

**Mendlowitz v County of Nassau**

2007 NY Slip Op 32974(U)

September 17, 2007

Supreme Court, Nassau County

Docket Number: 7126-06/

Judge: William R. LaMarca

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**SHORT FORM ORDER**

**SUPREME COURT - STATE OF NEW YORK  
COUNTY OF NASSAU - PART 19**

**Present: HON. WILLIAM R. LaMARCA  
Justice**



**ALLAN MENDLOWITZ, a minor by his mother  
and natural guardian, ELIZABETH  
MENDLOWITZ, and ELIZABETH MENDLOWITZ,  
individually,**

**Motion Sequence # 1  
Submitted July 6, 2007**

**Plaintiff,**

**-against-**

**INDEX NO: 17126/06**

**COUNTY OF NASSAU,**

**Defendant.**

**The following papers were read on this motion:**

<b>Notice of Motion.....</b>	<b>1</b>
<b>Affirmation in Opposition.....</b>	<b>2</b>
<b>Reply Affirmation.....</b>	<b>3</b>

Plaintiffs, ALLAN MENDLOWITZ, a minor by his mother and natural guardian, ELIZABETH MENDLOWITZ, and ELIZABETH MENDLOWITZ, individually, move for an order compelling discovery or for preclusion, pursuant to CPLR §§3124 and 3126, based upon the alleged insufficient responses to plaintiffs demands for discovery and inspection. Defendant, COUNTY OF NASSAU (hereinafter referred to as the "COUNTY"), opposes the motion, which is determined as follows:

In this action, plaintiffs seek to recover for personal injuries sustained by the infant plaintiff when, on January 27, 2006 at approximately 1:40 P.M., he was ice skating at the rink owned and operated by the COUNTY which is located in Grant Park, Hewlett, New York. Plaintiffs' allege that the COUNTY created a hazardous condition at the rink and was negligent in the maintenance, repair, construction and supervision of the ice rink, which caused the ice to be broken, deeply rutted, uneven, melted down and generally unsafe for skaters. Plaintiffs allege that, as a result of the dangerous condition, the infant plaintiff was caused to fall and sustained severe personal injuries, including a fracture to the left tibia and fibia.

Counsel for plaintiffs states that, on March 22, 2007, he received the COUNTY's responses to plaintiffs demands for discovery in which the COUNTY objected to copies of all requests for repair and maintenance records of the ice skating rink as over-broad and burdensome. Counsel states that said response is insufficient because the rink had an ice surface that was so thin that the wood base underneath could be seen, which he claims was a recurring problem. Counsel asserts that he is entitled to discovery of the work orders and repair records at the rink for a two (2) year period prior to the date of accident, which will lead to relevant evidence that the problem was addressed on a number of occasions. He claims that said disclosures are crucial and relevant to the prosecution of this matter as it relates directly to defendant's repair and maintenance of the ice skating rink and its condition on the date of loss.

In opposition to the motion, counsel for the COUNTY points out that, of the six (6) items demanded, five (5) were responded to by the COUNTY and are not the subject of this motion. The COUNTY objected to the sixth numbered request that, in essence,

demanded copies of all requests, notes and memoranda for repairs to the rink or the location of the accident, copies of all work orders notes and memoranda for repairs to the rink or the location of the accident on the date of the accident, and copies of all accident reports for two (2) years prior and two (2) years subsequent to the accident. The COUNTY points out that counsel for plaintiffs has now, if his affirmation, modified the original discovery demand which, in some instances, limits the original demand and in some cases expands it. While counsel acknowledges that an amended time period of “two (2) years prior to the accident” would normally be reasonable, it is the COUNTY’s position that an ice rink changes on an hour to hour basis and there are *never* any prior accidents at an ice rink that is regularly being used that involve the *same surface* as the one involved in the accident. Therefore, counsel for the COUNTY continues its objections to the requested discovery.

CPLR §3101(a) requires the “full disclosure of all information that is material and necessary to the defense or prosecution of an action”. The “material and necessary” requirement directed in CPLR §3101(a) is to be liberally construed to require disclosure where the matter sought will assist in trial preparation by sharpening the issues and reducing delay. *Andon v 302-304 Mott Street Associates*, 94 NY2d 746, 709 NYS2d 873, 731 NE2d 589 (C.A. 2000), citing *Allen v Crowell-Collier Publishing Co.*, 21 NY2d 403.

Furthermore, the Courts have held that the failure of a party to challenge a Notice for Discovery and Inspection within the time prescribed by CPLR §3122 “forecloses inquiry into the propriety of the information sought except with regard to material that is privileged pursuant to CPLR §3101 or requests that are palpably improper”. *Garcia v Jomber Realty*

*Inc.*, 264 AD2d 809,695 NYS2d 607 (2<sup>nd</sup> Dept. 1999); see also, *McMahon v Aviette Agency, Inc.*, 301 AD2d 820, 753 NYS2d 605 (3<sup>rd</sup> Dept. 2003). CPLR §3122 provides, as follows:

Within twenty days of service of a notice . . . under rule 3120 or section 3121, the party to whom the notice . . . is directed, if that party objects to the disclosure, inspection, or examination, shall serve a response which shall state with reasonable particularity the reasons for each objection.

Additionally, the nature and degree of the penalty to be imposed for failure to comply with a disclosure order is a matter generally left to the discretion of the Court. *Kingsley v Kantor*, 265 AD2d 529, 697 NYS2d (2<sup>nd</sup> Dept. 1999). To invoke the drastic remedy of preclusion, the Court must determine that the party's failure to comply with a disclosure order was the result of willful, deliberate and continuous conduct or its equivalent. *Patterson v New York City Health & Hospitals Corp.*, 284 AD2d 516, 726 NYS2d 715 (2<sup>nd</sup> Dept. 2001).

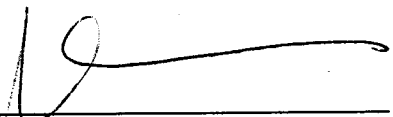
After a careful reading of the submissions herein, it is the judgment of the Court that plaintiffs are not entitled to the drastic relief of preclusion. However, plaintiffs are entitled to receive copies of all requests, notes, work orders and memoranda for repairs and maintenance of the ice skating rink surface during the ice skating season for a period of two (2) years prior to the date of the accident, and copies of all accident reports that occurred on the ice skating rink surface during the ice skating season for a period of two (2) years prior to the accident. Whether the accident reports are admissible as being sufficiently similar to the accident that occurred herein, is an issue that will be determined by the Trial Court. Accordingly, it is hereby

**ORDERED**, that plaintiffs' motion to compel disclosure and for an order of preclusion is granted to the extent indicated above; and it is further

**ORDERED**, that all counsel are directed to appear for a previously scheduled Compliance Conference on October 2, 2007 at 9:30 A.M. before your undersigned.

All further requested relief not specifically granted is denied.

Dated: September 17, 2007

  
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WILLIAM R. LaMARCA, J.S.C.

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**ENTERED**  
SEP 20 2007  
**NASSAU COUNTY  
COUNTY CLERK'S OFFICE**