**IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS**
**COUNTY DEPARTMENT, LAW DIVISION**

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| Tamara Castaneda, | ) | |
| | ) | |
| Plaintiff, | ) | |
| | ) | |
| v. | ) | No. 22 L 2807 |
| | ) | |
| Board of Education of the City of Chicago, | ) | |
| | ) | |
| Defendant. | ) | |

**MEMORANDUM OPINION AND ORDER**

The closure of past discovery in a re-filed case is appropriate only if a court has previously found that a party acted deliberately and with unwarranted disregard for the court's authority. Here, no court reached such a conclusion as to the plaintiff's inadvertent failure to serve Illinois Supreme Court Rule 213(f)(1) and (f)(2) disclosures. For that reason, the defendant's motion to adopt past discovery and close further discovery must be denied.

Facts

On November 22, 2017, Tamara Castaneda filed a complaint against the Board of Education in the case 2017 L 12004. The complaint alleged that Castaneda was injured after using a makeshift stack of cinder blocks as stairs to reach a loading dock owned by the Board. On June 6, 2018, Castaneda filed a second amended complaint.

On October 2, 2018, Castaneda answered the Board's interrogatories, disclosing treatment and surgery for a torn shoulder acromioclavicular ligament (ACL). The answers listed Castaneda's surgeon and therapists, and Castaneda provided all medical bills and records. On May 31, 2019, the Board issued deposition subpoenas to Castaneda's treating physicians, surgeon, Rule 215 examiner, and therapists. On March 12, 2020, Castaneda disclosed her Rule 213(f)(3) witness and presented him for a deposition a month later.

In January 2021, Castaneda's current attorney took over responsibilities for this case from two prior attorneys. On January 29, 2021, the parties agreed to close discovery despite Castaneda's new attorney being unaware that his predecessors never served Castaneda's Rule 213(f)(1) and (f)(2) disclosures. In September 2021, Castaneda's counsel discovered for the

first time that the Rule 213(f)(1) and (f)(2) disclosures had not been served. On October 14, 2022, Castaneda served the Rule 213(f)(1) an (f)(2) disclosures. For the first time, the Board's attorney objected to untimeliness of the disclosures.

On December 6, 2021, Judge Thomas Donnelly, who had been hearing the case, granted Castaneda's motion to allow her to disclosure those witnesses who had been deposed during the course of discovery—Castaneda and certain Board employees—but denied her motion as to those persons who had not been deposed—Castaneda's husband, treating physicians, and billing and records custodians. After a judge in courtroom 2005 denied Castaneda's motion to move the January 10, 2022 trial date, Castaneda voluntarily dismissed her case without prejudice and with leave to re-file.

On March 24, 2022, Castaneda re-filed her case. The current complaint is identical to Castaneda's second amended complaint. On April 26, 2022, the Board filed the current motion to adopt and close discovery. On May 3, 2022, Judge Thomas Donnelly transferred the case to courtroom 2005. A judge sitting there transferred the case to this court. On June 17, 2022, Castaneda served the Board with Rule 213(f)(1) and (f)(2) answers, which the Board argues disregarded Judge Donnelly's order.

Analysis

Illinois Supreme Court Rule 219(e) governs this dispute. That portion of the rule provides that:

> A party shall not be permitted to avoid compliance with discovery deadlines, orders or applicable rules by voluntarily dismissing a lawsuit. In establishing discovery deadlines and ruling on permissible discovery and testimony, the court shall consider discovery undertaken (or the absence of same), any misconduct, and orders entered in prior litigation involving a party. The court may, in addition to the assessment of costs, require the party voluntarily dismissing a claim to pay an opposing party or parties reasonable expenses incurred in defending the action including but not limited to discovery expenses, expert witness fees, reproduction costs, travel expenses, postage, and phone charges.

Ill. S. Ct. R. 219(e). The court also notes that, "when a case is refiled, the court shall consider the prior litigation in determining what discovery will be permitted, and what witnesses and evidence may be barred." Ill. S. Ct. R. 219(e), committee comments (rev. June 1, 1995). To make this assessment, a court is to consider the factors set forth in *Smith v. P.A.C.E.*, 323 Ill. App. 3d

1067 (1st Dist. 2001). Those factors include: (1) the surprise, if any, to the defendant; (2) the prejudicial effect of the plaintiff's witnesses' testimony; (3) the nature of that testimony; (4) the defendant's diligence; (5) whether the defendant objected to the testimony; and (6) the plaintiff's good faith. *Id.* at 1076 (citing cases). No single factor is determinative. *Shimanovsky v. General Motors Corp.*, 181 Ill. 2d 112, 124 (1998).

This court's review of the first factor indicates there is no surprise to the Board. Through document production and other disclosures, the Board knew of the persons Castaneda intended to call, including fact witnesses as well as treating medical personnel. Second, there was no undue prejudice to the Board given that it had received the medical records and knew the scope and substance of Castaneda's treaters. Further, there was no prejudice or surprise given the expected testimony of Castaneda's husband. Third, the nature of the missing testimony goes to the very heart of Castaneda's case—the scope of her injury and the steps undertaken to treat her torn ACL. To prohibit that testimony would effectively gut Castaneda's case. Fourth, the Board presumptively knew that Castaneda's had failed to serve the Rule 213(f)(1) and (f)(2) disclosures. While this court does not suggest that the Board acted willfully in withholding its objection to Castaneda's failure to serve, it would be unjust to grant the Board's motion given the Board's own failure to object earlier, let alone conduct a Rule 201(k) conference to work out the issue. Fifth, the Board ultimately did object to Castaneda's late disclosure, but this objection, as noted above, was also late. Sixth, Castaneda's attorney acted in good faith despite being given the short stick by his two predecessors. Indeed, the record indicates that counsel acted appropriately and in a timely fashion once he realized that the Rule 213(f)(1) and (f)(2) disclosures had not been served.

Also significant to this court's analysis is the common law gloss on the phrase "avoid compliance" as used in Rule 219(e). That phase has been interpreted to mean that a circuit court made "a preliminary finding of misconduct, analogous to unreasonable noncompliance." *Scattered Corp. v. Midwest Clearing Corp.*, 299 Ill. App. 3d 653, 659 (1st Dist. 1998). The standard for unreasonable noncompliance is "deliberate, contumacious or unwarranted disregard for the court's authority." *Id.* It is persuasive that the Supreme Court has cited *Scattered Corp.* with approval in *Morrison v. Wagner*, 191 Ill. 2d 162, 166 (2000), as have various appellate courts. *See Ramos v. Kewanee Hosp.*, 2013 IL App (3d) 120001, ¶¶ 110-13; *Jones v. Chicago Cycle Cntr.*, 391 Ill. App. 3d 101, 111-12 (1st Dist. 2009); *In re Marriage of Webb*, 333 Ill. App. 3d 1104, 1111-12 (2d Dist. 2002).

In this case, there is no evidence in the record that a judge made a preliminary finding of Castaneda's attorney's misconduct analogous to

unreasonable noncompliance. Indeed, it is compelling that the Board has not even suggested that Castaneda's attorney acted with deliberate, contumacious, or unwarranted disregard for the court's authority. In sum, it is unfortunate for all concerned that the lack of service of the Rule 213(f)(1) and (f)(2) disclosures went unnoticed by either party until it was too late to avoid Castaneda's voluntary dismissal. That oversight is, however, no basis for prohibiting the completion of discovery that should have been completed long ago.

Conclusion

For the reasons presented above, it is ordered that:

1. The defendant's motion to adopt and close discovery is denied; and
2. The parties shall appear for case management by Zoom on Wednesday, January 18, 2023 at 9:30 a.m.

John H. Ehrlich, Circuit Court Judge

Judge John H. Ehrlich

JAN 04 2023

Circuit Court 2075