

| |
|--|
| Kovalenko v New York State Thruway Auth. |
| 2013 NY Slip Op 33966(U) |
| January 29, 2013 |
| Court of Claims |
| Docket Number: 118509 |
| Judge: Frank P. Milano |
| Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office. |
| This opinion is uncorrected and not selected for official publication. |

STATE OF NEW YORK COURT OF CLAIMS

**BRACHA KOVALENKO AND IRVING
KOVALENKO,**

Claimants,

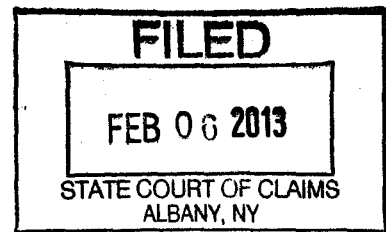
**DECISION AND
ORDER**

-v-

**NEW YORK STATE THRUWAY
AUTHORITY,**

**Claim No. 118509
Motion No. M-82891**

Defendant.



BEFORE:

**HON. FRANK P. MILANO
Judge of the Court of Claims**

APPEARANCES:

**For Claimants:
SUBIN ASSOCIATES, LLP
By: Robert J. Eisen, Esq.**

**For Defendant:
WILSON, ELSER, MOSKOWITZ, EDELMAN & DICKER,
LLP
By: F. Douglas Novotny, Esq.**

Claimants move by order to show cause in this premises liability claim to preclude the trial testimony of a witness (Whipple) and admission at trial of certain discovery material, to stay the trial scheduled to commence on April 16, 2013 and to strike defendant's answer. Defendant opposes the motion.

The motion is denied and the trial set for April 16, 2013 will proceed as scheduled, not on March 7, 2013, which is the next scheduled conference date, but which was mischaracterized in the motion papers of both parties as the scheduled trial date.

This is the second order to show cause brought by claimants on the eve of a scheduled trial. Trial of the claim was previously scheduled to commence on March 29, 2012. On or about February 10, 2012, defendant served a "Supplemental Response to Notice for Discovery and Inspection" which identified two witnesses (Pastula and Osborne) who were allegedly previously undisclosed and/or unknown to claimants. Defendant also provided copies of allegedly previously undisclosed records.

Claimants thereafter moved by order to show cause to preclude the trial testimony of Pastula and Osborne and the admission at trial of the records and to strike defendant's answer. Claimants also requested that the trial be stayed until the motion was decided.

On March 22, 2012 a telephone conference was held and the March 29, 2012 trial was adjourned without date to provide claimants an opportunity to engage in further discovery with respect to Pastula and Osborne and the previously undisclosed documents. By Decision and Order, signed on March 29, 2012 and filed on May 4, 2012, claimants' preclusion motion was denied with leave to renew after a further telephone conference scheduled for July 26, 2012.

At the July 26, 2012 conference the Court was advised that, despite the passage of more than four months since the March 22, 2012 telephone conference, no further discovery had been undertaken by claimants with respect to Pastula and Osborne. The parties were then advised to be prepared to set a trial date at the next conference scheduled for August 23, 2012.

At the August 23, 2012 conference, a trial date of April 16, 2013 was established, together with a pre-trial conference date of March 7, 2013. A letter confirming the trial date and conference date was sent to both claimants and defendant.

Claimants took the deposition testimony of Pastula and Osborne on October 23, 2012. At his deposition, Pastula identified Whipple as an employee of defendant who had conducted site inspections of the accident location. Defendant's attorney states in his affidavit opposing claimants' instant motion to preclude that this "was the first time I had heard Ms. Whipple's name so both Mr. Eisen and I shared in that new information at the same time." Claimants' attorney requested at the deposition that he be provided additional "Front of House Inspection" records by defendant.

On December 6, 2012, defendant provided to claimants a "Third Supplemental Response to Notice for Discovery and Inspection" which included the additional records requested by claimants at the October 23, 2012 depositions and which also included Whipple as a witness to the condition of the premises.

This order to show cause and underlying motion papers were presented to the Court on January 7, 2013.

It is axiomatic "that a trial court has broad discretionary power in controlling discovery and disclosure, and only a clear abuse of discretion will prompt appellate action" (Geary v Hunton & Williams, 245 AD2d 936, 938 [3d Dept 1997]).

In Abselet v Satra Realty, LLC (85 AD3d 1406, 1407-1408 [3d Dept 2011]), the court reminds that the "severe remedy of preclusion is left to the sound discretion of the trial court, 'reserved for those instances where the offending party's lack of cooperation with disclosure was willful, deliberate, and contumacious'" (quoting Kumar v Kumar, 63 AD3d 1246, 1248 [3d Dept 2009]).

Claimants' motion is denied and the trial will proceed as scheduled on April 16, 2013.

There is insufficient evidence to show that defendant's failure to identify Whipple and to produce the supplemental documents earlier was willful or contumacious conduct. In addition, it was foreseeable that the deposition of the two notice witnesses, Pastula and Osborne, could conceivably lead to further witnesses or records being unearthed. Because such a circumstance was foreseeable, the Court's Decision and Order, filed on May 4, 2012, adjourned the trial without date and the Court waited until August 23, 2012 to reschedule the trial to April 16, 2013.

Claimants are granted leave to take the deposition testimony of Whipple on or before March 6, 2013. The parties are reminded that a telephone conference will be held on March 7, 2013 at 10:00 a.m.

Albany, New York
January 29, 2013



FRANK P. MILANO
Judge of the Court of Claims

Papers Considered:

1. Claimants' Order to Show Cause, filed January 22, 2013;
2. Affidavit of Robert J. Eisen, sworn to December 28, 2012, and annexed exhibits;
3. Affidavit in Opposition of F. Douglas Novotny, sworn to January 16, 2013, and annexed exhibits.