

Menwer v Payano

2019 NY Slip Op 34208(U)

May 13, 2019

Supreme Court, Westchester County

Docket Number: 51507/2018

Judge: Joan B. Lefkowitz

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.

This opinion is uncorrected and not selected for official publication.

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

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NAWAF MENWER,

Plaintiff,

DECISION & ORDER

-against-

Index No. 51507/2018

Motion Date: May 13, 2019

Seq. 2

FRANKLIN A. DIAZ PAYANO, AMERICAN BASE
NO. 1, INC., CITY LIVERY LEASING QUEENS, INC.,
and EHAB WIR,

Defendants.

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LEFKOWITZ, J.

The following papers were read on this motion by plaintiff for an order pursuant to CPLR §3126, striking defendant Franklin A. Diaz Payano’s¹ (hereinafter “Payano”) answer for failure to comply with Court orders or, alternatively, for an order pursuant to CPLR §3126 striking defendant Payano’s answer for spoliation of evidence, and for such other and further relief that this Court may deem just and proper:

Order to Show Cause/Good Faith Affirmation/Affirmation in Support/Exhibits
Affirmation in Opposition/Exhibits
NYSCEF file

Upon the foregoing papers and proceedings held on May 13, 2019, this motion is determined as follows:

Plaintiff commenced this action for personal injuries arising out of a motor vehicle accident by filing a Summons and Verified Complaint on February 2, 2018. Issue was joined by the service and filing of Verified Answers with Cross Claims by the respective defendants on February 22, 2018 and March 19, 2018.

At the time of the accident on September 26, 2017, each driver claims to have had a green traffic signal in his favor to enter the intersection. Defendant Payano operated a vehicle which was owned by defendant City Livery Leasing Queens, Inc. The vehicle was equipped with a forward facing video camera mounted on the windshield of the vehicle next to the rearview

¹ The motion seeks the same relief as against defendant American Base No. 1, Inc., however a default judgment was granted against this defendant by virtue of a Decision and Order dated 6/28/18 (Blackwood, AJSC, NYSCEF Doc. #24).

mirror.

Plaintiff served defendants with various demands for discovery on March 26, 2018. Among those demands plaintiff asserted (a) a demand for records maintained or generated in computer readable or electronic form; (b) a demand for photographs; (c) demands relating to defendant's leased/rented vehicle; and (d) OBD device and/or electronic tracking data demands. Each of these demands included demands for video footage of the accident.

Plaintiff asserts that Payano's answer should be stricken as a result of his failure to produce the video footage of the accident as mandated in various court orders, including an order dated April 26, 2018 which required service of responses to discovery and inspection demands no later than June 28, 2018. Although Payano served a response to plaintiff's demands, plaintiff asserts the response was incomplete, that it claimed that several of the items of discovery did not exist, and that it failed to include the video footage of the collision from Payano's vehicle.

Thereafter, at a conference held on July 30, 2018, the Court issued a second order directing defendants to fully respond to plaintiff's discovery demands by August 15, 2018. Plaintiff asserts that no further response was served by Payano.

A third order was issued at a conference held on December 12, 2018. The order directed defendants to produce either the footage from the video camera or an affidavit with respect thereto. On or about January 4, 2019, defendants Payano and City Livery Leasing Queens, Inc. served a response indicating that "relevant inquiries are being made."

A fourth court order was issued at a conference held on January 24, 2019, in which defendants again were directed either to produce the footage from the camera or an affidavit that the video does not exist. Plaintiff alleges that no response was received from defendants.

A fifth court order containing the same language was issued after a Court conference on March 1, 2019. When no response was provided by defendants, a briefing schedule for the instant motion was set.

Plaintiff alleges that Payano's disregard of five (5) court orders directing either the production of the video of the incident from Payano's vehicle or an affidavit attesting to the location and/or existence of the video, constitutes willful and contumacious conduct warranting the striking of defendant Payano's answer. Alternatively, plaintiff seeks to strike defendant's answer as a result of an inference that defendants destroyed the evidence to avoid the implications arising from the video footage of the accident.

In opposition to the motion, counsel for defendants Payano and City Livery Leasing Queens, Inc. alleges, *inter alia*, that plaintiff's motion must be denied because plaintiff failed to comply with 22 NYCRR 202.7(a)(2) in that plaintiff did not provide an Affirmation of Good Faith.

Upon review of the NYSCEF file, the Court notes that an Affirmation of Good Faith was filed simultaneously with plaintiff's Order to Show Cause. The Affirmation states, in relevant part, that plaintiff's counsel made

"countless good faith attempts at resolving the issues contained in this motion. [Plaintiff's counsel has] both telephoned and e-mailed the attorneys for the Defendant and have requested that the Court compel the Defendants to provide the outstanding discovery which is the subject of this motion on multiple prior occasions. [Plaintiff's counsel has] also engaged in in-person discussions regarding the subject of this Order to Show Cause with Counsel for Defendants when I have appeared in Court for Conferences on this matter. However, each of my attempts to resolve this issue have been ignored. Therefore the instant motion has been necessitated. Further details regarding my good faith efforts are detailed in the attorney's affirmation which is included in this motion."

(NYSCEF Doc. #41).

Upon review of the submissions, the Court deems the Affirmation of Good Faith, together with the attorney's affirmation in support of the Order to Show Cause to be in compliance with the requirements of 22 NYCRR 202.7(a)(a), and as such, this argument will not be addressed further herein.

Defendants submit that plaintiff has failed to establish that the striking of its' answer is warranted due to their failure to provide discovery in accordance with the plaintiff's demands as well as numerous Court orders. Defendants state they have served responses to plaintiff's demands and are not guilty of willful or contumacious conduct. Notably absent from the affirmation in opposition to the Order to Show Cause, however, is an explanation of the whereabouts or existence of the footage taken by the camera in Payano's car at the time of the collision. While defendants state they provided a "CD in hard copy format" they tellingly fail to disclose to the court the content of the CD or whether it is the footage sought by plaintiff.

Defendants further argue that plaintiff has failed to establish that defendants destroyed or caused the spoliation of evidence. They cite to an affidavit from Payano wherein he answered each of plaintiff's demands by writing "no", as well as an affidavit by defendant City Livery Leasing Queens, Inc. indicating they provided the footage in their possession.

CPLR 3101(a) requires "full disclosure of all matter material and necessary in the prosecution or defense of an action." The phrase "material and necessary" is "to be interpreted liberally to require disclosure, upon request, of any facts bearing on the controversy which will assist preparation for trial by sharpening the issues and reducing delay and prolixity. The test is

one of usefulness and reason” (*Allen v Crowell-Collier Publishing Co.*, 21 NY2d 403 [1968]; see *Matter of Kapon*, 23 NY3d 32 [2014], *Foster v. Herbert Slepoy Corp.*, 74 AD3d 1139 [2d Dept 2010]).

On a CPLR 3126 motion to strike a pleading as a consequence of a party’s failure to proceed with discovery, “the nature and degree of the penalty . . . is a matter generally left to the discretion of the Supreme Court” (*Carbajal v Bobo Robo, Inc.*, 38 AD3d 820 [2d Dept 2007]). To invoke the drastic remedy of striking a pleading or of preclusion a court must determine that the party’s failure to disclose is willful and contumacious (see *Greene v Mullen*, 70 AD3d 996 [2d Dept 2010]; *Kingsley v. Kantor*, 265 AD2d 529 [2d Dept 1999]). Willful and contumacious conduct can be inferred from repeated noncompliance with court orders or a failure to comply with court-ordered discovery over an extended period of time, coupled with the lack of an adequate excuse for the failure (see *Mei Yan Zhang v Santana*, 52 AD3d 484 [2d Dept 2008]; *Carbajal*, 38 AD3d at 820; *Prappas v Papadatos*, 38 AD3d 871 [2d Dept 2007]).

Here, defendant Payano was ordered on five separate occasions to produce the video footage of the accident taken by the camera in his car; on at least two occasions, defendant was given the option of providing an affidavit explaining the whereabouts of the video, or alleging its non-existence. Neither of these events occurred. Accordingly, the Court deems defendant’s repeated failure to provide the video footage, as well as the lack of an adequate excuse for the failure to be willful and contumacious conduct requiring the striking of defendant’s answer.

To the extent plaintiff seeks an order striking defendant’s answer due to the spoliation of evidence, the motion is denied with leave to renew before the IAS Judge. Pursuant to the Differentiated Case Management Protocol, at Section II, C, “[u]nless otherwise accepted by the Compliance Part and a briefing schedule issued in the Compliance Part, motions to sever, amend, consolidate and with regard to spoliation of evidence are referred to the IAS Parts for disposition”. Here, the briefing schedule issued by the Court Attorney Referee did not include motion practice with regard to the spoliation of evidence and, as such, it will not be addressed herein².

All other arguments raised and evidence submitted by the parties have been considered by this Court notwithstanding the specific absence of reference thereto.

Accordingly, it is

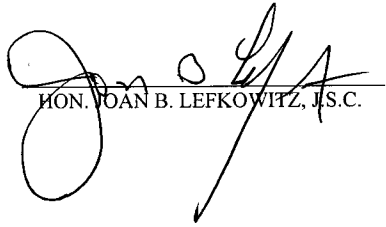
² To the extent that the issue of spoliation was argued in the instant motion and reviewed by the undersigned, it appears to this Court that plaintiff’s allegations are based upon speculation and conjecture as opposed to evidence of spoliation, and, as such cannot be sustained.

ORDERED that the plaintiff's motion is granted solely to the extent that defendant Payano's answer is stricken for failure to comply with Court ordered discovery. To the extent Payano produces either the video footage or an affidavit explaining the location of the footage or that it does not exist on or before May 29, 2019, Payano may seek to vacate the Court's striking of the answer; and it is further

ORDERED that counsel are directed to appear for a conference in the Compliance Part, Courtroom 800, on May 29, 2019 at 9:30 A.M.; and it is further

ORDERED that plaintiff shall serve a copy of this decision and order upon all defendants with notice of entry within five (5) days of entry.

Dated: White Plains, New York
May 13, 2019



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

TO:
All Counsel by NYSCEF
cc: Compliance Part