

**Supreme Court of the State of New York**  
**Appellate Division: Second Judicial Department**

D21734  
Y/hu

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Submitted - October 27, 2008

REINALDO E. RIVERA, J.P.  
ROBERT A. LIFSON  
RANDALL T. ENG  
CHERYL E. CHAMBERS, JJ.

2007-01120  
2007-03153

DECISION & ORDER

Edward Williams, etc., et al., appellants, v New York  
City Transit Authority, et al., respondents, et al.,  
defendants.

(Index No. 46605/99)

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Ronai & Ronai, LLP, New York, N.Y. (William Cafaro of counsel), for appellants.

Anita Isola, Brooklyn, N.Y., for respondent New York City Transit Authority (no  
brief filed).

Edward Garfinkel, New York, N.Y. (Fiedelman & McGaw [James K. O'Sullivan], of  
counsel), for respondent Schiavone Construction Co., Inc.

Wilson, Elser, Moskowitz, Edelman & Dicker, LLP, New York, N.Y. (Scott H.  
Stopnik and Debra A. Adler of counsel), for respondent Judlau Contracting, Inc.

L'Abbate, Balkan, Colavita & Contini, LLP, Garden City, N.Y. (Tomas B. Lim of  
counsel), for respondent CAB Associates.

In an action to recover damages for personal injuries, etc., the plaintiffs appeal (1)  
from an order of the Supreme Court, Kings County (Kurtz, J.), dated January 10, 2007, which  
granted the motion of the defendant Judlau Contracting, Inc., in which the defendants New York City  
Transit Authority, Schiavone Construction Co., and CAB Associates joined, to preclude the plaintiffs

December 30, 2008

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from relying on the testimony of or any other evidence obtained from two nonparty witnesses either in opposition to motions for summary judgment or at trial, due to late disclosure, and (2), as limited by their brief, from so much of an order of the same court, dated March 5, 2007, as, upon reargument, in effect, adhered to the original determination.

ORDERED that the appeal from the order dated January 10, 2007, is dismissed, as that order was superseded by the order dated March 5, 2007, made upon reargument, and it is further,

ORDERED that the order dated March 5, 2007, is affirmed insofar as appealed from; and it is further,

ORDERED that one bill of costs is awarded to the respondents.

The nature and degree of the penalty to be imposed pursuant to CPLR 3126 lies within the sound discretion of the Supreme Court (*see* CPLR 3126[2]; *Kihl v Pfeffer*, 94 NY2d 118, 122-123; *Suazo-Alvarez v Nordlaw, LLC*, 48 AD3d 670, 670-671; *Lotardo v Lotardo*, 31 AD3d 504). There is nothing in the record that warrants disturbing the Supreme Court's exercise of discretion in this case. The Supreme Court could have properly inferred the willful and deliberate character of the plaintiffs' conduct from their failures, over an eight-year period, to disclose the names of two nonparty witnesses (*see Frenk v Frederick*, 38 AD3d 593; *Moog v City of New York*, 30 AD3d 490, 491; *cf. Bermudez v Laminates Unlimited*, 134 AD2d 314). Under the circumstances, precluding the testimony of or any other evidence obtained from two nonparty witnesses was proper (*see Frenk v Frederick*, 38 AD3d 593; *Moog v City of New York*, 30 AD3d at 491; *see also Andujar v Benenson Inv. Co.*, 299 AD2d 503; *Ortega v New York City Tr. Auth.*, 262 AD2d 470).

RIVERA, J.P., LIFSON, ENG and CHAMBERS, JJ., concur.

ENTER:



James Edward Pelzer  
Clerk of the Court