SHORT FORM ORDER

INDEX No. 98-21946

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 33 - SUFFOLK COUNTY

P R E S E N T :

Hon. THOMAS F. WHELAN
Justice of the Supreme Court

MOTION DATE 10/19/04
ADJ. DATES 7/20/07
Mot. Seq. # 004 - MG
Mot. Seq. # 005 - XMD

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BARBARA A. HUGHES, as Administratrix of the Estate of HAROLD E. HUGHES, JR., deceased, and BARBARA A. HUGHES, Individually,

Plaintiffs,

-against-

BO CAI, OCS AMERICA, INC. and ASSOCIATES LEASING, INC.,

Defendants.

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Upon the following papers numbered 1 to 10 read on this motion for partial summary judgment and cross motion to dismiss; Notice of Motion/Order to Show Cause and supporting papers 1 - 3; Notice of Cross Motion and supporting papers 4-6; Answering Affidavits and supporting papers 7-8; 9-10; Replying Affidavits and supporting papers ; Other ; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that this motion (#004) by plaintiffs for an Order granting them partial summary judgment on the issue of liability, is granted; and it is further

ORDERED that the cross motion (#005) by the defendants for an Order dismissing the complaint for failure to appear for an independent medical examination, is denied; and it is further

ORDERED that counsel for the plaintiffs and defendants shall serve a copy of this Order with Notice of Entry upon respective counsel within thirty (30) days of the date herein pursuant to CPLR 2103(b)(1), (2) or (3) and thereafter file the affidavits of service with the Clerk of the Court.

In a decision dated June 3, 2005, the Court granted defendants' cross motion for summary judgment dismissing the complaint on the grounds that plaintiff, Harold E. Hughes, Jr., did not suffer a "serious injury" within the meaning of Insurance Law § 5102(d). In reaching that determination, the Court denied plaintiffs' motion for partial summary judgment on the issue of liability, as well as, that part of defendants' cross motion to dismiss plaintiffs' complaint for failure to appear for independent medical examinations as being academic and moot. Plaintiffs appealed and the Appellate Division, Second Department in ***Hughes v Bo Cai,*** 31 AD3d 385, 818 NYS2d 538 (2006) reversed the Court's decision, remanding the matter for a determination as to the question of liability in the occurrence of the accident and that part of defendants' cross motion to dismiss the matter based upon plaintiffs' failure to appear for independent medical examinations.

Familiarity with this matter and the previous Orders are presumed and only relevant facts will be restated where necessary. A rear end collision with a stopped or stopping vehicle creates a prima facie case of liability with respect to the operator of the rear vehicle, requiring a non-negligent explanation for the collision (*see* ***David v New York City Bd. of Educ.***, 19 AD3d 639, 797 NYS2d 249 [2d Dept 2005]; ***Velazquez v Denton Limo***, 7 AD3d 787, 776 NYS2d 874 [2d Dept 2004]; ***Dewar v Padilla***, 305 AD2d 629, 760 NYS2d 203 [2d Dept 2003]). When a driver of an automobile approaches another automobile from the rear, he or she is bound to maintain a reasonably safe rate of speed and control over his or her vehicle, and to exercise reasonable care to avoid colliding with the other vehicle (*see* ***Chepel v Meyers***, 306 AD2d 235, 762 NYS2d 95 [2d Dept 2003]; ***Bucceri v Frazer***, 297 AD2d 304, 746 NYS2d 185 [2d Dept 2002]; ***Filippazzo v Santiago***, 277 AD2d 419, 716 NYS2d 710 [2d Dept 2000]).

Here, in their moving papers for summary judgment, plaintiffs have failed to comply with the provisions of CPLR 3212(b). However, rather than deny the motion with leave to renew (*see* ***Welton v Drobnicki***, 298 AD2d 757, 749 NYS2d 288 [3d Dept 2002]), a court may overlook this procedural defect if the record before it is sufficiently complete (*see* ***Greene v Wood***, 6 AD3d 976, 775 NY2d 192 NYS2d [3d Dept 2004]). In their opposition, defendants included selected pages from plaintiff's examination before trial.[1] Therefore, in the interests of judicial economy and to avoid further delay in this litigation, the Court, in its discretion, deems the record before it to be sufficiently complete for the purposes of this

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[1]Copies of the pretrial transcripts submitted to the Court are unsigned and uncertified. However, none of the parties claim them to be inaccurate. Assuming that the original transcripts were properly submitted for signature or that, in fact, the signatures were affixed, transcripts of depositions attached as exhibits to an attorney's affirmation may be used in support of or to defeat a summary judgment motion (*see* CPLR 3116; ***Thomas v Hampton Express, Inc.,*** 208 AD2d 824, 617 NYS2d 831 [2d Dept 1994]; *app. den.* 85 NY2d 803, 624 NYS2d 373 [1995]; ***Olan v Farrell Lines,*** 64 NY2d 1092, 489 NYS2d 884 [1985]).

motion (*see* ***Greene v Wood***, 6 AD3d 976, *supra*). Further, defendants have failed to submit any evidence in opposition demonstrating the existence of a trial issue of fact (*see* ***Alvarez v Prospect Hosp.*** 68 NY2d 320, 508 NYS2d 923 [1986]; ***Zuckerman v City of New York***, 49 NY2d 557, 427 NYS2d 595 [1980]. Therefore, the motion for summary judgment on the issue of liability is granted.

CPLR 3126(3) provides that the Court has the discretion to strike a pleading for failure to abide with discovery. The striking of pleadings is an extreme remedy and should not be taken absent a showing of wilful and contumacious actions or bad faith on behalf of the defaulting party (*see* ***Vancott v Great Atl. & Pac. Tea Co.,*** 271 AD2d 438, 705 NYS2d 640 [2d Dept 2000]; ***Davidson v Aetna Cas. & Sur. Ins. Co.,*** 237 AD2d 321, 655 NYS2d 446 [2d Dept 1997]; ***Stathoudakis v Kelmar Contr. Corp.,*** 147 AD2d 690, 538 NYS2d 297 [2d Dept 1989]; ***Lull v Breiter,*** 127 AD2d 530, 512 NYS2d 370 [1987]; ***Delaney v Automated Bread Corp.,*** 110 AD2d 677, 487 NYS2d 402 [2d Dept 1985]). Generally, "'wilfulness' can be inferred from a party's repeated failure to respond to demands and/or to comply with disclosure orders, coupled with inadequate excuses for its defaults" (***DiDomenico v C&S Aeromatik Supplies,*** 252 AD2d 41, 52, 682 NYS2d 452 [1998] *citations omitted*). However, such remedy should be as "narrowly tailored as possible to the circumstances of the individual case" (***Matusewicz v Jo Jo's Auto Parts,*** 18 AD3d 828, 829, 796 NYS2d 385 [2d Dept 2005], *citation omitted*) because CPLR 3126 is "designed 'to prevent a party who has refused to disclose evidence from affirmatively exploiting or benefitting from the unavailability of the proof during the pending civil action'" (***DiDomenico v C&S Aeromatik Supplies,*** *supra* at 49; *accord* ***Matusewicz v Jo Jo's Auto Parts,*** *supra*). A court cannot impose a sanction under CPLR 3126 unless the disobedience by the defaulting party is shown to be wilful and no reasonable excuse for the disobedience can be shown. A party can satisfy their burden of showing wilfulness by showing repeated non-compliance of court orders by the opposing party (*see* ***Kubacka v Town of No. Hempstead,*** 240 AD2d 374, 657 NYS2d 770 [2d Dept 1997]; ***Garcia v Kraniotakis,*** 232 AD2d 369, 648 NYS2d 156 [2d Dept 1996]).

It is also well settled that the nature and degree of the penalty imposed pursuant to CPLR 3126 is a matter within the discretion of the trial court (*see* ***Herrera v City of New York***, 238 AD2d 475, 656 NYS2d 647 [2d Dept 1997]). Although courts favor the resolution on the merits of an action whenever possible (*see* ***Espinal v City of New York,*** 264 AD2d 806, 695 NYS2d 610 [2d Dept 1999]), a court may strike the pleadings or any part thereof as a sanction against a party who "refuses to obey an order for disclosure or willfully fails to disclose information that the court finds should have been disclosed upon notice" (***Devito v J&J Towing, Inc.,*** 17 AD2d 624, 794 NYS2d 74 [2d Dept 2005]).

It is apparent from the record before the Court that plaintiff's aggregate medical conditions, whether as a result of the subject accident or pre-existing, complicated and delayed the progress of discovery and resulted in no medical examinations being conducted before plaintiff passed away. The Court does not find that there was any conduct by plaintiff which would even invoke the draconian

sanction of striking one's pleading to be applicable under the facts and circumstances noted herein (*see* ***E.W. Howell v S.A.F. La Sala Corp.,*** 36 AD3d 653, 828 NYS2d 212 [2d Dept 2007]; *compare* ***Alizo v Alizo,*** 300 AD2d 515, 752 NYS2d 553 [2d Dept 2002]; ***Vatel v City of New York,*** 208 AD2d 524, 617 NYS2d 61 [2d Dept 1994]). Plaintiff was cooperative in providing discovery but unfortunately, passed away before the medical examinations could be conducted.

Accordingly, the motion and cross motion are decided as noted herein. This constitutes the Order and decision of the Court.

DATED: 11/24/09

THOMAS F. WHELAN, J.S.C.