

Shetty v Volvo Cars of N. Am.

2008 NY Slip Op 32876(U)

October 10, 2008

Supreme Court, New York County

Docket Number: 114301/05

Judge: Milton A. Tingling

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

HON. MILTON A. TINGLING

PRESENT: _____ J.S.C. Justice

PART 49

Index Number : 114301/2005

SHETTY, RAJMOHAN

vs

VOLVO CARS OF NORTH AMERICA,

Sequence Number : 005

DISMISS

INDEX NO. _____

MOTION DATE 5/7/08

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

in this motion to/for _____

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion is decided in accordance with annexed decisions.

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

FILED
OCT 21 2008
COUNTY CLERK'S OFFICE
NEW YORK

Dated: 10/10/08

mat J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: I.A.S. PART 44

HON. MILTON A. TINGLING
J.S.C.

-----X

RAJMOHAN SHETTY and PROMOD SHETTY,

Plaintiffs,

Index No.
114301/05

-against-

VOLVO CARS OF NORTH AMERICA, LLC and
LONG ISLAND AUTO GROUP, INC., d/b/a
VOLVOVILLE U.S.A.,

Defendants.

-----X

MILTON A. TINGLING, J.:

FILED
OCT 21 2008
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NEW YORK

Defendants Volvo Cars of North America (Volvo) and Long

Island Auto Group, Inc. (LI Auto) move for an order, pursuant to CPLR 3126, dismissing the instant complaint for failure to comply with this court's orders dated September 25, 2007 and January 8, 2008 regarding the production of discovery. Plaintiffs cross-move for an order striking the answer of defendant Volvo for its failure to respond to plaintiffs' discovery demands.

Plaintiff Rajmohan Shetty (Shetty) and his wife, Promod Shetty, bring this action to recover for personal injuries sustained by Shetty on February 2, 2005, when the 2004 Volvo motor vehicle (the Subject Vehicle) he was operating was involved in a one car accident at or near Forest Hill Road, in Staten Island, New York (the Subject Accident). The accident allegedly occurred when the front wheel mechanism in the Subject Vehicle

was caused to fall off the car, due to a break and/or crack in its front suspension and ball joint assembly. The action was commenced against Volvo, as the manufacturer and distributor of the Subject Vehicle, and LI Auto, the lessor and seller of the vehicle. Plaintiffs assert claims of negligence, breach of warranty, and loss of services.

On the date of oral arguments, this court addressed part of the parties' respective motions by ordering the production of certain discovery by the parties, the withdrawal of plaintiffs' cross motion without prejudice to renew, and the submission of those branches of defendants' motion with respect to their request for more complete interrogatory responses and the production of color photos (Order dated 5/7/08).

This court shall now address the remaining branches of defendants' motion, pursuant to CPLR 3126. Under this section, a trial court may, in its discretion, strike a party's pleadings for its failure to comply with court-ordered discovery (Henry Rosenfeld, Inc. v Bower and Gardner, 161 AD2d 374 [1st Dept 1990]). "However, in furtherance of the policy of favoring the resolution of actions on the merits, the extreme sanction of dismissal is warranted only where a clear showing has been made that the noncompliance with a discovery order was willful,

contumacious or due to bad faith (Corner Realty 30/7, Inc. v Bernstein Management Corp., 249 AD2d 191, 193 [1st Dept 1998]).

In support of their motion, as to the interrogatories, defendants maintain that plaintiffs have failed to provide them with supplemental responses to interrogatories numbered 10, 11, 13, 14, 17, 20-23, and 25-41, despite having been directed by the court to provide such responses. In opposition to defendants' application, plaintiffs submit their supplemental responses to defendants' interrogatories, and maintain that they have responded to defendants' interrogatories as best as possible, at this juncture, in the absence of relevant requested discovery from defendants. Defendants complain that the supplemental responses to interrogatories numbered 25-27, 30, 34, 36-41 are still incomplete.

This court, in its order dated May 7, 2008, dealt with interrogatories numbered 25, and 36-39. Further, a review of the plaintiffs' remaining supplemental responses reveals that their answers to interrogatories numbered 26, 30, 34, 40 and 41 are not sufficiently responsive, and their answer to 27 is inconsistent (plaintiffs must indicate whether a design change is alleged). Thus, this court directs that plaintiffs provide supplemental responses to interrogatories 26, 27, 30, 34, 40 and 41 within 20

days after service of a copy of this order with notice of entry.

This court further directs that plaintiffs provide defendants with the prints and/or laser color copies of the photographs of the Subject Vehicle that were annexed to plaintiffs' discovery responses within 20 days after service of a copy of this order with notice of entry.

This court notes that plaintiffs offered a reasonable excuse for its failure to comply with the court's directives to supplement their responses to defendant's interrogatories, which resulted in this court's order, dated May 7, 2008 directing defendants to produce certain documentation. Further, plaintiffs' demonstrated good faith efforts in complying with such directives, albeit belatedly, as demonstrated by their supplemental response.

"[E]ven where the proffered excuse is less than compelling, there is strong preference in our law that matter be decided on their merits" (Catarine v Beth Israel Medical Center, 290 AD2d 213, 215 [1st Dept 2002]). Therefore, in the absence of a clear showing that plaintiffs' conduct was willful or contumacious, under these circumstances, the imposition of the drastic sanction of striking plaintiffs' complaint is not warranted (see Corner Realty 30/7, Inc. v Bernstein Management

Corp., 249 AD2d 191, supra; see Frye v City of New York, 228 AD2d 182 [1st Dept 1996]).

Accordingly, it is

ORDERED that defendants motion for an order, pursuant to CPLR 3126, dismissing the instant complaint, is granted to the extent of directing that plaintiffs provide supplemental responses to Defendants' Interrogatories numbered 26, 27, 30, 34, 40 and 41, and prints and/or laser color copies of the photographs of the Subject Vehicle, which were annexed to plaintiffs' discovery responses, within 20 days after service of a copy of this order with notice of entry; and it is further

ORDERED that plaintiffs' cross motion for an order striking the answer of defendant Volvo is withdrawn without prejudice to renew.

Dated: 10/10/08

ENTER:

FILED
OCT 21 2008
COUNTY CLERK'S OFFICE
NEW YORK

mat

HON. MILTON A. TINGLING
J.S.C.