

Perez v 1422 Queens Blvd LLC
2011 NY Slip Op 33693(U)
June 1, 2011
Supreme Court, Queens County
Docket Number: 30503/2010
Judge: Robert J. McDonald
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Queens County, New York.

An action was commenced by the filing of a summons and complaint on December 8, 2010. Issue was joined by service of Chase's Verified Answer on February 1, 2011. Along with their Verified Answer, Chase served plaintiff with a Demand for a Verified Bill of Particulars and demands for discovery and inspection seeking certain specified information including photographs, documents, pleadings from other actions, reports, records and authorizations. After almost three months, the plaintiff had still not responded to Chase's discovery demands.

As a result of the plaintiff's delay in responding to Chase's discovery demands, defendant filed the instant motion contending that the failure to comply with their demands for a Bill of Particulars and discovery and inspection is willful and contumacious and, as such, pursuant to CPLR 3126 the complaint should be dismissed or plaintiff's testimony should be precluded at trial.

In opposition, the plaintiff's attorney, Adam Ashe, Esq. contends that the defendant's demands for discovery and inspection have been complied with. Counsel annexes a copy of the Verified Bill of Particulars and Response to Combined Demands dated May 11, 2011 to the affirmation in opposition.

"A court may, inter alia, issue an order "striking out pleadings or . . . rendering a judgment by default" as a sanction

against a party who "refuses to obey an order for disclosure or wilfully fails to disclose information which the court finds ought to have been disclosed" (CPLR 3126 [3]). "To invoke the drastic remedy of striking an answer, it must be shown that a defendant's failure to comply with a disclosure order was the result of willful and contumacious conduct" (Maignan v Nahar, 37 AD3d 557 [2d Dept. 2007]; also see Castillo v Star Leasing Co., 920 NYS2d 784 [2d Dept. 2011]; Iscowitz v County of Suffolk, 54 AD3d 725 [2d Dept. 2008]). "Willful and contumacious conduct may be inferred from a party's repeated failure to comply with court-ordered discovery, coupled with inadequate explanations for the failures to comply" (see Friedman, Harfenist, Langer & Kraut v Rosenthal, 79 AD3d 798 [2d Dept. 2010]).

This court finds that the defendant did not show that the plaintiff's delay in responding to the defendant's demands was wilful or contumacious. Therefore, the defendants' motion to strike the plaintiff's complaint or to preclude the plaintiff from testifying at trial is denied (see Conciatori v Port Auth. of N. Y. & N. J., 46 AD3d 501 [2d Dept. 2007]; Kuzmin v Visiting Nurse Serv. of N. Y., 22 AD3d 643 [2d Dept. 2005]).

However, the plaintiff is directed to supply the defendant with a supplemental Bill of Particulars providing more specific information with regard to items 16, 19 and 22 and to provide the defendant's attorney with any outstanding original authorizations

for plaintiff's medical records, collateral source records, employment records, union records, tax records and Medicaid, Medicare or SSI records within 20 days of service of a copy of this order with notice of entry thereof (see Jones v LeFrance Leasing Ltd. Partnership, 81 AD3d 900 [2d Dept. 2011]).

Dated: June 1, 2011
Long Island City, N.Y.

ROBERT J. MCDONALD
J.S.C.