

**Fabian v 1356 St. Nicholas Realty LLC.**

2019 NY Slip Op 33685(U)

December 17, 2019

Supreme Court, New York County

Docket Number: 153800/2017

Judge: Kathryn E. Freed

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This opinion is uncorrected and not selected for official publication.

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. 153800/2017

MARIA FABIAN,

Plaintiff,

MOTION SEQ. NO. 003

- v -

1356 ST. NICHOLAS REALTY LLC., THE CITY OF NEW YORK, 2009 BAMKP CORP. D/B/A LA ANTILLANA MEAT MARKET, INC., and ICELL HOLDINGS INC. D/B/A CRICKET WIRELESS LLC,

Defendants.

DECISION + ORDER ON MOTION

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1356 ST. NICHOLAS REALTY LLC,

Third-Party Plaintiff,

Third-Party Index No. 595133/2018

-against-

2009 BAMKP CORP. D/B/A LA ANTILLANA MEAT MARKET, INC. and ICELL HOLDINGS INC. D/B/A CRICKET WIRELESS LLC,

Third-Party Defendants.

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The following e-filed documents, listed by NYSCEF document number (Motion 003) 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85

were read on this motion to/for

DISMISS

In this personal injury action, defendant/third-party defendant Icell Holdings Inc. i/s/h/a Icell Holdings d/b/a Cricket Wireless LLC ("Icell") moves, pursuant to CPLR 3126, for an order dismissing the complaint due to plaintiff's willful failure to comply with status conference orders dated May 7 and July 23, 2019 or, in the alternative, pursuant to CPLR 3042, for an order precluding plaintiff from offering any testimony at trial regarding liability and damages or, in the alternative, pursuant to CPLR 3124, for an order compelling plaintiff to provide Icell with all

outstanding discovery by a date certain, with the failure to comply resulting in a self-executing order of preclusion, along with such other relief as this Court deems just and proper. After a review of the motion papers, as well as the relevant statutes and case law, the motion, which is unopposed, is decided as follows.

#### **FACTUAL AND PROCEDURAL BACKGROUND:**

Plaintiff Maria Fabian was allegedly injured on December 13, 2016 while she was walking on the sidewalk between and adjacent to the premises located at 1356-1358 St. Nicholas Avenue, New York, New York. Plaintiff claims that the accident occurred when she fell due to defective and dangerous conditions negligently permitted to exist by defendants, who allegedly owned, maintained and/or controlled the area in question.

Plaintiff commenced this action on April 25, 2017 by filing a summons and verified complaint as against defendants 1356 St. Nicholas Realty LLC (“St. Nicholas”), the City of New York (“the City”), 2009 Bamkp Corp. d/b/a La Antillana Meat Market, Inc. (“Bamkp”), and Icell. Doc. 1. St. Nicholas appeared in this action by the service of a verified answer with cross-claims dated June 15, 2017. Doc. 4. St. Nicholas also served and filed a third-party complaint against third-party defendants Bamkp and Icell on February 15, 2018. Doc. 8. On March 10, 2018, plaintiff filed a supplemental summons and amended complaint naming Bamkp and Icell as direct defendants. Doc. 76.

Icell filed its answer to St. Nicholas’ third-party complaint on or about May 24, 2018. Doc. 77. It then filed an amended answer to the third-party complaint on or about June 5, 2018. Doc. 78.

St. Nicholas was granted a default judgment on its third-party claim against Bamkp by

order entered February 7, 2019. Doc. 67.<sup>1</sup>

On or about March 22, 2019, Icell served a demand on plaintiff seeking authorizations for the release of the following medical records: 1) physical therapy she had at “Jacobi’s ‘bone rehab’”; 2) Dr. Martha Baldivia; 3) results of the sonogram plaintiff had on March 11, 2019; 4) Lenox Hill Hospital; 5) orthopedists visited by plaintiff; 6) ear nose and throat doctors visited by plaintiff; and 7) records from the facility where plaintiff’s laminectomy was performed in 2001. Doc. 79.

At status conferences held May 7 and July 23, 2019, this Court ordered, inter alia, that plaintiff was to respond to Icell’s demands dated March 22, 2019 within 30 days. Doc. 80. On August 28, 2019, after plaintiff still had not provided a response to the March 22, 2019 demand, counsel for Icell wrote to plaintiff’s attorney to make a good faith demand that the medical authorizations in question be provided. Doc. 82.

On September 23, 2019, Icell filed the instant motion seeking the relief set forth at pages one and two above. Doc. 70.

## LEGAL CONCLUSIONS:

CPLR 3126 permits the court to dismiss an action or to preclude a plaintiff from offering testimony or evidence where a “plaintiff’s continued pattern of noncompliance with court orders warrant[s] an inference of willful noncompliance.” *See Almonte v KSI Trading Corp.*, 172 AD3d 660, 661 (1<sup>st</sup> Dept 2019) (citations omitted). The sanction, if any, to be imposed on a party for

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<sup>1</sup> Plaintiff filed a Stipulation of Discontinuance against defendant City on May 18, 2018. Doc. No. 35.

failing to provide discovery is to be determined by the court in its discretion. *See Kihl v Pfeffer*, 94 NY2d 118, 122 (1999).

Willfulness may be inferred from a party's repeated failure to respond to discovery demands and/or to comply with discovery orders, combined with inadequate excuses for such conduct. *See Oversea Chinese Mission v Well-Come Holdings, Inc.*, 145 AD3d 634 (1st Dept 2016) (citations omitted). Here, such willfulness can be inferred from plaintiff's failure to respond to Icell's demand for authorizations dated March 22, 2019; the court orders dated May and July 23, 2019 directing plaintiff to comply with the said demand within 30 days; and the good faith letter sent to plaintiff's attorney by Icell's counsel on August 28, 2019. Additionally, by failing to oppose Icell's motion, plaintiff has failed to set forth any excuse for its failure to respond to the March 22, 2019 demand.

Despite the foregoing, however, in the exercise of its discretion, pursuant to CPLR 3124, and given the strong public policy in this state of resolving cases on their merits (*see Nedeltcheva v MTE Transp, Corp.*, 157 AD3d 423 [1<sup>st</sup> Dept 2018] [citations omitted]), this Court will allow plaintiff a final opportunity to respond to Icell's demand for authorizations. Icell's motion is thus granted to the extent of precluding plaintiff from producing evidence in support of her damages claims unless she provides Icell with the authorizations demanded in Icell's March 22, 2018 demand within 30 days after service of a copy of this order with notice of entry.

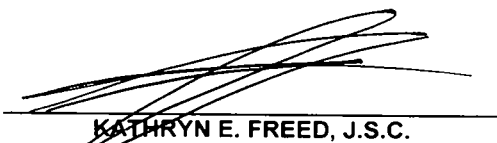
Therefore, in light of the foregoing, it is hereby:

ORDERED that the motion by defendant/third-party defendant Icell Holdings Inc. i/s/h/a Icell Holdings d/b/a Cricket Wireless LLC is granted to the extent of precluding plaintiff from presenting proof of her damages at trial unless, within 30 days after service of a copy of this order with notice of entry, plaintiff provides the duly executed HIPAA-compliant authorizations demanded by said defendant/third-party defendant on March 22, 2018; and it is further

ORDERED that the parties are to appear for a previously scheduled status conference in this matter on February 25, 2020 at 2:15 p.m. at 80 Centre Street, New York, New York; and it is further

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

12/17/2019  
DATE

  
KATHRYN E. FREED, J.S.C.

CHECK ONE:

CASE DISPOSED

GRANTED

SETTLE ORDER

INCLUDES TRANSFER/REASSIGN

DENIED

NON-FINAL DISPOSITION

GRANTED IN PART

SUBMIT ORDER

FIDUCIARY APPOINTMENT

OTHER

REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: