

Ceccarini v City of New York

2013 NY Slip Op 31284(U)

June 13, 2013

Supreme Court, New York County

Docket Number: 109037/2008

Judge: Kathryn E. Freed

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SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

HON. KATHRYN FRIED
JUSTICE OF SUPREME COURT

PRESENT: _____
Justice

PART 5

Index Number : 109037/2008
CECCARINI, JOHANNA
vs
MEMORIAL SLOAN-KETTERING
Sequence Number : 003
STRIKE ANSWER

Col # : 20

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____

The following papers, numbered 1 to _____, were read on this motion to/for _____

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). _____

Answering Affidavits — Exhibits _____ | No(s). _____

Replying Affidavits _____ | No(s). _____

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

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


**DECIDED IN ACCORDANCE WITH
ACCOMPANYING DECISION / ORDER**

FILED

JUN 19 2013

COUNTY CLERK'S OFFICE
NEW YORK

Dated: 6-13-13
JUN 13 2013


_____, J.S.C.
HON. KATHRYN FRIED
JUSTICE OF SUPREME COURT

- 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 5

-----X
JOHANNA CECCARINI and JOSEPH CECCARINI,

Plaintiffs,

-against-

THE CITY OF NEW YORK and
MEMORIAL SLOAN-KETTERING, ,

Defendants.

DECISION/ORDER
Index No. 109037/2008
Seq. No. 003

PRESENT:
Hon. Kathryn E. Freed
J.S.C.

-----X
HON. KATHRYN E. FREED:

RECITATION, AS REQUIRED BY CPLR§2219 (a), OF THE PAPERS CONSIDERED IN THE REVIEW OF THIS MOTION.

PAPERS

NUMBERED

NOTICE OF MOTION AND AFFIDAVITS ANNEXED.....
ORDER TO SHOW CAUSE AND AFFIDAVITS ANNEXED.....
ANSWERING AFFIDAVITS.....
REPLYING AFFIDAVITS.....
EXHIBITS.....
OTHER.....

.....1-2.....
.....3-4.....
.....5.....

FILED

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COUNTY CLERK'S OFFICE
NEW YORK

UPON THE FOREGOING CITED PAPERS, THIS DECISION/ORDER ON THE MOTION IS AS FOLLOWS:

Plaintiffs move for an Order pursuant to CPLR§ 3126, striking the answer of The City of New York ("the City"), and precluding it from offering any evidence and testimony at the trial of this action, upon the ground that it has willfully failed to obey a So-Ordered Stipulation of Hon. Barbara Jaffe dated October 23, 2012; precluding defendant City from offering into evidence at the trial of this action any of the information called for in plaintiff's Third Notice for Discovery and Inspection dated August 7, 2012, upon the ground that defendant City has willfully failed to serve a discovery response pursuant to said So Ordered Stipulation; striking the answer of defendant

Memorial Sloan-Kettering (“Memorial”), and precluding it from offering into evidence at the trial of this action any of the information called for in plaintiff’s Third Notice for Discovery and Inspection dated August 7, 2012, upon the ground that said defendant has willfully failed to serve an appropriate and responsive discovery response to plaintiffs’ aforesaid Third Notice for Discovery and Inspection.

Defendants’ oppose. After a review of the instant motion, all relevant statutes and case law, the Court denies the motion.

Factual and procedural background:

Plaintiffs seek monetary damages for personal injuries Johanna Ceccarini allegedly sustained on February 14, 2008, when she tripped and fell on a broken tree grate adjoining defendant Memorial’s premises on East 67th Street between First and York Avenues, in New York County.

Positions of the parties:

Plaintiffs assert that they served defendants with the aforesaid discovery demands dated August 7, 2012, and that both defendants have “willfully” failed to obey Judge Jaffe’s So-Ordered Stipulation, requiring them to serve a response to plaintiffs’ Third Supplemental Notice for Discovery and Inspection. They also assert that Memorial has willfully failed to serve an appropriate and responsive discovery response. Plaintiffs also assert that they served both defendants with the aforementioned discovery demands dated August 7, 2012, and as of the date of the instant motion, more than sixty (60) days have elapsed, and the City has failed to respond to plaintiffs’ discovery demands.

Annexed as plaintiffs’ Exhibit “C,” is a letter addressed to Ms. Yael Barbibay, Esq., an attorney with Corporation Counsel, dated November 21, 2012, wherein plaintiff’s counsel’s paralegal advises Ms. Barbibay that a courtesy copy of said Third Supplemental Notice for Discovery

and Inspection dated August 7, 2012 is enclosed. Thereafter, on October 23, 2012, at a compliance conference, the Court issued the aforementioned stipulation, mandating plaintiffs to serve a courtesy copy of the aforementioned discovery demands on the City, and mandating the City to serve its responses thereto within thirty (30) days thereafter.

Plaintiffs argue that despite the fact that the City and particularly Memorial, have repeatedly denied any participation in the installation of any trees or tree grates at the location or in their upkeep or maintenance, their counsel has recently learned that the subject tree grates were removed and replaced with stone work some time after January 1, 2011. Thus, plaintiffs argue that "since the very crux of the liability issues of this action is the installation of the tree grates and the maintenance of a broken tree grate upon which plaintiff was caused to trip and fall, it is imperative to [their] claim to obtain the information sought in their discovery demands, namely, information related to the work recently completed at the accident site.

Additionally, they argue that it would seem that the disclosure of such information by Memorial would be beneficial in that it may demonstrate that Memorial, in fact, bore no responsibility for the installation, maintenance and/or removal of the grates. Plaintiffs also argue that while it is well settled that evidence concerning post-accident repairs is generally inadmissible, where as here, there are issues of control and maintenance, such evidence is actually admissible and discoverable.

Defendant City argues that as a preliminary matter, it must be noted that plaintiffs' motion is procedurally improper because they have failed to request a resolution conference pursuant to this Part's Rules prior to the filing of the instant motion. Since Justice Jaffe's rules are not binding on this Court, this argument is unavailing. However, the City argues that notwithstanding the alleged procedural impropriety, plaintiffs' motion has been rendered moot because the City now submits its

response to plaintiffs' Third Supplemental Notice for Discovery and Inspection as its Exhibit "C," annexed to its opposition papers.

The City also argues that its actions in the instant case cannot and should not be construed as willful or contumacious. It asserts that its failure to timely respond to plaintiffs' discovery demands was not a deliberate effort to impede the progression of this proceeding. It also asserts that plaintiff filed the instant motion without exercising any other attempt to resolve the outstanding discovery at issue. Thus, the City argues that the drastic remedy of striking its answer is premature and certainly not warranted.

Defendant Memorial also argues that the drastic penalty of striking its answer is not warranted at this juncture in the proceeding, in that it did not violate any court order, and in fact, responded to plaintiffs' August 7, 2012, discovery demand in a timely matter. Memorial asserts that plaintiffs do not appear to allege that it failed to respond or timely respond to said demand, but merely take issue with its objections.

Conclusions of law:

CPLR§ 3126 addresses various penalties for the refusal to comply with disclosure. A court, in its discretion, may invoke the drastic remedy of striking an answer if it determines that a defendant's failure to comply with discovery demands is willful, contumacious, deliberate or in bad faith (see *Careccia v. Metropolitan Suburban Bus Authority*, 18 A.D.3d 793 [2d Dept. 2005], *lv denied* 7 N.Y.3d 719 [2006]; *Dexter v. Horowitz Management*, 267 A.D.2d 21 [1st Dept. 1999]; *Goldstein v. CIBC World Mkts. Corp.*, 30 A.D.3d 217 [1st Dept. 2006]; *Min Yoon v. Costello*, 29 A.D.3d 407 [1st Dept. 2006]; *Orlando v. Arcade Cleaning Corp.*, 253 A.D.2d 362 [1st Dept. 1998]). Indeed, granting judgment in a party's favor because its adversary has failed to produce discovery materials is a "drastic" remedy, that is "appropriate only when less severe sanctions have been ruled

out” (*Tommy Hilfiger, USA v. Commonwealth Trucking*, 300 A.D.2d 58, 60 [1st Dept. 2002]).

The movant bears the burden to “clearly establish” that the unavailability of the document(s) “fatally compromised [its] ability to prosecute the action (*Coleman v. Putnam Hosp. Ctr.*, 74 A.D.3d 1009, 1011 [2d Dept. 2010], *lv dismissed* 16 N.Y.3d 884 [2011]), or to come forward with such a clear-cut showing of willfulness (*Forman v. Jamesway Corp.*, 175 A.D.2d 514 [3d Dept. 1991]).

In the instant case, plaintiffs have failed to present any evidence that defendants’ alleged failure to comply with discovery demands was deliberate, in bad faith, and/or seriously jeopardized their case. Indeed, the City submitted their response to Plaintiffs’ Third Supplemental Notice For Discovery and Inspection on April 1, 2013. Moreover, plaintiffs served the demand in question on August 7, 2012 and Memorial timely responded with objections on August 24, 2012.

Since the instant motion specifically addresses the striking of answers for failure to provide discovery responses, the Court will not, at this time, determine the relevance of the contents of said discovery demands.

Therefore, in accordance with the foregoing, it is hereby

ORDERED that the plaintiffs’ motion is denied; and it is further

ORDERED that a compliance conference is scheduled for July 2, 2013 at 2:00 pm in room 103 at 80 Centre Street; and it is further

ORDERED that this constitutes the decision and order of the Court.

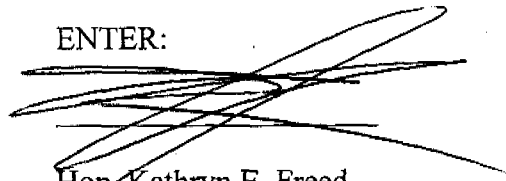
DATED: June 13, 2013

JUN 13 2013 **FILED**

JUN 19 2013

COUNTY CLERK'S OFFICE
NEW YORK

ENTER:



Hon. Kathryn E. Freed

J.S.C.

**HON. KATHRYN FREED
JUSTICE OF SUPREME COURT**