

J.P., Jr. v City of New Rochelle
2018 NY Slip Op 34055(U)
August 27, 2018
Supreme Court, Westchester County
Docket Number: 61351/2017
Judge: Joan B. Lefkowitz
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To commence the statutory time period for appeals as of right [CPLR 5513(a)], you are advised to serve a copy of this order, with notice of entry upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER-COMPLIANCE PART

J.P., Jr., an infant by his mother and natural guardian,
KEISHA CLARK and KEISHA CLARK, individually,

Plaintiffs,

-against-

CITY OF NEW ROCHELLE and
NEW ROCHELLE SCHOOL DISTRICT,

Defendants.

DECISION and ORDER
Index No. 61351/2017
Motion Date: Aug. 27, 2018
Seq. No. 4

LEFKOWITZ, J:

The following papers were read on the motion by defendant New Rochelle School District (hereinafter "the school district") for an order dismissing plaintiffs' complaint or compelling plaintiffs to provide all outstanding discovery, and for such other and further relief as this court deems just and proper.

Order to Show Cause dated July 30, 2018; Affirmation in Support; Exhibits A-T

Upon the foregoing papers and proceedings held on August 27, 2018, this motion is determined as follows:

In this action plaintiffs seek to recover damages for personal injuries allegedly sustained by the infant plaintiff on May 4, 2016, when he was assaulted and stabbed in the chest by another student, B.S., while he was playing basketball at a field connected to the Isaac E. Young Middle School, in New Rochelle, New York. Plaintiffs' claims sound in negligence and lack of supervision.

DISCOVERY DEMANDS

By Demand for Specific Authorizations dated November 22, 2016, the school district sought, among others, authorizations to obtain records from: (1) the Palisades Preparatory School; (2) West Med Associates in New Rochelle; and (3) psychologist, "Erica."

According to the school district in its Second Demand for Specific Authorizations dated

November 30, 2016, it sought among others, authorizations for: (1) the infant plaintiff's cell phone records; (2) ABB Optical employment records; (3) tax returns for the last five years; (4) "Edith Rosenbaum, student advisor;" and (5) Montefiore Hospital human resources records of plaintiff's employment at the hospital.¹

By Notice to Produce dated November 30, 2016, the school district sought (1) copies of any and all cell phone records of the infant plaintiff regarding texts and/or voice mails between the infant plaintiff and B.S.; (2) copies of any and all New Rochelle police records regarding the investigation of the incident; (3) copies of statements prepared by New Rochelle teachers; and (4) copies of any and all correspondence between plaintiff Keisha Clark and the New Rochelle school personnel regarding the incident.

Plaintiff Keisha Clark was deposed on March 20, 2018. Among other things she testified that the infant plaintiff and B.S. had been texting before the subject incident and that B.S. had threatened the infant plaintiff (Exhibit T, deposition transcript, page 30).

By Notice to Produce dated April 18, 2018, the school district sought, among other information: (1) copies of text messages that were provided to plaintiffs' attorneys and the New Rochelle Police Department pertaining to threats to the infant plaintiff and/or this incident; and (2) a copy of the video plaintiff Keisha Clark posted on Facebook pertaining to this incident.

By Demand for Specific Authorizations dated April 18, 2018, the school district sought, among others, authorizations for: (1) the cardiologist with whom the infant plaintiff treated; and (2) the Yonkers Central School District.

On May 7, 2018, the school district served plaintiff with its demands seeking, among other items: (1) a copy of all texts concerning this incident; and (2) an authorization to obtain all cell phone records concerning all texts relating to the incident as testified about in the deposition.

COMPLIANCE CONFERENCE ORDERS

In the compliance conference referee report and order dated January 12, 2018, so-ordered by this court, plaintiffs were directed to serve responses to defendants' discovery demands no later than January 26, 2018. In the compliance conference referee report and order dated April 10, 2018, so-ordered by this court, the parties were directed to serve responses to post-deposition discovery demands no later than May 21, 2018.

In the compliance conference referee report and order dated June 6, 2018, so-ordered by this court, plaintiffs were directed to serve complete responses to all outstanding discovery demands of all defendants no later than June 20, 2018. The order stated that plaintiffs, having failed to comply with several directives in the prior compliance order were expressly advised that

¹A copy of this demand is not an exhibit appended to the record on this motion.

failure to comply with the directives in this order could result in issuance of a briefing schedule for a motion to dismiss the complaint.

In the compliance conference referee report and order dated June 27, 2018, so-ordered by this court, plaintiffs were directed to serve supplemental responses to defendants' requests for the text exchange printouts or serve a detailed affidavit explaining what happened to the printouts, no later than July 10, 2018. Plaintiffs were further directed to serve a response to the school district's demand dated May 7, 2018, no later than July 10, 2018. The order stated that plaintiffs were advised that noncompliance with the directives in this order could result in issuance of a briefing schedule for a motion to dismiss the complaint. A discovery motion briefing schedule pertaining to the present motion was issued on July 17, 2018.

PLAINTIFFS' RESPONSE TO DISCOVERY

Pursuant to a cover letter dated July 18, 2018, plaintiffs' counsel wrote to counsel for the school district stating that on June 18, 2018, her office served plaintiffs' responses to the school district's post deposition demands, demand for specific authorizations, and notice to produce. In that letter plaintiffs' counsel stated she provided copies of all texts concerning the subject incident, several HIPAA compliant authorizations, and some additional information. The submissions appended to this letter include several authorizations. Plaintiffs' counsel states that plaintiffs are not in possession of any videos taken of the subject incident.

MOVANT'S CONTENTIONS

Presently the school district seeks an order, among other things, dismissing plaintiffs' complaint. It asserts that plaintiffs have failed to participate in discovery and/or provide evidence in response to its proper demands and that plaintiffs' failure in this regard has severely prejudiced it. The school district notes that plaintiffs have failed to claim that it requested discovery that is improper or privileged. Although duly served with the motion papers, plaintiffs have not submitted written opposition.

ANALYSIS

CPLR 3101(a)(1) provides that there shall be full disclosure of all matter material and necessary in the prosecution or defense of an action. It is the burden of the party seeking disclosure to demonstrate that the method of discovery sought will result in the disclosure of relevant evidence or is reasonably calculated to lead to the discovery of information bearing on the claims (*Quinones v 9 East 69 Street, L.L.C.*, 132 AD3d 750 [2d Dept 2015]).

CPLR 3126 provides that if any party "wilfully fails to disclose information which the court finds ought to have been disclosed," the court may issue an order, among other things, dismissing the action. "The nature and degree of the penalty to be imposed on a motion pursuant to CPLR 3126 is a matter generally left to the discretion of the Supreme Court" (*Carbajal v Bobo*

Robo, 38 AD3d 820 [2d Dept 2007]). To invoke the drastic remedy of striking a pleading a court must determine that the party's failure to disclose is wilful and contumacious (*Greene v Mullen*, 70 AD3d 996 [2d Dept 2010]; *Maiorino v City of New York*, 39 AD3d 601 [2d Dept 2007]). "Wilful and contumacious conduct can be inferred from repeated noncompliance with court orders ... coupled with no excuses or inadequate excuses" (*Russo v Tolchin*, 35 AD3d 431, 434 [2d Dept 2006]; see also *Prappas v Papadatos*, 38 AD3d 871, 872 [2d Dept 2007]).

In this matter, the court issued compliance conference orders on January 12, 2018, April 10, 2018, and June 6, 2018, directing plaintiffs to comply with defendants' discovery demands. According to her letter dated July 18, 2018, plaintiffs' counsel stated that plaintiffs provided discovery including authorizations on June 18, 2018. The court notes that this discovery was provided after three court orders directing plaintiffs to do so. Furthermore, a review of the discovery that was provided demonstrates that although plaintiffs' counsel states that copies of all texts concerning this incident were provided, a copy of those texts is not appended to her letter dated July 18, 2018, nor is an authorization for those text messages. Several other requested authorizations are also omitted from the exhibits attached to her letter. They are for tax returns for the last five years, and for records from the Palisades Preparatory School; West Med Associates in New Rochelle; ABB Optical employment records; Edith Rosenbaum, student advisor; Montefiore Hospital as to plaintiff's employment; and the cardiologist with whom the infant plaintiff treated. Accordingly, the motion by the school district seeking dismissal of this action shall be granted unless plaintiffs fully comply with all outstanding discovery requests.

All parties are reminded that pursuant to the Uniform Rules for Trial Courts (22 NYCRR § 202.5(e)(iii)) the full name of an individual known to be a minor, except the minor's initials, is considered to be confidential personal information, and must be redacted in papers submitted to the court for filing. Insofar as documents filed to the NYSCEF website in this action include confidential personal information such as the names of the two infants involved in the subject incident those documents shall be redacted as set forth in greater specificity below.

In light of the foregoing it is:

ORDERED that the branch of the motion of defendant New Rochelle School District for an order dismissing plaintiffs' complaint is granted unless, on or before September 11, 2018, plaintiffs provide all outstanding discovery requested by this defendant, including but not limited to, a copy of the printouts of any text exchange between the infant plaintiff and B.S., and all text exchanges referring to the subject incident, or a detailed affidavit explaining what happened to the printouts; a properly executed authorization for the release of these text messages; and properly executed authorizations for all other records as herein above set forth; and it is further

ORDERED that all other branches of the motion are denied; and it is further

ORDERED that in the event plaintiffs fail to provide any of the outstanding discovery,

defendant New Rochelle School District shall upload to the NYSCEF website, on or before September 18, 2018, a detailed affidavit/affirmation of noncompliance, outlining what discovery is still outstanding and a Proposed Order striking the complaint in its entirety, upon notice to all parties; and it is further

ORDERED that plaintiffs' counsel is directed within ten days of the date of entry of this Decision and Order to file a redacted copy of each of the NYSCEF documents numbered therein as 4, 32, and 49, redacting the confidential personal information pursuant to 22 NYCRR §202.5(e)(iii); and it is further

ORDERED that counsel for defendant New Rochelle School District is directed within ten days of entry of this Decision and Order to file a redacted copy of each of the NYSCEF documents numbered therein as 8, 44, 47, and 70, redacting the confidential personal information pursuant to 22 NYCRR §202.5(e)(iii); and it is further

ORDERED that counsel for defendant City of New Rochelle is directed within ten days of entry of this Decision and Order to file a redacted copy of the NYSCEF document numbered therein as 46, redacting the confidential personal information pursuant to 22 NYCRR §202.5(e)(iii); and it is further

ORDERED that all parties shall appear for a conference in the Compliance Part, Courtroom 800, on September 25, 2018, at 9:30 A.M.; and it is further

ORDERED that counsel for defendant New Rochelle School District shall serve a copy of this decision and order, with notice of entry, upon all parties within five days of entry.

The foregoing constitutes the decision and order of this court.

Dated: White Plains, New York
August 27, 2018



HON. JOAN B. LEFKOWITZ, J.S.C.

To:

Christina T. Hall, Esq.
Law Office of Christina T. Hall
Plaintiff Attorneys
Brian J. Powers, Esq.
Department of Law-City of New Rochelle
Katherine A. Lynch, Esq.
O'Connor, McGuiness, Conte, Doyle, and Oleson
Attorneys for New Rochelle School District
Service upon all attorneys via NYSCEF

cc: Compliance Part Clerk