Edoo-Rajotte v Kendall
2019 NY Slip Op 34500(U)
December 6, 2019
Supreme Court, Suffolk County
Docket Number: Index No. 616906/2018
Judge: Sanford Neil Berland

SHORT FORM ORDER

E-FILE

INDEX NO.: 616906/2018

SUPREME COURT - STATE OF NEW YORK
PART 6- SUFFOLK COUNTY

PRESENT:
Hon. Sanford Neil Berland, A.J.S.C.

MITSY EDOO-RAJOTTE,,

Plaintiff(s),

-against-

MELISSA KENDALL,

Defendant(s).

ORIG. RETURN DATE: December 3, 2019
FINAL RETURN DATE: December 3, 2019
MOT. SEQ. #: 002 MOT D

PLAINTIFF'S ATTORNEY:
GRUENBERG KELLY DELLA ESQS.
700 Koehler Avenue
Ronkonkoma, New York 11779

DEFENDANT'S ATTORNEY:
CHEVEN, KEELY & HATZIS, ESQS.
40 Wall Street, 15th Floor
New York, New York 10005

Upon the reading and filing of the following papers in this matter: (1) Notice of Motion, by plaintiff, dated November 15, 2019, and supporting papers; and (2) Affirmation In Opposition by defendant dated November 26, 2019, and supporting papers it is

ORDERED that plaintiff's motion is granted to the extent that defendant is directed to appear for her deposition within 30 days of service of this order, failing which she shall be precluded from testifying at trial, pursuant to CPLR § 3126, without further order of the Court; and it is further

ORDERED that plaintiff shall serve a copy of this order with notice of entry upon defendant's counsel by certified mail, return receipt requested, on or before December 12, 2019; and it is further

ORDERED that failure to serve a copy of this order shall be deemed a waiver by plaintiff of the relief sought; and it is further

ORDERED that the attorneys-of-record are directed to appear for a previously scheduled compliance conference before the undersigned at Courtroom 237, Part 6, One Court Street, Riverhead, New York, on **January 7, 2020 at 9:30 a.m.**

This is an action for personal injuries sustained by plaintiff in a motor vehicle accident that occurred on March 9, 2016, on Route 27 in Babylon, New York, when a motor vehicle owned and operated by the defendant struck the rear of plaintiff's vehicle. By decision and order dated January 24, 2019, the Court (Baisley, J.) granted plaintiff's motion for partial summary judgment in her favor on the issue of liability. Plaintiff now moves, pursuant to CPLR § 3126, for an order compelling defendant to appear for a court-ordered deposition on a date certain or, in the alternative, precluding defendant from offering any evidence at trial or in support or opposition to any motion.

Following the granting of partial summary judgment in plaintiff's favor, a preliminary conference was conducted in the action, and pursuant to the Preliminary Conference Stipulation and Order, dated February 20, 2019, depositions of both parties were scheduled for May 22, 2019. It appears that because the law firm representing the defendant did not have an attorney available on the originally-scheduled date, and at their request, the depositions of the parties were rescheduled for July 15, 2019. Although plaintiff appeared for her deposition and was deposed on July 15, 2019, defendant did not, because, according to her attorney, she was "unavailable." Defendant's deposition was rescheduled, for September 4, 2019, but she failed to appear on that date, as well, again because, according to counsel, she was "unavailable." Her deposition was rescheduled for October 18, 2019. In the interim, on September 10, 2019, a compliance conference was conducted in the action. Although at plaintiff's request, the conference was also treated as a pre-motion conference pursuant to the court's part rules, plaintiff's request for permission to file a CPLR § 3126 was not granted at that time. Subsequently, however, at a further conference conducted by the court of October 29, 2019, after the defendant had again failed to appear for deposition and defense counsel advised that his firm had been unable to contact the defendant to inform her of her scheduled deposition and was continuing its efforts to locate her, plaintiff was granted such permission. Plaintiff thereafter made the instant motion.

CPLR § 3126 authorizes the Court to sanction a party who "refuses to obey an order for disclosure or willfully fails to disclose information which the court finds ought to have been disclosed." "The nature and degree of a penalty imposed pursuant to CPLR 3126 for failure to comply with discovery is within the trial court's discretion" (***Briano v LKT Transp.***, 23 AD3d 421 [2d Dept 2005]). A failure to comply with discovery, particularly after a court order has been issued, may constitute the "dilatory and obstructive, and thus contumacious, conduct warranting the striking of their [pleading]" (***Kutner v Feiden, Dweck & Sladkus***, 223 AD2d 488, 489 [1st Dept. 1998]; see ***CDR Creances S.A. v Cohen***, 104 AD3d 17 (1st Dept. 2012); ***Reidel v Ryder TRS, Inc.***, 13 AD3d 170 [1st Dept. 2004]). Absent a showing that a "defendant's failure to comply with disclosure was the result of willful, contumacious and deliberate conduct," the plaintiffs are not entitled to the drastic remedy of striking a defendant's answer or precluding certain evidence at trial (***Williams v Ryder TRS, Inc.***, 29 AD3d 784, 785 [2nd Dept. 2006]; *see* ***Pepsico, Inc. v Winterthur Intl. America Ins. Co.***, 24 AD3d 742 [2nd Dept. 2005]; ***281 St. Nicholas Partners LLC v Peppers, Jr.*** 2015 WL 5366056 [Sup Ct, New York County 2015]).

Here, in opposition to the motion, defendant's counsel does not dispute plaintiff's counsel's recitation of the sequence of events surrounding - and the ongoing frustration of - plaintiff's efforts to conduct defendant's deposition. Instead, defendant's counsel avers that his offices have been fruitlessly attempting to contact the defendant since the preliminary conference on February 20, 2019. Counsel asserts that his office has sent the defendant numerous letters, called several telephone numbers for contained in its file, conducted a Clear Search and a Department of Motor Vehicles search and undertaken various internet searches, in an effort to contact their client, all to no avail. Defendant's counsel contends that because the defendant herself has been unaware of the scheduling of her deposition and of the requirement that she appear for it, her failure to appear for deposition cannot be deemed intentional or contumacious so as to warrant the severe remedy of preclusion that plaintiff is now requesting.[1]

"The willful and contumacious character of a party's conduct may be inferred from the party's repeated failure to comply with court-ordered discovery over an extended period of time," (***Watson v 518 Pennsylvania Housing Development Fund Corporation***, 160 AD3d 907, 910, 76 NYS3d 66 [2d Dept 2018], *quoting* ***New York Timber, LLC v Seneca Cos.***, 133 AD3d 576, 577, 19 NYS3d 78 [2d Dept 2015]; ***Richards v RP Stellar Riverton, LLC***, 136 AD3d 1011, 25 NYS3d 346 [2d Dept 2016]; ***Estaba v Quow***, 101 AD3d 940, 956 NYS2d 143 [2d Dept 2012]; ***Orgel v Stewart Title Ins. Co.***, 91 AD3d 922, 936 NYS2d 131 [2d Dept 2012]).

It is undisputed that the deposition of defendant was repeatedly rescheduled by agreement of the parties and that the defendant repeatedly failed to appear. Moreover, it should be noted that defendant's counsel did not advise plaintiff that his office had been unable to locate and or communicate with the defendant until she failed to appear on the most recently rescheduled date for her deposition. The fact that the defendant has lost touch with her attorneys or made herself unavailable provides no basis for denying plaintiff's motion to preclude defendant's testimony at trial for failure to appear at a deposition (*see* ***Rowe v Sook***, 224 AD2d 404, 638 NYS2d 120 [2d Dept 1996], *citing* ***Foti v Suero***, 97 AD2d 748, 468, NYS2d 170 [2d Dept 1983]; *see also* ***Spatoro v Ervin***, 186 AD2d 793, 589 NYS2d 73 [2d Dept 1992]). Similarly, the fact that defendant's whereabouts may be unknown to defendant's counsel is not a bar to plaintiff's requested sanction (*see* ***Rocco v Advantage Securities & Protection, Inc.***, 283 AD2d 317, 724 NYS2d 419 [1st Dept 2001]; ***Reidel v Ryder TRS, Inc.***, 13 AD3d 170, 786 NYS2d 487 [1st Dept 2004]). Counsel may not "permit an indifferent client to slip into obscurity and thereafter

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[1] Although defendant's counsel suggests that in light of the prior grant of partial summary judgment in plaintiff's favor on the issue of liability, plaintiff can complete discovery without the necessity of deposing the defendant, he also concedes that comparative fault is a potential issue in this action. (*See generally* ***Rodriguez v. City of New York***, 31 NY3d 312 [2018].) Hence, plaintiff's insistence that the defendant appear for deposition falls squarely within the ambit of the discovery to which she is entitled under the CPLR, and her current motion, and the relief she is seeking through it, is far from moot.

contend that the client's failure to appear pursuant to court orders cannot be met with the appropriate sanction," (***Montgomery v Colorado***, 179 AD2d 401, 402, 577 NYS2d 851 [1st Dept 1992], *quoting* ***Moriates v Powertest Petroleum Co.***, 114 AD2d 888, 889-890, 495 NYS2d 62 [2d Dept 1985]). Accordingly, a conditional order granting plaintiff's motion to the extent that defendant is directed to appear for her deposition within 30 days of service of this order, failing which she shall be precluded from testifying at trial pursuant to CPLR § 3126, without further order of the Court, is appropriate.

The parties are reminded that pursuant to the Rules of the Chief Judge (22 NYCRR 202.27) the Court may without further notice grant judgment by default or order an inquest against any defendant who fails to appear.

Dated: 12/6/2019
Riverhead, New York

HON. SANFORD NEIL BERLAND, A.J.S.C.

_____ **FINAL DISPOSITION** __XX__ **NON-FINAL DISPOSITION**