

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

D33053
Y/prt

_____AD3d_____

Submitted - November 10, 2011

WILLIAM F. MASTRO, A.P.J.
CHERYL E. CHAMBERS
LEONARD B. AUSTIN
ROBERT J. MILLER, JJ.

2010-10282

DECISION & ORDER

Amy Laskin, appellant, v Loretta Friedman,
et al., respondents.

(Index No. 27601/08)

Stephen H. Frankel, Mineola, N.Y. (Nicholas E. Tzaneteas of counsel), for appellant.

Grogan & Souto, P.C., Goshen, N.Y. (Edward P. Souto of counsel), for respondents.

In an action to recover damages for personal injuries, the plaintiff appeals from an order of the Supreme Court, Westchester County (Giacomo, J.), dated September 15, 2010, which denied her motion to strike the defendants' answer pursuant to CPLR 3126(3) for failure to comply with discovery demands and based on the spoliation of evidence.

ORDERED that the order is affirmed, with costs.

The Supreme Court providently exercised its discretion in denying that branch of the plaintiff's motion which was pursuant to CPLR 3126(3) to strike the defendants' answer for failure to comply with discovery demands. "[T]he drastic remedy of striking an answer is inappropriate absent a clear showing that the failure to comply with discovery demands is willful, contumacious, or in bad faith" (*Jenkins v Proto Prop. Servs., LLC*, 54 AD3d 726, 726-727 [internal quotation marks omitted]; see *Denoyelles v Gallagher*, 40 AD3d 1027, 1027). Here, the plaintiff failed to demonstrate that the defendants' action in discarding the subject porch swing was the product of willful, contumacious, or bad faith conduct (see *Jenkins v Proto Prop. Servs., LLC*, 54 AD3d at 727; *Denoyelles v Gallagher*, 40 AD3d at 1027).

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Further, the Supreme Court providently exercised its discretion in denying that branch of the plaintiff's motion which was to strike the defendants' answer on the ground of spoliation of the porch swing after being on notice that such evidence might be necessary for future litigation (*see Jenkins v Proto Prop. Servs., LLC*, 54 AD3d at 727; *Barnes v Paulin*, 52 AD3d 754, 755; *Denoyelles v Gallagher*, 40 AD3d at 1027). The absence of the porch swing did not leave the plaintiff "prejudicially bereft" of a means of proving her claim (*Jenkins v Proto Prop. Servs., LLC*, 54 AD3d at 727; *see Barnes v Paulin*, 52 AD3d at 755; *Denoyelles v Gallagher*, 40 AD3d at 1027; *Dennis v City of New York*, 18 AD3d 599; *cf. Velasquez v Brocorp., Inc.*, 283 AD2d 423, 423; *Yi Min Ren v Professional Steam-Cleaning*, 271 AD2d 602, 602-603).

MASTRO, A.P.J., CHAMBERS, AUSTIN and MILLER, JJ., concur.

ENTER:

A handwritten signature in black ink that reads "Aprilanne Agostino". The signature is written in a cursive, flowing style.

Aprilanne Agostino
Clerk of the Court