Thompson v New York City Tr. Auth.
2019 NY Slip Op 33129(U)
October 21, 2019
Supreme Court, New York County
Docket Number: 157277/2017
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** **IAS MOTION 2EFM**

Justice

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INDEX NO. 157277/2017

ROSALIND THOMPSON,

MOTION SEQ. NO. 003

Plaintiff,

- v -

NEW YORK CITY TRANSIT AUTHORITY, MORICIA FRANCIS, EMPIRE PARATRANSIT CORP. and ANA TUSA

DECISION AND ORDER

Defendants.

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The following e-filed documents, listed by NYSCEF document number (Motion 003) 50, 51, 52, 53, 54, 55, 56, 57, 58

were read on this motion to/for MOTION TO PRECLUDE

In this action arising from a motor vehicle accident, defendants New York Transit Authority ("NYCTA"), Moricia Francis ("Francis") and Empire Paratransit Corp. ("Empire") (collectively "moving defendants") move, pursuant to CPLR 3126, to strike the answer of co-defendant Ana Tusa ("Tusa") and to preclude her from offering evidence at trial (motion sequence 003) (Docs. 50-58). The motion is unopposed. After a review of the moving defendants' papers and the relevant statutes and caselaw, it is ordered that the motion is **granted in part**.

FACTUAL AND PROCEDURAL HISTORY

On November 30, 2016, plaintiff Rosalind Thompson was allegedly involved in a motor vehicle accident at the intersection of East 34th Street and Park Avenue South, New York, New York (Doc. 1). Plaintiff was allegedly a passenger in a vehicle operated by Francis and owned

by NYCTA (Doc. 1). The vehicle was operated pursuant to the MTA paratransit program to provide public paratransit services on behalf of the MTA and NYCTA (Doc. 58). On August 14, 2017, plaintiff commenced the instant action by filing a summons and complaint against various defendants, including Tusa, the owner and operator of another vehicle allegedly involved in the collision (Doc. 1). The moving defendants filed an answer which included, *inter alia*, cross claims against Tusa (Doc. 4). Tusa also filed an answer, asserting, *inter alia*, a cross claim against the moving defendants (Doc. 9).

The preliminary conference order filed March 9, 2018 directed all the parties to appear for depositions on May 31, 2018 (Doc. 55). As of July 17, 2018, all party depositions were still outstanding, and a compliance conference order entered July 19, 2018 rescheduled them for August 15, 2018 (Docs. 13, 56). The parties appeared for a compliance conference on October 30, 2018, but, by that date, defendants still had not appeared for their depositions, and this Court thus directed them to be completed by December 17, 2018 (Doc. 56). As of the February 19, 2019 status conference, Tusa still had not appeared for her deposition (Doc. 56). A status conference order filed February 20, 2019 ("the 2/20/19 order") directed Tusa to appear for a deposition by March 28, 2019 (Doc. 56). However, an order filed May 29, 2019 ("the 5/29/19 order") reflects that Tusa failed to comply with this directive (Doc. 56). In the 5/29/19 order, the parties reserved their "right to make [a] motion to preclude Tusa" if she failed to appear for her deposition within 45 days (Doc at 56).

On July 23, 2019, the moving defendants filed the instant motion (Doc. 50).[1] In support of the motion, they submit, *inter alia*, an affirmation of good faith and this Court's preliminary

[1] Although the note of issue was filed on July 3, 2019, defendants did not move to strike it.

conference order and subsequent orders (Doc. 52, 55-56). Specifically, the moving defendants argue that Tusa's noncompliance with their discovery demands warrants striking the answer with prejudice and that she should also be precluded from offering evidence at trial (Doc. 51). Tusa does not oppose the motion.

LEGAL CONCLUSION

"A determination of sanctions pursuant to CPLR 3216 lies in the trial court's discretion and should not be set aside absent a clear abuse of discretion" (*Husovic v Structure Tone, Inc.*, 171 AD3d 559, 559 [1st Dept 2019] [citations omitted]; *see De Socio v 136 East 56th Street Owners, Inc.*, 74 AD3d 606, 607 [1st Dept 2010]; *Arts4All Ltd v Hancock*, 54 AD3d 286, 286 [1st Dept 2008], *cert denied* 559 US 905 [2010]). When a party "disobeys a court order and by his [or her] conduct frustrates the disclosure scheme provided by the CPLR, dismissal of the [pleadings] is within the broad discretion of the trial court" (*Zletz v Wetanson*, 67 NY2d 711, 713 [1986]; *see Wilson v. W. Hempstead Generals Football Club, Inc.*, 286 AD2d 438, 438 [2d Dept 2001]). However, "a court may strike an answer only when the moving party establishes . . . that the failure to comply is willful, contumacious or in bad faith" (*Rodriguez v United Bronx Parents, Inc.*, 70 AD3d 492, 492 [1st Dept 2010], quoting *Palmenta v Colombia Univ.*, 266 AD2d 90, 91 [1st Dept 1999]). "Precluding a party from presenting evidence is also a drastic remedy which generally requires a showing that the party's conduct is willful and contumacious" (*Cioffi v S.M. Foods, Inc.*, 142 AD3d 520, 523 [2d Dept 2016] [internal citation omitted]). To successfully oppose a motion to preclude, a party must generally establish that it has both a reasonable excuse and a meritorious defense for noncompliance (*see Bryant v New York City Hous. Auth.*, 69 AD3d 488, 489 [1st Dept 2010]).

Here, Tusa's continued pattern of noncompliance with this Court's discovery orders warrants an inference of willful and contumacious conduct (*see Almonte v KSI Trading Corporation*, 172 AD3d 660, 661 [1st Dept 2019]; *Chowdhury v Hudson Valley Limousine Service*, LLC, 162 AD3d 845, 846-847 [2d Dept 2018]; *Stone v Zinoukhova*, 119 AD3d 928, 929-930 [2d Dept 2014]; *Merchants T & F. Inc. v Kase & Druker*, 19 AD3d 134, 134 [1st Dept 2005]; *Polanco v Duran*, 278 AD2d 397, 398 [2d Dept 2000]). Tusa ignored five directives issued by this Court on March 31, 2018, July 19, 2018, October 31, 2018, February 20, 2019 and May 29, 2019 to appear for a deposition (Docs. 56). Moreover, the 5/29/19 order contained language warning Tusa that she could be precluded if she failed to appear for a deposition with 45 days of the order. Accordingly, this Court finds that Tusa's conduct has caused unnecessary delays in this action and has frustrated the disclosure scheme provided by the CPLR (*see Kihl v Pfeffer*, 94 NY2d 118, 122-123 [1999]; *Castellano v T.J. Byrne's Bar and Rest.*, 277 AD2d 12, 12-13 [1st Dept 2000]; *Medina v Bronx-Lebanon Hosp. Ctr.*, 254 AD2d 25, 25-26 [1st Dept 1998]). Additionally, by failing to oppose the moving defendants' motion, Tusa has failed to establish a reasonable excuse and a meritorious defense for her noncompliance (*see Bryant v New York City Hous. Auth.*, 69 A.D.3d 488, 489 [1st Dept 2010]; *Carabello v Luna*, 49 AD3d 679, 679-680 [2d Dept 2008]).

Although Tusa's conduct was willful and contumacious, this Court finds that it does not warrant striking the answer (*see Doino v RPS Corp.*, 145 AD3d 576, 577 [1st Dept 2016]). In reaching this conclusion, this Court notes that the preclusion language in the 5/29/19 order only advised Tusa that defendants were reserving their right to "make [a] motion to preclude Tusa," and it contained no specific language about striking the answer (Doc. 56). Since "'there is a strong preference in our law that matters be decided on their merits'" (*241 Fifth Ave. Hotel, LLC*

v GSY Corp., 110 AD3d 470, 472 [1st Dept 2013], quoting *Catarine v Beth Israel Med. Ctr.*, 290 AD2d 213, 215 [1st Dept 2002]), this Court determines that defendants' motion is granted to the extent that Tusa is precluded from offering evidence at trial due to her repeated failure to appear for her a deposition (*see Henry v Lenox Hill Hospital*, 159 AD3d 494, 494 [1st Dept 2018]; *Doino v RPS Corp.*, 145 AD3d at 577; *Hogan v Vandewater*, 104 AD3d 1164, 1165 [4th Dept 2013]; *Mehta v Chugh*, 99 AD3d 439, 439 [1st Dept 2012]).

The remaining arguments are either without merit or need not be addressed given the findings above.

In accordance with the foregoing, it is hereby:

ORDERED that the motion by New York City Transit Authority, Moricia Francis and Empire Paratransit Corp is granted to the extent of precluding Ana Tusa from offering evidence at trial based on her repeated failure to appear for a deposition, and is otherwise denied; and it is further

ORDERED that the moving defendants' counsel shall serve a copy of this order with notice of entry upon all parties within 30 days of entry; and it is further

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

10/21/2019
DATE

KATHRYN E. FREED, J.S.C.

CHECK ONE:		CASE DISPOSED			X	NON-FINAL DISPOSITION	
APPLICATION:		GRANTED		DENIED	X	GRANTED IN PART	OTHER
		SETTLE ORDER				SUBMIT ORDER	
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN				FIDUCIARY APPOINTMENT	REFERENCE