

Matthews v The Gap, Inc.

2011 NY Slip Op 33732(U)

June 13, 2011

Supreme Court, New York County

Docket Number: 1126882010

Judge: Judith J. Gische

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. JUDITH J. GISCHE
J.S.C.

PART 10

Index Number : 112688/2010

MATTHEWS, JANE

INDEX NO. _____

vs
THE GAP, INC.

MOTION DATE _____

Sequence Number : 001

MOTION SEQ. NO. 001

STRIKE A PLEADING

_____	_____	_____	_____
_____	_____	_____	_____
_____	_____	_____	_____
_____	_____	_____	_____

Upon the foregoing papers, It is ordered that this motion is

*motion (e) and cross-motion(s)
decided in accordance with
the annexed decision/order
of even date.*

FILED
JUN 15 2011
NEW YORK
COUNTY CLERK'S OFFICE

Dated: 6/13/11

HON. JUDITH J. GISCHE, J.S.C.
J.S.C.

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

1. CHECK ONE: CASE DISPOSED NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: MOTION IS: GRANTED DENIED GRANTED IN PART OTHER
3. CHECK IF APPROPRIATE: SETTLE ORDER SUBMIT ORDER
- DO NOT POST FIDUCIARY APPOINTMENT REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 10

-----X

JANE MATTHEWS,

Plaintiff,

-against-

THE GAP, INC.

Defendants.

-----X

DECISION/ORDER
Index No.: 112688/10
Seq. No.: 001

Present:
Hon. Judith J. Gische
J.S.C.

Recitation, as required by CPLR 2219 [a], of the papers considered in the review of this motion:

FILED

Papers	Numbered
Def's motion (strike) w/ PGP affirm, exhs	1

JUN 15 2011

NEW YORK
COUNTY CLERK'S OFFICE

Upon the foregoing papers, the decision and order of the court is as follows:

This is defendant's motion for an order to strike plaintiff's summons and complaint and to dismiss the case with prejudice, or in the alternative, to preclude plaintiff from offering evidence at trial on matters within defendant's discovery demand dated January 26, 2011, to which plaintiff has not responded. CPLR § 3126. Plaintiff defaulted on this motion, for which proof of service was filed.

CPLR § 3042 requires that a party respond "[w]ithin thirty days of service of a demand for a bill of particulars." The requesting party may move for an order to compel compliance if the responding party does not respond or is otherwise non-compliant. If the responding party's actions are "willful," the requesting party may move for relief under CPLR §§ 3042, 3126 (when a party "wilfully fails to disclose information which the

court finds ought to have been disclosed," the court may make any order that is "just," including dismissal or preclusion). Therefore, a motion to strike a party's pleadings for non-compliance with a discovery request is properly granted "where the party seeking disclosure demonstrates conclusively that the failure to disclose was wilful, contumacious, or due to bad faith." Hassan v. Manhattan and Bronx Surface Transit Operating Auth., 286 A.D.2d 303, 304-05 (1st Dept. 2001) (dismissal not warranted where plaintiff responded approximately five years late to defendant's requested bill of particulars and there was no evidence of other non-compliance with discovery or prejudice to defendant).

This action was commenced on September 14, 2010 with service of the summons and verified complaint. Issue was joined on January 26, 2011, when defendant interposed a verified answer, demand for verified bill of particulars, combined demands, notice of examination before trial, demand pursuant to CPLR Section 3101(d), demand for proof of index number, Section 2103 notice, demand for authorizations, demand pursuant to CPLR Section 3017(a), notice of intention to speak with treating physicians, and demand pursuant to mandatory insurer reporting law Section 111 of Public Law 110-173. Plaintiff has not responded to any of defendant's January 26, 2011 demands. Since dismissal is "drastic" and preclusion is improperly used where, as here, the court has not issued an order for plaintiff's compliance with a discovery demand, Hassan v. Manhattan and Bronx Surface Transit Operating Auth., at 304; see Kleinberg Elec., Inc. v. City of New York, 255 A.D.2d 248, 249 (1st Dept. 1998) (regarding a bill of particulars), the court hereby issues the following order:

Plaintiff shall deliver to defendant a response to defendant's bill of particulars and combined discovery demands, dated January 26, 2011, no later than July 21, 2011.

This matter is also scheduled for a preliminary conference on Thursday, July 28, 2011 at 9:30 a.m., at 60 Centre Street, New York, New York, Part 10, Room 232, at which time both sides shall appear. No further notices will be sent.

This shall constitute the decision and order of the Court.

Dated: New York, New York
June 13, 2011

So Ordered.



HON. JUDITH J. GISCHE, J.S.C.

FILED

JUN 15 2011

**NEW YORK
COUNTY CLERK'S OFFICE**