Yuk Wha Sung v Pollack
2015 NY Slip Op 32760(U)
July 1, 2015
Supreme Court, Nassau County
Docket Number: 600112/14
Judge: James P. McCormack
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SUPREME COURT - STATE OF NEW YORK

PRESENT:

Honorable James P. McCormack
Acting Justice of the Supreme Court

TRIAL/IAS, PART 40
NASSAU COUNTY

YUK WHA SUNG,

Plaintiff,

Index No.: 600112/14

-against-

Motion Seq. No.: 004

Motion Submitted: 6/2/15

HOWARD K. POLLACK and CODY BECKER,

Defendant.

The following papers read on this motion:

Notice of Motion/Supporting Exhibits.....X
Affirmation in Opposition.....X
Reply Affirmation.....X

Plaintiff, Yuk Wha Sung, moves this court for an order, pursuant to CPLR §3126, striking the answer of Defendant Cody Becker (Becker). In the alternative, Plaintiff seeks an order either resolving all issues of liability in favor of Plaintiff, or preventing Becker

from opposing Plaintiff's claims. Further, Plaintiff seeks an immediate trial on the issue of damages. Becker opposes the motion.

Plaintiff commenced this action by the service of a summons and complaint dated January 8, 2014. Issue was joined by the service of answer dated January 29, 2014.

This action arises from a motor vehicle accident that occurred on December 10, 2013, when Plaintiff's vehicle and the vehicle owned by Pollack and driven by Becker had a head-on collision on Ocean Parkway, east of Jones Beach Tower, County of Nassau. According to Becker, he was operating his vehicle heading westbound on Ocean parkway when Plaintiff's vehicle, which was heading eastbound, crossed over the sizeable median and into oncoming traffic. Becker slowed and turned left, toward the median, but Plaintiff's vehicle also then turned back toward the median and the two vehicles collided head-on. Becker states he was traveling approximately 15 miles per hour at the time of the collision, having slowed from a speed of 50 miles per hour. Plaintiff submits an affidavit in which she states that she remembers driving eastbound on Ocean Parkway, and her next memory is of being removed from the scene of the accident. She remembers nothing else. Becker was arrested at the scene of the accident and has been charged with driving while impaired by drugs. Those charges are still pending.

Defendants brought a prior motion for summary judgment, on the issue of liability, annexed to which was an affidavit from Becker. In the affidavit, Becker acknowledges, under oath, the following: 1) he was operating a vehicle that was involved in an accident,

2) the accident occurred on Ocean Parkway in the Town of Oyster Bay, 3) he was traveling in a westbound lane when Plaintiff's eastbound vehicle crossed over the median into his lane, 4) he swerved, but Plaintiff's car did as well and they ended up colliding head-on, 5) approximately 2 ½ seconds elapsed from the time he saw Plaintiff's car cross the median until the accident, 6) he estimated he was driving 50 mph when he first saw Plaintiff's car crossing the median, and had slowed to about 15 mph at the time of the collision, 7) Plaintiff's vehicle was either traveling at the speed limit or a higher rate of speed as it crossed over the median.

Plaintiff cross-moved seeking an order, *inter alia*, compelling Becker's deposition. In light of the pending criminal charges, Becker opposed the cross motion arguing that a deposition could put him in danger of incriminating himself.

By order dated November 10, 2014, this court denied Defendants' motion for summary judgment and directed Becker to appear for a deposition, but indicated Becker did not have to testify as to any matters that might incriminate him.

On December 22, 2014, Becker appeared for a deposition, but refused to answer any questions other than pedigree information, claiming his 5th Amendments rights and this court's November 14, 2014 order. The within motion ensued.

This court's November 14, 2014 order stated, in relevant part, that Becker could "refuse to answer *only* those that would tend to incriminate him". (Emphasis added). It was clear from that order, which also lifted a stay on discovery, that this court wanted the

deposition to go forward. Somehow, Becker interpreted that to mean that this court felt it necessary to have a deposition where Becker would only acknowledge his name and address. That was clearly not the intent of this court's order. Becker has already submitted testimony under oath in an attempt to better his position in the case. As to those matters, this court finds he has waived his privileges under the 5th Amendment. (*OSRecovery, Inc. v. One Groupe Intern., Inc.* 262 F.Supp.2d 302 [S.D.N.Y. 2003]; *In Re East 51st Street Crane Collapse Litigation*, 30 Misc.3d 521 [N.Y.Sup. 2010]).

CPLR § 3124 provides that the court has the discretion to compel discovery or to strike a pleading for failure to abide with discovery and disclosure orders. At the discretion of the court, a party's failure to comply with such requests may result in sanctions, pursuant to CPLR § 3126. "Although actions should be resolved on the merits where possible, a court may strike the answer of a defendant for failure to comply with court-ordered discovery where there is a clear showing that the noncompliance is willful and contumacious" (*Rawlings v. Gillert*, 78 AD3d 806 [2d Dept 2010]; *see also* CPLR 3126[3]; *Moray v. City of Yonkers*, 76 AD3d 618 [2d Dept 2010]; *Palomba v. Schindler El. Corp.*, 74 AD3d 1037 [2d Dept 2010]; *Rini v. Blanck*, 74 AD3d 941 [2d Dept 2010]). The determination of whether to strike the answer is addressed to the sound discretion of the trial court (*see Raville v. Elnomany*, 76 AD3d 520 [2d Dept 2010]; *Pirro Group, LLC v. One Point St., Inc.*, 71 AD3d 654, 655 [2d Dept 2010]; *Workman v. Town of Southampton*, 69 AD3d 619, 620 [2d Dept 2010]).

It is well settled that "the penalty of preclusion is extreme and should only be imposed when the failure to disclose has been willful or contumacious" (*Kingsley v. Kantor*, 265 AD2d 529, 530 [2d Dept 1999]; *Nicoletti v. Ozram Transportation, Inc.*, 286 AD2d 719 [2d Dept 2001]). Striking an answer is appropriate when there is "a clear showing that the failure to comply with discovery demands is willful, contumacious, or in bad faith" (*Mendez v. City of New York*, 7 AD3d 766, 767 [2d Dept 2004]; *Simpson v. City of New York*, 10 AD3d 601, 602 [2d Dept 2004]).

The court finds that, while Becker's actions were willful, they were not necessarily in bad faith. Striking the answer or a similar sanction is not appropriate at this time. Instead, Becker will appear for a further deposition, prepared to answer questions related to matters he has already sworn to in his prior affidavit, as well as matters that will not tend to incriminate him in his criminal case. The deposition will occur in the courthouse. The parties are directed to choose three potential dates for the deposition and then contact the court to ensure the court will be available on the date of the deposition to immediately resolve any privilege-related issues that may arise.

Accordingly, it is hereby

ORDERED, that Plaintiff's motion is DENIED without prejudice; and it is further

ORDERED, that Becker shall appear for a further deposition, consistent with the terms of this order; and it is further

ORDERED, that Plaintiff is granted leave to renew the motion after the further deposition of Becker, if necessary.

This constitutes the Decision and Order of the Court.

Dated: July 1, 2015
Mineola, N.Y.

Hon. James P. McCormack, A. J. S. C.