

Warren v Evans

2013 NY Slip Op 34122(U)

July 17, 2013

Supreme Court, Nassau County

Docket Number: 21744/10

Judge: Denise L. Sher

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This opinion is uncorrected and not selected for official publication.

SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK

PRESENT: HON. DENISE L. SHER
Acting Supreme Court Justice

TAMMY WARREN, as Administratrix of the Personal
Property, Goods, Chattels and Credits which were of
GRAHAM JAMES WARREN a/k/a GRAHAM WARREN,
Deceased, and TAMMY WARREN, Individually,

TRIAL/IAS PART 33
NASSAU COUNTY

Plaintiffs,

Index No.: 21744/10
Motion Seq. No.: 03
Motion Date: 06/25/13

- against -

GREGORY EVANS, COUNTY OF NASSAU and
CITY OF GLEN COVE,

Defendants.

The following papers have been read on this motion:

	Papers Numbered
<u>Notice of Motion, Affirmations and Exhibits</u>	<u>1</u>
<u>Affirmation in Opposition and Exhibits</u>	<u>2</u>
<u>Reply Affirmation</u>	<u>3</u>

Upon the foregoing papers, it is ordered that the motion is decided as follows:

Plaintiffs move, pursuant to CPLR § 3126, for an order striking the Answer of defendant County of Nassau ("County") due to defendant County's willful and contumacious conduct in ignoring and disregarding multiple orders of this Court; or moves, in the alternative, pursuant to CPLR § 3124, for an order compelling defendant County to fully comply and respond to plaintiffs' discovery demands within twenty (20) days from the Decision and Order of the Court. Defendant County opposes the motion.

This action arises out of fatal personal injuries sustained by plaintiff Tammy Warren's

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decedent, Graham Warren, as a result of a motor vehicle accident which occurred on Forest Avenue, at its intersection with the entrance to the Glen Cove Shopping Center in Glen Cove, New York, on August 29, 2009. It is alleged that the motor vehicle owned and operated by defendant Gregory Evans came into contact with the motor cycle being operated by decedent Graham Warren.

Briefly, plaintiffs commenced suit on November 22, 2010. Defendant County served its Demands for a Bill of Particulars upon plaintiffs and, in response thereto, plaintiffs particularized the claims against said defendant including, *inter alia*:

negligently adopting a traffic control management system and/or plan without any adequate study, analysis and/or review;

failing and omitting to undertake any reasonable study, analysis and/or review of the aforementioned intersection and the surrounding areas leading to and from said location for the purpose of alleviating any danger thereat; and,

negligently, carelessly and recklessly ignoring and/or disregarding any reasonable analysis of traffic flow at the aforementioned intersection including the volume of vehicular and pedestrian traffic thereat. *See* Plaintiffs' Affirmation in Support Exhibit B.

Concomitant with serving the Verified Bill of Particulars, on January 16, 2012, plaintiffs served the "First Notice for Discovery and Inspection," as well as the "Combined Demands" and a "Demand for a Verified Bill of Particulars Relative to Defendants' Affirmative Defenses." *See* Plaintiffs' Affirmation in Support Exhibit C.

Counsel for plaintiffs submits, "[t]he discovery issues which are the basis for of (*sic*) this Motion were addressed before the Court on numerous Conference dates including February 7, 2013, March 13, 2013 and May 14, 2013. Notwithstanding the Court's repeated directives for Defendant to fully respond to Plaintiff's (*sic*) discovery demands, Defendant has failed to do so. Moreover, the Court had directed Defendant to provide an Affidavit as to those documents requested which Defendant could not provide setting forth a detailed Affidavit as to the efforts

made to locate same. Defendant never provided said Affidavits.”

Counsel for plaintiffs adds, “[i]t must be noted that Plaintiff (*sic*) previously moved for an Order compelling discovery which resulted in the Order of the Hon. Denise L. Sher dated August 8, 2012. Notwithstanding Justice Sher’s Decision, Defendant has yet to provide essential responses. Consequently, there have been numerous Conferences with the Court (including a more than 2 hour Conference on March 13, 2013) where the Court again directed compliance....As recently as the Conference on May 24, 2013, Defendant’s counsel defiantly advised the Court that it had no intention of complying.”

Counsel for plaintiffs contends, “[s]ignificantly, notwithstanding the limited discovery provided by Defendant, Defendant ultimately did produce a letter dated July 20, 1994 from PSC Engineering who provided the 1993 traffic study relative to enlarging the subject shopping center wherein a left turn arrow was requested from Forest Avenue at its intersection with the Glen Cove Shopping Center entrance/exit where the accident occurred....Consequently, Plaintiff (*sic*) has repeatedly sought all studies and plans upon which any denial and/or implementation was based. Certainly, these plans and studies are central to the issues of whether the traffic plan(s) had no rationale basis or were plainly inadequate. [citation omitted]. Certainly, these studies must be produced. To date Defendant has failed to provide said studies.” *See* Plaintiffs’ Affirmation in Support Exhibit G.

On December 7, 2012, plaintiffs served on defendant County a Second Notice for Discovery and Inspection which sought, *inter alia*, “[a]ll reports, including any pre-printed forms, completed by the Traffic Signal Management Section/Unit pertaining to the subject location on August 29, 2009 and prior thereto.” *See* Plaintiffs’ Affirmation in Support Exhibit I ¶ 5. Defendant County provided a Response to Plaintiff’s Second Notice for Discovery and Inspected on February 4, 2013, which indicated that “[w]ith respect to plaintiff’s (*sic*) request for

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'All reports, including any pre-printed forms, completed by the Traffic Signal Management Section/Unit pertaining to the subject location on August 29, 2009 and prior thereto', a search is being made for these records, and, to the extent that they exist and are not otherwise privileged, and not have been provided pursuant to earlier discovery responses, copies will be provided to Plaintiff's (sic) counsel.' See Plaintiffs' Affirmation in Support Exhibit J ¶ 5. Counsel for plaintiffs submits that, to date, defendant County has failed to provide any such response and that the aforementioned reports are material and relevant.

Plaintiffs' Second Notice for Discovery and Inspection also sought, "[c]omplete copies of all pre-printed forms utilized as checklists and/or surveys or other tools by the Traffic and Engineering Department and/or Traffic Signal Management for purposes of analyzing, investigating and/or reviewing any traffic study/plan/analysis conducted by a private entity for a traffic control intersection that was being implemented from 1992 through the subject date of accident." See Plaintiffs' Affirmation in Support Exhibit I ¶ 6. With respect to said request, defendant County's Response to Plaintiff's Second Notice for Discovery and Inspected stated, "[w]ith respect to plaintiff's (sic) request for *'Complete copies of all pre-printed forms utilized as checklists and/or surveys or other tools by the Traffic and Engineering Department and/or Traffic Signal Management for purposes of analyzing, investigating and/or reviewing any traffic study/plan/analysis conducted by a private entity for a traffic control intersection that was being implemented from 1992 through the subject date of accident'* upon information and belief, such forms do not exist." See Plaintiffs' Affirmation in Support Exhibit J ¶ 6. Counsel for plaintiffs claims "this response is palpably improper as it is utterly meaningless."

Counsel for plaintiffs further claims that "[d]efendant's counsel at the last two Conferences stated that more than one Department would be involved in document searches and neither he nor the Defendant COUNTY were willing to expend the time to conduct such search. Nor has Defendant ever offered any explanation as to why this document production is coming in piece meal thereby preventing Plaintiff (sic) from making informed inquiry of Defendant's

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witness in the manner anticipated by the C.P.L.R.”

On February 27, 2013, plaintiffs served on defendant County a Third Notice for Discovery and Inspection which sought, *inter alia*, “[c]opies of all studies conducted and/or relied upon by Defendant **COUNTY OF NASSAU** relating to the flow or volume of vehicular traffic within the City of Glen Cove between January 1993 up to and including August 29, 2009 (Lemberger EBT dated February 4, 2013, pp 287-292).” *See* Plaintiffs’ Affirmation in Support Exhibit K ¶ 3. Defendant County objected to this demand indicating that the request spans a period over 16 years. Counsel for plaintiffs adds that, “[w]ithout waiving this objection, it then provided a traffic study from November 15, 2010 outside the time period requested by Plaintiff (*sic*). Clearly, this post-accident study is meaningless and one more instance of Defendant obstructing discovery. The Court has repeatedly instructed Defendant that in the event documents exist they are to be produced and Defendant cannot hide behind a claim that it covers a 16 year period. If the records do not exist, the Court directed that an Affidavit to that effect be provided.”

Counsel for plaintiffs argues, “[c]learly, there is no justifiable explanation for Defendant’s continuing refusal to comply with the Court’s directives and provide responsive discovery. Defendant’s conduct has been willful and contumacious from the outset and its outright refusal to comply with the Court’s Orders by providing responsive demands or in the alternative an Affidavit as to why said documents do not exist and what efforts were made to locate same can no longer be tolerated.”

In opposition to the motion, counsel for defendant County argues, “[p]laintiff’s (*sic*) motion is based upon half-truths and outright misrepresentations. It appears to be predicated upon plaintiff (*sic*) counsel’s attempt to create the false impression that the County has been withholding discoverable documentation, when the truth is that plaintiff’s (*sic*) counsel has had almost all of the sought after documentation for months....[N]either Mr. Rosen [counsel for plaintiffs], nor his associate, Mr. Ira Pearlman, Esq. (also part of plaintiff’s (*sic*) counsel’s law firm) have ever apprised the Court that they have been in possession of the private engineering

study which provided the planning basis for the subject traffic signal light, for over a year. Instead, plaintiff's (*sic*) counsel, knowing full well that there was a full, complete formal study which they have had possession of, have been trying to convince the Court that the County is deliberately withholding a non-existent study which they are attempting to obtain."

Counsel for defendant County further asserts that "[t]he County, in accordance with the New York State regulatory authority is permitted to dispose of certain Department of Public Works ('DPW' herein) records six years after completion of the project which is the subject of the records. The applicable New York State regulation is entitled '*Records Retention and Disposition Schedule CO-2 For Use by Counties*', and is set forth in Section 185.13 8 NYCRR (Appendix J)." *See* Defendant County's Affirmation in Opposition Exhibits A, B and C. Counsel for defendant County therefore submits that "since the Traffic Signal Light in question was installed in the year 1995, the County was only obligated to preserve most of the documents which plaintiff (*sic*) was requesting (if they ever existed at all), for a period of six years. This means that after the year 2001, the County was not required to retain many of the records which the plaintiff (*sic*) has been demanding."

Counsel for defendant County adds, "[d]uring the course of this litigation, plaintiff's (*sic*) counsel has been previously advised that in the case of a developer seeking to place a traffic signal to regulate traffic into the developer's private property, its is the developer who bears the cost of hiring its own engineering firm to provide the requisite traffic study. This study and associated plans are then offered to the County DPW for its approval or disapproval. Plaintiff's (*sic*) counsel was first advised of this procedure by way of an affidavit from Mr. William Nimmo who is one of the Deputy Commissioners of the Nassau County Department of Public Works. [*see* Defendant County's Affirmation in Opposition Exhibit D]...Notwithstanding that plaintiff's (*sic*) counsel has now been twice advised that the private developer and not the County would have performed the relevant traffic study herein, plaintiff's (*sic*) counsel continues to demand 'studies' from the County, as if they existed, and even though there is no evidence that such

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'studies' were ever done. Compounding this is that plaintiff's (sic) counsel has known full well that a private traffic study was done, because plaintiff's (sic) counsel has had a copy of such study in his possession for over a year." See Defendant County's Affirmation in Opposition Exhibit F.

Counsel for defendant County further contends, "[n]otwithstanding that plaintiff's (sic) counsel has had the PSC Engineering study for over a year, plaintiff (sic) has nevertheless been making discovery demands upon the County requesting essentially the same information which is contained in the PSC study. Moreover, plaintiff (sic) has been making discovery requests for documentation which is over eighteen years old, even though the County is not required to maintain such documentation (even if it did exist) for more than six years after completion of the associated project." See Defendant County's Affirmation in Opposition Exhibits A, B and C.

With respect to counsel for plaintiffs' assertion that defendant County did not abide by the August 8, 2012 Decision and Order of this Court, counsel for defendant County states that this assertion "is completely false." In response to the August 8, 2012 Decision and Order of this Court, counsel for defendant, "in compliance with that decision provided further responses to items #14 and #16 in Plaintiff's 'First Notice for Discovery and Inspection.' The County did this in its 'Second Further Response to Plaintiff's First Notice for Discovery and Inspection' dated 9/24/12.... In this connection, plaintiff (sic) misrepresented the facts to the Court." See Defendant County's Affirmation in Opposition Exhibit J.

Counsel for defendant County submits that plaintiffs' Second Notice for Discovery and Inspection, dated December 7, 2012, consisted of seven requests and that defendant County responded to that demand in its Response to Plaintiffs' Second Notice for Discovery and Inspection, dated February 4, 2013. See Defendant County's Affirmation in Opposition Exhibit K. In said response, defendant County provided more documentation to plaintiffs. Then, in its Second Response to Plaintiffs' Second Notice for Discovery and Inspection, dated March 7, 2013, defendant County provided yet more documentation consisting of two site plans. See

Defendant County's Affirmation in Opposition Exhibit L. Plaintiffs' then made a Third Notice for Discovery and Inspection, dated February 27, 2013, which included six more discovery demands. Defendant County responded to said demand in its Response to Plaintiffs' Third Notice for Discovery and Inspection, dated May 13, 2013, in which defendant County provided still more documentation. *See* Defendant County's Affirmation in Opposition Exhibit M. Defendant County objected to plaintiffs' request for "[c]opies of all studies conducted and/or relied upon by Defendant COUNTY OF NASSAU relating to the flow or volume of vehicular traffic within the City of Glen Cove between January 1993 up to and including August 29, 2009..." In objecting to said demand, defendant County asserted, "[t]he Defendant objects to this demand as vague, broad and unduly burdensome. This request spans a period of over sixteen years for the entire City of Glen Cove." Defendant County refers to the Affidavit of William Nimmo in support of this objection. *See* Defendant County's Affirmation in Opposition Exhibit D.

In response to counsel for plaintiffs' accusations that "the Court had directed Defendant to provide an Affidavit as to those documents requested which Defendant could not provide setting forth a detailed Affidavit as to the efforts to locate same" and "[d]efendant never provided said affidavits," defendant County provides the Affidavits of William Nimmo and Aryeh Lemberger which "demonstrate that plaintiff (*sic*) has previously received the documents that plaintiff's (*sic*) counsel is requesting. Moreover, they will also show that the County's responses to plaintiff's (*sic*) discovery requests have been accurate. Thus, it is submitted that plaintiff's (*sic*) claim that the County has not submitted affidavits is now moot." *See* Defendant County's Affirmation in Opposition Exhibits D and E.

In reply to defendant County's opposition, counsel for plaintiffs argues, "[a] reading of the Affirmation in Opposition of James N. Gallagher, Esq. plainly reveals that there is no valid basis in law or fact upon which Defendant COUNTY OF NASSAU can oppose Plaintiff's (*sic*) Motion."

CPLR § 3126 provides the "[p]enalties for refusal to comply with order or to disclose." It

reads, “[i]f any party, or a person who at the time a deposition is taken or an examination or inspection is made is an officer, direction, member, employee or agent of a party or otherwise under a party’s control, refuses to obey an order for disclosure or wilfully fails to disclose information which the court finds ought to have been disclosed pursuant to this article, the court may make such orders with regard to the failure or refusal as are just, among them: 1. An order that the issues to which the information is relevant shall be deemed resolved for purposes of the action in accordance with the claims of the party obtaining the order; or 2. an order prohibiting the disobedient party from supporting or opposing designated claims or defenses, from producing in evidence designated things or items of testimony, or from introducing any evidence of the physical, mental or blood condition sought to be determined, or from using certain witnesses; or 3. an order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or any part thereof, or rendering a judgment by default against the disobedient party.”

The imposition of sanctions pursuant to CPLR § 3126 is a determination to be made within the sound discretion of the court. Although the Court has broad discretion in determining the appropriate sanction pursuant to CPLR § 3126, the “general rule is that a court should only impose a sanction commensurate with the particular disobedience it is designed to punish and go no further.” *See Rossal-Daub v. Walter*, 58 A.D.3d 992, 871 N.Y.S.2d 751 (3d Dept. 2009) *citing Landrigen v. Landrigen*, 173 A.D.2d 1011, 569 N.Y.S.2d 843 (3d Dept. 1991).

Upon a review of all the evidence and arguments presented in the papers before it, the Court fails to find that defendant County “refuse[d] to obey an order for disclosure or wilfully fail[ed] to disclose information which the court finds ought to have been disclosed.” *See* CPLR § 3126. It is clear that defendant County served responses to the numerous demands made by counsel for plaintiffs and made a good faith effort to respond to counsel for plaintiffs’ continuing demands. Defendant County provided counsel for plaintiffs with all of the documents which the Department of Public Works staff was able to find. Defendant County has further provided the

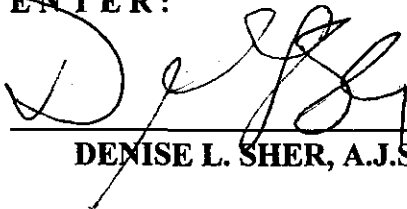
Affidavits of Deputy County Clerk Barbara Brudie, Esq., William Nimmo and Aryeh Lemberger to comply with both this Court's orders, as well as plaintiffs' discovery demands. *See* Defendant County's Affirmation in Opposition Exhibits A, D and E. The Court finds no evidence of defendant County's alleged "willful and contumacious conduct in ignoring and disregarding multiple orders of this Court." The Court finds that the documentation provided by defendant County, coupled with the aforementioned Affidavits, sufficiently answer all of plaintiffs' discovery requests.

Accordingly, plaintiffs' motion, pursuant to CPLR § 3126, for an order striking the Answer of defendant County due to defendant County's willful and contumacious conduct in ignoring and disregarding multiple orders of this Court; or, alternatively, pursuant to CPLR § 3124, for an order compelling defendant County to fully comply and respond to plaintiffs' discovery demands within twenty (20) days from the Decision and Order of the Court is hereby **DENIED**.

All parties shall appear for a Certification Conference in IAS Part 33 of the Nassau County Supreme Court, 100 Supreme Court Drive, Mineola, New York, on August 27, 2013, at 9:30 a.m.

This constitutes the Decision and Order of this Court.

ENTER:



DENISE L. SHER, A.J.S.C.

ENTERED

JUL 18 2013

**NASSAU COUNTY
COUNTY CLERK'S OFFICE**

Dated: Mineola, New York
July 17, 2013