

**Ardaya v Park and 76th St., Inc.**

2016 NY Slip Op 32453(U)

December 13, 2016

Supreme Court, New York County

Docket Number: 158295/2013

Judge: Manuel J. Mendez

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This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY**  
**PRESENT: MANUEL J. MENDEZ PART 13**  
*Justice*

MARTHA PARADA ARDAYA and STIVENS A. SANGUINO,  
as Co-Administrator of the Estate of ANTONIO PELAGIO  
URQUIZA CARDENAS a/k/a ANTONIO URQUIZA, Deceased,  
Plaintiffs,

INDEX NO. 158295/2013  
MOTION DATE 11/02/2016  
MOTION SEQ. NO. 019  
MOTION CAL. NO. \_\_\_\_\_

-against-  
PARK and 76<sup>TH</sup> ST., INC., MARY L. CARPENTER &  
EDMUND M. CARPENTER, NORDIC CUSTOM BUILDERS, INC.,  
MITCHELL STUDIO, LLC, GUMLEY-HAFT LLC, ARTHUR C. KLEM, INC.,  
ALKLEM PLUMBING, INC., AA SERVICES, LLC, GT CARPENTRY LLC,  
CONNECTICUT THERMOFOAM LLC, a/k/a CONNECTICUT THERMOFOAM  
LIMITED LIABILITY COMPANY, ERIN CUSTOM INTERIORS, INC.,  
W.M. SANFARDINO ELECTRIC LTD, AND PLASTER WORKS, INC.,  
Defendants.

PARK and 76<sup>TH</sup> ST. INC., and GUMLEY-HAFT, LLC,  
Third-Party Plaintiffs,

-against-  
STEPHEN GAMBLE, INC.,  
Third-Party Defendant.

MARY L. CARPENTER and EDMUND M. CARPENTER,  
Second Third-Party Plaintiffs,

-against-  
STEPHEN GAMBLE, INC.,  
Third-Party Defendant/Second  
Third-Party Defendant.

NORDIC CUSTOM BUILDERS, INC.,  
Third Third-Party Plaintiff,

-against-  
STEPHEN GAMBLE, INC.,  
Third-Party Defendant/Second  
Third-Party Defendant/Third  
Third-Party Defendant.

MITCHELL STUDIO, LLC,  
Fourth Third-Party Plaintiff,

-against-  
STEPHEN GAMBLE, INC.,  
Third-Party Defendant/Second  
Third-Party Defendant/Third  
Third-Party Defendant/Fourth  
Third-Party Defendant.

The following papers, numbered 1 to 7 were read on this motion to strike Defendants' Answers.

	<u>PAPERS NUMBERED</u>
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1 - 4
Answering Affidavits — Exhibits _____	5 - 6; 7
Replying Affidavits _____	

**Cross-Motion:**     Yes     No

Upon a reading of the foregoing cited papers, it is Ordered that Plaintiffs' motion to strike the Answers of Defendants Mary L. Carpenter, Edmund M. Carpenter, Nordic Custom Builders, Inc., Mitchell Studios, LLC, and AA Services, LLC, to direct all Defendants to proceed with the depositions as scheduled in this Court's July 13, 2016 Conference Order, and to extend the time for Plaintiff to file its Note of Issue, is denied.

This action was commenced by the Plaintiffs for the wrongful death and conscious pain and suffering of the Plaintiff-Decedent Antonio Urquiza (herein "the Decedent"), when the Decedent fell from a third floor window while performing wood-staining work in the course of his employment, at 840 Park Avenue, Apartment 3/4A, New York, New York (herein "the Apartment"). Plaintiffs assert claims for negligence, and violations of Labor Law §§200, 240(1), & 241(6), and allege, in relevant part, that the Defendants were negligent in utilizing an unstable board covered with slippery paper on a window ledge where Decedent stood while working in the library causing him to fall, and for failure to provide the proper safety devices. Issue was joined, and the parties have proceeded with some discovery.

This Court's Status Conference Order dated July 13, 2016, set forth a deposition schedule for the various Defendants that was to begin on September 8, 2016, and conclude on October 27, 2016. (Mot. Exh. B). Only the first deposition of Defendant Park and 76<sup>th</sup>, Inc. went forward on the scheduled date of September 8, 2016.

Plaintiff now moves for an Order (1) striking the Answers of the Defendants Mary L. Carpenter, Edmund M. Carpenter, Nordic Custom Builders, Inc., Mitchell Studios, LLC, and AA Services, LLC, (2) directing all Defendants to proceed with the depositions on the dates scheduled, and (3) extending Plaintiffs' time to file the Note of Issue.

Plaintiffs argue that counsel for Mary L. Carpenter and Edmund M. Carpenter adjourned their depositions without providing a new date, that Nordic Custom Builders, Inc.'s counsel refused to proceed with its client's deposition without the Carpenters having been deposed first, and that this failure of the Defendants to proceed was intentional. Plaintiffs contend that counsel for Mitchell Studios, LLC, would not produce its client due to the other Defendants' deposition adjournments, and would only go forward in order of the caption, and that counsel for AA Services,

LLC failed to go forward because of a scheduling conflict. Plaintiffs argue that it is evident that none of the Defendants will be appearing for their depositions, and that they are refusing to appear on legally baseless excuses such as the depositions needing to proceed in order of the caption, or that there was an unavoidable conflict.

Defendants Cummins Painting Specialists Inc., and Mitchell Studio, LLC, oppose the motion.

CPLR § 3126 grants the court the power to sanction a party that fails to comply with a court's discovery order. The nature and degree of the penalty to be imposed for a party's failure to comply with an order is a matter within the sound discretion of the court (CPLR § 3126). The striking of a pleading is a drastic remedy and is only warranted where a clear showing has been made that the noncompliance with an order was willful, contumacious or due to bad faith (*Mateo v. City of New York*, 274 A.D. 2d 337, 711 N.Y.S. 2d 396 [1<sup>st</sup>. Dept. 2000]). Willful and contumacious conduct, warranting the striking of a pleading, may be inferred from a party's repeated failure to comply with a court order, coupled with inadequate explanations for the failure to comply (*Duncan v. Hebb*, 47 A.D. 3d 871, 850 N.Y.S. 2d 610 [2<sup>nd</sup>. Dept. 2008]).

Plaintiffs fail to show willful or contumacious conduct, or bad faith on behalf of the Defendants. Therefore, Plaintiffs have not stated a basis for having the Defendants' Answers stricken.

Accordingly, it is hereby ORDERED that Plaintiffs motion to strike the Answers of Defendants Mary L. Carpenter, Edmund M. Carpenter, Nordic Custom Builders, Inc., Mitchell Studios, LLC, and AA Services, LLC, to direct all Defendants to proceed with the depositions as scheduled in this Court's July 13, 2016 Conference Order, and to extend the time for Plaintiff to file its Note of Issue, is denied, and it is further,

ORDERED, that the depositions of the Defendants are to be held in order of the caption, and per this Court's Status Conference Order dated July 13, 2016, and are to continue day by day until completion as follows:


- Mary and Edmund Carpenter, January 16, 2017
- Nordic Custom Builders, January 17, 2017
- Mitchell Studio LLC, January 18, 2017
- Gumley-Haft LLC, January 19, 2017
- Arthur C. Klem, Inc., Alklem Plumbing, Inc., January 20, 2017
- AA Services, LLC January 23, 2017
- Plastic Works, Inc., January 24, 2017
- Third-Party Defendant Stephen Gamble, January 25, 2017

and it is further,

ORDERED, that the parties appear for a Status Conference at IAS Part 13, 71 Thomas Street, Room 210, on February 22, 2017, at 9:30 a.m.

ENTER:

Dated: December 13, 2016

  
\_\_\_\_\_  
MANUEL J. MENDEZ  
J.S.C. MANUEL J. MENDEZ  
J.S.C.

Check one:  FINAL DISPOSITION    X NON-FINAL DISPOSITION  
Check if appropriate:  DO NOT POST                    X REFERENCE