

Richter v Biro Mfg. Co.
2010 NY Slip Op 33835(U)
September 27, 2010
Sup Ct, Suffolk County
Docket Number: 11262/2009
Judge: Joseph Farneti
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.
This opinion is uncorrected and not selected for official publication.

SHORT FORM ORDER

INDEX NO. 11262/2009

SUPREME COURT - STATE OF NEW YORK
I.A.S. TERM, PART 37 - SUFFOLK COUNTY

COPY

PRESENT:

HON. JOSEPH FARNETI
Acting Justice Supreme Court

 STEVEN RICHTER,

Plaintiff,

-against-

THE BIRO MANUFACTURING COMPANY,
 SIEGMEISTER SALES & SERVICE, and
 HOBART,

Defendants.

ORIG. RETURN DATE: MAY 18, 2010
 FINAL SUBMISSION DATE: MAY 20, 2010
 MTN. SEQ. #: 003
 MOTION: MOT D

ORIG. RETURN DATE: MAY 18, 2010
 FINAL SUBMISSION DATE: MAY 20, 2010
 MTN. SEQ. #: 004
 MOTION: MOT D

PLTF'S/PET'S ATTORNEY:

SCOTT R. COHEN, ESQ., P.C.
 1921 BELLMORE AVENUE
 BELLMORE, NEW YORK 11710
 516-366-7171

**ATTORNEYS FOR DEFENDANT
THE BIRO MANUFACTURING CO.:**

FISCHETTI & PESCE, LLP
 310 OLD COUNTRY ROAD - SUITE 201
 GARDEN CITY, NEW YORK 11530
 516-873-1511

**ATTORNEYS FOR DEFENDANT
SIEGMEISTER SALES & SERVICE:**

McCUE SUSSMAN & ZAPFEL, P.C.
 521 FIFTH AVENUE - 28TH FLOOR
 NEW YORK, NEW YORK 10175
 212-931-5500

**ATTORNEYS FOR DEFENDANT
HOBART:**

MONTFORT, HEALY, MCGUIRE & SALLEY
 1140 FRANKLIN AVENUE
 P.O. BOX 7677
 GARDEN CITY, NEW YORK 11530-7677
 516-747-7677

Upon the following papers numbered 1 to 7 read on this motion TO DISMISS OR PRECLUDE AND CROSS-MOTION TO DISMISS OR PRECLUDE OR COMPEL.
Notice of Motion and supporting papers 1-3; Notice of Cross-Motion and supporting papers 4-6; Affirmation in Support of Motion 7 it is,

ORDERED that this motion by defendant ITW FOOD EQUIPMENT GROUP, LLC s/h/a HOBART ("HOBART"), for an Order, pursuant to CPLR 3126, dismissing plaintiff's complaint in its entirety for allegedly willfully failing to respond to HOBART's disclosure demands and for refusing to obey this Court's Order dated February 25, 2010, or in the alternative, for an Order prohibiting the plaintiff from producing in evidence at the trial of this matter any things or testimony relating to discovery demanded and ordered produced by this Court that the plaintiff has failed to comply with, is hereby **GRANTED** to the extent set forth hereinafter; and it is further

ORDERED that this cross-motion by defendant THE BIRO MANUFACTURING COMPANY ("BIRO"), for an Order, pursuant to CPLR 3126, striking plaintiff's pleadings based upon plaintiff's alleged willful failure to respond to BIRO's discovery demands, and failure to obey this Court's Order, dated February 25, 2010, or in the alternative, for an Order, pursuant to CPLR 3124 and 3126 (2), precluding plaintiff from introducing evidence at the trial in support of the allegations contained in the complaint based upon plaintiff's alleged willful failure to respond to BIRO's discovery demands and failure to comply with this Court's Order; and/or for an Order, pursuant to CPLR 3124 and 3042 (c), compelling plaintiff to respond to BIRO's discovery demands and comply with this Court's Order before party depositions can be held, is hereby **GRANTED** to the extent set forth hereinafter.

The Court has not received opposition to either application at bar from plaintiff, but has received an affirmation in support of HOBART's motion from counsel for defendant SIEGMEISTER SALES & SERVICE.

Plaintiff's complaint in this products liability action alleges that plaintiff suffered personal injuries while using a bandsaw purchased by Pathmark from defendants. The complaint does not indicate the date or place of the alleged accident. Issue was joined by HOBART by service of a verified answer upon plaintiff on June 18, 2009, along with combined discovery demands and a demand for deposition. Thereafter, on October 21, 2009, HOBART served

additional discovery demands and interrogatories upon plaintiff. HOBART alleges that plaintiff has not responded to one discovery demand served upon him. As such, HOBART contends that it does not know the date of the alleged accident, where the accident occurred, or whether the accident even involved a machine sold and/or serviced by HOBART.

On February 25, 2010, a Preliminary Conference was held and a Preliminary Conference Stipulation and Order was executed. Pursuant to the aforementioned Order, plaintiff was to provide responses to HOBART's discovery demands by March 25, 2010. Again, HOBART alleges that plaintiff wholly failed to comply. Thus, HOBART has filed the instant application seeking to dismiss plaintiff's complaint or to preclude plaintiff at the time of trial.

BIRO has filed the instant cross-motion to strike plaintiff's pleadings based upon plaintiff's alleged willful failure to respond to BIRO's discovery demands and to obey the Preliminary Conference Order, or in the alternative, to preclude plaintiff at the time of trial or to compel plaintiff to respond to BIRO's discovery demands before party depositions can be held. To date, BIRO claims that plaintiff has failed to provide evidence as to plaintiff's alleged claims of liability and damages. Specifically, BIRO alleges that plaintiff has failed to respond to its Demand for a Verified Bill of Particulars and Combined Demands, both served on or about June 22, 2009 upon plaintiff along with BIRO's verified answer. BIRO similarly alleges that plaintiff failed to respond by the March 25, 2010 Preliminary Conference Order deadline, and therefore has filed the instant cross-motion.

As noted, the Court has received an affirmation in support of HOBART's motion from counsel for defendant SIEGMEISTER SALES & SERVICE. Also as noted, plaintiff has failed to file opposition to either motion.

CPLR 3126 provides that a court may, in its discretion, impose a wide range of penalties upon a party which either: (a) refuses to obey an order for disclosure; or (b) willfully fails to disclose information which the court finds ought to have been disclosed (CPLR 3126). The penalties proposed by the statute include: (1) deciding the disputed issue in favor of the prejudiced party; (2) precluding the disobedient party from producing evidence at trial on the disputed issue; or (3) either striking the pleadings of the disobedient party, or staying the proceedings until the ordered discovery is produced, or rendering a default judgment against the disobedient party (CPLR 3126). It is appropriate to strike a

party's pleading where there is a clear showing that its failure to comply with discovery demands is wilful, contumacious, or in bad faith (see *Denoyelles v Gallagher*, 40 AD3d 1027 [2007]; *Fellin v Sahgal*, 268 AD2d 456 [2000]; *Harris v City of New York*, 211 AD2d 663 [1995]). Generally, "willfulness" is inferred from a party's repeated failure to respond to demands and/or to comply with disclosure orders, coupled with inadequate excuses for its defaults (see *Siegman v Rosen*, 270 AD2d 14 [2000]; *DiDomenico v C & S Aeromatik Supplies, Inc.*, 252 AD2d 41 [1998]; *Frias v Fortini*, 240 AD2d 467 [1997]).

At this juncture, the Court finds that dismissal of plaintiff's complaint is not warranted. However, this motion and cross-motion are **GRANTED** to the extent that plaintiff's complaint shall be dismissed unless plaintiff serves responses to HOBART's Combined Demands, originally served on or about June 18, 2009; HOBART's Interrogatories and Notices to Produce, originally served on or about October 21, 2009; and BIRO's Demand for a Verified Bill of Particulars and Combined Demands, both originally served on or about June 22, 2009, all within thirty (30) days of service of the instant Order upon plaintiff with notice of entry.

The foregoing constitutes the decision and Order of the Court.

Dated: September 27, 2010



HON. JOSEPH FARNETI
Acting Justice Supreme Court