Damian v Damian
2019 NY Slip Op 33616(U)
December 10, 2019
Supreme Court, Suffolk County
Docket Number: 21397/2015
Judge: William G. Ford

SHORT FORM ORDER **INDEX NO.: 21397/2015**

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 38 - SUFFOLK COUNTY

PRESENT:

HON. WILLIAM G. FORD
JUSTICE OF THE SUPREME COURT

_____x

KIM DAMIAN,

Plaintiff,

-against-

SEAN M. DAMIAN & MARLENE LAPORTE,

Defendants.

_____x

Motions Submit Date: 08/08/09
Mot Conf Held: 10/18/18
Mot Seq 003 Mot D
Mot Seq 004 Mot D
Mot Seq 005 MD; RTC

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On plaintiff & defendant Damian's motions for an order of preclusion & defendant LaPorte's cross-motion for a protective order, the Court considered the following:

1. Notice of Motion, Affirmation in Support & supporting papers;
2. Notice of Motion, Affirmation in Support & supporting papers;
3. Notice of Cross-Motion, Affirmation in Support and supporting papers; and upon due deliberation and full consideration of the same; it is

ORDERED that defendant Damian and plaintiff' Damian's motions seeking an order precluding defendant Laporte from offering any testimony come time of trial of this matter pursuant to CPLR 3126 as discovery sanction for a willful and contumacious failure to provide court-ordered discovery is **granted in part** in the following manner; and it is further

ORDERED that defendant Laporte's cross motion for a protective order preventing her production at a pretrial deposition is **denied** for the following reasons; and it is further

ORDERED that plaintiff's counsel is hereby directed to serve a copy of this decision and order with notice of entry via electronic filing and electronic mail upon all counsel of record forthwith; and it is further

ORDERED that, if applicable, within 30 days of the entry of this decision and order, that defendant's counsel is also hereby directed to give notice to the Suffolk County Clerk as required by CPLR 8019(c) with a copy of this decision and order and pay any fees should any be required.

Plaintiff commenced this motor vehicle accident personal injury action filing summons and complaint on December 16, 2015 seeking recovery of money damages against defendants premised on their alleged negligence as proximate cause of serious physical injury and damages. The matter arises out of a motor vehicle collision which allegedly occurred on September 5, 2013. Plaintiff was passenger in a vehicle operated by her husband defendant Damian involved in a collision with another vehicle operated by defendant Laporte. Defendants joined issue filing and serving answers to the complaint and discovery in this matter proceeded. Presently, this matter is assigned to this Court to supervise discovery and the matter has appeared several times on the discovery compliance conference calendar in that fashion.

Presently, before the Courts are motions by all parties. Following a pre-motion conference held before the Court on October 18, 2018, plaintiff and defendant Damian both made motions (sequences ## 003 & 004) seeking an order precluding defendant Laporte from offering any testimony in this action for her failure to appear at a pretrial deposition despite numerous attempts at rescheduling. Thus, they seek to sanction her with preclusion for willful and contumacious failure to provide discovery under CPLR 3126.

In response to those applications, defendant Laporte has separately cross-moved under PLR 3103 for a protective order to prevent her production at a pretrial deposition. Laporte supports this application arguing that since the occurrence forming the basis of plaintiff's action, she has relocated to Florida. Additionally, her counsel has submitted *in camera* medical documentation suggestive that Laporte is under the care and supervision of a mental health treatment professional for diagnosis and a treatment regimen rendering her incapable of giving sworn testimony in this matter.

It is well settled that a trial court is vested with broad discretion to supervise the discovery process, and its determinations in that respect will not be disturbed in the absence of demonstrated abuse (*see* ***United Airlines v. Ogden New York Servs.***, 305 AD2d 239, 240, 761 NYS2d 16; ***Cho v. 401–403 57th St. Realty Corp.***, 300 AD2d 174, 176, 752 NYS2d 55***); Ulico Cas. Co. v. Wilson, Elser, Moskowitz, Edelman & Dicker***, 1 AD3d 223, 224, 767 NYS2d 228 [1st Dept. 2003]). However, the courts on the other hand recognized that "parties to a civil dispute are free to chart their own litigation course and, in so doing, they may stipulate away statutory, and even constitutional rights' " (***Astudillo v MV Transp., Inc.***, 136 AD3d 721, 721, 25 NYS3d 289, 290 [2d Dept 2016]). Thus, it has often been said that for "the credibility of court orders and the integrity of our judicial system are to be maintained, a litigant cannot ignore court orders with impunity" (***Jones v LeFrance Leasing Ltd. Partnership***, 110 AD3d 1032, 1033, 973 NYS2d 798, 800 [2d Dept 2013]).

A motion to compel discovery under CPLR 3124 should be denied where the document demands are overly broad, vexatious, and tend to confuse, rather than sharpen, the central issue of negligence (***Brandes v N. Shore Univ. Hosp.***, 1 AD3d 550, 551, 767 NYS2d 666, 667 [2d Dept 2003]). More importantly, where discovery requests are numerous, the court will not prune the requests even though some of them may be proper (***Chang v SDI Intern., Inc.***, 15 AD3d

520, 521, 789 NYS2d 892, 893 [2d Dept 2005]).

The test to be employed by the Supreme Court when determining discovery issues is one based on usefulness and reason (*see* ***Andon v. 302–304 Mott St. Assoc.***, 94 NY2d 740, 746, 709 NYS2d 873). However, discovery demands which are unduly burdensome, lack specificity, or seek privileged and/or irrelevant information are improper and will be vacated (*see* ***Board of Mgrs. of the Park Regent Condominium v. Park Regent Assoc.***, 78 AD3d 752, 753, 910 NYS2d 654; ***Bell v. Cobble Hill Health Ctr., Inc.***, 22 AD3d 620, 621, 804 NYS2d 362; ***Lopez v. Huntington Autohaus***, 150 AD2d 351, 352, 540 NYS2d 874; ***H.R. Prince, Inc. v Elite Envtl. Sys., Inc.***, 107 AD3d 850, 850, 968 NYS2d 122, 123–24 [2d Dept 2013])

It is incumbent on 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" (***Crazytown Furniture v. Brooklyn Union Gas Co.***, 150 AD2d 420, 421, 541 NYS2d 30; *see* Seigel, N.Y. Prac. § 345; CPLR 3101[a]; ***Herbst v. Bruhn***, 106 AD2d 546, 483 NYS2d 363; ***Andon v. 302–304 Mott St. Assocs.***, 94 NY2d 740, 746, 709 NYS2d 873; ***Palermo Mason Constr. v. AARK Holding Corp.***, 300 AD2d 460, 751 NYS2d 599; ***Vyas v Campbell***, 4 AD3d 417, 418, 771 NYS2d 375, 376 [2d Dept 2004]).

Generally, "public policy strongly favors the resolution of actions on the merits whenever possible, the striking of a party's pleading is a drastic remedy which is warranted only where there has been a clear showing that the failure to comply with discovery is willful and contumacious" (***Desiderio v Geico Gen. Ins. Co.***, 153 AD3d 1322, 1322, 61 NYS3d 309, 311 [2d Dept 2017]). On an application seeking striking of a party's pleading for refusal to comply with a court's discovery order, movant bears the burden of making a "clear showing" that the failure to comply was willful and contumacious (***Singer v Riskin***, 137 AD3d 999, 1001, 27 NYS3d 209, 211–12 [2d Dept 2016][internal citations omitted]).

A party's refusal "to obey an order for disclosure or willfully fail[ure] to disclose information which the court finds ought to have been disclosed ... the court may ... strik[e] out pleadings ... or dismiss[ ] the action ... or render[ ] a judgment by default against the disobedient party" (CPLR 3126[3]). "Willful and contumacious conduct may be inferred from a party's repeated failure to comply with court-ordered discovery, coupled with inadequate explanations for the failures to comply, or a failure to comply with court-ordered discovery over an extended period of time (***Honghui Kuang v MetLife***, 159 AD3d 878, 881, 74 NYS3d 88, 92 [2d Dept 2018]).

The failure to comply with deadlines and provide good-faith responses to discovery demands "impairs the efficient functioning of the courts and the adjudication of claims." The Court of Appeals has also pointed out that "[c]hronic noncompliance with deadlines breeds disrespect for the dictates of the Civil Practice Law and Rules" and has also remarked that "[i]f the credibility of court orders and the integrity of our judicial system are to be maintained, a litigant cannot ignore court orders with impunity (***Arpino v F.J.F. & Sons Elec. Co., Inc.***, 102 AD3d 201, 207, 959 NYS2d 74, 79 [2d Dept 2012]).

The nature and degree of the penalty to be imposed pursuant to CPLR 3126 is a matter within the discretion of the trial court (***Estaba v Quow***, 101 AD3d 940, 940-41, 956 NYS2d 143,

144 [2d Dept 2012]). The drastic remedy of striking an answer is not appropriate absent a clear showing that the failure to comply with discovery demands was willful or contumacious (***JPMorgan Chase Bank, N.A. v New York State Dept. of Motor Vehicles***, 119 AD3d 903, 903, 990 NYS2d 577, 578-79 [2d Dept 2014]).

It is clear that the willful and contumacious nature of a party's conduct may properly be inferred from repeated delays in complying with the plaintiff's discovery demands and the Supreme Court's discovery schedule, the failure to provide an adequate excuse for such delays, and the proffer of inadequate discovery responses, which otherwise evince a lack of a good-faith effort to address the requests meaningfully (***Studer v Newpointe Estates Condominium***, 152 AD3d 555, 557, 58 NYS3d 509, 512 [2d Dept 2017]; ***Schiller v Sunharbor Acquisition I, LLC***, 152 AD3d 812, 813, 60 NYS3d 79, 81 [2d Dept 2017]; ***Henry v Datson***, 140 AD3d 1120, 1122, 35 NYS3d 383, 385 [2d Dept 2016]; ***Stone v Zinoukhova***, 119 AD3d 928, 929, 990 NYS2d 567, 568 [2d Dept 2014]; ***H.R. Prince, Inc. v Elite Envtl. Sys., Inc.***, 107 AD3d 850, 851, 968 NYS2d 122, 124 [2d Dept 2013]; ***Silberstein v Maimonides Med. Ctr.***, 109 AD3d 812, 814, 971 NYS2d 167, 169 [2d Dept 2013]).

CPLR § 3103(a) provides that "a court may make a protective order conditioning or regulating the use of any disclosure device ... to prevent unreasonable annoyance, expense, embarrassment, disadvantage or other prejudice to any person or the courts." Further, it is settled that a court has discretion to limit disclosure and issue a protective order "to prevent unreasonable annoyance, expense, embarrassment, disadvantage, or other prejudice to any person or the courts" (CPLR 3103[a]; ***Accent Collections, Inc. v Cappelli Enters., Inc., 84 AD3d 1283, 924 NYS2d 545 [2d Dept 2011]). The burden of showing that discovery is improper is upon the party asserting it (Koump v Smith, 25 NY2d 297 [1969]; Bombard v Amica Mut. Ins. Co., 11 AD3d 647, 783 NYS2d 85 [2d Dept 2004]).***

Since the entry of the discovery schedule in the parties' preliminary conference order dated June 8, 2016 this matter has appeared for compliance conference on this Court's calendar 22 separate times, with counsel for the parties conferencing in the part on many of those occasions. This Court having reviewed defendant Laporte's medical documentation finds support behind the premise underlying her motion: at the present time her medical condition renders it impossible for her to give useful sworn testimony at this time. However, it is speculative at this time to further infer a fix duration of Laporte's present disability. All the while, this matter pends before the Court and depriving plaintiff and co-defendant of an ability to further discover or prosecute claims or defenses. In fact, at conference, the parties have advised that discovery in this matter is functionally complete save Laporte's outstanding deposition. Although this Court finds despite the proffer of an objectively adequate excuse, it remains uncontroverted that plaintiff and defendant Damian's motion is also just as adequately supported by the present record, to wit, that in part due to defendant Laporte's present disability, she has failed to abide her litigation responsibility and provide court-ordered discovery, i.e. her pretrial deposition.

Accordingly, this Court resolves the parties' present applications in the following manner:

It is

ORDERED that plaintiff and defendant Damian's motions are **granted in part to the extent that** defendant Laporte is hereby **conditionally precluded** from offering any testimony in this matter come time of trial **provided** she is not produced for an examination before trial within 60 days' time from filing of the note of issue in this matter; and it is further

ORDERED that defendant Laporte's cross motion for a protective order to prevent her production at an examination before trial is therefore **denied** for the foregoing reasons.

The Court thus **directs** counsel for all parties to be prepared to make a ready appearance at the **previously scheduled discovery compliance conference of March 19, 2020** ready to certify this matter as ready for trial with all pretrial disclosure completed.

The foregoing constitutes the decision and order of this Court.

Dated: December 10, 2019
Riverhead, New York

WILLIAM G. FORD, J.S.C.

____ **FINAL DISPOSITION** __X__ **NON-FINAL DISPOSITION**