

**Compasso v Muscolino**

2009 NY Slip Op 30154(U)

January 27, 2009

Supreme Court, Wayne County

Docket Number: 59195/2007

Judge: Dennis M. Kehoe

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STATE OF NEW YORK  
SUPREME COURT : COUNTY OF WAYNE

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SHAREN COMPASSO,

Plaintiff,

-against-

MICHAEL MUSCOLINO, SUSAN MUSCOLINO,  
PULTNEYVILLE MARINA, SALMON CREEK  
MARINA, JAMES TSEPAS, JEAN TSEPAS,  
and SHAN BISSEL,

Defendants,

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DECISION

Index No. 59195

2007

Wallace, Witty, Frampton & Vetry, P.C.  
Attorneys for Plaintiff

Anthony J. Villani, Esq.  
Attorney for Defendants Michael Muscolino, Sharon Muscolino,  
and Salmon Creek Marina

Milton J. Crystal, Esq.  
Attorney for Defendant, Shan Bissel

Samuel A. Dispenza, Esq.  
Attorney for Defendants, James Tsepas and Jean Tsepas

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The Plaintiff's claim arises from an accident which occurred on April 19, 2003, at a location designated as the Pultneyville Marina, as a result of which she allegedly suffered personal injuries after falling through a dock. The Co-Defendants James Tsepas and Jean Tsepas have moved pursuant

to CPLR §3212 for an order granting summary judgment against the Plaintiff and dismissing the Complaint. The Co-Defendants Michael Muscolino, Susan Muscolino, and Salmon Creek Marina have moved pursuant to CPLR §§3124 and 3126 for an Order dismissing the Complaint. Co-Defendant Shan Bissel also seeks an Order dismissing the Complaint.

The motions were returnable before the Court on January 22, 2009. No responding papers were received by the Court or by counsel for the Defendants prior to the scheduled argument. (After the argument was concluded, opposing Affirmations submitted by counsel for the Plaintiff were subsequently delivered to the Court's chambers.) Plaintiff's counsel of record did not appear on the return date, but engaged local counsel solely for the purpose of this appearance. (Local counsel did advise the Court that he had received the Plaintiff's opposing affirmations the evening before the argument, but acknowledged that he did not have proof of service of the papers on the Court or opposing counsel.) Counsel for Tsepas and Muscolino appeared in person. Counsel for Bissel notified the Court prior to the scheduled argument that he had developed car trouble, and that he would rest on his papers.

Counsel for Mr. and Mrs. Tsepas had previously moved for summary judgment, which motion was denied by the Court without prejudice based on

the Court's finding that "the motion was premature, and that discovery should proceed". (A subsequent motion for renewal/re-argument of the prior motion was made by Defendant Jean Tsepas, which was dismissed on procedural grounds.) However, well over one year has passed since the initial motion was heard, and the Plaintiff has done nothing to come forward with any additional factual arguments in support of her claims against Tsepas. Given this absence of prima facie evidence as to liability, the Court now concludes that no relevant factual issues have been shown by the Plaintiff to exist, so as to preclude summary judgment. Mr. Tsepas' control over the premises in question ceased to exist almost 16 months prior to the Plaintiff's accident, and there has been no showing that his actions in any way contributed to the condition which allegedly resulted in the Plaintiff's injuries. Such allegations are conclusory in nature and based solely on speculation and conjecture. Therefore, the Court grants Tsepas' motion for summary judgment, and the Complaint is hereby dismissed as to them.

The remaining co-Defendants are seeking dismissal of the Complaint, based on the ongoing failure of counsel for the Plaintiff to provide adequate responses to discovery demands, to produce the Plaintiff for deposition, to retain local counsel with authority to engage in meaningful negotiations at chambers conferences, and to comply with the Court's Scheduling Orders.

The most recent example of this course of conduct involved the last minute cancellation of yet another scheduled deposition of the Plaintiff, which was to be held on November 12, 2008, only to be cancelled unilaterally by counsel for the Plaintiff by faxed transmission, which stated no reason for the adjournment and failed to offer any alternative dates.

As previously stated, the Court received two attorney affirmations opposing the Defendants' motions, which were delivered to chambers after oral argument was concluded. These papers appear to have been forwarded only after the Court had refused to grant the Plaintiff's request for yet another adjournment. The Plaintiff's written responses are not timely under CPLR §2214. Even were the Court to consider the affirmations on their merits, the Plaintiff's proffered excuses for the extended failure to provide discovery as directed are inadequate. While this Court is mindful that a motion for summary judgment stays discovery, the decision regarding the original Tsepas motion was rendered August 15, 2007. Counsel also asserts that there were unexpected delays caused by his inability to retain local trial counsel. Such alleged difficulties do not excuse Plaintiff's counsel from his duty to continue his active representation of his client, as attorney of record. On those occasions when Plaintiff's attorney did arrange for local counsel to appear before this Court, he failed to provide them with adequate

knowledge of the case, as well as the authority to act, as required by Uniform Rule §202.12(b).

On September 26, 2008, this Court issued an Amended Scheduling Order, which provides that all discovery and depositions were to be completed by December 15, 2008. The Order further provides that "(f)ailure on the part of any party to comply with this order will result in the imposition of sanctions on that party".

Based on all the circumstances presented for consideration by the parties, it is the Court's decision that the Plaintiff has consistently delayed the prosecution of this action, and that such delay is sanctionable. Therefore, the Plaintiff's Complaint is dismissed in its entirety, pursuant to CPLR §3126(3).

Counsel for Tsepas and Muscolino are hereby directed to submit the appropriate orders for the Court's signature.

Dated: January 27, 2009  
Lyons, New York



Honorable Dennis M. Kehoe  
Acting Supreme Court Justice

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