during which a deficient party can spare itself exposure to sanctions by withdrawing counts/claims that would not meet the evidentiary, certification, and other minimal standards to plead, as described in R. 1:4-8(a).

The deficiency in producing the restrictive covenant document per Oaks was not a garden-variety R. 4:23 discovery issue wherein plaintiff failed to adequately respond with relevant discovery known to be in existence or by affidavit certifying to its absence. Here, plaintiff admittedly lacked the single memorializing document that would serve as the basis for a claim, despite giving unsupported assurances of its existence. The rules mandate that parties may have twenty-eight days during an active case to cure the fatal deficiencies in the pleadings, including the option to dismiss questionable claims without prejudice, while reserving the right to bring those claims later if the statute of limitations permits. In the present case, plaintiff exercised no viable option available to it. Plaintiff neither withdrew its claims, nor located the crucial missing document, despite its eventual retrieval. In fact, plaintiff failed to locate the document for well over two years beyond the filing of the complaint and approximately eight months after the filing of the Amedisys Defendants' frivolous litigation motion. [Emphasis added.]

Plaintiff's failure to demonstrate the existence of any evidentiary support for counts I-V was inexcusable at the time the R. 1:4-8 motion was heard, thus, there is no

reason to excuse plaintiff's conduct now. The standard for obtaining relief from an order or judgement is memorialized in R. 4:50-1:

> "On motion, with briefs, and upon such terms as are just, the court may relieve a party or the party's legal representative from a final judgment or order for the following reasons: **(a) mistake, inadvertence, surprise, or excusable neglect**; (b) newly discovered evidence which would probably alter the judgment or order and which by due diligence could not have been discovered in time to move for a new trial under R. 4:49; (c) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (d) the judgment or order is void; (e) the judgment or order has been satisfied, released or discharged, or a prior judgment or order upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment or order should have prospective application; or (f) any other reason justifying relief from the operation of the judgment or order."

As an initial consideration, R. 4:50-1 is permissive, not mandatory, in nature. Further, it appears plaintiff attributes its conduct to permissible "mistake, inadvertence, surprise or excusable neglect." Nothing in plaintiff's argument suggests that its conduct was accidental or excusable. In fact, the ultimate appearance of the restrictive covenant document may indicate that had plaintiff performed a thorough enough search at the time of the original R. 1:4-8 motion, the document could have been located. For over two years plaintiff failed to produce a quantum of evidentiary support to maintain counts I-V of its complaint. A move of plaintiff's headquarters at some point during that time or even before filing would not justify failing to produce a critical piece of evidence until after those claims were dismissed with prejudice. Defendants would undoubtedly be prejudiced by having to defend against the relevant claims when they have been unable to prepare an adequate defense for over two years due to their inability to inspect Oaks' restrictive covenant agreement. In the interim, defendants have incurred extensive fees in

discovery-related motion practice and may well have been prejudiced by spoliation of evidence or fading memory of witnesses. It is unreasonable to punish defendants for plaintiff's lack of care and diligence; therefore, the court finds no basis to vacate the dismissal of counts I-V of plaintiff's complaint as to Defendant Oaks, and other defendants, derivatively.

Order of February 6, 2017 – Dismissal without Prejudice as to Cheryl Oaks, Patricia Flowers & Amedisys

By Order of February 6, 2017, the complaint in this matter was dismissed without prejudice pursuant to R. 4:23(a)(1) as to Defendants Oaks, Flowers, and Amedisys due to plaintiff's failure to produce certain discovery. The nature of the deficiencies was related to ongoing failure to comply with the Order of November 18, 2016. That order compelled plaintiff to supplement interrogatory responses 1, 6, 10, 11, 12, 16, 17, 18, 19, 20 and 21, as well as to produce all documents referenced in plaintiff's complaint and first set of interrogatories. Presently, plaintiff seeks to vacate the dismissal pursuant to R. 4:23-5(a)(1), which states in pertinent part:

> The delinquent party may move on notice for vacation of the dismissal or suppression order at any time before the entry of an order of dismissal or suppression with prejudice. The motion shall be supported by affidavit reciting that the discovery asserted to have been withheld has been fully and responsively provided and shall be accompanied by payment of a $100 restoration fee to the Clerk of the Superior Court, made payable to the "Treasurer, State of New Jersey," if the motion is made within 30 days after entry of the order of dismissal or suppression, or a $300 restoration fee if the motion is made thereafter.

This court finds that plaintiff remains noncompliant with its discovery obligations and thus, the burden for obtaining restoration has not been met. Specifically, interrogatory responses 6, 10, 11, 17, and 20 remain incomplete.

Interrogatory six (6) requested plaintiff "[i]dentify all job duties of Flowers and Oaks while they worked for Plaintiff and identify all jobs and work performed for [Eastern Nursing] by Flowers and Oaks during respective employment with Plaintiff." Plaintiff's response prior to the initial dismissal was "[t]he defendants Flowers and Oaks were certified home health aides." This response was not sufficient. Defendant sought information as to the parties' specific duties and the patients served, presumably to confirm the accuracy of plaintiff's allegations and to determine whether the duties performed were identical at both companies or relevant to any condition in any contract in the matter. In hopes of restoration, plaintiff responded with a document dump of 3,839 pages, including the personnel files of Oaks and Flowers with visit notes and supervision findings relating to each patient. The court strains to understand how such production responds to defendant's request. It is not defendant's duty to hypothesize as to Oaks' and Flowers' job descriptions based upon visitation notes, only to be potentially contradicted by plaintiff's description of their scope of work during trial.

Interrogatory ten (10) asks for information about each and every voluntarily or involuntarily terminated employee from 2012 through the present, namely whether the individual was subject to a post-employment restrictive covenant not to compete, whether post-employment references were given, and whether an effort to enforce a post-employment covenant not to compete was pursued. Plaintiff's response since the dismissal includes a list of four matters in which "counsel was involved," and a list of inactive employees. Although plaintiff supplemented its responses by describing the context of some of the terminations, much of that detail was given off-the-cuff at oral argument rather than properly served in discovery. Nevertheless, the answer given is still

incomplete. It is entirely unreasonable at this late stage to provide a vague, partial response, which essentially ignores the thrust of Amedisys' line of questioning.

Interrogatory eleven (11) asks plaintiff to "identify and set forth with specificity any and all information that plaintiff contends constitutes 'proprietary information or confidential and proprietary information'" given to Amedisys or that Amedisys somehow obtained, as well as documents reflecting the same. This request goes to count five (5) of plaintiff's complaint and any and all other claims that may lead plaintiff to address confidential or proprietary information. Plaintiff's motion addresses this continuing deficiency by mentioning it turned over more than one hundred personnel files, including those of Defendants Oaks and Flowers. This is not an answer, let alone a fully compliant answer.

Interrogatory seventeen (17) is related to plaintiff's request for counsel fees in its pleading. Namely, the Amedisys Defendants requested for the names of all attorneys consulted, the dates on which they were first consulted, the scope of the attorney's employment, an itemization of all amounts paid, the engagement terms or retainer agreement, and any bills received by plaintiff from an attorney in connection with this matter. Having originally and unsuccessfully argued that the information was privileged, plaintiff now supplements its answers by stating "plaintiff has not paid any counsel fees yet." Again, this response is insufficient on its face.

Interrogatory twenty (20) asks plaintiff to name all of its employees who were hired by plaintiff from Defendant Amedisys or another competitor. Plaintiff's motion to vacate addresses this question as follows: "Plaintiff is not aware of any other former employees of Plaintiff that has been hired by Defendant Amedisys." The answer is

apparently responsive to a different question altogether. Amedisys' actual question seeks information as to whether plaintiff has hired employees away from its competitors, including Amedisys. Plaintiff responded as if the question sought information as to whether Amedisys has hired any additional employees away from plaintiff. This court infers no bad faith by plaintiff's answer, yet the time, if any, for excusing plaintiff's careless misreading of its adversaries' demands has long since passed. Plaintiff has been compelled to supplement its responses by order (November 18, 2016) and further placed on notice of the deficiency at the time of dismissal (February 6, 2017). If an order to compel and the subsequent dismissals were not enough to encourage a careful review of its deficient responses, it seems unreasonable to believe plaintiff will ever sufficiently respond.

Order of February 6, 2017 – Dismissal without Prejudice as to Kelly & Kelly's Cross Motion

By Order of February 6, 2017, the complaint in this matter was dismissed without prejudice pursuant to R. 4:23(a)(1) as to Defendant Kelly due to plaintiff's failure to produce certain discovery. Curiously, plaintiff's motion to restore the complaint via vacation of dismissal neglects to address the deficiencies in discovery due Kelly, whatsoever. Without the privilege of oral argument, this court would have properly assumed plaintiff had abandoned its claims against Kelly entirely. Plaintiff's statements at oral argument suggest that its claims against Kelly may have been abandoned by conduct, albeit not by intent. Plaintiff is quite frankly out of time to comply with its still outstanding discovery obligations. "If an order of dismissal or suppression without prejudice has been entered pursuant to paragraph (a)(1) of this rule and not thereafter

vacated, the party entitled to the discovery may, after the expiration of 60 days from the date of the order move on notice for an order of dismissal or suppression with prejudice." Rule 4:23-5(a)(1) clearly requires that a delinquent party must become fully compliant with its discovery obligations prior to moving for vacation of dismissal in these circumstances. In spite of the October Consent Order, the November Order compelling discovery, the February Order of dismissal, and the numerous correspondence, conferences and oral arguments with the court and Kelly related to said orders, plaintiff represented in oral argument that it did not "have a list of [the deficient items]," thus it did not respond. Plaintiff took no initiative to contact Kelly for clarification regarding what remained outstanding post-dismissal. Therefore, the only fact for the court to consider in terms of plaintiff's motion is that no further discovery has been exchanged between the February 2017 dismissal without prejudice and the May 2017 filing of Kelly's present cross motion for conversion to dismissal with prejudice. At oral argument on plaintiff's motion to vacate, Kelly informed the court of plaintiff's specific outstanding deficiencies without hesitation. Plaintiff provided no opposition to Kelly's assertion that certification of plaintiff's interrogatory responses and supplementation to interrogatory requests 39, 43, 44, and 45 remained incomplete. Oral argument was not the first time plaintiff was apprised of these deficiencies. The letter from Kelly's counsel to plaintiff's counsel dated September 1, 2016, provided by copy to the court, and the October 6, 2016 Consent Order alone would have noticed plaintiff of these items. If any question remained, it was plaintiff's obligation to review its responses for completeness or, at minimum, make an attempt to supplement its previous production and responses. Plaintiff did neither. Accordingly, plaintiff has failed to meet its burden with respect to

vacation of the dismissal. It follows that Kelly's cross motion for final dismissal is appropriately granted.

SANCTIONS

The Amedisys Defendants' Request for Fees and Costs

Subsequent to the dismissal of counts I-V of plaintiff's complaint as to Defendant Oaks, the Amedisys Defendants submitted an application for fees associated with the cost of filing of its' R. 1:4-8 motion. The application sought reimbursement of $30,700.80. Plaintiff attempted to oppose Amedisys' fee application by demanding the court consider "[t]he defendants needs[,] . . . [t]he plaintiff's financial ability to pay[,] . . . [and] [t]he defendant's good faith in instituting or defending the action." See Pl.'s Opp. 4; see also Williams v. Williams, 59 N.J. 229 (1971). Plaintiff presents a robust defense, requesting the court look not only to these factors, but to an expanded list of factors developed through case law over time; however, although plaintiff implores the court to apply the logic in a series of matrimonial cases to the matter before this court, such analysis would be misplaced. See Lavene v. Lavene, 148 N.J. Super. 267 (App. Div. 1977); see also Brennan v. Brennan, 187 N.J. Super. 351 (App. Div. 1982). Plaintiff asks the court to apply a R. 4:42-9 analysis, as is central to the proffered case law. Rule 4:42-9 parallels the American Rule, which stands for the premise that parties are expected to pay their own attorney's fees. See Pressler, Current N.J. Court Rules, comment 1 on R. 4:42-9 (2017). The majority of the rule describes specific matters and circumstances where the American Rule can or should be relaxed. See R. 4:42-9(a)(1)-(8). This rule essentially describes a fee-shifting scenario quite different from the question of sanctions presently before the court.

Our legal tradition does not promote the shifting of fees as a matter of course; however, special circumstances like those described in R. 1:4-8, R. 4:23-1, R. 4:23-2 permit fee shifting or other sanctions to deter the type of bad faith or inexcusable negligence that results in unnecessary motion practice. See R. 4:42-9(7) (maintaining a caveat to the American Rule "[a]s expressly provided by [the court rules] with respect to any action, whether or not there is a fund in court."). The applicable rule dictates in pertinent part:

> A sanction imposed for violation of paragraph (a) of this rule shall be limited to a sum sufficient to deter repetition of such conduct. The sanction may consist of (1) an order to pay a penalty into court, or (2) an order directing payment to the movant of some or all of the reasonable attorneys' fees and other expenses incurred as a direct result of the violation, or both. Among the factors to be considered by the court in imposing a sanction under (2) is the timeliness of the movant's filing of the motion therefor. In the order imposing sanctions, the court shall describe the conduct determined to be a violation of this rule and explain the basis for the sanction imposed.
> R. 1:4-8(d).

Nevertheless, "[a]ttorney's fees will not be awarded where plaintiff had a reasonable and good faith belief in the merit of the cause." Pressler, Current N.J. Court Rules, comment 2 on R. 1:4-8 (2017). The reasonableness of a belief in the merit of a cause of action may dwindle over time. "[R]easonable attorney's fees may be awarded only from the point in the litigation at which it becomes clear the action is frivolous." See ibid. Here, there is no evidence of bad faith at the outset of this litigation. Plaintiff repeatedly affirmed that its employee onboarding process includes the signing of a restrictive covenant agreement. Yet, after approximately two years of litigation, plaintiff failed to locate the necessary agreement to support its claim. Despite numerous requests to turn over the restrictive covenant document allegedly signed by Oaks, followed by a demand for withdrawal of

the related claims, plaintiff took no action. If plaintiff had diligently searched for the document, two years should have been more than sufficient for the restrictive covenant to resurface. At that point, and in light of the demand to withdraw in the Amedisys Defendants' R. 1:4-8 notice letter, plaintiff's continued prosecution of counts I-V was unreasonable. As such, this court deems it appropriate to require plaintiff to pay $2,500, an adequate amount to deter such conduct without unjustly punishing plaintiff for action taken without deceptive, subversive, or fraudulent intent.

Kelly's Request for Fees and Costs

Defendant Kelly Services (Kelly) presently seeks attorney's fees and costs under a separate set of rules than its co-defendant. Namely, Kelly's monetary requests flow from both plaintiff's failure to provide discovery and its failure to comply with two (2) court orders. More narrowly, Kelly relies on R. 1:10-3 and/or R. 4:23-2(b), which relate to plaintiff's failure to comply with the October 2016 Consent Order, nor the Order of November 18, 2016, which similarly ordered plaintiff to exchange outstanding discovery. Rule 1:10-3 guides this analysis:

> Notwithstanding that an act or omission may also constitute a contempt of court, a litigant in any action may seek relief by application in the action. A judge shall not be disqualified because he or she signed the order sought to be enforced. . . . The court in its discretion may make an allowance for counsel fees to be paid by any party to the action to a party accorded relief under this rule.

While the monetary relief granted under this rule is not limited to actual damages, "it must nevertheless be rationally related to the desideratum of imposing a [']sting['] on the offending party within its reasonable economic means." Pressler, Current N.J. Court Rules, comment 4.4.3 on R. 1:10-3 (2017). Rule 4:23-2 also addresses a failure to abide by court order:

> If a party or an officer, director, or managing or authorized agent of a party or a person designated under R. 4:14-2(c) or 4:15-1 to testify on behalf of a party fails to obey an order to provide or permit discovery, including an order made under R. 4:23-1, the court in which the action is pending **may** make such orders in regard to the failure as are just, and among others the following: . . . An order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or proceeding or any part thereof with or without prejudice, or rendering a judgment by default against the disobedient party . . . In lieu of any of the foregoing orders or in addition thereto, **the court shall require the party failing to obey the order to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust.**

It must be emphasized that plaintiff continued to provide inadequate discovery responses despite court entry of the parties' own consent order, followed by the court order of November 18, 2017, compelling plaintiff to comply with the October order. The dismissal orders as to Kelly, both with and without prejudice, appear to have been similarly unsuccessful at coercing plaintiff to fully meet its obligations.

A monetary sanction is necessary, as a mere court order or even dismissal has done little to deter plaintiff from continuing to ignore its discovery obligations. Nevertheless, we consider the fact that partial discovery was performed, no bad faith is evident, and that plaintiff has already received essentially the highest sanction of dismissal. Taken together, this court holds that a partial attorney's fee sanction amounting to no greater than $2,500 would be sufficient to deter plaintiff's inexcusable negligence in failing to even attempt to provide fully responsive, certified interrogatory answers as was ordered months prior to the oral argument on plaintiff's motion to vacate the previous dismissal and Kelly's cross motion to dismiss with prejudice. Plaintiff shall not be required to pay this sanction to Kelly unless and until Kelly submits an accounting

of fees of $2,500 in connection with its work seeking to compel discovery. If Kelly's accounting of fees reveals an amount less than $2,500, Kelly shall receive its full fee.

CONCLUSION

For the foregoing reasons, plaintiff's motion is denied. The Order of November 18, 2017, dismissing counts I-V of plaintiff's complaint as to Cheryl Oaks, and derivatively as to Amedisys and Kelly remains in full force and effect. The Orders of February 6, 2017, shall not be vacated and the dismissals without prejudice therein are hereby converted to dismissals with prejudice. The Kelly cross motion for dismissal with prejudice is granted, accordingly. In conjunction with these motions, plaintiff shall pay a partial fee in the amount of $2,500 to the Amedisys Defendants and a $2,500 fee to Kelly, pending an appropriate accounting of fees.

Very Truly Yours,

/s/Hon. Ernest M. Caposela, A.J.S.C.