

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

D31391
C/prt

_____AD3d_____

Submitted - April 13, 2011

PETER B. SKELOS, J.P.
THOMAS A. DICKERSON
L. PRISCILLA HALL
LEONARD B. AUSTIN
ROBERT J. MILLER, JJ.

2010-07813

DECISION & ORDER

Evelyn Thompson, appellant, v
Dallas BBQ, et al., respondents.

(Index No. 19573/09)

Eric Turkewitz, New York, N.Y., for appellant.

McMahon, Martine & Gallagher, Brooklyn, N.Y. (Patrick W. Brophy of counsel), for respondents.

In an action to recover damages for personal injuries, the plaintiff appeals from an order of the Supreme Court, Queens County (Grays, J.), dated June 21, 2010, which denied her motion pursuant to CPLR 3126 to strike the defendants' answer for failure to provide certain disclosure.

ORDERED that the order is affirmed, with costs.

Pursuant to CPLR 3126, “[a] court may strike an answer as a sanction if a defendant ‘refuses to obey an order for disclosure or willfully fails to disclose information which the court finds ought to have been disclosed’” (*Mazza v Seneca*, 72 AD3d 754, 754, quoting CPLR 3126). The nature and degree of the penalty to be imposed pursuant to CPLR 3126 lies within the sound discretion of the trial court (*see* CPLR 3126[3]; *Kihl v Pfeffer*, 94 NY2d 118, 122-123; *Bernal v Singh*, 72 AD3d 716). The drastic remedy of striking a pleading is not appropriate absent a clear showing that the failure to comply with discovery demands is willful and contumacious (*see* CPLR 3126[3]; *Kyung Soo Kim v Goldmine Realty, Inc.*, 73 AD3d 709; *Moray v City of Yonkers*, 72 AD3d

May 24, 2011

THOMPSON v DALLAS BBQ

Page 1.

766).

Here, there was no such clear showing that the defendants' conduct was willful and contumacious (*see Dank v Sears Holding Mgt. Corp.*, 69 AD3d 557). Accordingly, the Supreme Court providently exercised its discretion in denying the plaintiff's motion to strike the defendants' answer.

SKELOS, J.P., DICKERSON, HALL, AUSTIN and MILLER, JJ., concur.

ENTER:


Matthew G. Kiernan
Clerk of the Court