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| <b>Jimenez v Broadway 207 Realty Corp.</b>                                                                                                                                                                                                                       |
| 2015 NY Slip Op 32166(U)                                                                                                                                                                                                                                         |
| November 16, 2015                                                                                                                                                                                                                                                |
| Supreme Court, New York County                                                                                                                                                                                                                                   |
| Docket Number: 155115/15                                                                                                                                                                                                                                         |
| Judge: Kathryn E. Freed                                                                                                                                                                                                                                          |
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| This opinion is uncorrected and not selected for official publication.                                                                                                                                                                                           |

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: Part 2

-----X  
LUISA JIMENEZ,

Plaintiff,

DECISION/ORDER

-against-

Index No. 155115/15

Mot. Seq. No. 001

BROADWAY 207 REALTY CORP., ELYSEE  
INVESTMENT CO., LA NUEVA ESPANA, INWOOD  
RESTAURANT CORP., AND JOANNA FRANCISCO,

Defendants.

-----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 AFFIDAVIT ANNEXED

1 (Exs. A-D)

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

Defendants Broadway 207 Realty Corp., Inwood Restaurant Corp. d/b/a La Nueva Espana and Joanna Francisco move for an order 1) pursuant to CPLR 3042(d) and 3126, striking plaintiff Luisa Jimenez's complaint and precluding her from offering any evidence in this action or, in the alternative, 2) pursuant to CPLR 3042, compelling plaintiff to provide complete responses to their outstanding discovery demands, and 3) for costs, attorneys' fees and such other relief as this Court deems just and proper. The motion, which is unopposed, is **granted** to the extent of directing plaintiff to provide all outstanding discovery within 30 days of the service of this order with notice of entry.

**Factual and Procedural Background:**

This action arises from an incident on January 30, 2015, in which plaintiff was allegedly injured on a defective sidewalk basement door at or near 606 West 207<sup>th</sup> Street in Manhattan due to the negligence of the defendants. Ex. A.<sup>1</sup> On or about May 20, 2015, plaintiff commenced an action against the defendants which, she claimed, owned, managed, or occupied the premises. Ex. A. The movants served their answer and combined discovery demands, including a demand for a verified bill of particulars, on or about June 29, 2015. Exs. B and C. To date, the movants have not received a response to these discovery requests despite a good faith request for the same mailed September 11, 2015. Ex. D. Plaintiff neither objected to the demands nor requested an extension of time in which to respond to the same.

After the September 11, 2015 letter failed to prompt a response from plaintiff, the movants brought the instant motion seeking to strike the complaint and preclude plaintiff from introducing at trial evidence relevant to their discovery demands or, in the alternative, to compel plaintiff to produce all outstanding discovery. Plaintiff has not opposed the motion.

**Position of the Movants:**

The movants argue that the complaint should be stricken and plaintiff should be precluded from introducing evidence at trial given her failure to respond to their discovery demands, including their demand for a verified bill of particulars. In the alternative, they assert that plaintiff must be compelled to provide the discovery they need to defend the case.

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<sup>1</sup>All references are to the exhibits annexed to the affirmation in support of the motion.

**Conclusions of Law:**

CPLR 3042(a) states, in pertinent part, that “[w]ithin thirty days of service of a demand for a bill of particulars, the party on whom the demand is made shall serve a bill of particulars complying with each item of the demand, except any item to which the party objects, in which event the reasons for the objection shall be stated with reasonable particularity. The assertion of an objection to one or more of the items in the demand shall not relieve the party on whom the demand is made from the obligation to respond in full within thirty days of service of the demand to the items of the demand to which no objection has been made.”

Insofar as it is pertinent, CPLR 3042(c) provides “[i]f a party fails to respond to a demand in a timely fashion or fails to comply fully with a demand, the party seeking the bill of particulars may move to compel compliance, or, if such failure is willful, for the imposition of penalties pursuant to subdivision (d) of this rule.” Subdivisions (c) and (d) provide that sanctions for the failure to respond to a demand for a bill of particulars may be granted only when such failure is willful. Therefore, before the sanction of preclusion can be granted or a pleading stricken, a showing of “willful or contumacious conduct” is necessary. *See Fairbanks Capital Corp. v Nagel*, 289 AD2d 99 (1<sup>st</sup> Dept 2001).

In the case at bar, it is clear that plaintiff failed to provide the movants with a bill of particulars. However, this fact alone is insufficient to grant the movants’ desired remedy of precluding plaintiff from introducing evidence of her claims at this juncture. *See Kovacs v Castle Restoration and Construction, Inc.*, 262 AD2d 165 (1<sup>st</sup> Dept 1999). However, this Court directs plaintiff, pursuant to CPLR 3042 (c), to provide a verified bill of particulars within 30 days of

service of this order with notice of entry.

Similarly, the movants' motion to strike the complaint or to preclude plaintiff pursuant to CPLR 3126 due to her failure to provide responses to their combined discovery demands is denied. The movants have failed to establish that plaintiff's conduct, i.e., her failure to respond to the movants' demands and one good faith request for compliance, was willful, contumacious, or in bad faith. *See Nat. Cas. Co. v Amer. Home Assur. Co.*, 102 AD3d 553, 554 (1<sup>st</sup> Dept 2013); *Armstrong v B.R. Fries & Assocs., Inc.*, 95 AD3d 697, 698 (1st Dept 2012).

Even if plaintiff's conduct had been willful and contumacious, "the extreme penalty of dismissal should not be imposed in the absence of any prior notice to [plaintiff] that such a sanction might be imminent." *Armstrong, supra*, at 698. The movants' papers are devoid of any indication that plaintiff had been warned, prior to the filing of this motion, that she would be precluded from introducing testimony or evidence, or have her answer stricken, if she did not provide certain discovery. For the same reason, this Court declines to impose costs on plaintiff for the movants' expenses in making this motion.

The Court does direct, however, that pursuant to CPLR 3124, plaintiff must respond to the movants' discovery demands dated June 29, 2015 within 30 days of service of this order with notice of entry. Should plaintiff fail to provide a response to the movants' demands within that time period, then movants shall be able to renew this motion, and this Court may impose sanctions against plaintiff including, but not limited to, preclusion, dismissal, and costs.

Therefore, in accordance with the foregoing, it is hereby:

ORDERED that the branch of the motion seeking to strike the complaint and to preclude plaintiff from introducing evidence at trial is denied with leave to renew should plaintiff fail to comply with this order within thirty days of service of this order with notice of entry; and it is further,

ORDERED that the branch of the motion seeking to compel plaintiff to provide a verified bill of particulars and responses to the movants' combined discovery demands is granted; and it is further,

ORDERED that this case is scheduled for a preliminary conference on February 2, 2016 at 2:15 PM in Room 280 at 80 Centre Street; and it is further,

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

DATED: November 16, 2015

ENTER:

A handwritten signature in black ink, appearing to read 'Kathryn E. Freed', written over a horizontal line.

Hon. Kathryn E. Freed, J.S.C.

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