SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

P R E S E N T : HON. JEFFREY S. BROWN
JUSTICE

----------X **TRIAL/IAS PART 17**

RUTH ORR,

Plaintiffs,

- against -

P.F. CHANG'S CHINA BISTRO, INC. and W & S ASSOCIATES, L.P.,

Defendants.

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Index No. 16545/10
Mot. Seq. # 1
Mot. Date 11.29.11
Submit Date 12.8.11

The following papers were read on this motion: Papers Numbered

Notice of Motion, Affidavits (Affirmations), Exhibits Annexed..... 1
Answering Affidavit 2
Reply Affidavit..... 3

The plaintiff, Ruth Orr, moves for the following forms of relief: an order pursuant to CPLR §3126[1], resolving the issue of defendants' purported negligence in favor of the plaintiff, or; an order pursuant to CPLR §3126[2], precluding the defendants from either opposing the plaintiff's claims or proffering evidence in support of their claimed defenses at the time of trial, or; for an order pursuant to CPLR §3126[3], striking the defendants' answer, for their willful failure to provide court-ordered discovery and granting a judgment by default in favor of the plaintiff. In the *alternative*, the plaintiff moves pursuant to CPLR §3124, for an order compelling the defendants to respond to all outstanding discovery (Sequence #001).

On February 12th, 2010, the plaintiff allegedly sustained serious injuries when she fell while exiting a raised dining booth in the P.F. Chang's restaurant located in Westbury, New York (*see* Kluepfel Affirmation in Support at ¶3; Exh. A; *see also* Casey Affirmation in Opposition at ¶3). As a result thereof, the plaintiff commenced the underlying action on or about August 20th, 2010 (*see* Kluepfel Affirmation in Support at¶ 4; *see also* Exh. A).

During the course of the within litigation, this court issued a preliminary conference order on February 28th, 2011, and three compliance conference orders, respectively issued on June 15th, 2011, September 22nd, 2011 and October 24th, 2011, the latter of which granted permission to plaintiff's counsel to interpose the application *sub judice* (id. at Exhs. F, H ,J).

In support of the instant application, counsel contends that notwithstanding the orders issued by this court, the defendants have willfully failed to comply with the discovery directives contained therein and as such the relief herein requested should be granted (*id.* at ¶¶8,12, 14,16,17,18,18,21). Counsel additionally asserts that the defendants have failed to fully and meaningfully respond to the plaintiff's "Supplemental Notice for Discovery and Inspection", dated, June 21st, 2011, as they were expressly directed to do by way of this court's orders dated, September 22nd and October 24th, 2011 (*id.* at ¶¶14, 16,17,18,19; *see also* Exhs. H, J). Counsel further contends that defense counsel has yet to arrange "for the depositions of the Manager who tended to plaintiff at the scene of her accident and the two Managers who prepared the reports of the two prior similar accidents at the subject restaurant" (*id.* at ¶15). Finally, counsel asserts that the defendants have failed to provide, as directed, copies of the reports as to the plaintiff's independent neurologic and orthopedic examinations (*id.* at ¶¶12,17).

In opposing the plaintiff's application, counsel for the defendants argues that there has been substantial compliance with respect to all of the orders issued by this court, as well as full compliance with the plaintiff's outstanding discovery demands (*see* Casey Affirmation in Opposition at ¶5,20,24). To this latter point, counsel asserts that by way of a supplemental response dated, November 11th, 2011, the defendants indicated the following: they were not in possession of any records or documents relating to plaintiff's accident; they were not in possession of any architectural drawings, other than those which were previously provided; they were not in possession of any records, invoices, bill and receipts relating to the services of electrician Steve Urban[1], and; they were not in possession of any call logs from Go-Chang's system[2] with respect to prior accidents, other than those which had already been provided (*id.* at ¶18). Counsel further asserts that the defendants have provided reports with respect to two prior accidents, as well as copies of the plaintiff's IME reports (*id.* at ¶¶22,24).

As noted above, the plaintiff has moved under the various provisions embodied in CPLR §3126 and seeks, *inter alia*, an order striking the defendants' answer. It is well settled that "[a]ctions should be resolved on the merits whenever possible, and the nature and degree of the penalty to be imposed pursuant to CPLR §3126 is a matter of discretion with the court" (*Pascarelli v City of New York*, 16 AD3d 472,475 [2d Dept 2005]; *Zouev v City of New York*, 32 AD3d 850 [2d Dept 2006]). Moreover, "the drastic remedy of striking an answer is inappropriate absent a clear showing that the failure to comply with discovery demands is willful and

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[1] Steve Urban is allegedly the electrician who performed services at the subject location.

[2] Go-Chang's is allegedly a call-in system that fields reports of accidents occurring at all P.F. Chang's restaurants.

contumacious, or in bad faith" (*Harris v City of New York*, 211 AD2d 663, 664 [2d Dept 1995] ; *Zouev v City of New York*, 32 AD3d 850 [2d Dept 2006], *supra; Pascarelli v City of New York,* 16 AD3d 472 [2d Dept 2005], *supra*).

In the instant matter, the court has carefully reviewed the submissions of the respective parties and finds that the relief requested by the plaintiff is unwarranted under the extant circumstances (*id.*). In the compliance conference order dated, October 24th, 2011, this court directed the defendants to respond to the plaintiff's supplemental notice for discovery and inspection by November 7th, 2011. In response thereto, the defendants served a response dated, November 3rd, 2011, wherein they provided certain information and indicated that a search was underway to obtain additional information. Thereafter, the defendants served a supplemental response dated, November 11th, 2011, and provided the additional information as is recited herein above (*id.*). While the court is cognizant that in providing the latter response, the defendants stated they were not in possession of certain documents, a party "cannot be compelled to produce documents which do not exist or are not in [its] possession" (*Euro-Central Corp. v Dalsimer, Inc.*, 22 AD3d 793 [2d Dept 2005]; *Bach v City of New York*, 304 AD2d 686 [2d Dept 2003]).

Therefore, having reviewed the foregoing responses, the courts finds that the defendants have been neither willful nor contumacious *vis a vis* the plaintiff's discovery demands (*Harris v City of New York*, 211 Ad2d 663 [2d Dept 1995], *supra*). Moreover, this determination coupled with the important policy of resolving cases on the merits warrants denial of the plaintiff's application (*Pascarelli v City of New York*, 16 AD3d 472 [2d Dept 2005], *supra*).

Accordingly, based upon the foregoing, those branches of the plaintiff's application interposed pursuant to CPLR §3126, are hereby **DENIED**.

The Court now turns to that branch of the plaintiff's application interposed under CPLR §3124, which seeks an order compelling the defendants to provide certain materials, which have yet to be disclosed. CPLR §3124 provides "If a person fails to respond to or comply with any request, notice, interrogatory, demand, question or order under this article, except a notice to admit under section 3123, the party seeking disclosure may move to compel compliance or a response." As best can be adduced from the record, the following items have yet to be produced by the defendants: copies of all records and reports in the defendants' possession relating to any prior accidents involving a raised booth at any P.F. Chang's restaurant; copies of sales receipts and any other records or documents reflecting the amount of dinners sold at the Westbury P.F. Chang's restaurant on the evening of February 12th, 2010; depositions of the two managers who prepared the previously disclosed accident reports; and a deposition of the manager, who tended to the plaintiff at the scene of the accident.

CPLR §3101[a] [1] provides that with respect to parties to litigation, "[t]here shall be full disclosure of all matter material and necessary in the prosecution or defense of an action, regardless of the burden of proof." The phrase "material and necessary" is "to be interpreted liberally to require disclosure, upon request, of any facts bearing on the controversy which will assist preparation for trial by sharpening the issues and reducing delay and prolixity. The test is one of usefulness and reason * * *" (*Allen v Cromwell-Collier Pub. Co.*, 21 NY2d 403 [1968]). The Court in *Allen* went on to note that the term necessary has been "held to mean needful and not indispensable" (*id.* at 407 [internal quotations omitted]).

As noted above, the plaintiff alleges that the raised booth from which she fell was a dangerous condition of which the defendants had notice. It is well settled, that "[i]n order to

prove a prima facie case of negligence in a trip and fall case, a plaintiff is required to show that the defendant created the condition which caused the accident or that the defendant had actual or constructive notice of the condition" (*Cruceta v Funnel Equities, Inc.*, 18 AD3d 693 [2d Dept 2005]).

Guiding by the foregoing legal precepts, the court finds that neither the sales receipts generated on the evening in issue nor the depositions of the two managers, who authored the previously disclosed accident reports, are material and necessary to the prosecution of the underlying negligence action (*Allen v Cromwell-Collier Pub. Co.*, 21 NY2d 403[1968], *supra*). Here, the sales receipts requested by the plaintiff are not in any respect relevant to either notice or the condition of the raised booth, which the plaintiff claims is defective (*id.*). Likewise, the information gleaned from deposing the two mangers would not sharpen the issues of either notice or the condition of the booth, especially given that the plaintiff is in possession of the actual accident reports authored by these managers (*id.*).

Addressing now the plaintiff's request for a deposition of the manager present at the scene of the plaintiff's accident, the record indicates that the defendants have provided both this individual's name and last known address, as was requested in plaintiff's supplemental notice for discovery and inspection. Thus, while this individual's whereabouts appear to be currently unknown, the defendants are under a continuing obligation to provide a current address should one become known (CPLR §3101[h]).

Finally, with respect to the plaintiff's demand for all records and reports relating to any prior accidents involving a raised booth at any P.F. Chang's restaurant, said request is hereby **GRANTED** to the extent as provided below. In a slip and fall action, a plaintiff is entitled to full

disclosure with respect to prior similar accidents inasmuch as "they are relevant in establishing that a particular condition was dangerous and that the defendant had notice of that condition" (*Coan v Long Island Rail Road*, 246 AD2d 569 [2d Dept 1998]). However, "discovery of reports of prior accidents is limited to those similar in nature to the accident in question" (*D'Alessio v Nabisco, Inc.*, 123 AD2d 816 [2d Dept 1986]; *see also Rauppius v City of New York*, 285 AD 958 [2d Dept 1955]). Here, the Court finds that the plaintiff's request for information as to *any* prior accidents involving a raised booth at any P.F. Chang's to be overly broad in scope (*id.*).

Accordingly, the plaintiff's request is hereby **GRANTED** to the extent that the defendants are directed to produce those records and reports relative to any trip and fall accidents at a raised booth (identical in design to that involved in the plaintiff's accident), occurring in any P.F. Chang's restaurant within the three years prior to the subject incident (*id.*; CPLR §3124).

This constitutes the decision and order of this Court. All applications not specifically addressed herein are denied.

Dated: February 7, 2012

ENTER:

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J.S.C.

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