

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

D57626
O/htr

_____AD3d_____

Argued - September 11, 2018

MARK C. DILLON, J.P.
SHERI S. ROMAN
ROBERT J. MILLER
COLLEEN D. DUFFY, JJ.

2017-09206
2017-09207

DECISION & ORDER

Thomas J. Aiken, plaintiff, Rosemary Wiltshire,
respondent, v Patrick Liotta, appellant (and a third-
party action).

(Index No. 14333/11)

Armienti, DeBellis, Guglielmo & Rhoden, LLP, New York, NY (Vanessa M. Corchia of counsel), for appellant.

Subin & Associates, LLP (Pollack, Pollack, Isaac & DeCicco, LLP, New York, NY [Brian J. Isaac and Michael H. Zhu], of counsel), for respondent.

In a consolidated action, inter alia, to recover damages for personal injuries, the defendant appeals from (1) an order of the Supreme Court, Kings County (Lauren Baily-Schiffman, J.), dated March 4, 2017, and (2) an order of the same court dated May 25, 2017. The order dated March 4, 2017, denied, as premature and without prejudice, that branch of the defendant's motion which was for summary judgment dismissing the complaint insofar as asserted by the plaintiff Rosemary Wiltshire. The order dated May 25, 2017, insofar as appealed from, denied the defendant's motion to enforce certain orders of preclusion against the plaintiff Rosemary Wiltshire pursuant to CPLR 3126 and, thereupon, for summary judgment dismissing the complaint insofar as asserted by that plaintiff.

ORDERED that the appeal from the order dated March 4, 2017, is dismissed, as that order was superseded by the order dated May 25, 2017; and it is further,

ORDERED that the order dated May 25, 2017, is affirmed insofar as appealed from; and it is further,

December 19, 2018

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

The underlying facts of these appeals are summarized in the companion appeal decided herewith (*see Aiken v Liotta*, ____ AD3d ____ [Appellate Division Docket No. 2016-00784]).

We agree with the Supreme Court's denial of the defendant's motion to enforce certain orders of preclusion against the plaintiff Rosemary Wiltshire pursuant to CPLR 3126 and, thereupon, for summary judgment dismissing the complaint insofar as asserted by that plaintiff. Despite Wiltshire's delays, she substantially complied with the relevant discovery demands and orders, and the defendant failed to demonstrate that the delays were the product of willful and contumacious conduct (*see Brannigan v Christie Overhead Door*, 144 AD3d 959, 960; *McDermott v Bahnatka*, 83 AD3d 1014, 1015; *LOP Dev., LLC v ZHL Group, Inc.*, 78 AD3d 1020, 1020; *Jenkins v Proto Prop. Servs., LLC*, 54 AD3d 726; *Zouev v City of New York*, 32 AD3d 850, 851; *Passarelli v National Bank of Westchester*, 81 AD2d 635, 636).

DILLON, J.P., ROMAN, MILLER and DUFFY, JJ., concur.

ENTER:


Aprilanne Agostino
Clerk of the Court