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SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK

PRESENT: HON. DANIEL MARTIN
Acting Supreme Court Justice

TRIAL/IAS, PART 31
NASSAU COUNTY

HEBREW ACADEMY OF FIVE TOWNS.

Plaintiff.

- against -

Index No.: 014613/05
Sequence No.: 004, 005, 006, 007 & 008

HERALD COMMUNITY NEWSPAPER, RICHNER COMMUNICATIONS, INC., WESTBURY PAPER STOCK CORP. And NANOIA RECYCLING EQUIPMENT, INC.

Defendants.

PG INSURANCE COMPANY OF NEW YORK, as subrogee of RICHNER COMMUNICATIONS, INC.

Plaintiff.

Index No.: ~~110509/05~~ 004604/07

- against -

WESTBURY PAPER STOCK CORP. And NANOIA RECYCLING EQUIPMENT, INC.

Defendants.

HANOVER INSURANCE COMPANY a/s/o RECOGNITION SYSTEMS, INC.

Plaintiff.

Index No.: ~~003291/05~~ 008056/06

- against -

WESTBURY PAPER STOCK CORP. And NANOIA RECYCLING EQUIPMENT, INC.

Defendants.

CHUBB INDEMNITY INSURANCE COMPANY a/s/o HARRIET SWIEDLER.

Plaintiff.

- against -

Index No.: 012708/06

RICHNER COMMUNICATIONS, INC., WESTBURY PAPER STOCK CORP. And NANOIA RECYCLING EQUIPMENT, INC.

Defendants.

RICHNER COMMUNICATIONS, INC. And THE JEWISH STAR LLC.

Plaintiffs. **Index No.: 010263/07**

- against -

WESTBURY PAPER STOCK CORP. And NANOIA RECYCLING EQUIPMENT, INC.

Defendants.

The following named papers have been read on this motion:

	Papers Numbered
Notice of Motion and Affidavits Annexed	X
Notice of Cross-Motions and Affidavits Annexed	X
Answering Affidavits	X
Replying Affidavits	X

Defendant Westbury Paper Stock Corp. (hereinafter "Westbury") moves for an order pursuant to CPLR 3041 et seq. precluding plaintiffs Hebrew Academy of Five Towns (hereinafter "Academy") and PG Insurance Company of New York (hereinafter "PG") from offering any evidence at trial as to negligence, causation and defects.

Plaintiff Academy cross-moves for an order pursuant to CPLR 3126 striking defendant Westbury's answer for its failure to provide outstanding discovery, or alternatively, directing Westbury to provide said discovery.

Defendants Herald Community Newspaper (hereinafter "Herald") and Richner Communications, Inc. ("Richner") cross-move for an order 1) striking Westbury's complaint for its failure to provide outstanding discovery or alternatively directing Westbury to provide said discovery; and 2) for the reasons set forth in Westbury's motion, precluding plaintiff Academy from offering any evidence herein.

Plaintiff PG moves for an order pursuant to CPLR 3124 compelling defendant Westbury to produce employees to be deposed and to produce outstanding documents.

Defendant Nanoia Recycling Equipment, Inc. (hereinafter "Nanoia") cross-moves for an

order precluding plaintiffs Academy and PG from offering evidence at trial as to negligence, defects and causation.

The following facts are undisputed. Defendants Herald and Richner are newspaper publishing companies located at 379 Central Avenue, Lawrence New York. On June 15, 2004 a fire occurred at that location which spread to plaintiff Academy's property which is located at 33 Washington Avenue and which abuts the property operated by defendants Herald and Richner. Defendant Westbury is engaged in the business of recycling waste paper. Defendant Nanoia is engaged in the business of installing , restoring and /or repairing machinery including paper baling machines. One of these machines was allegedly provided by defendant Westbury to defendants Herald and Richner and defendant Nanoia installed and maintained same at the 379 Central Avenue property. Plaintiff PG provided insurance to defendant Richner relative to its business property located on Central Avenue.

Plaintiff Academy alleges herein that the fire which occurred on June 15, 2004 originated in the vicinity of the baling machine allegedly provided by defendant Westbury and installed by defendant Nanoia. Plaintiff Academy commenced an action against defendants Herald, Richner, Westbury and Nanoia (Hebrew Academy of Five Towns v. Herald Community Newspaper, et. al., Index No. 14613/05) asserting causes of action for 1) negligent maintenance and operation of the baling machine and negligent hiring and supervision of the employees who operated and maintained the machine against defendants Herald and Richner; 2) negligent installation, delivery, maintenance, etc. of the baling machine against defendants Westbury and Nanoia; 3) breach of contract against defendants Westbury and Nanoia as third-party beneficiaries; and 4) products liability against defendant Westbury. Plaintiff PG as subrogee of its insured, defendant Richner, commenced an action against defendants Westbury and Nanoia (PG Insurance Company of New York a/s/o
Richner Communications, Inc. v. Westbury Paper Stock, et. al., Index No. 4604/07) asserting causes of action for 1) negligence, breach of warranty, breach of contract and product liability against defendant Westbury (causes of action one through four); and 2) negligence against defendant Nanoia (fifth cause of action).

Defendants Westbury, Nanoia, Herald and Nanoia's Motions to Preclude

Defendant Westbury moves for an order holding that plaintiffs Academy and PG are precluded from offering any evidence as to negligence, defect and causation on the grounds that plaintiffs failed to provide a bill of particulars which provided specifics on these issues as required by the preliminary conference order herein dated July 18, 2007. That order required plaintiffs Academy and PG to provide supplemental bills of particulars by August 17, 2007 as to items 3 (nature of the occurrence), 4 (acts and omissions), 5 (manner in which property is damaged), 7 (damages), 8 (manner of computation of damages), 10 (statutes, rules or regulations allegedly violated), 12 (allegation of product defect), 15 (content of alleged warranties) and 17 (negligent acts and omissions) contained in defendant Westbury's demand for a bill of particulars. It should be noted that in its motion defendant Westbury also indicates that plaintiffs

were required to respond to items 11 (product description), 13 (defect specification), 14 (statement of breach of warranty), 16 (causation) and 19 (remedial measures). Such, however, were not set forth in the preliminary conference order of this court executed on July 18, 2007. The original responses in plaintiffs' bills of particulars indicated that the demands were premature and discovery was required in order to respond to same. The additional responses were required in order to provide defendant Westbury with specific details of its alleged negligence. Defendants Nanoia, Herald and Richner all join in this application in separate branches of their own cross-motions.

Westbury contends that since the service of the original bills of particulars plaintiffs Academy and PG have had ample opportunities to conduct discovery herein and supplement their bills of particulars. This discovery includes an inspection of the baling machine which plaintiffs allege caused the accident, depositions of witnesses from Nanoia, Westbury and Richner and the fire marshal's report which does not indicate that a defective piece of equipment caused the fire. Westbury then asserts that where, as here, plaintiffs allege negligence on the part of defendants based upon a defective product, plaintiffs' bill of particulars must allege the specific mechanism or defect in the product and causation which resulted therefrom.

In opposition plaintiffs Academy and PG assert that the motion should be denied because defendant Westbury did not provide responses to plaintiff's demand for documents dated April, 2006 until November, 2007 and that depositions of Westbury's employees did not commence until January, 2008 and further, that Westbury refused to produce additional witnesses for depositions, one or two of whom is Westbury's "owner". The depositions are required because Academy needs information on the method of the baling machine's acquisition, its past condition, maintenance, repair history and its refurbishment. Plaintiff Academy does acknowledge its obligation to specifically identify the alleged defect in its bill of particulars.

CPLR 3042(c) provides that where party fails to serve a bill of particulars the court, on motion, may preclude that party "from giving evidence at trial of the items of which particulars have not been delivered." A preclusion order may be conditional. CPLR 3042(e). In fact, a conditional preclusion order is preferable. See, e.g. Barone v. Gangi, 34 A.D.2d 889 (4th Dep't 1970). See, also, Siegel, McKinney's Practice Commentaries, C3402:9, p. 534.

Westbury has demonstrated entitlement to a conditional preclusion order in that discovery has been had herein. Regardless of whether the additional discovery would have enabled these plaintiffs to provide an adequate bill of particulars, the court notes that they stipulated to and this court "so ordered" a directive which required them to provide said bill of particulars within thirty days of July 17, 2007. Nowhere did the parties stipulate or the court direct that plaintiffs were to provide the bills of particulars after completion of discovery.

Accordingly, defendant Westbury's motion is granted to the extent that the court directs that plaintiffs Academy and PG are directed to provide a supplemental bill of particulars by July 31, 2008 as to those items in the demand for a bill of particulars delineated in the preliminary

conference order. In the event plaintiffs fail to serve said bills of particulars as directed, defendants Westbury, Nanoia, Herald and Richner may move for such relief as is just.

Academy, Herald, Richner and PG's Cross-Motions to Strike Westbury's Answer or to Compel Discovery

Academy, Herald, Richner and PG all move for an order either striking defendant Westbury's answer or compelling Westbury to provide outstanding discovery. Defendant Westbury produced for deposition an individual named Ken Sillifant as a witness who was employed with Westbury at around the time of the fire. Witnesses from Nanoia testified that prior to the fire defendant Westbury provided a replacement baling machine to Herald and Richner and entered into an agreement with Richner and Herald pursuant to which Westbury would maintain the machine. Mr. Sillifant testified that he had no knowledge about the prior transactions relative to the supplying of the machine and its maintenance agreement. The Nanoia witnesses all testified to dealing with an individual at Westbury who is believed to be named John Recince. Further, the moving parties assert that the deposition of Evelyn and/or Carolyn Core, Westbury's alleged owners is necessary as they may have relevant knowledge about the baler and maintenance agreement.

These parties all noticed defendant Westbury for the depositions of the Cores and Recine and assert that Westbury has refused to comply.

In opposition defendant Westbury annexes the affidavits of Mr. Recine and Carolyn Kenevan, nee Core, Ms. Core's daughter. Mr. Recien avers that he did not work at all with the subject baling machine and never inspected same. Ms. Kenavan avers that she was employed by Westbury and that Richard Getter, now deceased, was the Westbury employee responsible for the Richner account. Ms. Kenavan further avers that her mother, Evelyn Core, Westbury's president has no knowledge about the machine.

Defendant Westbury has adequately demonstrated Mr. Recine's and Ms. Kenavan's lack of relevant knowledge and the futility of deposing them at such a late date. With regard to Evelyn Core, however, notably absent from Westbury's opposition is an affidavit from Ms. Core herself. The court shall not accept Ms. Kenavan's hearsay assertion that Ms. Core has no knowledge about the baling machine.

Pursuant to CPLR §3126 when a party refuses "to obey an order for disclosure or willfully fails to disclose information which the court finds ought to have been disclosed pursuant to this article, the court may make such orders with regard to the failure or refusal as are just..." CPLR §3126(3) authorizes the court to strike pleadings or grant a default judgment against the disobedient party. The court may certainly impose sanctions or strike pleadings where a party fails to provide disclosure pursuant to an order. Siegel, Practice Commentaries, 3126:5. It is only proper to strike a pleading, however, where it appears that the failure to obey the court's order is "deliberate and contumacious." Sindebrand v. McCleod, 226 A.D.2d 623,

623 (2nd Dep't 1996). See, also, Orvits v. Weaver, 188 A.D.2d 290 (1st Dep't 1992). It does not appear to the court that Westbury's failure to produce Ms. Core for a deposition is so contumacious as to merit striking its answer. As will be discussed below, the court shall impose other sanctions. CPLR 3124 authorizes the court to compel defendant Westbury to provide the outstanding discovery.

Thus, based upon the foregoing, it is directed that the parties are to conduct Ms. Core's deposition on July 24, 2008 at the Nassau County Supreme Court Courthouse at 9:30 a.m.

In their cross-motions PG, Herald and Richner all additionally seek compliance with purported outstanding discovery demands from Westbury. Nowhere in their supporting papers do these movants demonstrate that Westbury failed to provide responses to same or if it did, how those responses are deficient, thus, these cross-motions are denied to the extent they seek to compel Westbury to provide responses to the document demands.

It is hereby directed that plaintiffs Academy and PG as well as their attorneys and defendant Westbury as well as its attorneys are each sanctioned in the amount of $250.00. Payment by plaintiffs Academy and PG and defendant Westbury shall be made to the clerk of the court for transmittal to the Commissioner of Taxation and Finance. 22 NYCRR §130-1.3. Payment by the attorneys for these parties shall be made to the Lawyers Fund for Client Protection. 22 NYCRR 130-1.3.

The matter is hereby set down for a conference on July 31, 2008 at 9:30 a.m. in this part at which time all discovery is to be completed.

So Ordered.

A.J.S.C.

Dated: June 30, 2008