

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

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Submitted - November 28, 2012

PETER B. SKELOS, J.P.  
CHERYL E. CHAMBERS  
SANDRA L. SGROI  
SYLVIA HINDS-RADIX, JJ.

2012-01298

DECISION & ORDER

Blanca Estaba, respondent, v Joel L. Quow, et al.,  
defendants, Kev-Ra Limo, Inc., et al., appellants.

(Index No. 9422/08)

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

Robert C. Fontanelli, P.C. (Arnold E. DiJoseph, P.C., of counsel), for respondent.

In an action to recover damages for personal injuries, the defendants Kev-Ra Limo, Inc., and Luis Alfredo Ruiz appeal from an order of the Supreme Court, Kings County (Francois Rivera, J.), dated December 2, 2011, which granted the plaintiff's motion pursuant to CPLR 3126 to strike their answer.

ORDERED that the order is affirmed, with costs.

The nature and degree of the penalty to be imposed pursuant to CPLR 3126 is a matter within the discretion of the trial court (*see Kihl v Pfeffer*, 94 NY2d 118, 122-123; *Commisso v Orshan*, 85 AD3d 845; *Rock City Sound, Inc. v Bashian & Farber, LLP*, 83 AD3d 685, 686). The drastic remedy of striking an answer is inappropriate absent a clear showing that the defendant's failure to comply with discovery demands was willful and contumacious (*see Orgel v Stewart Tit. Ins. Co.*, 91 AD3d 922, 923; *Commisso v Orshan*, 85 AD3d at 845; *Rock City Sound, Inc. v Bashian & Farber, LLP*, 83 AD3d at 686). Willful and contumacious conduct may be inferred from a party's repeated failure to comply with court-ordered discovery, coupled with inadequate explanations for the failures to comply or a failure to comply with court-ordered discovery over an extended period of time (*see Orgel v Stewart Tit. Ins. Co.*, 91 AD3d at 924; *Commisso v Orshan*, 85 AD3d at 845; *Rock City Sound, Inc. v Bashian & Farber, LLP*, 83 AD3d at 686-687). Here, the appellants' failure,

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over a period of one year and nine months, to comply with five court orders directing them to appear for a deposition, coupled with a lack of a reasonable excuse for that failure, supports an inference that their conduct was willful and contumacious (*see Orgel v Stewart Tit. Ins. Co.*, 91 AD3d at 924; *Rock City Sound, Inc. v Bashian & Farber, LLP*, 83 AD3d at 686-687; *Commisso v Orshan*, 85 AD3d at 845; *Morgenstern v Jeffsam Corp.*, 78 AD3d 913, 914; *Giano v Ioannou*, 78 AD3d 768, 771). Accordingly, the Supreme Court providently exercised its discretion in granting the plaintiff's motion to strike the appellants' answer.

SKELOS, J.P., CHAMBERS, SGROI and HINDS-RADIX, JJ., concur.

ENTER:

  
Aprilanne Agostino  
Clerk of the Court