

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

D36721
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_____AD3d_____

Argued - October 1, 2012

PETER B. SKELOS, J.P.
THOMAS A. DICKERSON
L. PRISCILLA HALL
SHERI S. ROMAN, JJ.

2010-07200
2011-05781

DECISION & ORDER

William Flynn, appellant-respondent, v City of New York, respondent-appellant.

(Index No. 29059/95)

Leahey & Johnson, P.C., New York, N.Y. (Gabriel M. Krausman, Peter James Johnson, James P. Tenney, Joanne Filiberti, and Peter James Johnson, Jr., of counsel), for appellant-respondent.

Michael A. Cardozo, Corporation Counsel, New York, N.Y. (Edward F.X. Hart and Tahirih M. Sadrieh of counsel), for respondent-appellant.

In an action to recover damages for personal injuries, (1) the plaintiff appeals, as limited by his brief, from so much of an order of the Supreme Court, Kings County (Velasquez, J.), dated June 16, 2010, as, in effect, denied that branch of his motion which was pursuant to CPLR 3126 to strike the defendant's answer, and the defendant cross-appeals, as limited by its brief, from so much of the same order dated June 16, 2010, as, sua sponte, directed it to produce all documents in its possession pertaining to protective clothing for firefighters known as "bunker gear," in accordance with a schedule to be determined by a court-appointed referee, and (2) the plaintiff separately appeals, as limited by his brief, from so much of an order of the same court dated June 2, 2011, as, upon renewal, adhered to its original determination in the order dated June 16, 2010, denying that branch of his motion which was pursuant to CPLR 3126 to strike the defendant's answer, and the defendant separately cross-appeals, as limited by its brief, from so much of the same order dated June 2, 2011, as, sua sponte, directed it to comply with an order of a court-appointed referee dated July 23, 2010, directing it to produce all documents concerning "bunker gear," and

December 12, 2012

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precluding it from introducing at trial any evidence relating to a person identified and described as “the other Lt. Flynn,” who is “not the same Lt. Flynn as plaintiff.”

ORDERED that the appeal and cross appeal from the order dated June 16, 2010, and the cross appeal from the order dated June 2, 2011, are dismissed; and it is further,

ORDERED that the order dated June 2, 2011, is reversed insofar as appealed from, on the facts and in the exercise of discretion, upon renewal, the determination in the order dated June 16, 2010, denying that branch of the plaintiff’s motion which was pursuant to CPLR 3126 to strike the defendant’s answer is vacated, that branch of the motion is thereupon granted, and the matter is remitted to the Supreme Court, Kings County, for an inquest on the issue of damages; and it is further,

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

The appeal from so much of the order dated June 16, 2010, as denied that branch of the plaintiff’s motion which was pursuant to CPLR 3126 to strike the answer must be dismissed, as that portion of the order was superseded by so much of the order dated June 2, 2011, as was made upon renewal. The cross appeals from so much of the order dated June 16, 2010, as, sua sponte, directed the defendant to produce certain documentation and so much of the order dated June 2, 2011, as, sua sponte, directed the defendant to comply with an order of a court-appointed referee dated July 23, 2010, must be dismissed because no cross appeal lies as of right from these portions of the orders dated June 16, 2010, and June 2, 2011, which did not result from motions made on notice, and leave to cross-appeal has not been granted (*see Cascardo v Stacchini*, ____ AD3d ____, 2012 NY Slip Op 07616, *2 [2d Dept 2012]; *Faello v Faello*, 45 AD3d 728; *Warren v Hyman*, 19 AD3d 481, 481-482).

“Generally, the trial court is afforded broad discretion in supervising disclosure and its determination will not be disturbed unless that discretion has been clearly abused . . . However, the Appellate Division is vested with its own discretion and corresponding power to substitute its own discretion for that of the trial court, even in the absence of abuse” (*Byam v City of New York*, 68 AD3d 798, 800, quoting *Matter of Astor*, 62 AD3d 867, 868 [internal quotation marks omitted]).

Actions should be resolved on the merits wherever possible (*see Maiorino v City of New York*, 39 AD3d 601, 601). However, the striking of a pleading may be an appropriate sanction where there is a clear showing that the failure to comply with discovery demands is willful or contumacious (*see Montemurro v Memorial Sloan-Kettering Cancer Ctr.*, 94 AD3d 1066, 1066; *Byam v City of New York*, 68 AD3d at 801). The willful or contumacious character of a party’s conduct can be inferred from the party’s repeated failure to respond to demands or to comply with discovery orders (*see Montemurro v Memorial Sloan-Kettering Cancer Ctr.*, 94 AD3d at 1066).

Here, the willful and contumacious conduct of the defendant, City of New York, can be inferred from its repeated failures—over an extended period of time and without an adequate excuse—to comply with the plaintiff’s discovery demands for the disclosure of “all” of the documents in the possession of the New York City Fire Department (hereinafter the FDNY) relating

to the FDNY's determination to provide its members with protective "bunker gear," including documents dated prior to 1990, as well as to comply with several discovery orders mandating such disclosure (*see Montemurro v Memorial Sloan-Kettering Cancer Ctr.*, 94 AD3d at 1066-1067; *Pirro Group, LLC v One Point St., Inc.*, 71 AD3d 654, 655; *Byam v City of New York*, 68 AD3d at 801). Accordingly, upon renewal, that branch of the plaintiff's motion which was to strike the defendant's answer should have been granted. We, thus, remit the matter to the Supreme Court, Kings County, for an inquest on the issue of damages.

In view of our determination, we need not address the parties' remaining contentions.

SKELOS, J.P., DICKERSON, HALL and ROMAN, JJ., concur.

ENTER:

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

Aprilanne Agostino
Clerk of the Court