

McMahon v Ford Motor Company

2004 NY Slip Op 30163(U)

March 23, 2004

Supreme Court, New York County

Docket Number: 0112524/1999

Judge: Marilyn Shafer

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HON. MARILYN SHAFER, JSC
0112524/1999

PART 36

MCMAHON, CHRISTOPHER
VS
FORD MOTOR COMPANY

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

SEQ 2

DISMISS

The following papers, numbered 1 to _____ were read on this motion to/for _____

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion *denied*
pursuant to attached Mem.

FILED

MAR 29 2004

COUNTY CLERK'S OFFICE
NEW YORK

MOTION/CASE IS RESPECTFULLY REFERRED TO
JUSTICE

Dated: 3/23/04

HON. MARILYN SHAFER, JSC
J.S.C.

Check one: FINAL DISPOSITION

NON-FINAL DISPOSITION

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF **NEW** YORK: PART 36

-----X
CHRISTOPHER MCMAHON, and KATHLEEN
GITTO-MCMAHON,

Index No. 112524/1999

Plaintiffs,

- against -

FORD MOTOR COMPANY and METRO FORD,

Defendants.

-----X

SHAFER, MARILYN, J.,

In this products liability action brought by plaintiffs Christopher McMahon (plaintiff) and his wife Kathleen Gitto-McMahon (Gitto-McMahon), defendant Ford Motor Company (Ford) moves, and defendant Metro Ford Sales, Inc. s/h/a Metro Ford (Metro) cross-moves, for an order of dismissal, or a conditional order of dismissal, pursuant to CPLR **3042** (d), **3124**, and **3126**, based on plaintiff's alleged failure to comply with this court's orders, and to respond to defendants' demands for a bill of particulars and other discovery material. Plaintiff opposes the motions and asks the court to set this matter down for a compliance conference.

On August 7, 1991, Gitto-McMahon bought a new 1991 Ford Explorer automobile (Explorer), which was manufactured by Ford **and** sold by Metro, a Ford dealership in Schenectady County. On August 11, 1996, plaintiff, an insurance executive and resident of Columbia County, was driving the Explorer in Claverack Town when his vehicle was rear-ended and caused to **flip** over. Plaintiff alleges that his seatbelt disengaged during the collision, causing him to sustain a thoracic level spinal cord injury. Plaintiff settled a separate personal injury claim against the offending driver for \$1.3 million, allegedly after negotiating pro se with the Farm Family Insurance Company (**Farm Family**).

Procedural History

Plaintiff filed this products liability action on June 17, 1999, alleging that defendants' negligence and the faulty design, engineering, manufacturing, and distribution of the vehicle and seatbelt caused his injuries. The matter was originally assigned to Judge Richard B. Lowe III in the court's Motor Vehicles Part. On December 22, 1999, Judge Lowe signed an order denying Metro's motion to change the venue to Schenectady County. On August 9, 2000, the court's Trial **Support** Office sent an order to plaintiff requesting that plaintiff advise **if** the matter had been resolved, and if not, to schedule a preliminary conference. That order set out a discovery schedule to be followed if the case was still open, obliging plaintiff *to* serve defendants with a bill of particulars and authorizations for medical and employment records by August 18, 2000. Plaintiff was also required to provide insurance information by August 25, 2000. The Trial Support notice also advised that, following plaintiff's mandatory response to the court's order, a compliance conference would be scheduled with Judge Lowe, if necessary.

Plaintiff responded, advising the court that he had served a request for a preliminary conference on July 25, 2000. Accordingly, on August 31, 2000, Judge Lowe signed a Case Scheduling Order (CSO), which required the parties to exchange witness information by September 18, 2000; conduct depositions by October 27, 2000; complete plaintiff's physical examination by November 9, 2000; and complete all disclosure by November 24, 2000. The CSO set November 28, 2000, for a compliance conference, **and** advised in large, bold letters that "NONE OF THE **DATES** IN THE ORDER MAY BE EXTENDED WITHOUT ADVANCE NOTICE **AND** APPROVAL BY THE COURT.

On December 8, 2000, the court marked this case as disposed and took it off the calendar.

On April 20, 2001, Justice Milton Tingling¹ signed the parties' stipulated request, and restored the action to the court's active calendar. The April 20, 2001, stipulation indicated that it was signed by plaintiff's attorney, James G. Karpalos of the Law Office of Jeffrey S. Lisabeth; Ford's attorney, Bryce Friedman of Simpson Thacher; and Metro's attorney, Patricia Zincke of Cartafalsa, Slattery & Kelly, Esqs (Slattery).² Justice Tingling's order directed that the parties appear before the court for a May 23, 2001, conference.³ On April 30, and May 24, 2001, Justice Milton A. Tingling signed two orders reclassifying the matter as a complex case to be randomly reassigned to a non-motor vehicle part, citing the settlement of plaintiffs personal injury claim.

Parties' Pleadings and Discovery Requests

The law firm of Simpson Thacher & Bartlett (Simpson Thacher) answered the complaint, on Ford's behalf, on August 19, 1999. On December 1, 1999, **Ford**, through Simpson Thacher served various discovery demands on plaintiff, including a 29-paragraph demand for a bill of particulars, a 19-paragraph demand for medical, insurance, employment, and collateral source data, a request to inspect the Ford Explorer and seatbelt, and a CPLR 3101 (d) notice for information on plaintiff's expert. Ford's submissions indicate that plaintiff responded to its demand for a bill of particulars, via Simpson Thacher, with a document dated June 12, 2000, which was accompanied by an attorney's affirmation dated July 24, 2000. The bill of particulars

¹The matter was reassigned to Judge Tingling when Judge Lowe was assigned to the court's Commercial Division.

²On October 7, 1999, Metro filed notice that Slattery was replacing its previous counsel, James T. Towne, P.C.

³Zincke, Metro's attorney, denies having filed or signed the underlying stipulation, and points out that her name is misspelled on the document as "Zinke."

objected to 10 of Ford's inquiries as improper for such a document, and either responded to the remaining questions, or promised to forward the information at a later date.

Ford also submits a copy of a consent to change attorney form, signed on December 21, 2001, substituting its present counsel Aaronson Rappaport Feinstein & Deutsch, LLP (Aaronson Rappaport) for the Simpson Thacher firm. Another Ford submission is a letter from Aaronson Rappaport, dated February 14, 2002, which advised plaintiff's attorneys that Aaronson Rappaport had reviewed the file transferred from Simpson Thacher and found that "a substantial amount of discovery remains outstanding." Defendant Ford's Motion, Exhibit I. The letter asked plaintiff to forward the outstanding discovery material and new authorizations that would permit Aaronson Rappaport to receive plaintiff's medical, employment, insurance, and income tax information. Ford also submits letters to plaintiff, dated November 3, 2000; April 9, 2001; and July 5 and 10, 2001, which request responses to Ford's discovery demands, including a specific date, time, and location at which Ford could inspect the subject seatbelt. Ford's counsel submits an affirmation of good faith, asserting that he was forced to serve this motion due to plaintiff's repeated failure to comply with Ford's discovery demands and a court-ordered discovery schedule, over four years, despite "numerous attempts, both telephonically and in writing." *See id.*, Exhibit K.

In addition, Ford submits a copy of an undated and unsigned preliminary conference order (PCO) that allegedly issued from a conference held in this court on May 23, 2001. *See* Ford's Motion, Exhibit J. There is no copy of the PCO in the County Clerk's records, although the parties assert that they attended the conference. According to the PCO, Kapralos, Zincke, and Friedman attended the conference, where plaintiff was given until June 30, 2001, to respond to

Ford's outstanding discovery demands, including identifying information about the Ford Explorer and information on its disposition, a police accident report, and documents relating to plaintiff's personal injury action against the driver of the offending vehicle. The PCO stated that plaintiff would submit to a deposition by August 10, 2001, and allow Ford to inspect the seatbelt.

Metro answered the complaint on August 18, 1999, and issued a demand for a bill of particulars and a notice for discovery and inspection, seeking information about the Explorer and about plaintiffs' alleged losses. Metro submits copies of letters dated April 20, May 17, and August 31, 2000, and **April 17, 2001**, which all request that plaintiff respond to its outstanding discovery demands. The **April 20**, and May 17, 2000, letters advise that Metro could not use any authorizations sent to its prior counsel and request new authorizations addressed to Slattery. The April 17, 2001, letter repeats a prior request for a bill of particulars. Plaintiff had not responded to Metro's demands when this motion was filed, in April 2003.

In opposing the motions, plaintiff submits a copy of a supplemental bill of particulars, dated May **14, 2003**, which was addressed to both defendants. The document supplies the basic identifying data for the Explorer, such as the vehicle identification and registration numbers, and the names of the occupants on the date of the accident. It also states that Farm Family declared the vehicle a total wreck and **took** possession of it after the accident. Plaintiff also proffers copies of authorizations sent to Slattery and Aaronson Rappaport, dated **April 10, 2000**. The authorizations, which have handwritten notations correcting crossed-out numbers for plaintiff's date of birth **and** social security number, **ask** plaintiff's medical providers, Farm Family, and the IRS to provide relevant information about plaintiff to "BEARER." *See* Plaintiff's Affirmation in Opposition, Exhibit 2.

Discussion

Citing plaintiff's dilatory conduct in responding to their demands and in obeying the court orders mentioned above, defendants ask the court to dismiss this matter. Plaintiff asserts that this is a complex action, necessitated by the very serious injuries that he sustained in his 1996 accident. He begs the court to deny defendants' motions, asserting that his claim has merit and that he is ready **and** willing to be deposed. Plaintiff advises that Ford inspected the seatbelt in Bayberry, PA on October 23, 2002. He alleges that Metro was aware of the planned inspection, but chose not to attend. Plaintiff **asks** the court to schedule a compliance conference to resolve any outstanding discovery problems, and points to his recent attempts to comply with defendants' discovery demands, to argue that the circumstances do not warrant a dismissal of his complaint.

Although actions should be resolved on the merits wherever possible (*see Chowdhury v Philips*, 306 AD2d 51, 53 [1st Dept 2003]; *Cruzatti v St. Mary's Hosp.*, 193 AD2d 579, 580 [2d Dept 1993]), a court may strike the "pleadings or parts thereof" as a sanction against a party who "refuses to obey an order for disclosure or willfully fails to disclose information which the court finds ought to have been disclosed upon notice. See CPLR **3124**; 3126 (3). While the nature and degree of the penalty to be imposed on a motion pursuant to CPLR 3126 is a matter of the court's discretion, striking a pleading is appropriate where there is a clear showing that the failure to comply with discovery demands is willful, deliberate, contumacious, or in bad faith. *See Birch Hill Farm v Reed*, 272 AD2d 282 (2d Dept 2000); *Espinal v City of New York*, 264 AD2d 806 (2d Dept 1999); *Herrera v City of New York*, 238 AD2d **475,476** (2d Dept 1997). Compliance with a disclosure order requires both a timely response and one that evinces a good-faith effort to address the requests meaningfully. *Kihl v Pfeffer*, 94 NY2d 118, 123 (1999).

Plaintiff bought the Explorer in 1991, sustained his alleged injuries in August 1996, and started this suit in June 1999, a mere two months before the three-year Statute of Limitations would have expired. Unlike defendants, plaintiff has had the same counsel throughout the long life of this action, which has already consumed the energies of three justices. Nonetheless, plaintiff had still not been deposed when defendants filed these motions in 2003, and had not filed a note of issue indicating his readiness for a trial of this matter, as required by Judge Lowe's CSO of December 22, 1999. **And** plaintiff never requested a stay or extension of the discovery schedule outlined in any of the court's orders. Even at this juncture, plaintiff has not provided defendants with proper authorizations that would allow them to receive pertinent information about his medical, employment, insurance, and income history. **As** defendants note, the four-year-old, marked-up authorizations asking institutions to produce information about plaintiff to "Bearer" are useless.

The supplemental bill of particulars, which plaintiff only served in response to these dismissal motions, contains nothing more than routine, albeit relevant, information about the Explorer and its occupants on the accident date. Yet, plaintiff previously objected to Ford's demand for this information with the nonsensical assertion that they were not matters fit for a bill of particulars. Furthermore, although this suit hinges on plaintiff's claim that the Explorer's seat belt was defective in its design, manufacture, and installation, plaintiff has still not produced the service and repair data for the Explorer, which was already five years old on the accident date. Rather, plaintiff responded to this request with the statement that "there were no repairs, alterations, modifications, or adjustments to the [Explorer], except in the ordinary course of maintenance." Plaintiff's Supplemental Bill of Particulars, ¶6.

Plaintiffs willful and contumacious conduct can be inferred from his failure to comply with defendants' discovery demands and with the court's orders for more than four years. *See Ciao Europa, Inc. v Silver Autumn Hotel Carp., Ltd.*, 270 AD2d 2 (1st Dept 2000); *see also Conch Assocs., Inc. v PMCC Mortg. Corp.*, 303 AD2d 538 (2d Dept 2003); *Ranfort v Peak Tours*, 250 AD2d 747 (2d Dept 1998). Plaintiff's 11th-hour proffer of the supplemental bill of particulars, served with his response to these dismissal motions, and without any explanation for the long delay, is precisely the type of "deliberately evasive, misleading and uncooperative course of conduct" that supports the ultimate sanction of dismissal. *See Kihl v Pfeffer*, 94 NY2d 118, *supra*; *Smith v Eastern Long Is. Hosp.*, 263 AD2d 477 (1st Dept 1999). Thus, defendants have satisfied their initial burden of proving willfulness, and the burden shifts to plaintiff to offer a reasonable excuse for his failure to comply. *See Birch Hill Farm, Inc. v Reed*, 272 AD2d 282 (2d Dept 2000). Yet, plaintiff provides no excuse, let alone an adequate one, for his dilatory prosecution of this action. If the credibility of court orders and the integrity of the judicial system are to be maintained, plaintiff cannot be allowed to ignore court orders with impunity indefinitely. *Zletz v Wetanson*, 67 NY2d 711, 713 (1986).

On this record, therefore, defendants have established that plaintiff violated orders from this court and failed to respond to their relevant discovery demands in a timely and meaningful manner. *See Kihl v Pfeffer*, 94 NY2d 118, *supra*. Nonetheless, considering the severity of plaintiff's alleged injuries, and the contribution of defendants' counsel substitutions to the delayed prosecution of this suit, the court will grant plaintiff one last opportunity to comply with defendants' discovery demands. Therefore, defendants' motion and cross motion for a conditional order of dismissal will be granted. *See Birch Hill Farm v Reed*, 272 AD2d 282,

supra; *Conch Assoc. v PMCC Mtge. Corp.*, 303 AD2d 538; *Pryzant v City of New York*, 300 AD2d 383 (2d Dept 2002).

Accordingly, it is hereby

ORDERED that the motion and cross motion are granted in part insofar as this action will be dismissed unless plaintiff submits to a deposition and a physical examination; provides defendants with **proper** authorizations allowing defendants to receive plaintiff's medical, income tax, and employment records and collateral source information, **and** the maintenance and service records for the 1991 Ford Explorer within 30 days of service of this order with notice of entry; and is otherwise denied.

Dated: 3/23/04

ENTER

J.S.C.

FILED

MAR 3 9 2004

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