

<b>Budget Truck Rental, LLC v Mollo</b>
2016 NY Slip Op 30933(U)
May 20, 2016
Supreme Court, New York County
Docket Number: 150666/15
Judge: Gerald Lebovits
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**NEW YORK STATE SUPREME COURT  
NEW YORK COUNTY: PART 7**

BUDGET TRUCK RENTAL, LLC,

Plaintiff,

-against-

Index No: 150666/15  
**DECISION/ORDER**  
Motion sequence 1

DARREN T. MOLLO, D.C.,  
JULES FRANCOIS PARISIEN, M.D.,  
CHARLES DENG ACUPUNCTURE, P.C.,  
ISLAND LIFE CHIROPRACTIC PAIN CARE, PLLC,  
MAIGA PRODUCTS CORPORATION,  
PROMPT MEDICAL SERVICES, P.C. and  
CLIFORD GOURDET,

Defendants.

Recitation, as required by CPLR 2219 (a), of the papers considered in reviewing defendants' motion to compel under CPLR 3124 and plaintiff's cross-motion under CPLR 3126 striking defendants' answer and under CPLR 3215 for a default judgment, for sanctions, and to extend its time to file its note of issue.

<b>Papers</b>	<b>Numbered</b>
Notice of Motion.....	1
Notice of Cross-Motion .....	2
Defendants' Reply Affirmation .....	3
Plaintiff's Affirmation in Reply.....	4

*Rubin, Fiorella & Friedman, LLP*, New York (Harlan R. Schreiber of counsel), for plaintiff.  
*The Rybak Firm, PLLC*, Brooklyn (Oleg Rybak of counsel), for defendants Darren T. Mollo, D.C., Jules Francois Parisien, M.D., Charles Deng Acupuncture, P.C., Island Life Chiropractic Pain Care, PLLC, and Maiga Products Corporation.<sup>1</sup>

Gerald Lebovits, J.

In this action, plaintiff seeks a judgment declaring that (1) claimant's (Cliford Gourdet) injuries and his no-fault treatments were not causally related to an insured incident; thus claimant and defendants have no rights to collect no-fault benefits with respect to the November 7, 2013, collision; (2) claimant breached a condition precedent to coverage by failing to appear for two independent medical examinations (IME); thus, defendants have no right to collect no-fault benefits; (3) defendants referred claimant to one another without disclosing to the claimant that defendants were owned by the same common person; (4) defendants Charles Deng Acupuncture, P.C., Island Life Chiropractic Pain Care, PLLC, and Prompt Medical Services, P.C. are not

<sup>1</sup> Defendants Prompt Medical Services, P.C. and Cliford Gourdet never answered.

properly incorporated and formed as a professional service limited liability company; (5) defendants Charles Deng Acupuncture, P.C., Island Life Chiropractic Pain Care, PLLC, and Prompt Medical Services, P.C. submitted reimbursement applications for no-fault claims on claimant's behalf for services of independent contractors; thus, defendants have no standing to recover no-fault benefits for the November 7, 2013, collision; and (6) defendants Darren T. Mollo, D.C., Jules Francois Parisien, M.D., Charles Deng Acupuncture, P.C., Island Life Chiropractic Pain Care, PLLC, and Prompt Medical Services, P.C. split its fees for professional services with someone other than a partner, employee, associate in a professional firm or corporation, professional subcontractor or consultant authorized to practice medicine; thus plaintiff has no duty to pay the no-fault claims. Plaintiff is also seeking a permanent stay for all of defendants' arbitrations, lawsuits, and claims; plaintiff asserts that it will suffer irreparable harm without a stay.

Defendants moves under CPLR 3124 to compel plaintiff to respond to defendants' demands for disclosure, namely for plaintiff to produce its Special Investigations Unit (SIU) file and claim file. Plaintiff cross-moves under CPLR 3126 to strike defendants' answer and under CPLR 3215 for a default judgment. Plaintiff also moves under 22 NYCRR 130-1.1 for sanctions, attorney fees, and costs against defendants. Plaintiff also moves under 22 NYCRR 202.21 to extend its time to file its note of issue or to allow plaintiff to file its note of issue even though disclosure is not yet complete.

Defendants' motion under CPLR 3124 to compel plaintiff to produce its SIU file and claim file is granted only to the extent provided below. Parties to an action shall disclose all matters "material and necessary in the prosecution or defense of an action, regardless of burden of proof." (CPLR 3101 [a].) The court must take a "liberal and practical view . . . of what is necessary." (*Marie Dorros, Inc. v Dorros Bros.*, 274 AD 11, 13 [1st Dept 1948].) For plaintiff to avoid producing its SIU file because it is privileged, plaintiff has "to establish that its SIU file was prepared solely for litigation." (*All Boro Psych. Servs. a/a/o Shantal Arthur v Allstate Ins. Co.*, 43 Misc 3d 143 [A], \*1, 2014 NY Slip Op 50870 [U], \*1 [App Term, 2d Dept, 11th & 13th Jud. Dists. 2014]; *All Boro Psych. Servs. a/a/o Earl Davis v Allstate Ins. Co.*, 40 Misc 3d 131 [A], \*1, 2013 NY Slip Op 51124 [U], \*1 [App Term, 2d Dept, 11th & 13th Jud. Dists. 2013].)

Defendants contend that without access to information that is in the plaintiff's control, defendants cannot defend this action. (Defendants' Notice of Motion, Affirmation in Support, at ¶ 7.) Defendants argue that "[t]he allegation in the Plaintiff's complaint challenge the very legitimacy of the Rybak Defendants' medical practice operations, yet the Plaintiff refuses to offer any discovery on the issue." (Defendants' Notice of Motion, Affirmation in Support, at ¶ 7.) Defendants argue that the SIU file and claim file "presumably have information the investigation conducted by the Plaintiff that led to its (unfounded) belief that the Rybak Defendants are improperly licensed." (Defendants' Notice of Motion, Affirmation in Support, at ¶ 12.) Defendants contend that the SIU file and claim file are not privileged.

On July 17, 2015, plaintiff mailed its responses to defendants' Notice of Discovery and Inspection. (Plaintiff's Notice of Cross-Motion, Exhibit J.) Plaintiff asserts that it "has produced all responsive *non-privileged* documents in its possession, contrary to their [defendants'] representation." (Plaintiff's Notice of Cross-Motion, Affirmation of Aaron F. Fishbein, Dec. 10,

2015, at ¶ 50 [emphasis added].) Plaintiff argues that defendants “have failed to identify any specific material issues that require more discovery, or why they think that further discovery would change the unrebutted facts set forth in Budget’s papers.” (Plaintiff’s Notice of Cross-Motion, Affirmation of Aaron F. Fishbein, Dec. 10, 2015, at ¶ 50.)

Although defendants argue that the documents it needs are in the plaintiff’s possession, defendants have access to its own records to defend itself, namely, documents to show whether the corporate entities are properly licensed, whether its medical-practice operations are legitimate, whether defendants engaged in fee splitting, and whether defendants engaged independent contractors.

The responsive documents plaintiff attaches to its cross-motion, as Exhibit J, are documents that pertain to the claimant’s nonappearance at IMEs, namely the scheduling letters, proof of the claimant’s nonappearance, and plaintiff’s denials. Plaintiffs have not cross-moved for a protective order. It is unclear whether plaintiffs are asserting that its SIU and claim files are privileged.

To the extent that plaintiff is asserting that the SIU and claim files are privileged, plaintiff must submit by June 24, 2016, a letter to the court, copying defendants on the letter. Plaintiff must assert which documents are privileged and the reasons the documents are not subject to disclosure. The remaining aspect of defendants’ motion is denied.

Plaintiff’s cross-motion under CPLR 3126 to strike defendant’s answer and under CPLR 3215 for a default judgments against the defendants is granted in part and denied in part. A CPLR 3126 motion is appropriate when a party disobeys a court order for disclosure or when a party “willfully disobeys” a disclosure notice. (*Goldner v Lendor Structures, Inc.*, 29 AD2d 978, 979 [2d Dept 1968].) The moving party must establish the non-moving party’s willfulness by showing a pattern of disobedience. (*Fish & Richardson, P.C. v Schindler*, 75 AD3d 219, 220 [1st Dept 2010] [“Supreme Court did not abuse its discretion in striking defendant’s answer based on a pattern of disobeying court orders and failing to provide discovery.”].) Willful and contumacious conduct can be inferred from a party’s “repeated failure to comply with orders . . . and the inadequate excuses [a party] offer[s] to explain [its] noncompliance.” (*Wright v Mount Vernon Hosp.*, 88 AD3d 873, 873 [2d Dept 2011].) To avoid a finding that a noncomplying party’s conduct was willful and contumacious, the noncomplying party must provide a reasonable excuse for its noncompliance. (*Dietrick v Gutman*, 39 AD 3d 392, 392 [1st Dep’t 2007].)

Defendants violated two court orders, namely, the preliminary-conference order dated April 22, 2015, and the compliance-conference order dated September 2, 2015. Defendants violated the April 22, 2015: Defendants did not appear for examinations before trial (EBT) before July 31, 2015; defendants did not provide verified responses to disclosure demands within 60 days of the court’s order. (Defendants’ Notice of Motion, Exhibit C.) At the compliance conference held on September 2, 2015, the court ordered the following:

“[D]efendants . . . failed to provide verified responses to plaintiff’s discovery demands and defendants failed to appear for an EBT.

Accordingly, it is ORDERED that within 30 days . . . defendants shall provide verified responses to plaintiff's discovery demands and shall appear for an EBT no later than 11/18/15." (Plaintiff's Notice of Cross-Motion, Exhibit G.)

On September 25, 2015, plaintiff sent defendants notices to take the EBTs of the defendants on October 13-15, 2015. Defendants never appeared for the EBTs. (Plaintiff's Notice of Cross-Motion, Affirmation of Jason Moussourakis, Dec. 4, 2015, at ¶¶ 6-7.) Defendants never provided verified responses to plaintiff's discovery demands.

Defendants do not offer any excuse for not complying with the two court orders. Defendants do not adequately explain why it failed to attend the EBTs and why it failed to respond to plaintiff's disclosure demands. Defendants contend that "before depositions may be held, the Rybak Defendants must receive from Plaintiff all of the information currently in Plaintiff's possession relating to the claims at issue here." (Defendants' Reply Affirmation, at ¶ 27.) Defendants' failure to comply with disclosure was willful and contumacious. But because striking defendants' answer is a drastic remedy, the court gives defendants an opportunity to comply.

That aspect of plaintiff's cross-motion to strike defendants' answer and enter a default judgment against defendants is denied. Plaintiff's cross-motion is granted only to the extent that defendants must provide verified responses to plaintiff's discovery demands by June 24, 2016. Defendants' EBTs must be completed by August 12, 2016. All disclosure must be complete by September 2, 2016. Defendants' failure to comply with this court's order will result in the court striking defendants' answer and entering a default judgment against defendants.

Plaintiff's motion under 22 NYCRR § 202.21 — to extend its note of issue or to file its note of issue before disclosure is complete — is granted to the following extent. Plaintiff's time to file its note of issue is extended to September 9, 2016.

Plaintiff's cross-motion under 22 NYCRR § 130-1.1 for sanctions, attorney fees, and costs is denied. On a motion for sanctions under 22 NYCRR § 130-1.1, this court has the discretion to "award . . . any party or attorney . . . costs in the form of reimbursement for actual expenses reasonably incurred and reasonable attorney's fees, resulting from frivolous conduct." (22 NYCRR 130-1.1 [a].) The court also has the discretion "[i]n addition to or in lieu of awarding costs, . . . [to] impose financial sanctions upon any party or attorney . . . who engages in frivolous conduct." (*Id.*) Under the statute, conduct is frivolous if

- “(1) it is completely without merit in law and cannot be supported by a reasonable argument for an extension, modification or reversal of existing law;
- (2) it is undertaken primarily to delay or prolong the resolution of the litigation, or to harass or maliciously injure another; or
- (3) it asserts material factual statements that are false.” (22 NYCRR 130-1.1 [c] [1] – [c] [3].)

In determining whether the conduct is frivolous, a court must consider “the circumstances under which the conduct took place, including the time . . . for investigating the legal or factual basis . . . , and whether . . . the conduct was continued when its lack of legal or factual basis was apparent, should have been apparent, or was brought to the attention of counsel or the party.” (*Id.* 130-1.1 [c].) Plaintiff has not demonstrated that defendants’ conduct is frivolous.

ORDERED that defendants’ motion under CPLR 3124 is granted only to the extent that if plaintiff is asserting that the SIU and claim files are privileged, plaintiff must submit by June 24, 2016, a letter to the court and copying defendants on the letter. Plaintiff must assert which documents are privileged and the reasons the documents are not subject to disclosure. The remaining aspects of defendants’ motion is denied, and it is further

ORDERED that plaintiff’s cross-motion under CPLR 3126 to strike defendants’ answer and under CPLR 3215 for a default judgments against the defendants is denied. Plaintiff’s cross-motion is granted only to the extent that defendants must provide verified responses to plaintiff’s discovery demands by June 24, 2016. Defendants’ EBTs must be completed by August 12, 2016. All disclosure must be complete by September 2, 2016. Defendants’ failure to comply with this court’s order will result in the court striking defendants’ answer and entering a default judgment against defendants, and it is further

ORDERED that plaintiff’s cross-motion under 22 NYCRR 130-1.1 for sanctions, attorney fees, and costs is denied, and it is further

ORDERED that plaintiff’s motion under 22 NYCRR 202.21 is granted only to the extent that plaintiff’s time to file its note of issue is extended to September 9, 2016, and it is further

ORDERED that if the parties have any further disputes stemming from their obligations under this order, the parties should contact the Part Clerk at (646) 386-3746 and request an immediate conference.

This opinion is the court’s decision and order.

Dated: May 20, 2016



J.S.C.

**HON. GERALD LEBOVITS**  
J.S.C.