

Osarczuk v Associated Univs., Inc.

2016 NY Slip Op 32513(U)

September 26, 2016

Supreme Court, Suffolk County

Docket Number: 2836/1996

Judge: Joseph Farneti

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SUPREME COURT - STATE OF NEW YORK
I.A.S. TERM, PART 37 - SUFFOLK COUNTY

PRESENT:

HON. JOSEPH FARNETI
Acting Justice Supreme Court

BARBARA OSARCZUK, JOHN OSARCZUK, Individually and as the Administrator of the Estate of DOROTHY OSARCZUK, HELGA A. DEMPSEY, CAROL ANGELORA, WILLIAM FERGUSON, DEBORAH FERGUSON, JAMES ANDREJKOVIC, JOAN WEISNER, MICHAEL MIESEMER, BARBARA MIESEMER, VINCENT SCAVONE, ROBERT O'GARA, Individually and as the Administrator of the Estate of JEAN O'GARA, PAULINE MODICA, NANCY BOND, FLORENCE CARRANO, RANDY SNELL of LAUREN SNELL, DONNA J. VELARDO, THOMAS CUNNINGHAM, JOSEPH ROMBOLA, MARRA ROMBOLA, CAROL ZAMBOLI, JOSEPH ZAMBOLI, JOYCE ZENKER, COLLEEN PALMERI, JOSEPH PALMERI, JOSEPH SCHIEVELLA, WILLIAM LESNICK, BRENDA LESNICK, BARBARA AGRESTI, ANTHONY AGRESTI, ALFRED ANDERSEN, LISA ANDERSEN, HENRY AUGIS, DIANE AUGIS, JOSEPH AURICCHIO, CATHERINE AURICCHIO, JEAN BATTAGLIA, RUTH BERGER, ROBERT BOSWELL, LINDA BRAUN, MARILEE CAFFREY, RAYMOND CAIME, BESSIE CAIME, CLARA CARNIGLIA, FLORENCE CARRANO, RUSSELL CHRISTIAN, ROSEANN CIPULLY, JOSEPH CONCANNON, ELLEN CONCANNON, MAUREEN CONNOLLY, RUTH CRUZ, HENRY DELUCA, JOSEPHINE DEVOE, DELORES DIANTONIO, STEVEN DONAHUE, CLAUDINE M. DONNELLY, WILLIAM M. DOVIK, JR., AMNERIS

ORIG. RETURN DATE: JUNE 30, 2016
FINAL SUBMISSION DATE: JULY 28, 2016
MTN. SEQ. #: 011
MOTION: MOT D

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WERNER LAIBACH, ALFRED KOPEL, JR.,
DANIEL BROOKS, FRANCES BROOKS, and
CAMILE BOWERS,

Plaintiffs,

-against-

ASSOCIATED UNIVERSITIES,
INCORPORATED, commonly known as
BROOKHAVEN NATIONAL LABORATORY,

Defendant.

Upon the following papers numbered 1 to 7 read on this motion _____
TO STRIKE COMPLAINT _____

Notice of Motion and supporting papers 1-3; Memorandum of Law in Support 4; Affirmation
in Opposition 5; Memorandum of Law in Opposition 6; Reply Affirmation 7; it is,

This matter again comes before the Court on defendant's motion, pursuant to CPLR 3126, seeking to strike the plaintiffs' complaint for failure and refusal to meet their discovery obligations, or in the alternative, to strike the complaint as against those individual plaintiffs who have not properly responded to the defendant's First Set of Interrogatories, in the event the responses are not received within thirty (30) days of any conditional order issued and served as a result of this motion.

This action was commenced some twenty years ago (February 6, 1996) and has an extensive trial and appellate level history. The Court presumes familiarity with the following decisions and Orders of the trial court, the Appellate Division, and the Court of Appeals:

Osarczuk v Associated Univs., Inc., 26 NY3d 1126, 47 NE3d 86, 26 NYS3d 756 (2016) (decision without published opinion);

Osarczuk v Associated Univs., Inc., 17 NY3d 893, 957 NE2d 1147, 933 NYS2d 644 (2011) (decision without published opinion);

Osarczuk v Associated Univs., Inc., 130 AD3d 592, 12 NYS3d 286 (2d Dept 2015), leave to appeal dismissed by, motion dismissed by, as moot *Osarczuk v Associated Univs., Inc.*, 26 NY3d 1126 (Feb 18, 2016);

Osarczuk v Associated Univs., Inc., 82 AD3d 853, 918 NYS2d 538 (2d Dept 2011), leave to appeal dismissed by *Osarczuk v Associated Univs., Inc.*, 17 NY3d 893, 957 NE2d 1147, 933 NYS2d 644 (2011), motion denied by, without prejudice *Osarczuk v Associated Univ., Inc.*, 2013 NY Slip Op 31138(U) (Sup Ct, May 16, 2013);

Osarczuk v Associated Univs., Inc., 36 AD3d 872 (2d Dept 2007), motion denied by *Osarczuk v Associated Univs., Inc.*, 36 AD3d 878 (2d Dept 2007), on remand at, class certification granted by *Osarczuk v Associated Univs., Inc.*, 26 Misc 3d 1209(A) (Sup Ct, Dec 23, 2009);

Osarczuk v Associated Univs., Inc., 36 AD3d 878 (2d Dept 2007);

Osarczuk v Associated Univ., Inc., 2013 NY Slip Op 31138(U) (Sup Ct, May 16, 2013), reversed by, motion granted by *Osarczuk v Associated Univs., Inc.*, 130 AD3d 592 (2d Dept 2015); and

Osarczuk v Associated Univs., Inc., 26 Misc 3d 1209(A) (Sup Ct, 2009), reversed by *Osarczuk v Associated Univs., Inc.*, 82 AD3d 853 (2d Dept 2011).

The result of this protracted procedural litigation is that according to plaintiffs' counsel there are now 189 plaintiffs who have been permitted to intervene in this action where class status had been denied by the Appellate Division, Second Department. Through the years, a number of causes of action have been either dismissed outright or abandoned by plaintiffs through counsel. The operative pleading herein is the plaintiffs' Third Amended Complaint, which the defendant seeks to strike due to plaintiffs' "willful and contumacious failure and refusal to discharge their discovery obligations in this action," as stated in defendant's notice of motion and supporting papers.

The status of discovery, according to plaintiffs and defendant, is that the plaintiffs' counsel are in the process of communicating with the plaintiffs who were permitted to intervene and have furnished responses to the defendant's First Set of Interrogatories for fewer than twenty of the intervening plaintiffs as of the date of the submission of this motion. Plaintiffs' counsel alleges that there have been some difficulties in locating and communicating with the plaintiffs, and that they are diligently pursuing the action with the intention of complying with the discovery requests and have used their best efforts in this regard.

The defendant claims that the interrogatories were served nine months prior to the making of this motion to strike the complaint, and that plaintiffs have been afforded sufficient time to respond to a relatively simple set of interrogatories.

"The nature and degree of the sanction to be imposed on a motion pursuant to CPLR 3126 is within the broad discretion of the motion court" (*Wolf v Flowers*, 122 AD3d 728, 728 [2014]; see *Novick v DeRosa*, 51 AD3d 885 [2008];

Martin v City of New York, 46 AD3d 635 [2007]). "A determination to impose sanctions for conduct which frustrates the disclosure scheme of the CPLR should not be disturbed absent an improvident exercise of discretion" (*Duncan v Hebb*, 47 AD3d 871, 871 [2008]; see *Dokaj v Ruxton Tower Ltd. Partnership*, 91 AD3d 812 [2012]). The drastic remedy of striking a pleading pursuant to CPLR 3126 (3) is not appropriate absent a showing that the failure to comply with court-ordered disclosure, or to disclose information which the court finds ought to have been disclosed, was willful and contumacious (see *Parker Waichman, LLP v Laraia*, 131 AD3d 1215 [2015]; *Wolf*, 122 AD3d at 728-729; *Novick*, 51 AD3d 885; *Martin v City of New York*, 46 AD3d 635 [2007]).

Here, there have been no prior court orders compelling discovery compliance; however, while this is a somewhat unique situation where the Appellate Division has permitted a mass intervention in what plaintiffs had originally intended to be a class action lawsuit where this Court had granted class status and the intermediate appellate court reversed that certification, and in the absence of any compulsory prior discovery compliance order, the striking of the Third Amended Complaint would be an improvident exercise of this Court's discretion.

However, that is not to say that the plaintiffs will be unreasonably excused from their obligation and responsibility to properly, adequately and timely comply with the discovery requests served by the defendant. That branch of defendant's motion seeking to strike the complaint for willful and contumacious failure to comply with the discovery demands is **DENIED** at this juncture.

A conditional order of preclusion should not be entered lightly. A conditional order of preclusion requires a party to provide certain discovery by a date certain, or face the sanctions specified in the order (see *Gibbs v St. Barnabas Hosp.*, 16 NY3d 74 [2010]; *SRN Realty, LLC v Scarano Architect, PLLC*, 116 AD3d 693 [2014]; *Wei Hong Hu v Sadiqi*, 83 AD3d 820 [2011]). As a result of a party's failure to timely comply with the conditional order of preclusion, that conditional order becomes absolute (see *Archer v Capital Fund, L.P. v GEL, LLC*, 95 AD3d 800 [2012]; *Keenan v Fiorentino*, 84 AD3d 740 [2011]; *Wei Hong Hu*, 83 AD3d at 821; *Panagiotou v Samaritan Vil., Inc.*, 66 AD3d 979 [2009]). To be relieved of the adverse impact of the conditional order of preclusion, a plaintiff is required to demonstrate a reasonable excuse for its failure to comply with the order and the existence of a potentially meritorious cause of action (see *Keenan v Fiorentino*, 84 AD3d 740 [2011]; *Wei Hong Hu*, 83 AD3d at 821).

The gravity and effect of a conditional order needs to be balanced with the orderly administration and supervision of discovery. It has been ten months since the service of the First Set of Interrogatories. This action has a long procedural and appellate history, and as mentioned, has been pending in excess of 20 years. Both durational and decisional excellence require this matter to proceed apace such that a conditional order of compliance is not only beneficial but appropriate in the circumstances. Given the length of time of the delay in compliance with the demand for interrogatories the nature of the information requested and the length of time this matter has been pending, the defendant's application for a conditional order pursuant to CPLR 3126 is **GRANTED** to the following extent. It is,

ORDERED that the plaintiffs' Third Amended Complaint shall be stricken as to each and every plaintiff from whom a properly verified response to defendant's First Set of Interrogatories is not received within ninety (90) days after service of a copy of this Order upon counsel for plaintiffs with notice of entry.

The foregoing constitutes the decision and Order of the Court.

Dated: September 26, 2016


HON. JOSEPH FARNETI
Acting Justice Supreme Court

FINAL DISPOSITION NON-FINAL DISPOSITION