

Mendez v Joseph

2021 NY Slip Op 33088(U)

November 18, 2021

Supreme Court, Queens County

Docket Number: Index No. 702853/20

Judge: Timothy J. Dufficy

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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

PRESENT: HON. TIMOTHY J. DUFFICY
Justice

PART 35

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MARIA MENDEZ,

Plaintiff,

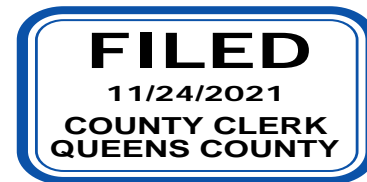
Index No.: 702853/20

Mot. Date: 8/17/21

-against-

Mot. Seq. 4

**THOMAS JOSEPH AND SCARSDALE TRIP
SERVICE, INC. D/B/A RED OAK
TRANSPORTATION, INC.,**



Defendants.

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The following papers read on this motion by plaintiff for an order, *inter alia*, pursuant to CPLR 3126, striking the Answer of defendants for failing to provide full and complete responses to Plaintiff’s Demand for Surveillance, dated February 25, 2021; and on the cross-motion by defendants for an order, pursuant to CPLR 3103, granting a protective order as to undiscoverable materials regarding surveillance undertaken by defendants and for an order awarding defendants costs and sanctions, pursuant to 22 NYCRR 130-1.1.

	<u>PAPERS NUMBERED</u>
Notice of Motion-Affidavits-Exhibits	EF 69-79
Notice of Cross-Motion-Affidavits-Exhibits.....	EF 80-84
Affidavits in Opp to Mot. and In support of Cross-Mot..	EF 118
Replying Affidavits.....	EF 119

Upon the foregoing papers, it is ordered that the motion by plaintiff is granted in part and denied in part; the branch of the cross-motion by defendants for a protective order is granted in part and denied in part; and the branch of the cross-motion seeking costs and sanctions pursuant to 22 NYCRR 130-1.1 is denied.

Plaintiff moves for an order, *inter alia*, pursuant to CPLR 3126, striking the Answer of defendants for failing to provide full and complete responses to Plaintiff’s

Demand for Surveillance, dated February 25, 2021; and the defendants cross-move for an order, pursuant to CPLR 3103, granting a protective order as to undiscoverable materials regarding surveillance undertaken by defendants, and for an order awarding defendants costs and sanctions, pursuant to 22 NYCRR 130-1.1.

It is well-established law that under CPLR 3101(a), the parties may engage in liberal discovery of evidence that is "material and necessary" for the preparation of trial (*see Allen v Crowell-Collier Publ. Co.*, 21 NY2d 403 [1968]). "The words 'material and necessary' as used in the statute are to be interpreted liberally, to require disclosure, upon request, of any facts bearing on the controversy which will assist in the preparation for trial." (*Anonymous v High School for Environmental Studies et. al.*, 820 NYS2d 573, 578 [1st Dept 2006]) (citations omitted). The Court is given broad discretion to supervise discovery (*Lewis v Jones et. al.*, 182 AD2d 904 [3d Dept 1992]). "The test is one of usefulness and reason.

CPLR 3101(subd[a]) should be construed . . .to permit discovery of testimony 'which is sufficiently related to the issues in litigation to make the effort to obtain it in preparation for trial reasonable' Weinstein-Korn-Miller, N.Y. Civ. Prac., par. 3101.07, p. 31-13)." (*Allen, supra*). It is immaterial that the material sought may not be admissible at trial as "pretrial discovery extends not only to proof that is admissible but also to matters that may lead to disclosure of admissible proof." (*Twenty Four Hour Fuel Oil Corp v Hunter Ambulance Inc.*, 226 AD2d 175 [1st Dept 1996]; *Polygram Holding, Inc. v Cafaro*, 42 AD3d 339 [1st Dept 2007] ["disclosure extends not only to admissible proof but also to testimony or documents which may lead to the disclosure of admissible proof, including materials which may be used in cross-examination"]). The CPLR directs full disclosure of all relevant material. The test is one of usefulness and reason (CPLR 3101[a]; *Allen, supra*; *Andon v 302-304 Mott Street Assocs.*, 94 NY2d 740 [2000]; *Hoenig v Westphal*, 52 NY2d 605 [1981] [pre-trial discovery is to be encouraged, limited only by the test of *materiality of "usefulness and reason"*]; *Spectrum Sys. Int'l. Corp. v Chemical Bank*, 78 NY2d 371, 376 [1991]). With respect to nonparty discovery, in order to withstand a challenge to the disclosure request, the party seeking disclosure must satisfy the threshold requirement that the disclosure sought is "material and necessary" (*Kooper v Kooper*, 74 AD3d 6 [2d Dept 2010]). Moreover the adequacy and

circumstances and reasons for the disclosure will ultimately be determined by the trial court, and the “determination of whether a particular discovery demand is appropriate, are all matters within the sound discretion of the trial court, which must balance competing interests.” (*Id.*; *Santariga v McCann*, 161 AD2d 320 [1st Dept 1990] [the scope and supervision of disclosure is a matter within the sound discretion of the court in which the action is pending]).

CPLR 3101(i) states, in relevant part:

- i) In addition to any other matter which may be subject to disclosure, there shall be full disclosure of any films, photographs, video tapes or audio tapes, including transcripts or memoranda thereof, involving a person referred to in paragraph one of subdivision (a) of this section. There shall be disclosure of all portions of such material, including out-takes, rather than only those portions a party intends to use.

The Court of Appeals held in *Tran v New Rochelle Hosp. Med. Ctr.*, 99 NY2d 383 [NY 2003], that surveillance tapes and other specified documents are subject to “full disclosure.”

After a thorough review of the Plaintiff’s Demand for Surveillance, dated February 25, 2021, the Court finds that the defendants **shall** produce:

- The name and address of the investigation company and the name and address of the videographer, photographer/investigator that conducted surveillance and prepared, recorded, videotaped, developed, transferred and edited the surveillance materials referenced above.

- All memoranda, transcripts, notes, logs, journals, and time records of each videographer, photographer, and/or investigator, including, but not limited to an itemized list indicating the date(s) and time(s) each videographer, photographer, and/or investigator conducted surveillance.

- All raw footage used to compile the DVDs which were exchanged with Plaintiff, including but not limited to those segments which have been transferred to the exchanged

DVDs.

●All records regarding the amount of footage of film, videotape and/or audiotape used, the type of equipment used to take, develop, convert, transfer and edit such film, videotape or audiotape the make and model of all equipment, lenses and range setting employed.

The Court finds the defendants **need not** produce:

- any billing records of any videographer, photographer or investigator
- each videographer, photographer and investigator that conducted surveillance and prepared, recorded, videotaped, developed, and edited the surveillance materials referenced above for an oral deposition.

Additionally, the branch of the cross-motion seeking costs and sanctions, pursuant to 22 NYCRR 130-1.1, is denied.

Pursuant to 22 NYCRR 130-1.1, conduct is deemed frivolous if: "(1) it is completely without merit in law and cannot be supported by a reasonable argument for an extension, modification or reversal of existing law; (2) it is undertaken primarily to delay or prolong the resolution fo the litigation, or to harass or maliciously injure another; or (3) it asserts material factual statements that are false."

At this stage, the court finds that the defendants have not demonstrated that plaintiff's conduct is "frivolous" as defined by 22 NYCRR 130-1.1. Nor have defendants established sufficient cause to warrant sanctions (*see Schaeffer v Schaeffer*, 294 AD2d 420 [2d Dept 2002]; *Breslaw v Breslaw*, 209 AD2d 662, 663 [2d Dept 1994]). The conduct of the plaintiff has not risen to the level of frivolous.

Accordingly, it is

ORDERED that the motion by plaintiff for an order, *inter alia*, striking the Answer of defendants for failing to provide full and complete responses to Plaintiff's

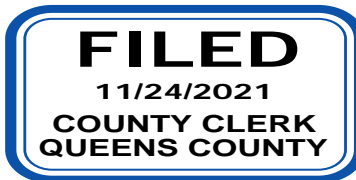
Demand for Surveillance, dated February 25, 2021, and the branch of the cross-motion by defendants for an order granting a protective order as to undiscoverable materials regarding surveillance undertaken by defendants are both granted in part and denied in part, as set forth above; and it is further

ORDERED that the defendants shall provide all the aforementioned items, as set forth above, within sixty (60) days of the date that this Order appears in the minutes of the Office of the Queens County Clerk–NYSCEF system.

ORDERED that the branch of the cross-motion by defendants seeking costs and sanctions pursuant to 22 NYCRR 130-1.1 is denied; and it is further

The foregoing constitutes the decision and order of the Court.

Dated: November 18, 2021



A handwritten signature in black ink, appearing to read "T. J. Dufficy".

TIMOTHY J. DUFFICY, J.S.C.