

**Richards v Great Atl. & Pac. Tea Co., Inc.**

2010 NY Slip Op 30631(U)

March 15, 2010

Supreme Court, Nassau County

Docket Number: 14204/08

Judge: Denise L. Sher

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**SHORT FORM ORDER**

**SUPREME COURT OF THE STATE OF NEW YORK**

**PRESENT: HON. DENISE L. SHER**  
**Acting Supreme Court Justice**

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**BETH RICHARDS and BRUCE RICHARDS,**

**Plaintiffs,**

**- against -**

**THE GREAT ATLANTIC & PACIFIC TEA COMPANY,  
INC., THE GREAT ATLANTIC & PACIFIC TEA  
COMPANY, INC. d/b/a WALDBAUMS and  
WALDBAUM INC.,**

**Defendant.**

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**TRIAL/IAS PART 32  
NASSAU COUNTY**

**Index No.: 14204/08  
Motion Seq. Nos.: 02, 03, 04  
Motion Dates: 12/29/09  
12/29/09  
01/14/10**

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**The following papers have been read on these motions:**

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	<b>Papers Numbered</b>
<u>Notice of Motion, Affirmation and Exhibits</u>	<b>1</b>
<u>Notice of Cross-Motion, Affirmation and Exhibits</u>	<b>2</b>
<u>Affirmation in Opposition to Cross-Motion and Exhibits</u>	<b>3</b>
<u>Reply Affirmation</u>	<b>4</b>
<u>Notice of Motion, Affirmation and Exhibits</u>	<b>5</b>
<u>Affirmation in Opposition and Exhibits</u>	<b>6</b>

Upon the foregoing papers, it is ordered that the motions are decided as follows:

Plaintiffs moves, pursuant to CPLR § 3126, for an order striking the Answer of defendant and directing an inquest therein based upon the willful failure of defendant to abide by Court Order in failing to provide Court Ordered response to discovery and inspection demand dated November 11, 2008 in failing to provide prior accident/incident reports for the produce aisle for a time period of two years prior to date of occurrence as agreed to by plaintiffs'

counsel (modifying court order date of three years prior) and to compel defendant, pursuant to CPLR § 3124, to appear for a deposition by a produce manager of Waldbaums for date of occurrence and/or depositions of individuals identified in the surveillance tape provided by defendant. Defendant opposes said motion and cross-moves, pursuant to CPLR § 3126, for an order precluding plaintiffs from offering any evidence at the time of trial with respect to plaintiff Beth Richards alleged medical condition and/or in the alternative for an order, pursuant to CPLR § 3124, compelling plaintiffs to respond to outstanding discovery notices. Plaintiffs oppose defendant's cross-motion.

This matter arises out of a trip and fall accident that occurred at the Waldbaums supermarket located at 1050 Willis Avenue, Albertson, New York. It is alleged that on April 30, 2007, while a customer in the aforementioned store, plaintiff, Beth Richardson, while in the aisle in front of the fresh vegetable and herbs, was caused to slip, trip and fall by reason of the vegetable misting machine spraying mist/water onto the aisles and beyond the perimeters of the mat/carpet, thereby wetting the floors and causing plaintiff Beth Richards to slip into the bunched up carpet/mat, thereby sustaining injuries. Summons and Verified Complaint were served on or about July 17, 2008. Issue was joined on or about September 10, 2008.

Plaintiffs served a Combined Demand for Discovery and Inspection on or about November 11, 2008. In said demand, amongst other things, plaintiffs requested copies of all accident/incident reports of incidents occurring in the produce aisle for a three year period prior to April 30, 2007. In its December 1, 2008 response to plaintiffs' demand, defendant objected to plaintiffs' demand number twelve (12) which demanded accident/incident reports for incidents occurring in the produce aisle for a three year period prior to April 30, 2007. Defendant also

objected to plaintiffs' demand number thirteen (13) for maintenance/cleaning/mopping schedules. Defendant replied to demand number thirteen that "defendant is not in possession of any maintenance, cleaning, mopping or inspection schedules and/or reports in effect on April 30, 2007, and one year prior thereto." At a preliminary conference held on July 29, 2009, defendant was ordered to respond to plaintiff's November 11, 2008 demand. However, defendant had already done so on December 18, 2008. On August 13, 2009, defendant provided plaintiffs with an affidavit of the store manager and instructions regarding the vegetable misting machine and a copy of the customer incident report. On September 14, 2009, via a telephone conference with plaintiffs' counsel, an agreement was reached between the parties in which plaintiffs modified their demand for accident/incident reports in the produce aisle, specifically "in the area of the vegetable mister and/or specific floor mat for a two (2) year period." Defendant claims that a subsequent phone conversation with plaintiffs' counsel modified the demand even further so as to tailor the demand to a period of one (1) year in the agreed upon subject area. This claim is disputed by plaintiffs.

Pursuant to CPLR §3126 when a party refuses "to obey an order for disclosure or willfully fails to disclose information which the court finds ought to have been disclosed pursuant to this article, the court may make such orders with regard to the failure or refusal as are just..." CPLR §3126(3) authorizes the court to strike pleadings or grant a default judgment against the disobedient party. The court may certainly impose sanctions or strike pleadings where a party fails to provide disclosure pursuant to an order. Siegel, Practice Commentaries, 3126:5. It is only proper to strike a pleading, however, where it appears that the failure to obey the court's order is "deliberate and contumacious." *See Sindeband v. McCleod*, 226 A.D.2d 623,

641 N.Y.S.2d 127 (2d Dept. 1996); *Ortiz v. Weaver*, 188 A.D.2d 290, 590 N.Y.S.2d 474 (1<sup>st</sup> Dept. 1992).

CPLR §3126 provides that a pleading may be struck or the introduction of evidence precluded where a party fails to comply with a discovery order or fails to provide discovery which the court finds ought to have been provided. Pleadings should not be stricken unless the “resisting party’s default is shown to be deliberate and contumacious.” *See Furniture Fantasy, Inc. v. Cerrone*, 154 A.D.2d 506, 546 N.Y.S.2d 133 (2d Dept 1989). “[W]here a party disobeys a court order and by his conduct frustrates the disclosure scheme provided by the CPLR, dismissal of the [pleading] is within the broad discretion of the court.” *See Eagle Insurance Company of America v. Behar*, 207 A.D.2d 326 (2d Dept. 1994).

The Court finds that defendant has not wilfully failed to provide the demanded discovery with respect to accident/incident reports for the produce aisle. Defendant provided what it considered an adequate response to said demand. However, due to the discrepancy over the exact time period for said reports, the Court hereby orders defendant to provide plaintiffs, within fifteen days of service of this order, with the reports for a time period of two years prior to date of occurrence.

With respect to plaintiffs demand for copies of all maintenance/cleaning/mopping and inspection schedules and reports in effect April 30, 2007 and for the one year period prior thereto, defendant responded to this demand by stating that defendant is not in possession of any maintenance, cleaning, mopping or inspection schedules and/or reports in effect on April 30, 2007 and one year prior thereto. Plaintiffs claim that, “[n]otwithstanding said response defendants never performed a search and the fact that their file does not contain said reports does not mean that the defendant Waldbaums is not in possession of same.” The Court is

therefore ordering defendant to specify whether or not said reports exist and, if said reports do indeed exist, but are just not in the physical possession of defendant, defendant must provide plaintiffs, within fifteen days of service of this order, with said reports.

Therefore, plaintiffs' application for an order, pursuant to CPLR §3126, striking the Answer of defendant and directing an inquest is hereby denied and defendants are ordered to comply with the aforementioned orders of the Court pertaining to said discovery.

With respect to plaintiffs' request for the Court to compel defendants, pursuant to CPLR § 3124, to appear for a deposition by a produce manager of Waldbaums for the date of occurrence and/or depositions of individuals identified in the surveillance tape provided by defendant, the Court grants plaintiffs' application for production of the produce manager for a deposition, but denies the application to order the depositions of the individuals identified in the surveillance tape. It is further ordered that said deposition shall take place in this courthouse on April 6, 2010 at 9:30 a.m. and continue on a day to day basis until complete.

Defendant cross-moves (Motion Sequence Number 03) for an order, pursuant to CPLR § 3126, precluding plaintiffs from offering any evidence at the time of trial with respect to plaintiff Beth Richards' alleged medical condition and/or in the alternative for an order, pursuant to CPLR § 3124, compelling plaintiffs to respond to outstanding discovery notices. Plaintiffs respond by stating that they have fully responded to defendant's request for medical authorizations and assert that defendant's request for plaintiff Beth Richards' 1986 medical records should be denied as irrelevant and immaterial. Defendant argues that the medical records from plaintiff Beth Richards' 1986 motor vehicle accident are relevant as it is part of her medical history and, as such, is relevant to litigation where her cause of action is based upon physical injury. Defendant's motion pursuant to CPLR § 3126, precluding plaintiffs from


offering any evidence at the time of trial with respect to plaintiff Beth Richards' alleged medical condition is denied, but plaintiffs are hereby ordered to provide defendant with the requested outstanding medical authorizations.

Plaintiffs additionally move for an order, pursuant to CPLR § 3124, compelling defendant to provide discovery, demanded on October 29, 2009, which defendant stipulated to provide on or before December 28, 2009. (Motion Sequence Number 04). Defendant opposes the motion.

In as much as plaintiffs' Motion Sequence Number 04 seeks discovery that was already addressed in plaintiffs' Motion Sequence Number 02, the rulings stated previously in this decision and order apply. The Court finds that defendant has complied with the other demands enumerated by plaintiff in the present motion and denies plaintiffs' motion to compel with respect to these demands.

This constitutes the Decision and Order of this Court.

ENTER:



DENISE L. SHER, A.J.S.C.

Dated: Mineola, New York  
March 15, 2010

**ENTERED**  
MAR 22 2010  
NASSAU COUNTY  
COUNTY CLERK'S OFFICE