[* 1]

SHORT FORM ORDER

INDEX No. 5201-06

COPY

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 33 - SUFFOLK COUNTY

PRESENT:

Hon. THOMAS F. WHELAN
Justice of the Supreme Court

MOTION DATE 2/17/12
ADJ. DATES 5/4/12
Mot. Seq. # 006 - MG
Mot. Seq. # 007 - XMG
Mot. Seq. # 008 - XMD
Case Disp YES

----------X

JOHN MORRIS and TERESA MORRIS,

Plaintiffs,

-against-

HOME DEPOT USA,

Defendant.

----------X

HOME DEPOT USA,

Third-Party Plaintiff,

-against-

J&J BUILDING MAINTENANCE, INC.,

Third-Party Defendant.

----------X

BRODY, O'CONNOR & O'CONNOR
Attys. For Plaintiffs
7 Bayview Ave.
Northport, NY 11768

SIMMONS, JANNACE & STAGG
Attys. For Deft/Third-Party Plaintiff
75 Jackson Ave.
Syosset, NY 11791

MAZZARA & SMALL, PC
Attys. For Third-Party Defendant
800 Veterans Memorial Hwy.
Hauppauge, NY 11788

Upon the following papers numbered 1 to 16 read on this motion and cross motion by defendant and third-party defendant to dismiss the complaint or to compel discovery and cross motion by the plaintiffs to compel location of exam and testimony ; Notice of Motion/Order to Show Cause and supporting papers 1 - 4 ; Notices of Cross Motion and supporting papers 5-7; 8-10 ; Answering Affidavits and supporting papers 11-12 ; Replying Affidavits and supporting papers 13-14; 15-16 ; Other ; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motion (#006) by defendant/third party plaintiff, Home Depot USA, Inc. and cross motion (#007) by third-party defendant, J&J Building Maintenance, Inc., for an order dismissing the complaint pursuant to CPLR 3126 or for an order compelling disclosure are considered under Article 31and are granted to the extent that the complaint is dismissed pursuant to CPLR 3126; and it is further

DB

ORDERED that the cross motion (#008) by the plaintiffs for, in effect, a protective order obviating any need for the plaintiffs to appear here in New York for any outstanding discovery proceedings or for the trial of this action by requiring the defendants to conduct all physical examinations of the injured plaintiff in the plaintiffs' home state of Florida and directing that the trial testimony of the plaintiffs and of the defendants' medical experts be video taped in Florida, is considered under CPLR Article 31 and is denied.

This action arises out of work site accident that occurred in the parking lot of a Home Depot store in Shirley, New York on January 19, 2004. At the time of the accident, the injured plaintiff, John Morris, was employed by ASR Electrical Contracting as an electrician and he was injured when he fell on ice and/or snow while traversing the parking lot of the store under construction. The injuries which the injured plaintiff claims to have sustained in the fall include a rotator cuff tear in the right shoulder and three herniations of discs in his thoracic spine region and/or aggravations to any such herniations which may have pre-existed, all of which, allegedly rendered the injured plaintiff incapable of working and in need of surgery, which was performed.

The within action was commenced on October 28, 2005 in the New York State Supreme Court in Nassau County. The defendant's answer was served in December of 2005 together with its combined demands for discovery and a demand for a venue change. On January 25, 2006, a stipulation of counsel resolved the venue change demand and the action was transferred to this court.

When no responses to the defendant's combined demands for discovery were received, the defendant requested a preliminary conference which was held in the DCM part of this court on May 22, 2006. Thereat, the plaintiffs and the defendant agreed that the depositions of the parties would be held on September 19, 2006. They further agreed to a physical examination of the injured plaintiff within 45 days of the plaintiff's deposition and that all discovery, except for expert discovery, would be completed by May 1, 2007. The plaintiffs served their bill of particulars on July 21, 2006, which reflected, among other things, that the plaintiffs had relocated to Florida and that the injured plaintiff was being treated by physicians in the Boca Raton area. For reasons not discernable from the record, neither the depositions nor the physical examination of the plaintiff were conducted within the time frames dictated by the court in its preliminary conference order.

In March of 2007, the defendant commenced the third-party action against J&J Building Maintenance, Inc., who allegedly had been retained to perform snow removal in the parking lot in which the plaintiff's accident allegedly occurred. It wasn't until April 22, 2008, that the injured plaintiff appeared for his deposition under compulsion of specific court directives set forth in two orders dated January 9, 2008 and March 14, 2008 that were issued on two separate motions. Thereafter, disputes arose between Home Depot and the other parties regarding the inability of defendant Home Depot to produce a witness with knowledge of, among other things, control of the parking lot on the date of the accident. Ultimately, two depositions of Home Depot agents were conducted, the last of which was recently concluded.

The record reflects that this action has appeared on conferences calendars of this court no fewer than 35 times since its transfer from Nassau County. At the 33rd scheduled conference appearance date

in September of 2011, counsel stipulated to deposition dates of the defendant and third-party defendant and a resolution of the plaintiffs' claim that the injured plaintiff would not be able to appear for a physical examination in New York due to his allegedly poor physical condition which made it difficult for him to travel here. Two letters from a treating physician in Florida dated October 18, 2007 and September 28, 2011 were apparently gathered by the plaintiff as evidence of Mr. Morris' alleged inability to appear for physical examinations by New York physicians designated by the defendant and third-party defendant.

In October of 2011, the plaintiffs served a "supplemental bill of particulars". In response, both the defendant and third-party defendant demanded in writing further depositions of the plaintiffs relative to the new injuries and conditions asserted in the "supplemental bill of particulars" and the production of the injured plaintiff for his physical examination. The written demands specified that both the further depositions and the physical examinations were to be held here in New York. The instant applications were interposed after counsel could not resolve the issues surrounding the location of the physical examinations and those surrounding any depositions of the plaintiffs[1].

By the motion (#006) and cross motion (#007) interposed by the defendant and the third-party defendant, these parties seek an order dismissing the plaintiff's complaint due their failure to provide discovery. Alternatively, these moving parties seek an order compelling the injured plaintiff to appear for his physical examination here in New York and compelling his appearance for a further deposition based upon the new items of damages and/or injuries and conditions set forth in the plaintiffs' "supplemental" bill of particulars dated October 6, 2011.

The plaintiffs cross move for, in effect, a protective order against the plaintiffs' appearances here in New York for further depositions, a physical examination or for trial by the issuance of an order directing that the defendants designate Florida physicians for the purpose of conducting any and all outstanding physical examinations and that the plaintiffs' trial testimony be taken by video tape in Florida and used at the trial in lieu of live testimony. The plaintiffs further oppose the defendants' demands for further depositions of either plaintiff since no claims, new injuries or new elements of damages are allegedly advanced in the plaintiffs' supplemental bill of particulars. In support of their demands for a protective order, the plaintiffs rely upon two letters from a treating physician, Dr. Marc H. Feinberg of Boca Ratan, Florida dated October 18, 2007 and September 28, 2011. They also submit an unsigned affirmation of Dr. Feinberg which allegedly enlarges the description of the conditions afflicting the injured plaintiff that prevent him from traveling to New York.

For the reasons stated below, the defendants' motion and cross motion are granted while the plaintiffs' cross motion is denied.

Pursuant to CPLR 3126(3), this court is authorized to strike the pleadings of any and all parties who refuse to obey an order for disclosure or who wilfully fail to disclose information which the court finds ought to have been disclosed (*see* ***Palomba v Schindler El. Corp.,*** 74 AD3d 1037, 903 NYS2d

---

[1] A motion (#005) to compel Home Depot's further deposition was interposed by the third-party defendant and resolved prior to the final submission date of these motions.

137 [2d Dept 2010]; ***Nicolia Ready Mix, Inc. v Fernandes***, 37 AD3d 568, 829 NYS2d 704 [2d Dept 2007]; ***Mendez v City of New York***, 7 AD3d 766, 778 NYS2d 501 [2d Dept 2004]). The striking of a pleading may be appropriate where there is a clear showing that the failure to comply with discovery demands is willful or contumacious (*see* ***Northfield Ins. Co. v Model Towing & Recovery***, 63 AD3d 808, 881 NYS2d 135 [2d Dept 2009]; ***Kuzmin v Visiting Nurse Serv. of NY***, 22 AD3d 643, 804 NYS2d 352 [2d Dept 2005]; ***Diel v Rosenfeld***, 12 AD3d 558, 784 NYS2d 379 [2d Dept 2004]). Willful and contumacious conduct may be inferred from a party's repeated failure to respond to demands or to comply with discovery orders and the absence of any reasonable excuse for such failures (*see* ***Northfield Ins. Co. v Model Towing & Recovery***, 63 AD3d 808, *supra*; ***McArthur v New York City Hous. Auth.***, 48 AD3d 431, 851 NYS2d 271 [2d Dept 2008]; ***Bomzer v Parke-Davis***, 41 AD3d 522, 839 NYS2d 110 [2d Dept 2007]).

As a general rule, a non-resident plaintiff who has invoked the jurisdiction of New York State by bringing suit in its courts must stand ready to be deposed in New York unless it is shown that undue hardship would result (*see* ***Yu Hui Chen v Chen Li Zhi***, 81 AD3d 818, 818, 916 NYS2d 525 [2d Dept 2011]; ***Rodriguez v Infinity Ins. Co.***, 283 AD2d 969, 723 NYS2d 741 [4th Dept 2001];***Farrakhan v N.Y.P. Holdings***, 226 AD2d 133, 135–136, 640 NYS2d 80 [1st Dept 1996]; ***Boylin v Eagle Telephonics***, 130 AD2d 538, 515 NYS2d 273 [2d Dept1987]; *see also* CPLR 3110[1]). An exception exists where a party demonstrates that conducting his or her deposition in that county would cause undue hardship (*see* ***Gartner v Unified Windows, Doors and Siding, Inc***., 68 AD3d 815, 890 NYS2d 608 [2d Dept 2009]; ***Droogas v Droogas***, 1 AD2d 965, 150 NYS2d 445 [2d Dept 1956]).

Although CPLR § 3121 does not specify the place at which the physical examinations that are the subject of that statute shall be held, it gives the party demanding the examination the right to designate the examining physician whose offices are the preferred place for such examinations (*see* ***Resnick v Seher***, 198 AD2d 218, 603 NYS2d 501 [2d Dept 1993]); ***Foley v Haffmeister***, 156 AD2d 541, 549 NYS2d 48 [2d Dept 1989]). However, a demonstration of special circumstances, including hardship on, or prejudice to the examinee, may warrant a judicial direction that such examinations be held elsewhere (*see* ***Wygocki v Milford Plaza Hotel***, 38 AD3d 237, 831 NYS2d 381 [1st Dept 2007]; *cf*., ***Rakowski v Irmisch***, 46 AD2d 826, 361 NYS2d 68 [4th Dept 1974]).

Claims of hardship must be supported by due proof, as conclusory claims thereof are insufficient (*see* ***Mount Vernon Fire Ins. Co. v Lundy***, 217 AD2d 574, 628 NYS2d 820 [2d Dept 1995]; ***Kahn v Rodman***, 91 AD2d 910, 457 NYS2d 480 [1st Dept 1983]). Where the hardship claimed is medical in nature, proof thereof of the type necessary to excuse a trial appearance of a deposed witness who is purportedly unavailable for trial due to age, sickness or infirmity as contemplated by the CPLR 3101(a)(3) and 3117(30)(iii) (***see de Velutini v Velutini U.***, 151 AD2d 300, 542 NYS2d 574 [1st Dept 1989.]; ***Foley v Haffmeister***, 156 AD2d 541, *supra*; ***Platman v Pham Thu Duc***, 191 AD2d 620, 595 NYS2d 111 [2d Dept 1993]).

Here, the court finds that the cross moving papers of the plaintiffs failed to demonstrate by due and sufficient proof a sufficient predicate for their cross motion for a protective order against their return to New York for discovery or trial purposes relating to this action. The hardship claimed, namely, a total inability on the part of the injured plaintiff to travel from Florida to New York due to one or

more physical conditions allegedly afflicting him is unsupported by medical proof. The only submission aimed at establishing the hardship claims are the two letters of Dr. Feinberg , both of which are vague and conclusory and the unsigned affirmation of Dr. Feinberg which has no evidentiary value whatsoever. The court agrees with the defendants that such submissions are insufficient to sustain the claims of medical hardship that underlie the plaintiffs' cross motion for the relief outlined above. The plaintiff's cross motion(#008) is thus denied.

The court further finds that the moving papers of the defendants sufficiently established that the plaintiffs have repeatedly refused to personally participate in discovery proceedings in accordance with the schedule dictated by the court. Their relocation to Florida shortly after the commencement of this action and their unwillingness to return to New York to participate, personally, in pretrial proceedings requiring such participation are attributable to discretionary determinations and deliberate conduct on the part of the plaintiffs rather than to any qualifying hardship, as their claims of an inability to travel to New York due to physical disabilities are wholly unsupported by competent medical proof. (*see* ***Dec v Auburn Enlarged School Dist.***, 222 AD2d 1100, 636 NYS2d 513 [4th Dept 1995]; ***Bristol–Myers, Squibb Co. v Yen–Shang B. Chen***, 186 AD2d 999, 588 NYS2d 672 [4th Dept 1992]; ***United Refrig. Co. v Rose***, 19 AD2d 809, 243 NYS2d 347 [1st Dept 1963]). It is clear to this court that the actions of the plaintiffs may fairly be construed as evincing wilful and contumacious conduct which has clearly frustrated the orderly progression of this action, including defendants' entitlement to the discovery stipulated to by counsel and directed by the court, some five years ago (*see* CPLR 3126; ***Umar v Ohrnberger***, 72 AD3d 1066, 900 NYS2d 349 [2d Dept 2010]).

Under these circumstances, the defendant and third-party defendant are entitled to an order dismissing the complaint of the plaintiffs pursuant to CLR 3126. Those portions of the motion (#006) and cross motion (#007) of the defendant and third-party defendant wherein they demand dismissal of the plaintiffs complaint pursuant to CPLR 3126 are granted.

DATED: 5/14/12

THOMAS F. WHELAN, J.S.C.