

**Cintron v New York City Tr. Auth.**

2008 NY Slip Op 32446(U)

September 4, 2008

Supreme Court, New York County

Docket Number: 0118093/2004

Judge: Donna M. Mills

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

PRESENT : DONNA M. MILLS  
*Justice*

PART 21

CINTRON, EDELFIN

INDEX NO. 118093/04

Plaintiff,

MOTION DATE \_\_\_\_\_

-v-

MOTION SEQ. NO. 001

NEW YORK CITY TRANSIT AUTHORITY, et al.,  
Defendants.

MOTION CAL NO. \_\_\_\_\_

The following papers, numbered 1 to 4 were read on this motion for \_\_\_\_\_.

PAPERS NUMBERED

Notice of Motion/Order to Show Cause-Affidavits- Exhibits.... 1+2

Answering Affidavits- Exhibits \_\_\_\_\_ 3

Replying Affidavits \_\_\_\_\_ 4

CROSS-MOTION:  YES  NO

Upon the foregoing papers, it is ordered that this motion is:

DECIDED IN ACCORDANCE WITH THE ATTACHED MEMORANDUM  
DECISION.

**FILED**

SEP 08 2008

COUNTY CLERK'S OFFICE  
NEW YORK

Dated: 9/4/08

Donna M. Mills  
J.S.C.

Check one:  FINAL DISPOSITION

NON-FINAL DISPOSITION

SUPREME COURT OF THE CITY OF NEW YORK  
COUNTY OF NEW YORK: PART 21

-----x  
EDELFIN CINTRON and RUTH CINTRON,

Plaintiffs,

Index No.: 118093/04

-against-

DECISION AND ORDER

THE NEW YORK CITY TRANSIT AUTHORITY,  
EOP WORLDWIDE PLAZA, LLC, EQUITY  
OFFICE PROPERTIES MANAGEMENT CORP.,  
and TEMCO SERVICE INDUSTRIES, INC.,

Defendants.

-----x  
DONNA MILLS, J.

**FILED**  
SEP 08 2008  
COUNTY CLERK'S OFFICE  
NEW YORK

**FACTUAL BACKGROUND**

This is a personal injury action that commenced over four years ago. Plaintiffs filed a note of issue in May of 2008, and defendant Temco Service Industries, Inc. (Temco) filed the instant motion seeking the following alternate remedies: 1) to dismiss the complaint; or 2), to be granted an order of preclusion; or 3), to compel production of discovery; or 4), to strike the action from the trial calendar. This motion is based on the allegation that plaintiffs have not yet provided defendants with all the discovery previously demanded. Defendant New York City Transit Authority has cross-moved to join in Temco's motion, and adopts all of Temco's arguments.

Temco alleges that plaintiffs have failed to provide the following: a) a supplemental bill of particulars specifying how

they allege defendants had actual or constructive notice of the condition that allegedly caused Edelfin Cintron's (Edelfin) injuries; b) production of releases for plaintiffs' psychiatric claims; c) Edelfin's submission to an IME; d) a release for pharmacy records for depression medication taken by Edelfin (this same demand appears in Temco's motion as request "f" as well, and so is duplicative); and e) authorization for the release of the records of Edelfin's primary care physician.

In opposition, plaintiffs allege that the only way they can prove that defendants had notice of the condition is by deposition testimony of defendants' employees, and the witness so produced by Temco was a person who was not even on the premises at the time in question. Further, plaintiffs assert that Temco has failed to produce the address of its former product manager who was in charge of the site at the time in question. Basically, plaintiffs maintain that they have provided as much particularity as they can.

Plaintiffs also aver that Edelfin did submit to an IME by the physician identified by defendants on June 5, 2008; that Edelfin does not have a primary care physician, a fact that they previously told defendants; that Edelfin has not taken any medication for depression, so no authorization is required; and that plaintiffs have withdrawn their claims for psychological damage, "except for the normal psychological sequelae resulting

from the injuries he sustained."

Temco now seeks the sanctions noted above, based on prior discovery orders issued by the court. It is noted that the earlier orders did not state that failure to produce the information requested would result in sanctions being imposed.

#### **DISCUSSION**

Defendants' "motion for disclosure sanctions, which was made after [plaintiffs] filed a note of issue but was based upon notices and orders that predated the note of issue, [is] not precluded by 22 NYCRR 202.21 (d) ... ." *Magee v City of New York*, 242 AD2d 239, 240 (1<sup>st</sup> Dept 1997).

"In order to invoke the drastic remedy of preclusion (CPLR 3126), the court must determine that the party's failure to comply with a disclosure order was wilful, deliberate and contumacious [internal citation omitted]." *Holliday v Jones*, 36 AD3d 557, 557-558 (1<sup>st</sup> Dept 2007). So too is the striking of a pleading so drastic a remedy that it should only be invoked when there is a clear refusal of a party to obey a discovery order. See *Villega v New York City Housing Authority*, 231 AD2d 404 (1<sup>st</sup> Dept 1996).

In the instant matter, it cannot be said that plaintiffs have acted in a wilful or contumacious manner. According to the papers submitted, plaintiffs have attempted to comply with discovery requests to the best of their ability, and of the five

items identified by Temco as still outstanding, only two might require further clarification: the specific allegations of defendants' notice of the dangerous condition that caused the accident, and what is actually meant by the psychological damages plaintiffs are seeking. Plaintiffs' responses have not been "so egregious as to outweigh the general policy that actions should be resolved on their merits." *Commerce & Industry Insurance Company v Lib-Com, Ltd.*, 266 AD2d 142, 145 (1<sup>st</sup> Dept 1999). "A party's dissatisfaction with its opponent's document production is an insufficient basis for a finding that the opponent was willful and contumacious." *Id.* at 146.

It is noted that the prior discovery orders did not provide for any sanctions in the case of a party's failure to comply. Under these circumstances, "[a] conditional order is an appropriate remedy when it affords the party who is refusing to comply with a disclosure order an additional opportunity to comply prior to the imposition of the final sanction." *Casas v Romanelli*, 232 AD2d 445, 445 (2d Dept 1996). This approach provides the parties with "a fresh start with a clean slate and a firm directive to move this case along and complete discovery [internal quotation marks omitted]." *Carpenter v Browning-Ferris Industries, Inc.*, 262 AD2d 999, 999 (4<sup>th</sup> Dept 1999).


#### **CONCLUSION**

Based on the foregoing, it is hereby

ORDERED that defendants Temco Service Industries, Inc. and the New York City Transit Authority's motion is granted to the extent of ordering plaintiffs to provide defendants with a supplemental bill of particulars detailing how plaintiffs' allege that defendants had actual or constructive notice of the alleged dangerous condition, and precisely what is meant by the statement that plaintiffs are only seeking damages "for the normal psychological sequelae resulting from the injuries he sustained ... ;" and it is further

ORDERED that should plaintiffs fail to provide this discovery within 30 days of notice of entry of this order plaintiffs will be precluded from offering any evidence or testimony on these issues at the time of trial.

Dated: 9/4/08

ENTER:  


Donna Mills, J.S.C.  
**DONNA M. MILLS, J.S.C.**

**FILED**  
 SEP 08 2008  
 COUNTY CLERK'S OFFICE  
 NEW YORK