

**Ashfaq v Ice Cream Depot Corp.**

2017 NY Slip Op 31031(U)

April 13, 2017

Supreme Court, Suffolk County

Docket Number: 16271/2010

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**

MUHAMMED ASHFAQ, ROBINA ASHFAQ,

Plaintiffs,

-against-

ICE CREAM DEPOT CORP., CHARLES BATTIPEDE, ANTHONY IVANDITTO, DAVID IVANDITTO, IVANDITTO LAND CORPORATION, PAUL A. LOCK, "JOHN DOE," and "JAMES DOE" the last name are being intended to designate other person who jointly and severely involved to cause damages to the Plaintiffs thereof, if any there be, said names being fictitious, their true name being unknown to plaintiffs,

Defendants.

ORIG. RETURN DATE: AUGUST 11, 2016  
FINAL SUBMISSION DATE: AUGUST 25, 2016  
MTN. SEQ. #: 006  
MOTION: MG

ORIG. RETURN DATE: NOVEMBER 3, 2016  
FINAL SUBMISSION DATE: DECEMBER 8, 2016  
MTN. SEQ. #: 007  
MOTION: MD

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Upon the following papers numbered 1 to 17 read on these motions \_\_\_\_\_  
FOR DISMISSAL AND TO STRIKE ANSWERS

Notice of Motion and supporting papers 1-3; Affirmation in Opposition and supporting papers 4, 5; Affirmation in Support 6; Reply Affirmation and supporting papers 7, 8; Notice of Motion and supporting papers 9-11; Affirmation in Opposition and supporting papers 12, 13; Affirmation in Opposition and supporting papers 14, 15; Affirmation in Opposition and supporting papers 16, 17; it is,

**ORDERED** that this motion (seq. #006) by defendants ICE CREAM DEPOT CORP. and CHARLES BATTIPEDE (collectively "defendants") for an Order, pursuant to CPLR 3126 and 3124, dismissing plaintiffs' complaint for failure to provide Court-Ordered and duly noticed discovery; or alternatively, a conditional Order of dismissal, is hereby **GRANTED** for the reasons set forth hereinafter. The Court has received an affirmation in support of this application from defendants ANTHONY IVANDITTO, DAVID IVANDITTO and IVANDITTO LAND CORPORATION (collectively "Ivanditto defendants"). The Court has also received opposition to this application from plaintiffs MUHAMMED ASHFAQ and ROBINA ASHFAQ that was not served in compliance with CPLR 2214 (b), and defendants have raised this objection. Notwithstanding, as defendants have had an opportunity to reply thereto, the Court has considered the untimely opposition in the interests of judicial economy. However, the Court has received an untimely "Affirmation in Response" from plaintiffs relative to the Ivanditto defendants' support for the motion, which was received after the submit date of this motion and therefore has not been considered by the Court; and it is further

**ORDERED** that this motion (seq. #007) by plaintiffs for an Order, pursuant to CPLR 3124 and 3126, striking the Answers of defendants for failure to provide Court-Ordered discovery, including the failure of defendants ICE CREAM DEPOT CORP., CHARLES BATTIPEDE, IVANDITTO LAND CORPORATION, and PAUL A. LOCK to appear for Court-Ordered examinations before trial; or, in the alternative, compelling defendants to provide Court-Ordered discovery, including to appear for examinations before trial on a date certain, or to be precluded from offering any evidence at the time of trial of this action without any further application to the Court, is hereby **DENIED** as moot, given the Court's ruling on defendants' motion to dismiss.

Plaintiff, MUHAMMED ASHFAQ, seeks damages for personal injuries that he claims he received during an assault and robbery during the late

evening on March 27, 2009, at 481 Furrows Road, Holbrook, New York. Plaintiff alleges defendants were negligent in that they failed to maintain proper security measures that resulted in his assault and personal injuries. Plaintiff ROBINA ASHFAQ alleges a derivative claim for loss of consortium.

This action was commenced by the filing of a Verified Complaint on or about May 7, 2010. Issue was joined on behalf of defendants by service of a Verified Answer with Cross-Claims on or about June 9, 2010. Subsequently, plaintiff served an Amended Verified Complaint on or about March 25, 2012. A stipulation to amend the complaint to add ROBINA ASHFAQ as a plaintiff and DAVID IVANDITTO and PAUL A. LOCK as defendants was So-Ordered by the Court on March 27, 2012. Verified Answers by defendants with Combined Demands and Demand for Medicare/Medicaid Information were originally served on or about May 11, 2012. Plaintiff served a Verified Bill of Particulars as to defendants on or about March 10, 2011. Plaintiffs served a further Verified Bill of Particulars as to defendants on or about January 17, 2013.

A preliminary conference was held herein on November 9, 2010. The matter first appeared on this Court's compliance conference calendar on May 26, 2011, and has been conferenced with the Court and/or adjourned over thirty (30) times since that date and is still not ready to be certified for trial. Numerous agreements were made with the assistance of the Court with respect to the exchange of discovery and the scheduling of examinations before trial of the parties, including, among other things, So-Ordered Stipulations dated March 26, 2015 and September 24, 2015.

After a compliance conference held on May 5, 2016, this Court issued an Order dated June 24, 2016 ("Conference Order"), wherein the Court directed plaintiffs to provide defendants with the outstanding discovery memorialized and described in the correspondence dated April 4, 2016, from counsel for defendants to counsel for plaintiffs, on or before July 8, 2016, and the parties were directed to appear for a compliance conference on July 14, 2016.

Defendants have now made the instant motion to dismiss, and plaintiffs have made a subsequent motion to strike defendants' Answers. Defendants allege that notwithstanding the Conference Order, the only discovery provided by plaintiffs prior to July 8, 2016, were six authorizations for medical records. Defendants contend that plaintiffs have repeatedly failed to provide the

Court-Ordered discovery, some of which has been outstanding since 2010, despite good faith efforts to procure compliance from plaintiffs. Defendants' counsel indicates that she has sent no less than sixteen letters to plaintiffs' counsel seeking compliance. As such, defendants now request dismissal of this action, or a conditional Order of dismissal, arguing that plaintiffs' pattern of non-compliance over a period of six years demonstrates willful, deliberate, and contumacious conduct herein.

As noted, the Ivanditto defendants have submitted support for this application and adopt the moving defendants' arguments, except they urge an outright dismissal of this action, not a conditional Order of dismissal.

Also as noted, plaintiffs' opposition to this motion was untimely, but has been considered by the Court nevertheless. Plaintiffs argue that defendants' motion is moot because on August 10, 2016, plaintiffs served "Plaintiff's Response to Defendant's Demand for Authorizations and Information," which allegedly supplied all the items requested in defendants' counsel's letter dated April 4, 2016. In addition, plaintiffs indicate that they have served other responses to defendants' demands during this action, including on or about November 24, 2015, and on or about October 23, 2012.

In reply, defendants inform the Court that notwithstanding plaintiffs' contentions, plaintiffs to date have failed to provide eight of the items requested in the letter of April 4, 2016.

CPLR 3126 provides that a court may, in its discretion, impose a wide range of penalties upon a party which either: (a) refuses to obey an order for disclosure; or (b) willfully fails to disclose information which the court finds ought to have been disclosed (CPLR 3126). The penalties proposed by the statute include: (1) deciding the disputed issue in favor of the prejudiced party; (2) precluding the disobedient party from producing evidence at trial on the disputed issue; or (3) either striking the pleadings of the disobedient party, or staying the proceedings until the ordered discovery is produced, or rendering a default judgment against the disobedient party (CPLR 3126). It is appropriate to strike a party's pleading where there is a clear showing that its failure to comply with discovery demands is wilful, contumacious, or in bad faith (*see Denoyelles v Gallagher*, 40 AD3d 1027 [2007]; *Fellin v Sahgal*, 268 AD2d 456 [2000]; *Harris v City of New York*, 211 AD2d 663 [1995]). Generally, "willfulness" is inferred from

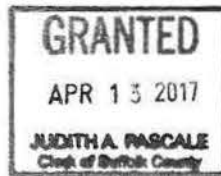
a party's repeated failure to respond to demands and/or to comply with disclosure orders, coupled with inadequate excuses for its defaults (*see Siegman v Rosen*, 270 AD2d 14 [2000]; *DiDomenico v C & S Aeromatik Supplies, Inc.*, 252 AD2d 41 [1998]; *Frias v Fortini*, 240 AD2d 467 [1997]).

Here, the Court finds that plaintiffs have repeatedly failed to provide the discovery demanded by defendants over a period of six years, in violation of the directives of the Court at compliance conferences, the So-Ordered Stipulations of the parties, and the Conference Order, without a reasonable excuse for the failure to adequately comply. As such, the Court finds that plaintiffs' conduct has been willful and contumacious in this matter. Therefore, the striking of plaintiffs' complaint as asserted against all defendants is warranted under the circumstances presented (*see Wolf v Flowers*, 122 AD3d 728 [2014]; *Tos v Jackson Hgts. Care Ctr., LLC*, 91 AD3d 943 [2012]; *Matone v Sycamore Realty Corp.*, 87 AD3d 1113 [2011]).

Accordingly, this motion by defendants is **GRANTED**, and plaintiffs' Amended Verified Complaint is hereby dismissed in its entirety. Thus, plaintiffs' motion to strike defendants' Answers is **DENIED** as moot.

The foregoing constitutes the decision and Order of the Court.

Dated: April 13, 2017



  
HON. JOSEPH FARNETI  
Acting Justice Supreme Court

FINAL DISPOSITION

NON-FINAL DISPOSITION