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Settlement Conf: February 27, 2012

To commence the 30 day statutory time period for appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties

SUPREME COURT OF THE STATE of NEW YORK
COUNTY OF PUTNAM

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JOHN C. BOOKLESS,

Plaintiff,

-against -

ACTION CARTING ENVIRONMENTAL SERVICES, INC. and DARRELL W. HALL,

Defendants.

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DECISION & ORDER

Index No. 3038-2008

Sequence No. 7 & 8

LUBELL, J.

The following papers were considered in connection with this motion by plaintiff for an Order (A) pursuant to CPLR 3126(3) striking the Answers of defendants or (B) pursuant to CPLR 3216(2) precluding defendants from offering any testimony or opinions at trial of this matter based on information contained in defendants' Supplemental disclosure dated September 8, 2011 and (C) pursuant to 22 NYCRR 130-1.1 imposing costs and sanctions on defendants for their deliberate, willful and contumacious violation of an explicit Order of the Court:

PAPERS	**NUMBERED**
Motion/Affirmation/Exhibits A-P	1
Affirmation in Opposition (Action Carting)/ Affidavit/Exhibits A-N	2
Affirmation in Opposition/Exhibits A-C	3
Reply Affirmation	4
Affirmation of Wilson	5

This personal injury action arises out of a motor vehicle accident which took place on November 17, 2007, at approximately 4:30 a.m. when, while plaintiff was traveling northbound on Interstate 684 in the Town of North Salem, County of Westchester, he crashed his vehicle into the underside of an overturned garbage truck operated by defendant Darrell W. Hall during his course of

employment with the truck owner, defendant Action Carting Environmental Services, Inc. ("Action Carting").

This motion is made in connection with a post-Note of Issue discovery dispute between plaintiff and defendants over Action Carting's service of a CPLR §3101(d) Supplemental Disclosure dated September 8, 2011.[1]

Following an exchange of letters and other communication between counsel for plaintiff and Action Carting, on notice to counsel for Hall, regarding Action Carting's desire to perform "further expert testing" of its truck, post-Note of Issue, counsel for Action Carting agreed to be "prepared to address the question of further expert disclosure by Fawzi Bayan, P.E., [its noticed expert] at the May 24, 2011 [Pre-Trial] Conference." Upon doing do, Action Carting reiterated its position that it could engage in post-Note of Issue discovery and that same could form the basis of its expert's opinion which would be incorporated into an otherwise timely made expert witness disclosure which, as set forth in the Preliminary Conference Order, may be made by defendants up to thirty days before trial.

The case came before the Court on May 24, 2011, by which time the Court had denied plaintiff's motion for summary judgment (see, Decision & Order of March 2, 2011). In addition, and despite the then pendency of the summary judgment motion and the filing of the Note of Issue, the Court had also Ordered that plaintiff submit to an examination by a medical specialist, a life planner and vocational rehabilitator. Since the examinations had yet to be fully completed by the May 24th conference, all agreed that settlement discussions should be adjourned.

In accord with counsels' understanding, plaintiff then proceeded to advise the Court that defendants were attempting to conduct "new discovery", more precisely, new "testing or inspection" by their expert of the garbage truck. In response thereto, Action Carting expressed its position that plaintiff's objection was premature pending further disclosure by defendants. Continuing, counsel stated, "But as of right now, we already made disclosure from our liability expert, we've had affidavits from both experts submitted on summary judgment[] . . . This is nothing other than a supplement, it's nothing new."

Plaintiff reiterated his objection noting, among other things, that the truck had been in defendants' possession for some three and a half years, and that the case had been set down for settlement talks, now adjourned for the completion of the aforesaid examinations. Plaintiff also noted that the Court had inquired back in February 2011 as to whether there were any open discovery issues

[1] The Note of Issue was filed in October 2010.

in response to which no mention had been made of the truck.

In the end, the Court ruled as follows:

> Do the exams. Let's have settlement discussions. They want to take a look at the truck. I may have them make a motion for it. You are talking about a timeframe, though technically, expert disclosure can be exchanged according to the Second Department with a reasonable period of time prior to trial.
>
> But to start doing - - I'm not making, I'm not giving an opinion. *I'm telling you, you are not doing it now*. [Emphasis Added.]

Notwithstanding that clear and unequivocal ruling, if not admonishment, Action Carting reiterated its position that its expert should be allowed further examination of the truck at this time. Following further colloquy between the Court and counsel, the Court ruled:

> *I would do your physical exams and then we'll talk about whether or not I'm going to allow further discovery post Note of Issue, when you've already done your examination of the vehicle.* I believe this may produce something new that may put him at some prejudice. [Emphasis Added.]

Thereupon counsel addressed various other issues such as the need for a non-party deposition and the asserted need to have plaintiff re-produced for further deposition, among other things. As to those issues, the Court directed counsel to make motions, if so advised.

As is the Court's usual practice, the transcript closes as follows:

> All directives placed on the record this date will constitute the Decision and Order of the Court and

will be deemed so-ordered without the necessity for signature.

Notwithstanding the clear and unequivocal Order of the Court, astonishingly, the Court is called upon to address this motion challenging Action Carting's CPLR 3101(d) Supplemental Disclosure which is admittedly based upon expert inspection of the truck that took place during the evening of May 24, 2011, i.e., the date of the Court conference.

Whether or not one or both defendants had any say in the scheduling of the inspection, and whether or not same had been scheduled prior to the May 24 Court conference, the record is clear that the inspection upon which the Supplemental Disclosure took place occurred after this Court's clear and unequivocal directive that such an inspection would not take place absent further Order of the Court, by way of formal motion or otherwise. Nonetheless, with counsel present, the inspection occurred that very evening.

Defendants' determination to proceed in face of this Court's clear and unequivocal directive made upon plaintiff's application, on notice to defendants, can only be deemed a wilful, if not bad faith (see, Rodriquez v. United Bronx Parents, Inc., 70 AD3d 492 [1st Dept., 2010]), disregard of this Court's ruling and directive.

Further, in response to same, the Court is not satisfied that defendants have come forward with a reasonable excuse for having proceeded as they did (see, Mei Yan Zhang v. Santana, 52 A.D.3d 484, 485 [2d Dept., 2008]). Had there been any genuine disagreement or confusion as to the meaning of the Court's directive, defense counsel should have sought clarification from the Court, even if informally at first, or as the Court may have directed thereupon. Any disagreement with the Court's clear and unequivocal directive should have been addressed by way of motion to reargue; here again, even if sought as informally as plaintiff's application or as otherwise may have been directed by the Court upon such informal application.

Certainly, whether or not defense counsel believe that the Court's directive is misguided and erroneous has no bearing on the issue. There is no challenge to the lawfulness of the Order and, as such, "a party is not free to disregard it and decide for himself the manner in which to proceed" (Vill. of St. Johnsville v. Triumpho, 220 A.D.2d 847, 848 [3d Dept., 1995] citing Matter of Balter v. Regan, 63 N.Y.2d 630, 631 [1984] cert. denied 469 U.S. 934, 105 S.Ct. 333, 83 L.Ed.2d 269 [1984]). No matter how erroneous an order may be or may be believed to be, it must be obeyed as long as the court is possessed of jurisdiction and the

order is not void on its face (City School Dist. of City of Schenectady v. Schenectady Fedn. of Teachers, 49 A.D.2d 395, 397 [1975] lv. denied 38 N.Y.2d 707 [1975] appeal dismissed 38 N.Y.2d 820, 826 [1975]).

The issue here is not the timeliness of defendants' expert disclosure under CPLR §3101 or even whether an expert can base his or her opinion on post-Note of Issue discovery. The very limited issue before the Court is whether, under the circumstances of this case, the Court, in its discretion, should impose sanctions for defendants' willful disregard of this Court's directive.

The question is answered in the affirmative. "If the credibility of court orders and the integrity of our judicial system are to be maintained, a litigant cannot ignore court orders with impunity" (Kihl v. Pfeffer, 94 NY2d 118, 123 [1999]).

Upon review and consideration of the papers currently before the Court, including the procedural history set forth therein and the transcript of the May 24, 2011 court proceedings, and after due and deliberate consideration thereof, the Court, in its discretion, grants that aspect of plaintiff's motion pursuant to CPLR 3216(2) seeking to preclude defendants from offering any testimony or opinions at trial of this matter that is based on information contained in defendants' Supplemental Disclosure dated September 8, 2011, to the extent based on the inspection or testing of the subject truck that took place after the May 24, 2011 appearance before the Court.

Although not persuaded that defendants had come forward with a reasonable excuse for their actions, upon review and consideration of defendants' papers, the Court does not find that defense counsels' conduct, overzealous as it is, warrants the imposition of frivolity sanctions within the meaning of 22 NYCRR 130.1-1(c).

Based upon the foregoing, it is hereby

ORDERED, that, plaintiff's motion be and is hereby granted to the extent that defendants are precluded from offering any testimony or opinions at the trial of this matter that is based on information contained in defendants' Supplemental Disclosure dated September 8, 2011, to the extent derived from the inspection or testing of the subject truck that took place after the Court's May 24, 2011 Order; and, it is further

ORDERED, that, to any further extent, the motion be and is hereby denied; and, it is further

ORDERED, that the parties are directed to appear before the Court at 9:30 a.m. on February 27, 2012 for a Pre-Trial/Settlement Conference.

The foregoing constitutes the Opinion, Decision, and Order of the Court.

Dated: Carmel, New York
January 12, 2012

S/ _____
HON. LEWIS J. LUBELL, J.S.C.

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