

Saeed v City of New York
2015 NY Slip Op 32624(U)
May 14, 2015
Supreme Court, Queens County
Docket Number: 27824/2011
Judge: Phyllis Orlikoff Flug
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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE PHYLLIS ORLIKOFF FLUG IA Part
Justice

MUHAMMAD SAEED, AS ADMINISTRATOR x
FOR THE DECEDENT, MOHAMMAD RASHID,
AND MUHAMMAD SAEED, INDIVIDUALLY,

Plaintiff(s),

- against -

THE CITY OF NEW YORK, THE NEW YORK
CITY FIRE DEPARTMENT, VALERIE VERA-
TUDELA, JIMMY BARRERA, EMKAY, INC.,
(ILLINOIS) A/T/D/B/A EMKAY INC., TRUST,
EMKAY INC., TRUST A/T/D/B/A EMKAY, INC.,
(ILLINOIS), AND STUART DEAN COMPANY,

Index
Number 27824 2011

Motion
Dates October 29 &
December 10, 2014

Motion
Cal. Numbers 143 & 146

Motion Seq. Nos. 3 & 4

FILED
MAY 29 2015
COUNTY CLERK
QUEENS COUNTY

The following papers numbered 1 and 18 read on this motion

- Notices of Motion - Affidavits - Exhibits 1 - 8
- Answering Affidavits - Exhibits 9 - 14
- Reply Affidavits 15 - 18

Plaintiff seeks sanctions against defendants The City of New York, The New York City Fire Department, and Valerie Vera-Tudela (City defendants) pursuant to CPLR 3124 and 3126 for failure to respond to discovery demands and for spoliation of evidence and, additionally, for an order staying the trial of this matter pursuant to CPLR 2201; and, by separate motion, seeks similar relief against defendants Jimmy Barrera (Barrera), Emkay, Inc. (Illinois) a/t/d/b/a Emkay Inc. Trust, Emkay Inc. Trust a/t/d/b/a Emkay, Inc. (Illinois)

McGAW, ALVENTOSA & ZAJAC

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(Emkay), and Stuart Dean Company (Stuart Dean). Finally, they seek summary judgment in thier favor on the issue of liability.

On September 15, 2010, the decedent, a pedestrian, was fatally struck by a van owned by Emkay, leased by Stuart Dean, and operated by Barrera while he was standing on the sidewalk at the intersection of Woodside Avenue and 76th Street in Elmhurst, New York. It is alleged that, as the van entered the intersection, it was struck on the side by an ambulance owned by the City of New York and The New York City Fire Department and operated by Valerie Vera-Tudela (Vera-Tudela), which was also proceeding through the intersection, causing the van to tip over onto the decedent. Plaintiff subsequently commenced this wrongful death action against defendants, alleging that the accident was caused by the negligent operation, ownership, and control of defendants' respective vehicles. Pursuant to a so-ordered stipulation by Justice Martin E. Ritholtz dated November 18, 2013, the note of issue was to be filed by November 22, 2013, discovery demands must be served by January 28, 2014, and the depositions of Emkay and Stuart Dean were to be held by February 8, 2014. On November 22, 2013, plaintiff filed the note of issue. On January 28, 2014, plaintiff served the City defendants and Barrera, Emkay, and Stuart Dean with separate discovery demands and notices to produce the event data recorders (EDR) of the van and the ambulance involved in the accident. On February 3, 2014, plaintiff sent a letter to counsel for Emkay and Stuart Dean extending the depositions of said parties for one week. On March 31, 2014, plaintiff forwarded a follow-up letter to counsel for the City defendants requesting all outstanding discovery. To date, defendants have not responded to plaintiff's discovery demands, included the notices to produce the EDR's of the van and the ambulance involved in the subject accident, and the depositions of Emkay and Stuart Dean have not been conducted. Furthermore, it is noted that, by an order of the court dated October 9, 2014, Justice Jeremy S. Weinstein vacated the note of issue in this matter due to significant outstanding discovery.

On his separate motions, plaintiff seeks an order pursuant to CPLR 3124 and 3126 striking the respective answers of the City defendants and Barrera, Emkay, and Stuart Dean or, in the alternative, resolving the issues to which the requested information is relevant in plaintiff's favor or, alternatively, precluding defendants from producing any evidence at trial. Specifically, plaintiff asserts that, despite plaintiff's prior written requests, the City defendants have failed to respond to his discovery demands and have failed to produce the EDR of the ambulance involved in the subject accident, and that, despite plaintiff's prior written requests, Barrera, Emkay, and Stuart Dean have failed to respond to his discovery demands, have failed to produce the EDR of the van involved in the accident, and Emkay and Stuart Dean have failed to appear for scheduled depositions. Pursuant to CPLR 3124, a party seeking disclosure may move to compel compliance or a response to any request, notice, interrogatory, demand, question, or court order. Additionally, as a sanction against a party

who "refuses to obey an order for disclosure or willfully fails to disclose information which the court finds ought to have been disclosed," the court, pursuant to CPLR 3126, may issue an order (1) "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," (2) "prohibiting the disobedient party . . . from producing in evidence designated things or items of testimony," or (3) "striking out pleadings or parts thereof . . ." The willful and contumacious character of a party's conduct can be inferred from his or her repeated failures to comply with court-ordered disclosure and/or discovery demands, coupled with inadequate excuses for these defaults (*see McArthur v New York City Hous. Auth.*, 48 AD3d 431 [2008]; *Bates v Baez*, 299 AD2d 382 [2002]). The nature and degree of the penalty to be imposed under CPLR 3126 lies within the sound discretion of the trial court (*see Workman v Town of Southampton*, 69 AD3d 619 [2010]).

Plaintiff has failed to make a showing that defendants willfully failed to respond to discovery demands or comply with disclosure orders. Moreover, with respect to the request for sanctions based on the alleged spoliation of evidence, plaintiff failed to present any evidence indicating that defendants intentionally or negligently disposed of the EDR's of the vehicles involved in the subject accident after being placed on notice that they might be needed for future litigation (*see e.g. Sloane v Costco Wholesale Corp.*, 49 AD3d 522 [2008]; *Andretta v Lenahan*, 303 AD2d 527 [2003]).

In light of this history, defendants are directed to respond to all outstanding discovery demands, including depositions and notices to produce, within 60 days of the date of this order or be precluded from offering evidence at trial on the issue of liability and damages.

The branch of plaintiff's motion for summary judgment against Barrera, Emkay, and Stuart Dean on the issue of liability is denied. Plaintiff fails to meet his prima facie burden that Barrera operated the van in a negligent manner. According to Barrera's deposition testimony, the traffic light was green as he entered the intersection. Barrera further testified that he did not hear sirens or see the flashing lights of the ambulance at any time prior to the accident. Meanwhile, Vera-Tudela testified at her first deposition that she entered the intersection, with flashing lights and sirens on, while the light was red and, at her second deposition, she testified that, as she proceeded through the intersection with flashing lights and sirens on, the traffic signal was initially red and then turned green. Given the conflicting versions of the circumstances leading up to the subject accident, triable issues of fact exist as to whether Barrera contributed to the accident (*see Ahr v Karolewski*, 48 AD3d 719 [2008]; *Gordon v Honig*, 40 AD3d 925 [2007]; *Kolivas v Kirchoff*, 14 AD3d 493 [2005]).

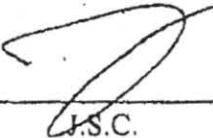
Based on spoliation of evidence, namely, the EDR of the van involved in the subject accident, that branch of plaintiff's summary judgment motion against Barrera, Emkay, and

Stuart Dean is also denied (*see e.g. Fireman's Fund Ins. Co. v Sweeney & Harkin Carpentry & Dry Wall Corp.*, 78 AD3d 650 [2010]).

Given that the note of issue has been vacated pursuant to an order of Justice Weinstein dated October 9, 2014, plaintiff's application for a stay of the trial of this matter pursuant to CPLR 2201 has been rendered moot.

Accordingly, plaintiff's separate motions against the City defendants and Barrera, Emkay, and Stuart Dean pursuant to CPLR 3124 and 3126 are granted only to the extent that defendants are directed to comply with all outstanding discovery demands, including depositions and notices to produce, within 60 days from the date of this order or be precluded from offering any evidence at the time of trial of this matter as to liability and damages. That branch of plaintiff's motion for a stay of the trial of this matter pursuant to CPLR 2201 is also denied. In addition, the branch of plaintiff's motion for summary judgment against Barrera, Emkay, and Stuart Dean on the issue of liability is denied.

May 14, 2015



J.S.C.
HON. PHYLLIS ORLIKOFF FLUG

FILED

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QUEENS COUNTY