

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

D32292  
W/prt

\_\_\_\_\_AD3d\_\_\_\_\_

Submitted - September 7, 2011

WILLIAM F. MASTRO, J.P.  
RUTH C. BALKIN  
CHERYL E. CHAMBERS  
SANDRA L. SGROI, JJ.

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2010-10398

DECISION & ORDER

Trudy Facey, respondent, v Silver Express Cab Corp.,  
et al., appellants, et al., defendants.

(Index No. 21794/06)

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Baker, McEvoy, Morrissey & Moskovits, P.C., New York, N.Y. (Stacy R. Seldin of counsel), for appellants.

Bradley Gillam, Melville, N.Y. (Jeffrey K. Levine of counsel), for respondent.

In an action to recover damages for personal injuries, the defendants Silver Express Cab Corp. and Mohammad Akbar appeal, as limited by their brief, from so much of an order of the Supreme Court, Kings County (Partnow, J.), dated September 14, 2010, as granted that branch of the plaintiff's motion which was pursuant to CPLR 3126 to strike their answer.

ORDERED that the order is modified, on the law and in the exercise of discretion, by deleting the provision thereof granting that branch of the plaintiff's motion which was to strike the answer of the defendants Silver Express Cab Corp. and Mohammad Akbar and substituting therefor a provision granting that branch of the plaintiff's motion only to the extent of precluding the defendant Mohammad Akbar from offering any testimony at trial and otherwise denying that branch of the motion; as so modified, the order is affirmed insofar as appealed from, without costs or disbursements.

As a sanction against a party who "refuses to obey an order for disclosure or wilfully fails to disclose information which the court finds ought to have been disclosed," a court may issue an order, inter alia, "prohibiting the disobedient party . . . from producing in evidence designated

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things or items of testimony” or “striking out pleadings” (CPLR 3126[2], [3]). A court may invoke the drastic remedy of striking a pleading, however, only upon a clear showing that the failure to comply with court-ordered discovery was willful and contumacious (*see Argo v Queens Surface Corp.*, 58 AD3d 656; *Paca v City of New York*, 51 AD3d 991, 993). Here, the record does not support a finding that the appellants willfully and contumaciously failed to produce the defendant Mohammad Akbar for a deposition. Under the circumstances, the appropriate remedy was an order precluding the appellants from calling Akbar as a witness at trial (*cf. Patel v DeLeon*, 43 AD3d 432, 433; *Williams v Ryder TRS, Inc.*, 29 AD3d 784, 785).

MASTRO, J.P., BALKIN, CHAMBERS and SGROI, JJ., concur.

ENTER:

A handwritten signature in black ink that reads "Matthew G. Kiernan". The signature is written in a cursive, slightly slanted style.

Matthew G. Kiernan  
Clerk of the Court