

Torres v City of New York

2013 NY Slip Op 31286(U)

June 13, 2013

Supreme Court, New York County

Docket Number: 401896/2012

Judge: Kathryn E. Freed

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SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

PRESENT: HON. KATHRYN FREED
JUSTICE OF SUPREME COURT Justice

PART 5

Index Number : 401896/2012
TORRES, JUSTINA
vs.
CITY OF NEW YORK
SEQUENCE NUMBER : 001
STRIKE A PLEADING CAL # 67

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

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


FILED

JUN 19 2013

COUNTY CLERK'S OFFICE
NEW YORK

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

Dated: 6-13-13
JUN 13 2013


_____, J.S.C.
HON. KATHRYN FREED
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
JUSTINA TORRES, as Administratrix of the Estate
of RUBEN TORRES,

Plaintiff,

-against-

THE CITY OF NEW YORK and KIEWIT
CONSTRUCTORS INC.,

Defendant.

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

DECISION/ORDER
Index No. 401896/2012
Seq. No. 001

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

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.....1-2.....
ORDER TO SHOW CAUSE AND AFFIDAVITS ANNEXED.....
ANSWERING AFFIDAVITS.....
REPLYING AFFIDAVITS.....
EXHIBITS.....3-5.....
OTHER.....

FILED
JUN 19 2013
COUNTY CLERK'S OFFICE
NEW YORK

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

Defendants move for an Order pursuant to CPLR§3126, dismissing plaintiff's Complaint for failure to comply with discovery demands, or, in the alternative; pursuant to CPLR§3042, precluding plaintiff from offering evidence at the trial of this action as to matter of which particulars have been sought but not provided, or in the alternative, pursuant to CPLR§3124, compelling plaintiff to comply with said discovery demands.

No opposition has been submitted. After a review of the instant motion, all relevant statutes

and case law, the Court grants said motion in part and denies it in part.

Factual and procedural background:

This is an action for the wrongful death of plaintiff decedent who on June 13, 2009, fell from the southern approach to the Willis Avenue Bridge on the Manhattan side to the street below, and landed on the southeast corner of 125th Street and Marginal Street, in New York County.

Plaintiff initially commenced this action in Bronx County Supreme Court against the City and Kiewit, indicating that the basis of venue was “Location of Tort” and “Decedent’s Residence.” However, upon defendants’ motion, the venue of this matter was subsequently changed to New York Supreme Court. Plaintiff filed a Notice of Claim against the City on September 2, 2009. Plaintiff then commenced the instant suit via the filing of a summons and complaint in Bronx Supreme Court on May 3, 2010. Subsequently, defendants joined issue via the service of a verified answer on May 26, 2010. On July 13, 2012, defendants requested that plaintiff serve responses to their respective demands. Furthermore, defendants have telephoned plaintiff’s counsel reiterating their request for a response. To date, defendants have not received any response from plaintiff.

Defendants argue that the time in which a Bill of Particulars and responses to discovery demands, other than the deposition notice, could be timely served has clearly passed. Additionally, plaintiff has failed to comply with discovery and has also failed to request an extension of time to comply.

It is well settled that “[t]he nature and degree of the penalty to be imposed pursuant to CPLR 3126 rests within the discretion of the Supreme Court (see *Raville v. Elnomany*, 76 A.D.3d 520 [2d Dept. 2010], *lv dismissed* 16 N.Y.3d 739 [2011]; *Negro v. St. Charles Hosp. & Rehabilitation Ctr.*, 44 A.D.3d 727, 728 [2d Dept. 2007]; *Rawlings v. Gillert*, 78 A.D.3d 806 [2d Dept. 2010]; *Pinto v.*

Tenenbaum, 105 A.D.3d 930 [2d Dept. 2013]). [W]hen a party fails to comply with a court order and frustrates the disclosure scheme set forth in the CPLR, it is well within the Trial Judge's discretion [to dismiss a pleading]' (*Kihl v. Pfeffer*, 94 N.Y.2d 118, 122 [1999]).

However, strong public policy favors the resolution of cases on the merits (see *Negro v. St. Charles Hosp. & Rehabilitation Ctr.*, 44 A.D.3d at 728]. Moreover, the drastic remedy of striking an answer is inappropriate absent a clear showing that the failure to comply with discovery demands is willful or contumacious (see *Laskin v. Friedman*, 90 A.D.3d 617, 617-618 [2d Dept. 2011]; *Nunez v. Long Is. Jewish Med. Ctr.—Schneider Children's Hosp.*, 82 A.D.3d 724 [2d Hosp. 2011]; *Hoi Wah Lai v. Mack*, 89 A.D.3d 990 [2d Dept. 2011]; *Polsky v. Tuckman*, 85 A.D.3d 750 [2d Dept. 2011]).

“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 failure to comply' (*Savin v. Brooklyn Mar. Park Dev. Corp.*, 61 A.D.3d 954, 954-955 [2d Dept. 2009], or a failure to comply with court ordered discovery over an extended period of time' (*Pappas v. Papadatos*, 38 A.D.3d 871, 872 [2d Dept. 2007]; see also *Russell v. B&B Industries, Inc.*, 309 A.D.2d 914, 915 [2d Dept. 2003]).

Under the circumstances of the case at bar, the Court finds that dismissal of the complaint at this time is unwarranted. The Court notes that while defendants have annexed the aforementioned letter to plaintiff's counsel as Exhibit “D,” this is not sufficient evidence that plaintiff's failure to comply can be classified as “wanton and contumacious.” Indeed, there is no evidence that plaintiff disregarded any previous orders rendered by the court to comply with discovery or face the consequences.

Therefore, in accordance with the foregoing, it is hereby

ORDERED that the component of defendants' motion to dismiss plaintiff's complaint pursuant to CPLR§ 3126 or preclude plaintiff from offering evidence at trial as to matters of which particulars have been sought but not provided pursuant to CPLR§ 3024, is hereby denied and it is further

ORDERED that the component of defendants' motion pursuant to CPLR§ 3124 is granted to the extent that plaintiff is ordered to comply with all defendants' discovery demands, including a Bill of Particulars, within thirty days (30 days) of this order; and it is further

ORDERED that upon plaintiff's failure to comply with this order shall result in the striking of its Answer; and it is further

ORDERED that defendants shall serve a copy of this order on plaintiff and the Trial Support Office at 60 Centre Street, Room 158; and it is further

ORDERED that this constitutes the decision and order of the Court.
ALL PARTIES TO APPEAR AT A COMPLIANCE CONFERENCE ON JULY 23, 2013, IN RD: 103 AT 80 CENTRE ST. AT 2⁰⁰ PM

DATED: June 13, 2013

ENTER:



Hon. Kathryn E. Freed
J.S.C.
HON. KATHRYN FREED
JUSTICE OF SUPREME COURT

JUN 13 2013

FILED

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COUNTY CLERK'S OFFICE
NEW YORK