

**Aybar v Tropical Smoothie Cafe**

2017 NY Slip Op 33307(U)

November 20, 2017

Supreme Court, Nassau County

Docket Number: 602623/15

Judge: Julianne T. Capetola

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This opinion is uncorrected and not selected for official publication.

At a Term of the Supreme Court  
of the State of New York held in  
and for the County of Nassau,  
100 Supreme Court Drive,  
Mineola, New York, on the 20<sup>th</sup>  
day of November 2017

P R E S E N T:

HON. JULIANNE T. CAPETOLA  
Justice of the Supreme Court

-----X

DONNA AYBAR,  
Plaintiff,

**DECISION AND  
ORDER ON MOTION**  
Index No: 602623/15  
Motion Sequence: 002, 003

- against -

TROPICAL SMOOTHIE CAFÉ and DELCO PLAZA,  
Defendants.

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- The following papers were read on this Motion:
- Defendant Delco Plaza's Notice of Motion and Supporting Documents
  - Defendant Tropical Smoothie Café's Notice of Cross-Motion and Supporting Documents
  - Plaintiff's Affirmation in Opposition to Both Motions and Supporting Documents
  - Defendant Delco Plaza's Affirmation in Opposition.
  - Defendant Delco Plaza's Reply Affirmation
  - Defendant Tropical Smoothie Café's Reply Affirmation

Defendants Delco Plaza and Tropical Smoothie Café have each moved separately by notice of motion for an order pursuant to CPLR §3126 dismissing Plaintiff's complaint for failure to comply with discovery, or, in the alternative, for an order pursuant to CPLR §3124 compelling Plaintiff's timely compliance. Defendant Tropical Smoothie has also moved for an order compelling Defendant Delco Plaza to comply with certain items of outstanding discovery. Plaintiff has opposed both motions jointly, Defendant Delco Plaza has opposed the motion by Defendant Tropical Smoothie, both Defendants replied on their respective motions, and the motions were deemed submitted November 9, 2017.

"CPLR §3101(a) provides that '[t]here shall be full disclosure of all matter material and necessary in the prosecution or defense of an action, regardless of the burden of proof.' In general, 'the supervision of disclosure is left to the broad discretion of the trial court, which must balance the parties' competing interests' (Accent Collections, Inc. v. Cappelli Enters., Inc., 84 A.D.3d 1283, 1283, 924 N.Y.S.2d 545; see Reilly Green Mtn.

Platform Tennis v. Cortese, 59 A.D.3d 694, 695, 873 N.Y.S.2d 494)". *Eremina v. Scparta*, 120 A.D.3d 616 (2d. Dept. 2014).

CPLR §3126 states:

"If any party, or a person who at the time a deposition is taken or an examination or inspection is made is an officer, director, member, employee or agent of a party or otherwise under a party's control, refuses to obey an order for disclosure or wilfully 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, among them: 1. an order that the issues to which the information is relevant shall be deemed resolved for purposes of the action in accordance with the claims of the party obtaining the order; or 2. an order prohibiting the disobedient party from supporting or opposing designated claims or defenses, from producing in evidence designated things or items of testimony, or from introducing any evidence of the physical, mental or blood condition sought to be determined, or from using certain witnesses; or 3. an order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or any part thereof, or rendering a judgment by default against the disobedient part"

In order to prevail on a motion to preclude pursuant to CPLR §3126, the moving party bears the burden of demonstrating that the "failure to comply with discovery demands is willful, contumacious, or in bad faith". *Herrera v. City of New York*, 238 A.D.2d 475 (2d Dept. 1997) (internal citations omitted). Absent such a showing, a resolution of the action on the merits is the favored course. *Id.* Willful and contumacious conduct can be inferred from repeated, unexplained or inadequately explained failure to comply with disclosure requests and court orders and directives over a significant period of time. *Rawlings v. Gillert*, 78 A.D.3d 806 (2d Dept. 2010). Upon a showing by the moving party of willfulness, the burden shifts to the defendant to offer a reasonable excuse the its default. *Herrera v. City of New York, supra*.

CPLR §3124 states:

"If a person fails to respond to or comply with any request, notice, interrogatory, demand, question or order under this article, except a notice to admit under section 3123, the party seeking disclosure may move to compel compliance or a response".

On or about May 8, 2017, Defendant Delco Plaza served a Notice for Discovery & Inspection (hereinafter the "May 8, 2017 Notice") on Plaintiff's counsel seeking general releases and/or stipulations of discontinuance pertaining to a prior personal injury action

filed by Plaintiff on or about 2009. Counsel also corresponded with Plaintiff's counsel seeking the settlement amount with respect to that prior lawsuit. Defendant Delco Plaza argues that, inasmuch as the injuries alleged in the prior action were similar in nature to those alleged herein, the information pertaining to the prior action is material, relevant, and discoverable. Defendant Tropical Smoothie Café joined in the motion in that regard.

Plaintiff argues in opposition first that she objects to the request for the amount of the prior settlement "because it is patently prejudicial to Plaintiff. The amount of Plaintiff's prior settlement in no way reflects, enhances or diminishes Plaintiff's injuries in that case and case settlement value is affected by various factors such as comparative negligence and insurance limits". Plaintiff does not cite any case law or statutory support for their argument or assertions.

With regard to the requests for other information pertaining to the prior action, Plaintiff has annexed to their opposition papers their response to the May 8, 2017 Notice which includes authorizations for various medical providers, and prior counsel who represented Plaintiff in the 2009 lawsuit, Gene Duenas, Esq.

Defendant Delco Plaza addressed the Plaintiff's response to the May 8, 2017 Notice in their moving papers, noting that they had sent further correspondence to Plaintiff's counsel on or about June 28, 2017 requesting copies of non privileged materials regarding the 2009 lawsuit in which they informed Plaintiff that they had received correspondence from Gene Duenas, Esq. explaining that his files pertaining to the 2009 lawsuit were destroyed as a result of a storm.

Plaintiff addressed the June 28, 2017 correspondence in their opposition papers by annexing a copy of an October 3, 2017 response wherein they note that Plaintiff is not in possession of any documents pertaining to the 2009 lawsuit. Defendant Delco Plaza does not revisit the issue in their reply papers with respect to the production of the documents which Plaintiff now claims are not in her possession and, accordingly, this Court deems that limited issue moot on that basis.

With respect to revealing the amount of the prior settlement, Plaintiff has argued that same would be prejudicial however Plaintiff does not explain the prejudice they claim would befall Plaintiff if that information were revealed. Plaintiff offers no case law or statutory authority in support of their opposition. There is no requirement upon the movant other than to show that no response has been received to a discovery request. Thus, in the case at bar, Defendant Delco Plaza was not required to demonstrate that its

discovery demands were not palpably improper. *See, All Boro Psychological Services, P.C. v. Allstate Ins. Co.*, 962 N.Y.S.2d 844 (App. Term. 2013). Accordingly, Plaintiff is ordered to provide information pertaining to the amount of the settlement of the 2009 lawsuit to both Defendants within thirty (30) days of service of the instant order.

Defendants have also sought public assistance records from 10-15 years prior to the accident. Plaintiff has not opposed this request in their opposition papers. Accordingly, Plaintiff is directed to provide a full authorization for Plaintiff's public assistance records from the requested period.

With respect to the remaining requests from Defendant Delco Plaza to Plaintiff, to wit, the litany of medical authorizations sought, Plaintiff has responded by annexing a copy of their response to the May 8, 2017 Notice. In their reply papers, Defendant Delco Plaza objects to the authorizations provided inasmuch as they limit the scope of the disclosure to right side injuries without explanation or justification. Plaintiff has failed to provide an explanation in their papers and, accordingly, Plaintiff is directed to provide a new complete set of authorizations without limitation to the scope of same with respect to a right side injury.

Finally, as it relates specifically to the medical provider Millennium Health, Defendant Delco Plaza notes in their reply papers that, despite Plaintiff's representation in their opposition papers that they do not recognize the name of the provider, Plaintiff's own medical records reflect a referral to said provider and, accordingly, they are entitled to an authorization for same. Plaintiff is hereby directed to provide a full authorization for provider Millennium Health.

Both Defendants make reference in their reply affirmations to a further surgery Plaintiff underwent on September 13, 2017 and seeks an additional deposition and independent medical examination of Plaintiff. Despite the fact that their reply affirmations are not the appropriate vehicles for seeking such disclosure, the Court notes Defendants' entitlement to same.

Defendant Tropical Smoothie Café has also sought one additional item of discovery from Defendant Delco Plaza, to wit, an affidavit from an appropriate affiant pertaining to the records of the property manager and the principal of Defendant Delco Plaza with respect to post-incident repair records for the roof/overhang where Plaintiff is alleged to have sustained her injuries. Defendant Delco Plaza opposed the cross-motion in this regard, arguing that it has repeatedly provided affidavits pertaining to the repair records

for the "general area" where the accident took place pursuant to the terms of the So-Ordered Stipulation entered into on May 23, 2017.

Defendant Delco Plaza is correct in that the May 23, 2017 stipulation only refers to records pertaining to the "general area" where the accident occurred and not the "roof/overhang". While, clearly, the drastic remedy of striking a pleading or precluding testimony is not in any way warranted, in order to conclude discovery on this issue, Defendant Delco Plaza is directed to provide a further affidavit from an appropriate affiant pertaining to the records of the property manager and the principal of Defendant Delco Plaza with respect to post-incident repair records for the roof/overhang where Plaintiff is alleged to have sustained her injuries.

In accordance with the foregoing, it is hereby:

ORDERED, that Defendant Delco Plaza's motion to dismiss the complaint pursuant to CPLR §3126 is hereby granted to the limited extent that Plaintiff is ordered to provide the following to Defendants within thirty (30) days of service of this order upon them: information pertaining to the amount of the settlement of the 2009 lawsuit, a new complete set of authorizations without limitation to the scope of same with respect to a right side injury, and a full authorization for provider Millennium Health; and it is further

ORDERED, that Defendant Tropical Smoothie Cafe's cross-motion to dismiss the complaint pursuant to CPLR §3126 is hereby granted to the limited extent that Plaintiff is ordered to provide the following to Defendants within thirty (30) days of service of this order upon them: information pertaining to the amount of the settlement of the 2009 lawsuit, a new complete set of authorizations without limitation to the scope of same with respect to a right side injury, and a full authorization for provider Millennium Health; and it is further

ORDERED, that the branch of Defendant Tropical Smoothie Cafe's cross-motion that seeks the striking of the answer of Defendant Delco Plaza is hereby granted to the limited extent that Defendant Delco Plaza is directed to provide a further affidavit from an appropriate affiant pertaining to the records of the property manager and the principal of Defendant Delco Plaza with respect to post-incident repair records for the roof/overhang where Plaintiff is alleged to have sustained her injuries within thirty (30) days of service of this order upon them; and it is further

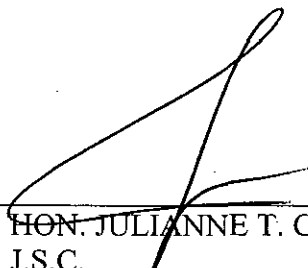
ORDERED, that the matter is hereby scheduled for a **FINAL certification conference on January 10, 2018 at 9:30 a.m.**; and it is further

ORDERED, that Defendant Delco Plaza shall serve a copy of this order upon all parties within ten (10) days of their receipt hereof.

This constitutes the decision and order of the Court.

Dated: 11/20/17

ENTER

  
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HON. JULIANNE T. CAPETOLA  
J.S.C.

**ENTERED**

NOV 27 2017

NASSAU COUNTY  
COUNTY CLERK'S OFFICE