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

PRESENT: HON. EILEEN A. RAKOWER PART Part 5

Justice

Index Number : 104010/2006

ZOVAS, VASILIKI

VS.

ECKERD CORP.

SEQUENCE NUMBER : 002

SEVER ACTION

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

n this motion to/for _____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1, 2, 3
Answering Affidavits — Exhibits	4, NYT
Replying Affidavits	

Cross-Motion: ☐ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion

FILED

MAY 28 2009

COUNTY CLERK'S OFFICE

NEW YORK

DECIDED IN ACCORDANCE WITH ACCOMPANYING DECISION / ORDER

Dated: 5/26/09

HON. EILEEN A. RAKOWER

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

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 5

----------X

VASILIKI ZOVAS,

Plaintiff,

Index No.
104010/06

- against -

ECKERD CORPORATION,

DECISION & ORDER

Defendant

Mot. Seq.
002 & 003

----------X

ECKERD CORPORATION,

Third Party Plaintiff,

Index No.
590521/07

- against -

THE CITY OF NEW YORK and GENOVESE ENTERPRISES,

Third Party Defendants.

----------X

HON. EILEEN A. RAKOWER

Plaintiff brings this action for personal injuries sustained when she tripped and fell due to debris and garbage alongside a store owned by Defendant Eckerd Corporation ("Eckerd") at 30-99 Steinway Street, in Astoria, New York, on March 4, 2005. Plaintiff commenced this action against Eckerd on March 23, 2006. On June 11, 2007, Eckerd commenced a third party action against the City of New York ("City") and Genovese Enterprises ("Genovese"), seeking apportionment, indemnification and contribution, in the event that Eckerd was found liable for Plaintiff's injuries. Plaintiff states that discovery between Plaintiff and Eckerd was complete, and that she was preparing to file her note of issue when Eckerd Commenced the third party action.

Presently before the court are two motions. First, Plaintiff moves to have the third party action severed from her lawsuit against Eckerd. Meanwhile, Eckerd moves this court for an order striking the City's Answer. Both motions, while seeking different relief from the court, are predicated upon the City's alleged failure to comply with numerous orders directing discovery, thus resulting in a delay of over a year. Plaintiff submits an Affirmation in Support of her motion. Annexed to the Affirmation as exhibits are an Affirmation by Plaintiff; a copy of the initial Summons and Complaint; the Preliminary Conference Order in the initial action; order of the Hon. Richard F. Braun assigning the matter to a City Part upon the joining of the City to the action; the pleadings in the third party action; several compliance conference orders; the Case Scheduling Order; and a 1/13/09 letter from counsel for Eckerd to counsel for the City advising that counsel will move to strike if the city does not provide discovery responses.

Eckerd has submitted an Affirmation in Opposition to Plaintiff's motion to sever, claiming that the purpose of Plaintiff's motion – allowing the parties to proceed with the prosecution and defense of action – will be served by either striking the City's Answer, or granting a conditional order requiring the City to respond to outstanding discovery. In addition, Genovese has submitted an Affirmation in Opposition, asserting that it would be prejudiced by severance of the action.

Plaintiff has submitted a Reply Affirmation in response.

Eckerd has submitted a Affirmation in Support of its motion to strike the City's Answer. Annexed to its Affirmation as exhibits are a copy of Plaintiff's Summons and Complaint; Eckerd's Verified Answer; Eckerd's Third Party Complaint; the City's Verified Third Party Answer; Eckerd's Notice for Discovery and Inspection to the City; so-ordered stipulations from several compliance conferences; Eckerd's 1/13/09 letter to the City demanding discovery; and the City's response to the Case Scheduling Order. .

The record before the court indicates the following. At a November 20, 2007 compliance conference, the parties entered into a so-ordered stipulation wherein the deposition of the City's witness was set to take place on March 20, 2008. In addition, the City was to respond to the Case Scheduling Order ("CSO") within 45 days of the conference. The City did not respond to the CSO within 45 days, and did not produce a witness for deposition on March 20, 2008. A new deposition date

was set for July 17, 2008 by stipulation. In addition, Eckerd served a Notice for Discovery and Inspection on the City on or around April 16, 2008. The City did not produce a witness for deposition on July 17, 2008, and did not respond to Eckerd's Notice for Discovery and Inspection in a timely fashion. Another compliance conference was held on August 5, 2008. At the August 5th conference, the deposition of the City witness was rescheduled to September 15, 2008, and the parties stipulated that the City was to respond to Eckerd's discovery demands within 30 days. The City again failed to produce a witness for deposition on September 15th, and did not respond to Eckerd's discovery demands within 30 days of the previous conference. At a November 18, 2008 compliance conference, the parties stipulated that the City's deposition would be rescheulcd to January 30, 2009, and that the City was to respond to Eckerd's demands within 30 days. According to both Plaintiff and Eckerd, the parties received personal assurances from counsel for the City, Joshua Erik Seidman, Esq., that the responses would be served within 30 days. Despite Mr. Seidman's assurances, the City failed to respond to Eckerd's demands within 30 days. On January 13, 2009, counsel for Eckerd sent a letter to the City concerning the City's failure to respond to its demands, and advising the City of its intention to seek judicial intervention if the City failed to comply.

At a compliance conference held on March 3, 2009, counsel for the City hand-delivered its responses to the CSO, but did not submit any response to Eckerd's discovery demands. In addition, counsel for the City guaranteed at the conference that the deposition of the City's witness would take place on March 6, 2009. The parties also stipulated that the City would respond to Eckerd's discovery demands within 30 days. However, on March 5, 2009, the City advised Eckerd that it would not be able to go forward with the deposition because it was unable to confirm the deposition with its witness.

In the City's Affirmation in Opposition, the City asserts that the documents which were hand-delivered to Eckerd's counsel at the March 3rd conference "were, for the most part," responsive to Eckerd's discovery demands. In addition, the City provided its formal response to Eckerd's discovery demands on March 26, 2009 – three weeks less than a year after Eckerd served their demands on the City. Further, the City's opposition states that the deposition of the City's witness is scheduled for April 16, 2009. Accordingly, the City asserts, Eckerd's motion to strike has been rendered moot and should thus be denied. Annexed to the City's Affirmation as exhibits are copies of the City's Response to the CSO; a copy of a so-ordered

stipulation entered into by the parties during a March 3, 2009 compliance conference; and the City's response to Eckerd's discovery demands.

Plaintiff has submitted an Affirmation in Support of Eckerd's motion to strike the City's Answer.

Eckerd submits a Reply Affirmation, wherein Eckerd disputes that the City has complied with its discovery obligations, claiming that the City's purported response to Eckerd's discovery demands is insufficient, and is largely comprised of meritless objections.

The record before the court does not indicate whether the City's deposition was held on April 16th.

CPLR §3216 provides, in pertinent part:

> If any party... refuses to obey an order for disclosure... the court may make such orders with regard to the failure or refusal as are just, among them:
>
> (3) an order striking out pleadings or parts thereof...

Pursuant to CPLR §3126, a court may impose sanctions when a party willfully fails to disclose information which the court finds ought to have been disclosed. The sanction of striking a party's answer is warranted when a party repeatedly and persistently fails to comply with several disclosure orders issued by the court. *(Yoon v. Costello*, 29 A.D.3d 407[1st Dept. 2006]). A court may strike a party's answer only when "a clear showing that the failure to comply is willful, contumacious or in bad faith" is made by the moving party. Repeated non-compliance with court orders gives rise to an inference of willful and contumacious conduct. (*Goldstein v. CIBC World Markets Corp.*,30 A.D.3d 217 [1st Dept. 2006]). The burden then shifts to the non-moving party to provide a reasonable excuse for its non-compliance. (*Reidel v. Ryder TRS, Inc.*, 13 AD3d 170 [1st Dept. 2004]) (where the court issued a conditional order striking the defendant's answer after it found that defendant's failure to appear at three court-ordered depositions was willful and defendant failed to offer a reasonable excuse for its non-

compliance). In *Figor v. City of New York*, 33 AD3d 560[1st Dept. 2006], the Court took the opportunity to

> encourage the IAS courts to employ a more proactive approach in such circumstances; upon learning that a party has repeatedly failed to comply with discovery orders, they have an affirmative obligation to take such additional steps as are necessary to ensure further compliance. (*Id.* at 561).

Here, the City has failed to respond to Eckerd's discovery demands and appear for deposition for over a year. The City does not set forth the reasons, if any, for this substantial delay. However, the City, apparently prompted by Eckerd's making the instant motion to strike, has finally responded to Eckerd's discovery demands. Accordingly, inasmuch as Eckerd seeks an order compelling a response to the discovery demands, that portion of the motion is moot. Any issues with the sufficiency of the City's response is not a matter properly before the court at this juncture, as there is no showing that the parties have conferred in good faith and have otherwise been unable to resolve the issue absent judicial intervention.

In addition, it is unclear based upon the record before the court whether the City has produced a witness for deposition as of this date. If the City has not yet produced a witness for deposition, it has 20 days within service of a copy of this order with notice of entry to do so or its Answer will be stricken. The City's repeated failures to comply with discovery in this matter permit the court to draw an inference of willful and contumacious conduct on the part of the City (*see Goldstein* at 217), and while "there is a strong preference in our law that matters be decided on their merits," (*Rosen v. Corvalon*, 309 A.D.2d 723 [1st Dept. 2003]), conduct which causes "substantial and gratuitous delay and expense... should not escape adverse consequences" (*Figdor* at 561).

Turning now to Plaintiff's motion to sever the action, the First Department has observed that

> To avoid the waste of judicial resources and the risk of inconsistent verdicts, it is preferable for related actions to be tried together such as in a tort case where the issue is

the respective liability of the defendant and the third-party defendant for the plaintiff's injury.

(*Sichel v. Community Synagogue*, 256 A.D.2d 276-77 [1st Dept. 1998]) (holding that lower court's *sua sponte* severance of slip and fall action due to commencement of third party action approximately one year into the action was an improvident exercise of the court's discretion) (citing *Rothstein v. Milleridge Inn, Inc.*, 251 A.D.2d 154 [1st Dept 1998]) .

While the record before the court indicates that this action has been unnecessarily prolonged by the City's failure to comply with numerous so-ordered stipulations directing it to produce discovery responses and a witness for deposition, severance is unwarranted because it would result in a waste of judicial resources and pose a risk of inconsistent verdicts. Moreover, Plaintiff's stated justification for the severance – that her case be allowed to proceed in an efficient manner – is equally served by this court's ordering that the city immediately comply with all outstanding discovery or have its answer stricken.

Wherefore it is hereby

ORDERED that, if it has not yet done so, the City shall produce its witness for deposition within 20 days of receipt of a copy of this order with notice of entry or have its Answer stricken by the court; and it is further

ORDERED that Plaintiff's motion to sever the action is denied.

This constitutes the decision and order of the court. All other relief requested is denied.

DATED: May 26, 2009

EILEEN A. RAKOWER, J.S.C.