

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE HOWARD G. LANE IAS PART 22
Justice

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KELVIN THEN, an infant under the age of 14 years, by his father and natural Guardian, BLAS THEN and BLAS THEN individually,	Motion Date January 13, 2009
Plaintiffs, -against-	Motion Cal. No. 28
NEW YORK CITY TRANSIT AUTHORITY and FITZROY SMITH,	Motion
Defendants.	Sequence No. 4

	<u>PAPERS</u>
	<u>NUMBERED</u>
Order to Show Cause-Affidavits.....	1-4
Opposition.....	5
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Upon the foregoing papers it is ordered that this motion by defendant, New York City Transit Authority (NYCTA) for an order pursuant to CPLR 3126 permitting plaintiff to restore this matter to the Court's trial calendar; pursuant to CPLR 3126 striking the answer of defendant NYCTA; directing an inquest by jury be held for an assessment of damages against defendant NYCTA at the time of trial in the within action against the remaining co-defendant is hereby granted solely to the following extent:

A Notice for Discovery and Inspection, dated April 18, 2008 was served upon defendant seeking, *inter alia*, "all information and/or data retrieved and/or retrievable from the black box which was on board the subject bus involved in the subject accident including all reports and/or memoranda which was generated as a result of any downloaded information from any box on board the aforesaid subject bus". Defendant failed to comply with the plaintiffs' request. Thereafter, plaintiffs mailed two follow-up letters to defendant dated June 6, 2008 and June 17, 2008 and defendant still failed to comply.

Plaintiffs then filed the instant motion dated July 30, 2008 seeking an order compelling defendant to comply with plaintiffs' discovery demand. In plaintiffs' paper in support of the

motion, plaintiffs assert that the instant motion is not the first time they have had to seek court intervention to command defendant's compliance with plaintiffs' discovery demands. Plaintiffs also indicate, that plaintiffs have made several other prior discovery demands, unrelated to the instant motion, with which defendant failed to comply or only complied with after plaintiffs filed a motion or obtained a court order.

Defendant submitted no opposition to the motion and instead, counsel for the parties entered into a Stipulation dated September 30, 2008. The Stipulation stated in relevant part: "Defendant New York City Transit Authority will produce the sought after data from the event recorder of the subject bus within 45 days, or if such data is unavailable, an affidavit from an employee with knowledge as to the unavailability of the data." It is undisputed that defendant has failed to comply with the Stipulation. Defendant submits an Affirmation in Opposition wherein defendant states *inter alia*, "[d]efendants have not complied with the September 30, 2008 stipulation as it has proven more difficult to determine an individual employee who can execute an appropriate affidavit. . . "[y]our affirmant miscalculated the time frame necessary to obtain information concerning the procedure for creating the event recorder data, downloading the event recorder data and preserving the event recorder data pursuant to NYCTA procedures, guidelines and criteria."

The drastic remedy of striking a pleading pursuant to CPLR 3126 for failure to comply with court-ordered disclosure should be granted only where the conduct of the resisting party is shown to be wilful, contumacious, or in bad faith (*Ranfort v. Peak Tours, Inc.*, 250 AD2d 747 [2d Dept 1998]). Wilful and contumacious conduct of the resisting party may be inferred from the repeated failure to comply with court disclosure orders which were entered upon consent and without adequate excuse for failing to comply (*Zhang v. Santana*, 52 AD3d 484 [2d Dept 2008]; *Du Valle v. Swan Lake Resort Hotel*, 26 AD3d 616 [3d Dept 2006]).

Notwithstanding the existence of some evidence of conduct demonstrating a pattern of noncompliance, at this time this Court finds that defendant's conduct fails to rise to the level of wilful, contumacious, or bad faith. The Court notes that although rejected by the court as being grossly untimely, defendant did submit several affidavits from employees with knowledge as to the unavailability of the data sought by plaintiffs on the return date of the motion.

The Court in *Pugsley* noted: "attorneys and the parties have a professional and/or legal obligation to fully comply with all court orders, including those which relate to discovery and

disclosure demands. Failure to comply with such orders will result in sanctions (both monetary and otherwise) which may among other things, severely affect the prosecution or defense of underlying lawsuit." (*Pugsley v. City of New York*, 2007 NY Misc LEXIS 2793 [Sup Ct, Bx Cty 2007]).

The Court recognizes that although the undisputed facts here present a situation where defendant violated the terms of a written stipulation between counsel, rather than a court order, a violation of a written stipulation between counsel for the parties to provide outstanding discovery may be strictly enforced as the court would enforce a court order, including the imposition of sanctions. A trial court may impose sanctions for an attorney's conduct, such as here, related to disclosure and failure to comply with a stipulation between the parties to provide disclosure (see, *Provenzano v. Turner Construction Co., Inc.*, 275 AD2d 314 [2d Dept 2000]).

Stipulations are highly favored by the courts. Strict enforcement of stipulations "not only serves the interest of efficient dispute resolution but also is essential to the management of court calendars and integrity of the litigation process." (*Hallock v. State of New York and Power Authority of State of New York*, 64 NY2d 224, 230 [1984]). Courts should encourage the parties to enter into stipulations to resolve their disputes, and recognize the stipulations as carrying the same force and effect as a court order.

The Court finds that defendant need be punished and the movant shall be reimbursed for the additional motion practice and court appearances necessitated by defendant's non-compliance. (*Id.*).

Accordingly, it is ORDERED that defendant NYCTA is ordered to pay plaintiffs \$300.00 for the costs of the motion for sanction (see, *Pugsley v. City of New York*, 2007 NY Misc LEXIS 2793 [Sup Ct, Bx Cty 2007]; see also, *MacArthur v. NYCHA*, 48 AD3d 431 [2d Dept 2008][holding that the nature and degree of the penalty to be imposed pursuant to CPLR 3126 lies within the sound discretion of the trial court, citations omitted]); and

It is further ORDERED that defendant is compelled to comply with the terms of the Stipulation dated September 30, 2008 within forty-five (45) days from the date of service of a copy of this order with notice of entry; and

It is further ORDERED that in the event that the aforementioned sought after data from the event recorder cannot be located by defendant or is otherwise unavailable for production at this time, defendant is ordered to comply with the

following additional conditions within forty-five (45) days after service of a copy of this order with notice of entry:

1. Defendant must serve plaintiffs with an affidavit made by the custodian of such data, or the person charged by the defendant with the responsibility and obligation to store, maintain, preserve, and search for said sought after data.

2. The affidavit must include: (a) a detailed description of the "diligent and reasonable efforts" made to locate and produce said sought after data including the date, time and place of each search conducted; (b) a detailed explanation as to why the said sought after data is not now available; (c) the identity of the person or persons who are in the authorized chain of custody of such data, and if unknown, an explanation must be provided; (d) the identity of the person last in possession of said data, and if unknown an explanation must be provided; (e) all of the authorized locations where such data is, or should have been, stored, maintained and preserved in accordance with the defendant's regular business practices and procedures;

and,

It is further ORDERED that should defendant fail to comply with this order, defendant, New York City Transit Authority's Answer shall be stricken without further order of the Court; and

It is further ORDERED that plaintiffs may restore the matter to the trial calendar upon completion of all outstanding discovery and the resolution of any discovery issues, along with payment of the appropriate fee.

Plaintiffs are directed to serve a copy of this order on defendants.

This constitutes the decision and order of the Court.

Dated: March 4, 2009

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Howard G. Lane, J.S.C.