SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

Present:

HON. DANIEL PALMIERI
Acting Justice Supreme Court

----------x **TRIAL TERM PART 48**

NANCY E. SARRO, INDIVIDUALLY AND AS PARENT AND NATURAL GUARDIAN OF THEODORE SARRO, AN INFANT UNDER THE AGE OF FOURTEEN (14) YEARS,

INDEX NO.: 13524/04

Plaintiff,

-against-

COUNTY OF NASSAU, INCORPORATED VILLAGE OF ISLAND PARK, TOWN OF HEMPSTEAD AND IRENE X. GKLOTSOS,

MOTION DATE:6-9-08
SUBMIT DATE: 6-26-08
SEQ. NUMBER - 006

Defendants.

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The following papers have been read on this motion:

Notice of Motion, dated 5-23-08.....1
Affirmation in Opposition, (Village of Island Park) dated 6-2-08.....2
Affirmation in Opposition, (Plaintiff), dated 6-19-08.....3

This motion by the plaintiff pursuant to CPLR 3124 and CPLR 3126 for an order striking the answer of defendant Village of Island Park ("Village"), deeming liability resolved in favor of the plaintiff against this defendant, precluding the Village from offering any evidence in opposition to the plaintiff's proof and thereupon awarding summary judgment in favor of the plaintiff, all based upon the Village's alleged wilful failure to provide pre-trial discovery; or, in the alternative, for a conditional and self-executing order

compelling the Village to fully comply with the plaintiff's notice of discovery and inspection dated June 6, 2007 and upon such failure striking its answer; and for an order granting judgment against defendant Irene X. Gklotsos for wilful failure to permit pre-trial discovery, is decided as follows.

The facts of this case have been discussed in prior orders of this Court, and will not be repeated here.

That branch of this motion that is directed to defendant Gklotsos is granted. She was the driver of the automobile that allegedly struck the infant plaintiff, and has appeared in this action *pro se*. The plaintiff claims, without contradiction, that Gklotsos appeared for a deposition in November of 2006, but prior to the completion thereof refused to answer any further questions and left the courthouse, where the examination was being conducted, all without good cause. She has not attended any further conferences and has refused to return to New York [1] to complete her deposition. Accordingly, the Court finds her failure to complete her deposition wilful, and justifies the extreme sanction of declaring her in default, striking what ever informal answer has been served, and resolving all liability issues against her. CPLR 3126; *see, Reyes v The Vanderbilt,* 303 AD2d 391 (2d Dept. 2003); *Nowak v Veira,* 289 AD2d 383 (2d Dept. 2001). A hearing on damages shall be had simultaneously with the trial of this action, or upon resolution of the case against all remaining defendants,

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[1] This motion was served upon her in Dover, Delaware, not in Pennsylvania, the state of her residence in 2006 as referred to in plaintiff's affirmation of good faith. Further, there is no affidavit of service presented with regard to service upon her of subsequent conference orders. Nevertheless, the motion against her should be granted based upon the wilful failure to complete the deposition, which as noted is undisputed.

which ever shall first occur.

That branch of the motion that is directed to the Village is granted to the extent that the answer of this defendant is stricken unless it provides an adequate response to the items of plaintiff's demand of June 6, 2007 identified as 5, 6, and 9 through 14 within 30 days of the date of this order, as directed below. The motion is otherwise denied.

The present discovery dispute centers around the Supplemental Response by the Village, dated March 11, 2008 to the plaintiff's notice for discovery and inspection dated June 5, 2007. The Court will consider the March 11, 2008 paper timely in view of the many conferences before the Court in which attempts were made to resolve outstanding discovery issues, all of which had the effect of extending the Village's time to respond. *See,* CPLR 2004. After service of this response new counsel have been substituted for the Village, but they have essentially stood on the responses of prior counsel. It also should be noted that on February 1, 2008 plaintiff's counsel conducted an inspection of documents at Village Hall, and had certain documents copied.

Turning to the merits, the Court has examined the Village's responses, and disagrees that many of the plaintiff's demands may be characterized as seeking irrelevant documents. The mandate of CPLR Article 31 is to permit discovery of all information that may be "material and necessary" to the prosecution of defense of an action. CPLR 3101(a); *Allen v Crowell-Collier Publ. Co.,* 21 NY2d 403 (1968). The test is one of usefulness and reason; "if there is any possibility that the information is sought in good faith for possible use as evidence-in-chief or in rebuttal or for cross examination, it should be considered 'evidence material... in the prosecution or defense.' " *Id.,* at 432, quoting *Matter of Comstock,* 21 AD2d

843 (4th Dept. 1964).

Nevertheless, as indicated the Village did answer and supplement its earlier responses notwithstanding its objections regarding relevancy. It is apparent to this Court that the supplemental response and documents made available for review by plaintiff's counsel pass muster, with the exception indicated below.

With regard to items 1 through 4, the Court finds the Village's response to be adequate given the production at Village Hall.

Item 5 demands "copies of all documents... reflecting all work scheduled to be performed by... the Village of Island Park Department of Public Works on daily, weekly, and monthly basis for the period of one (1) year prior to the date of the accident." Item 6 essentially parrots item 5, but substitutes "all work actually performed" for "all work scheduled to be performed." The Court finds these demands to be overly broad, as this would encompass literally any work that the Department might do, and smacks of the "fishing expedition" found objectionable by our courts. *See, Saratoga Harness Racing, Inc. v Roemer,* 274 AD2d 887 (3d Dept. 2000); *Oak Beach Inn Corp. v Town of Babylon,* 239 AD2d 568 (2d Dept. 1997).

Plaintiff's counsel later offered to narrow this to records having to do with Parma Road only, but still complains that the Village will not look for them. However, an opportunity to examine records has been provided, and the Court will not direct an affidavit from the custodian of records attesting to the absence of any other such document, as is sought by plaintiff. Article 31 does not require an affidavit response to a discovery demand

except for CPLR 3122-a, which has to do with business records sought from a non-party by way of subpoena. *See* Conners, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B,CPLR C3122-a:1. To the extent that the plaintiff relies on a case by the Supreme Court, Bronx County to support such a request of a party, [2] this Court declines to follow it. The Court notes that the Village did provide an affidavit regarding destruction of earlier-made records kept in an area identified as the "vault", but this resolution to this particular issue does not serve to expand the general obligations of parties under Article 31.

Having said that, however, the Court will require a statement from the Village or from its counsel that no other documents exist that are responsive to items 5 and 6, as narrowed by plaintiff's counsel, if not among those previously produced for inspection on February 1, 2008. This is being directed because of the language in the response that "there are no other records that are potentially relevant to the instant action." It is not for the Village to determine relevancy if a dispute arises, but the Court.

Plaintiffs also complain about the responses to items 9 through 14, noting that its counsel found some relevant documents during his February 1, 2008 inspection. However, given the Village's production for that inspection, and what is indicated above regarding 5and 6, all that can be required is a statement that no records exists other than what was produced for that inspection. This shall be made as indicated for items 5 and 6.

In sum, while the Court does find that the responses of the Village's prior counsel were less than adequate to the limited extent indicated, it does not find that the Village's conduct constitutes such wilful conduct that the severe sanctions sought should be granted.

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[2] *Lewis v City of New York*, 17 Misc 3d 559 (Sup Ct. Bronx County 2007)

Rather, the Village shall correct the response, as indicated above, within 30 days of this order. The Village is also reminded of its continuing duty to supplement its response should additional information or documents come to be found that are responsive to any of plaintiff's prior demands. CPLR 3101(h).

Finally, the Court notes that the moving affirmation of Stanley E. Orzechowski was submitted unsigned, unlike his affirmation of good faith, which was. As no other party has demanded that the Court disregard his statement as a result thereof, Mr. Orzechowski may correct the record by submitting a signed original affirmation to the County Clerk for filing with these papers. This must be accomplished within ten days of the date of this order, and will then be deemed a part of the record on this motion.

This shall constitute the Decision and Order of this Court.

ENTER

DATED: July 1, 2008

HON. DANIEL PALMIERI
Acting Supreme Court Justice

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ENTERED
JUL 03 2008
NASSAU COUNTY
COUNTY CLERK'S OFFICE

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