Rivas v City of New York
2018 NY Slip Op 30653(U)
April 12, 2018
Supreme Court, New York County
Docket Number: 157111/2015
Judge: Kathryn E. Freed
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. KATHRYN E. FREED **PART** 2

Justice

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BRIANNA RIVAS, an infant, by her mother and natural guardian, TAJUANA RIDEOUT, and TAJUANA RIDEOUT, individually,

Plaintiffs,

- v -

THE CITY OF NEW YORK and THE NEW YORK CITY DEPARTMENT OF EDUCATION,

Defendant.

INDEX NO. 157111/2015

MOTION SEQ. NO. 002

DECISION AND ORDER

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The following e-filed documents, listed by NYSCEF document number 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 35

were read on this motion to/for DISMISSAL

Upon the foregoing documents, it is ordered that the motion is granted to the extent indicated below.

In this action to recover damages for personal injuries, defendants The City of New York and The New York City Department of Education move: 1) pursuant to CPLR 3126, to dismiss the complaint due to the failure by plaintiffs Brianna Rivas, an infant,[1] by her mother and natural guardian, Tajuana Rideout, and Tajuana Rideout, individually, to provide discovery; 2) pursuant to CPLR 3042, precluding plaintiffs from offering evidence at trial regarding items for which they have failed to provide particulars; 3) entering judgment in favor of defendants and awarding them costs and disbursements; and 4) for such other and further relief as this Court deems just and

[1] Although Rivas is designated as an infant in the caption, there is no allegation in the complaint regarding her age.

proper. Plaintiffs oppose the motion. After oral argument, and after a review of the parties' papers and the relevant statutes and case law, the motion is granted to the extent set forth below.

FACTUAL AND PROCEDURAL BACKGROUND:

This action arises from an incident on April 21, 2014 in which plaintiff Brianna Rivas was allegedly injured when she tripped and fell when pushed by other students at a public school in Manhattan allegedly owned, operated, and/or maintained by defendants The City of New York ("The City") and The New York City Department of Education ("DOE"). Doc. 11.[2] On or about July 14, 2015, plaintiff Rivas,[3] by Tajuana Rideout, her mother and natural guardian, commenced the captioned action seeking to recover damages for Rivas' injuries on the ground that they were caused by the negligence of the City and the DOE. Id. Rideout also brought a claim alleging loss of consortium. Id.

The City and DOE joined issue by service of their answer on October 29, 2015. Doc. 12. Concomitantly with the service of their answer, defendants served combined discovery demands, including a demand for a verified bill of particulars. Docs. 13, 14, 27, 28. To date, plaintiffs have not responded to these demands despite defendants' good faith requests. Docs. 15, 24. Plaintiffs neither objected to the demands nor requested an extension of time in which to respond to the same.

On March 20, 2017, after plaintiffs failed to respond to defendants' August 31, 2016 good faith letter, the City and DOE filed a motion (mot. seq. 001) seeking relief essentially identical to that sought herein. Doc. 8. Plaintiffs did not oppose that motion, which was decided by this Court

[2] Unless otherwise noted, all references are to the documents filed with NYSCEF in connection with this matter.
[3] The summons and complaint refers to the infant plaintiff as Brianna Rivas. Although the caption of defendants' motion papers refers to the infant plaintiff as "B.R.", there is no indication in NYSCEF that this change of the caption was made pursuant to court order or stipulation. Thus, the caption will remain in its original form.

by order dated August 24, 2017 and entered September 5, 2017. Doc. 20. In that order, this Court held that defendants' motion was granted to the extent of directing plaintiffs to respond to defendants' demand for a verified bill of particulars and combined discovery demands dated October 29, 2015. Doc. 20. This Court further stated that "defendants shall have leave to renew the instant motion if plaintiffs fail to comply with this order within thirty days of service of this order with notice of entry and, upon such renewed motion, defendants may seek sanctions against plaintiffs including, but not limited to, preclusion, dismissal, and costs." Doc. 20. Defendants served the order with notice of entry on September 14, 2017. Doc. 31.

Plaintiffs failed to produce a bill of particulars and discovery responses and defendants' attorney contacted plaintiffs' attorney on November 2, 2017 in a good faith attempt to obtain the discovery in question. Doc. 24. However, plaintiffs' counsel advised defendants' attorney "that he would not be able to comply with the discovery demands, as he was not able to contact the plaintiffs." Doc. 24.

On November 17, 2017, defendants filed the instant motion (mot. seq. 002) seeking the relief set forth above on the ground that plaintiffs still had not complied with the order of this Court entered September 5, 2017. Docs. 23-33. In support of their motion, defendants argue that the complaint must be dismissed since the willful and contumacious conduct by plaintiffs can be inferred from their failure to respond to defendants' demands for over two years. They further assert that, given the admission by plaintiffs' attorney that he has lost touch with his clients, it is unlikely that he will ever be able to provide the discovery demanded.

In opposition to the motion,[4] plaintiffs' attorney states, inter alia, that he prepared a bill of particulars and authorizations and sent them to Tajuana Rideout for her signature but, despite

[4] Plaintiffs' counsel failed to efile his opposition papers, as required by this Court. However, since defendants' counsel submitted a reply affirmation, this Court will consider plaintiffs' opposition papers.

writing to her and calling her several times, she failed to send the documents back to him. During one of the calls, Rideout advised plaintiffs' counsel that she did not have custody of Rivas, who was "somewhere in Florida" with her father. Plaintiffs' counsel also submits a note which, he claims, was send to him by Rideout, requesting that he stop work on the case.

In reply, defendants reiterate their contention that the complaint must be dismissed due to plaintiffs' failure to provide the discovery demanded.

CONCLUSIONS OF LAW:

Pursuant to CPLR 3126(3), a court may strike a party's pleading if it fails to obey a discovery order or willfully fails to provide discovery. The party moving to strike a pleading must establish that the other party's failure to comply with a discovery order was willful, contumacious, or in bad faith. *See Rodriguez v United Bronx Parents, Inc.*, 70 AD3d 492 (1st Dept 2010). "[W]illfulness can be inferred when a party repeatedly fails to respond to discovery demands and/or to comply with discovery orders, coupled with inadequate excuses for those defaults." *Oversea Chinese Mission v Well-Come Holdings, Inc.*, 145 AD3d 634, 635 (1st Dept 2016), *quoting Siegman v Rosen*, 270 AD2d 14, 15 (1st Dept 2000), *citing* CPLR 3126. This Court has broad discretion to determine the nature of the sanction to be imposed pursuant to CPLR 3126. *See Kihl v Pfeffer*, 94 NY2d 118, 122 (1999).

This Court finds that plaintiffs' failure to provide discovery responses and a bill of particulars for over two years, including their failure to comply with this Court's order entered September 5, 2017, which warned them of the potential consequences of such a failure to comply, constitutes a pattern of willful and contumacious conduct warranting dismissal of the complaint. *See Northern Leasing Sys., Inc. v Estate of Turner*, 82 AD3d 490 (1st Dept. 2011) (imposition of

sanctions affirmed where willful and contumacious refusal to comply with demands was inferred from two years of noncompliance with plaintiff's requests and defendants' failure to comply with three court orders).

Here, as in *Northern Leasing*, plaintiffs have failed to provide discovery for over two years. Although plaintiffs violated only one court order, as opposed to three in *Northern Leasing*, the order herein, like those in that case, warned plaintiffs that they could be subject to sanctions, including dismissal of the complaint, if they did not comply. Thus, this Court finds, in its discretion, that dismissal is warranted under the circumstances.

The excuses proffered by plaintiffs' counsel for failing to provide discovery are insufficient. Although plaintiffs' counsel produces a note, allegedly from Rideout, instructing him to stop work on this file, he has neither discontinued the action nor moved to be relieved as counsel. Additionally, counsel claims that this matter cannot proceed because Rivas is no longer in the custody of Rideout, but he has not produced any affidavit from Rideout to this effect or any records reflecting that Rivas is not in Rideout's custody. Even if the whereabouts of Rivas are unknown, the failure of plaintiffs' counsel to provide discovery does not preclude dismissal. *See Smith v North Shore Univ. Hosp.*, 198 AD2d 219 (2d Dept 1993). Further, plaintiffs' counsel has not explained why Rideout is unable to assist him in preparing responses to the outstanding demands. Moreover, plaintiffs' counsel does not represent that he has made any efforts to contact Rivas' father in an attempt to obtain information from Rivas necessary to prepare discovery responses.

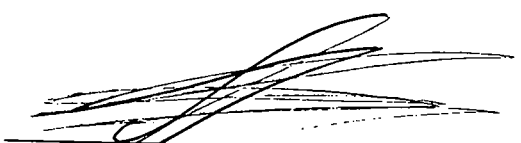
This Court notes, however, that the dismissal is without prejudice given the paucity of information regarding Rivas' age. What little information this Court has regarding Rivas' age suggests that she is an infant. Thus, she may elect to pursue her claims against defendants once the statute of limitations is no longer tolled due to her infancy. See CPLR 208.

Therefore, in light of the foregoing, it is hereby:

ORDERED that the motion by defendants The City of New York and The New York City Department of Education to dismiss the complaint pursuant to CPLR 3126 is granted, without prejudice, with costs and disbursements to be taxed by the Clerk, and the Clerk is directed to enter judgment accordingly; and it is further

ORDERED that this constitutes the decision and order of the court.

4/12/2018
DATE



KATHRYN E. FREED, J.S.C.

CHECK ONE: [X] CASE DISPOSED [ ] NON-FINAL DISPOSITION

APPLICATION: [X] GRANTED [ ] DENIED [ ] GRANTED IN PART [ ] OTHER
[ ] SETTLE ORDER [ ] SUBMIT ORDER

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