

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

D27105
O/kmg

_____AD3d_____

Submitted - April 7, 2010

REINALDO E. RIVERA, J.P.
ANITA R. FLORIO
HOWARD MILLER
CHERYL E. CHAMBERS
SHERI S. ROMAN, JJ.

2009-07285

DECISION & ORDER

Bibi Umar, appellant, v June Ohrnberger, respondent,
et al., defendant.

(Index No. 13802/04)

Mallilo & Grossman, Flushing, N.Y. (Francesco Pomara, Jr., of counsel), for
appellant.

Russo & Apoznanski, Westbury, N.Y. (Susan J. Mitola of counsel), for respondent.

In an action to recover damages for personal injuries, the plaintiff appeals from an
order of the Supreme Court, Nassau County (Palmieri, J.), dated July 15, 2009, which granted the
motion of the defendant June Ohrnberger pursuant to CPLR 3126 to dismiss the complaint insofar
as asserted against her for failure to comply with court-ordered disclosure.

ORDERED that the order is affirmed, with costs.

The nature and degree of the penalty to be imposed pursuant to CPLR 3126 lies within
the sound discretion of the trial court (*see Kihl v Pfeffer*, 94 NY2d 118, 122-123; *Joseph v Iannace*,
6 AD3d 502, 503; *Ordonez v Guerra*, 295 AD2d 325, 326). The drastic remedy of dismissing a
complaint for a plaintiff's failure to comply with court-ordered discovery is warranted where the
failure to comply with discovery demands is willful and contumacious (*see Rowell v Joyce*, 10 AD3d
601; *My Carpet, Inc. v Bruce Supply Corp.*, 8 AD3d 248). Here, the willful and contumacious
character of the plaintiff's conduct can be inferred from her repeated failure to respond to demands
and/or to comply with discovery orders or to offer a reasonable excuse for her lack of compliance

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(see *Horne v Swimquip, Inc.*, 36 AD3d 859, 861; *Sowerby v Camarda*, 20 AD3d 411; *Bodine v Ladjevardi*, 284 AD2d 351, 352; *Reed v Jaspan, Ginsberg, Schlesinger, Silverman & Hoffman*, 283 AD2d 630). Accordingly, the Supreme Court did not improvidently exercise its discretion in granting the motion of the defendant June Ohrnberger.

RIVERA, J.P., FLORIO, MILLER, CHAMBERS and ROMAN, JJ., concur.

ENTER:

A handwritten signature in black ink, reading "James Edward Pelzer". The signature is written in a cursive, flowing style.

James Edward Pelzer
Clerk of the Court