

**Slavinskaya v Ray**

2020 NY Slip Op 35471(U)

September 28, 2020

Supreme Court, Queens County

Docket Number: Index No. 714996/2018

Judge: Maurice E. Muir

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.

Short Form Order

NEW YORK SUPREME COURT – QUEENS COUNTY

**FILED**

**10/1/2020  
9:27 AM**

Present: HONORABLE MAURICE E. MUIR  
Justice

**COUNTY CLERK  
QUEENS COUNTY**

ANASTASIA SLAVINSKAYA and TAMARA  
SLAVINSKAYA,

IAS Part - 42

Index No.: 714996/2018

Plaintiffs,

Motion Date: 7/30/20

-against-

SWAPON K. RAY and PUMAS CAB CORP.,

Motion Cal. No. 17

Defendants.

Motion Seq. No. 1

The following electronically filed documents read on this motion by Swapon K. Ray (“Mr. Ray”) and Pumas Cab Corp. (“Pumas Cab”) (collectively, the “defendants”) for an order (a) striking the Note of Issue and Certificate of Readiness; (b) compelling plaintiffs to submit to Examination Before Trial (“EBT”); (c) precluding plaintiffs from testifying at trial should they fail to appear for the scheduled EBT(s); or in the alternative (d) dismissing plaintiffs’ complaint should they fail to appear for EBTs; and (e) compelling plaintiffs to submit to Physical Exams after appearing for EBTs, pursuant to CPLR § 3121(a).

	Papers
	<u>Numbered</u>
Notice of Motion-Affirmation-Exhibits-Service.....	EF 12- 19
Affirmation in Opposition-Exhibits.....	EF 20 - 21

Upon the foregoing papers, it is ordered that this motion is determined as follows:

**BACKGROUND**

This is an action to recover damages for personal injuries, which the plaintiffs allegedly sustained in a motor vehicle collision. On March 8, 2018, while Anastasia Slavinskaya (“Anastasia”) and Tamara Slavinskaya (“Tamara”) (collectively, the “plaintiffs”) were

passengers in a vehicle driven by Mr. Ray and owned by Pumas Cab Corp., wherein they allegedly sustained injuries (“subject accident”). As a result, on October 2, 2018, the plaintiffs commenced the instant action against the defendants. On November 9, 2018, issue was joined. On March 27, 2019, the parties appeared for a preliminary conference at which time the plaintiffs were ordered to appear for an examination before trial (“EBT”) on or before June 4, 2019; and physical examination were to be conducted 45 days after their EBTs. Furthermore, pursuant to the preliminary conference order (“PCO”), the plaintiffs were further directed to file their note of issue on or before March 6, 2020. At the compliance conference, on October 21, 2019, the court ordered that “. . . all parties not yet deposed shall appear for deposition(s) on 11/14/2019 at time 10:00 o’clock . . .” Furthermore, pursuant to the compliance conference order (“COC”), the court ordered that “[a]ll physical examinations shall be completed within 30 days of the designation of examining physician(s).”

On or about March 9, 2020, the plaintiffs filed their Note of Issue and Certificate of Readiness for Trial (“NOI”), wherein it stated “[d]iscovery now know[n] to be necessary completed.” However, the defendants argue the plaintiffs’ physical examinations have not been completed and that “[a]t present, neither Plaintiff has been deposed. Completion of Plaintiffs’ EBTs are necessary to mounting a proper defense to this action, which will allow Defendant to ascertain the alleged damages of Plaintiffs claim, and the extent of Plaintiff’s injuries.” As a result, the defendants filed the instant motion seeking the following relief: (a) striking the NOI; (b) compelling plaintiffs to submit to an EBT; (c) precluding plaintiffs from testifying at trial should they fail to appear for the scheduled EBTs; or in the alternative (d) dismissing the plaintiffs’ complaint should they fail to appear for EBTs; and (e) compelling plaintiffs to submit to physical examination, pursuant to CPLR § 3121(a). Counsel for the plaintiffs opposes the defendants’ application in its entirety and argues that “[c]ontrary to the defendants’ allegations . . . there is no lack of cooperation to appear for depositions and subsequent medical examination necessary in this matter. Plaintiffs will appear, on a mutually agreeable day, to conduct depositions of all parties.” Moreover, counsel asserts that “[p]laintiffs Certificate of Readiness is not deficient or inaccurate and does not contain erroneous allegations. . . . The plaintiffs’ Note of Issue, including the Affirmation, says that the parties were not yet deposed and the plaintiffs intend to complete all depositions and discovery in this matter after placing this matter on a trial calendar as directed by this Court.”

### APPLICABLE LAW

CPLR § 3101(a)(1) provides, in relevant part, that "[t]here shall be full disclosure of all matter material and necessary in the prosecution or defense of an action." The terms "material and necessary" in this statute "must 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" (*Matter of Kapon v. Koch*, 23 NY3d 32, 38 [2014], quoting *Allen v. Crowell-Collier Publ. Co.*, 21 NY2d 403, 406 [1968]; see also *Brito v. Gomez*, 33 NY3d 1126 [2019]). At the same time, a party is "not entitled to unlimited, uncontrolled, unfettered disclosure" (*Geffner v. Merry Med. Ctr.*, 83 AD3d 998, 998 [2d Dept 2011]; see *Quinones v. 9 E. 69th St., ILC*, 132 AD3d 750, 750 [2d Dept. 2015]). "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 [2d Dept. 1989]; see *Quinones v. 9 E. 69th St., ILC*, 132 AD3d at 750, supra).

Furthermore, pursuant to CPLR § 3126, "[i]f any party . . . refuses to obey an order for disclosure or willfully fails to disclose information which the courts finds ought to have been disclosed pursuant to this article, the court may make such orders with regard to the failure or refusal as are just, among them . . . an order striking out pleading or part thereof, or dismissing the action or any part thereof . . ." (see *Fish & Richardson, P.C. v. Schindler*, 75 AD3d 219, 220 [1<sup>st</sup> Dept 2010]). In *Friedman, Harfenist, Langer & Kraut v. Rosenthal*, 79 AD3d 798 [2d Dept 2010], the court ruled that "[t]he nature and degree of the penalty to be imposed pursuant to CPLR 3126 rest within the discretion of the Supreme Court (see *Raville v. Elnomany*, 76 AD3d 520 [2d Dept 2010]; *Negro v. St. Charles Hospital & Rehabilitation Ctr.*, 44 AD3d 727 [2d Dept 2007]; *1523 Real Estate, Inc. v. East Atl. Props. LLC*, 41 AD3d 567, 568 [2d Dept 2007]). "[W]hen a party fails to comply with a court order and frustrates the disclosure scheme set forth in the CPLR, it is well within the Trial Judge's discretion [to dismiss a pleading]" (*Kihl v. Pfeffer*, 94 NY2d 118, 122 [1999]). "While actions should be resolved on the merits when possible, a court may strike [a pleading] upon a clear showing that a party's failure to comply with disclosure order was the result of willful and contumacious conduct." (*Almonte v. Pichardo*, 105 AD3d 687 [2d Dept 2012]; *Harris v. City of New York*, 117 AD3d 790 [2d Dept 2014]; *Arpino v. F.J.F. & Sons Elec. Co., Inc.*, 102 AD3d 201 [2d Dept 2012]; *Zakhidov v. Boulevard*

*Tenants Corp.*, 96 AD3d 737 [2d Dept 2012]; *see also Brannigan v. Door*, 44 AD3d 959 [2d Dept 2016]). “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 failure to comply, or a failure to comply with court-ordered discovery over an extended period of time” (*Rock City Sound, Inc. v. Bashian & Farber, LLP*, 83 AD3d 685, 686-687 [2d Dept 2011]; [internal quotation marks and citations omitted]; *Teitelbaum v. Maimonides Med. Ctr.*, 144 AD3d 1013 [2d Dept 2016]; *Orgel v. Stewart Tit. Ins. Co.*, 91 AD3d 922 [2d Dept 2012].)

### DISCUSSION

Here, the court finds that plaintiffs failed to comply with the court’s previous orders (i.e., PCO and COC); and the plaintiff failed to offer a reasonable explanation for its non-compliance with said court orders. As a result, of the plaintiff’s non-compliance with the court’s orders, the defendants have not been afforded the opportunity to either depose the plaintiffs or conduct their physical examination. (*Carmona v. HUB Props Trust*, 2020 NY Slip Op 05030 [2d Dept 2020]). Thus, inasmuch as all necessary discovery has not been completed, the court must vacate the notice of trial and certificate of readiness and strike the action from the trial calendar so that discovery may be completed. (*see Breytman v. Olinville Realty, LLC*, 110 AD3d 753 [2d Dept 2013]; *Singh v. CBCS Construction Corp.*, 137 AD3d 1250 [2d Dept 2016]; *Cioffi v. S.M. Foods*, 178 AD3d 1003 [2d Dept 2009]; *see e.g. Barrett v. New York City Health & Hosps Corp.*, 150 AD3d 949 [2d Dept 2017]; *Ferreira v. Village of Kings Point*, 56 AD3d 718 [2d Dept 2008]). Lastly, should plaintiffs fail to appear for either the EBT or the physical examination, the defendants shall be able to renew this motion, and this court may impose sanctions against plaintiffs including, but not limited to, preclusion, dismissal, and costs.

Accordingly, it is hereby

ORDERED that the motion is denied insofar as it seeks to dismiss the complaint, to preclude plaintiffs from introducing evidence at trial; and it is further,

ORDERED that the motion to vacate the Notice of Issue and Certificate of Readiness for Trial, pursuant to 22 NYCRR § 202.21(e), is granted; and it is further,

ORDERED that the plaintiffs’ Notice of Issue and Certificate of Readiness for Trial is vacated and this matter shall be stricken from the trial calendar; and it is further,

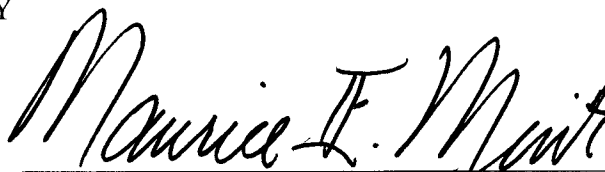
ORDERED that plaintiffs shall appear for an examination before trial on or before November 30, 2020; and it is further,

ORDERED that the physical examinations of the plaintiffs shall be held on or before January 15, 2021; and it is further,

ORDERED that defendants shall serve a copy of this decision and order with notice of entry upon plaintiffs and the clerk of this court on or before October 31, 2020.

The foregoing constitutes the decision and order of the court.

Dated: September 28, 2020  
Long Island City, NY



MAURICE E. MUIR, J.S.C.

**FILED**

**10/1/2020**

**9:27 AM**

**COUNTY CLERK  
QUEENS COUNTY**