

Siben v Croman

2007 NY Slip Op 31579(U)

June 1, 2007

Supreme Court, New York County

Docket Number: 0101379/2005

Judge: Louis B. York

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

PRESENT: York
Justice

PART 2

Aiven

INDEX NO. 101379/05

MOTION DATE _____

MOTION SEQ. NO. 01

MOTION CAL. NO. _____

Croman

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

**MOTION IS DECIDED IN ACCORDANCE
WITH ACCOMPANYING MEMORANDUM DECISION.**

FILED
JUN 12 2007
NEW YORK
COUNTY CLERK'S OFFICE

Dated: 6/1/07

Levy
J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

REFERENCE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IAS PART 2

----- X

ANDREA SIBEN,

Plaintiff,

INDEX NO.
101379/05

-against-

STEVEN CROMAN, HARRIET CROMAN, and
EDWARD M. CROMAN,

Defendants.

----- X

LOUIS YORK, J.:

FILED
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Plaintiff moves for an order striking defendants' amended answer, claiming spoliation of evidence that is necessary and material to the prosecution of plaintiff's case.

Defendants cross-move for an order: (i) pursuant to CPLR 3126 dismissing plaintiff's complaint for failure to comply with prior court orders; or, alternatively, (ii) pursuant to CPLR 3126 precluding plaintiff from offering or introducing any evidence at trial relating to liability or damages as a result of her failure to comply with prior discovery orders and demands; (ii) alternatively, compelling plaintiff to provide unrestricted authorizations for medical records relating to all prior and present conditions similar to those alleged in the instant lawsuit; (iv) compelling plaintiff to appear for a further deposition relating to prior injuries and questioning as to information contained in any further medical records obtained; and (v) compelling plaintiff to appear for a further independent medical examination.

This is an action for damages for personal injuries allegedly sustained by plaintiff as the result of a fire in a neighboring apartment in a building owned by defendants. Plaintiff is seeking

records. Defendants then state that the documents sought are public records that can be obtained by way of a FOIL request or subpoenas. The focus of defendants' cross-motion is medical authorizations.

The information sought by both parties appears to be material and necessary to the respective prosecution and defense of this action (see CPLR 3101; Allen v. Crowell-Collier Publishing Company, 21 NY2d 403, 406 [1968] [CPLR 3101 is to be liberally interpreted]).

With respect to plaintiff's motion to strike defendants' pleading, it appears to the court that plaintiff's discovery demands are reasonable and defendants' failure to acknowledge possession of the various building records is curious. Nonetheless, while the nature and degree of the penalty to be imposed under CPLR 3126 is a matter of discretion with the court, striking an answer is inappropriate absent a clear showing that the failure to comply with discovery demands was willful or in bad faith (see Herrera v. City of New York, 238 AD2d 475, 476 [2d Dept 1997]). "In furtherance of the policy favoring the resolution of actions on the merits, it is well settled that the harsh remedy of striking a pleading should not be employed without a clear showing of a deliberate and willful refusal to disclose" (Washington v. Alco Auto Sales, 199 AD2d 165 [1st Dept 1993]). At this point defendant has not made such a showing of willfulness or bad faith by plaintiff to warrant the striking of the complaint under ~~with~~ CPLR 3126 (compare Langer v. Miller, 281 AD2d 338, 339 [1st Dept 2001]).

Neither has plaintiff sufficiently justified her spoliation claim sufficient to justify the drastic remedy of striking the answer. "Where a party destroys essential physical evidence such that its opponents are prejudicially bereft of appropriate means to confront a claim with incisive evidence, the spoliator may be sanctioned by the striking of its pleading.... However, the

striking of a pleading is a drastic sanction that is warranted as a matter of elemental fairness....

Where the evidence lost is not central to the case or its destruction is not prejudicial, a lesser sanction, or no sanction, may be appropriate” (Klein v. Ford Motor Co., 303 AD2d 376, 377 [2d Dept 2003], citations omitted).

In accordance with the foregoing, the court finds that defendants should be given another opportunity to comply with plaintiff’s discovery demands before their answer is stricken, and such compliance is hereby compelled. Defendants’ argument that the availability of FOIL as a disclosure tool absolves them of the obligation to comply with discovery demands borders on the frivolous. “A civil litigant is unquestionably entitled, as against a claim of privilege, to obtain by way of discovery in a pending action at least the same documents that any member of the public could obtain by simply filing a FOIL request” (Wunsch v. City of Rochester, 108 Misc 2d 854, 859 [Sup Ct, Monroe Co, 1981], citing Walker v. City of New York, 64 AD2d 980 [2d Dept 1978]).

In support of their cross-motion defendants argue *inter alia* that plaintiff should be compelled to provide discovery responses, including unrestricted authorizations for all present and prior medical providers relating to any injury claimed in the instant action because by instituting this action she has placed her medical care and treatment at issue.

At a compliance conference held on April 4, 2007 plaintiff furnished to defendant 11 medical authorizations which were limited to pulmonary and respiratory treatment (see Janis reply affirmation, exhibit A). Nonetheless, in her bill of particulars plaintiff alleges that she suffers from, *inter alia*, “severe headaches” as a result of the fire (see plaintiff’s moving papers, exhibit C, ¶ 8). Since there is a relationship between plaintiff’s claim and the requested

discovery, plaintiff should give it. When a party brings an action for personal injuries, his medical and physical condition is relevant and the right to privacy is waived with respect to the specific conditions put at issue.

Accordingly, plaintiff's motion is granted to the extent that defendants are hereby directed to furnish the materials sought by plaintiff. If defendants still are not able to produce those records, they shall provide a detailed affidavit setting forth in detail by a person with personal knowledge why those records are not available within ten days of service of a copy of this order with notice of entry. Should defendants fail to comply with this direction, they shall be precluded from offering any evidence at the time of trial as to those matters for which demands have been made but which defendants have failed to provide.

Defendants' cross-motion is granted to the extent that, if not already provided, plaintiff is hereby directed to provide within ten days of service of a copy of this order with notice of entry unrestricted authorizations for medical records relating to all prior and present conditions similar to those alleged in the instant lawsuit, including headaches. Should plaintiff fail to provide such authorizations then she will be precluded from presenting any evidence relating to those matters which she has failed to provide.

This constitutes the decision and order of the court.

DATED: *June 1*, 2007

FILED
JUN 12 2007
NEW YORK
COUNTY CLERK'S OFFICE
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J.S.C.