

**Garbett v Wappingers Cent. Sch. Dist.**

2016 NY Slip Op 32896(U)

May 23, 2016

Supreme Court, Dutchess County

Docket Number: 50965/14

Judge: Maria G. Rosa

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT - STATE OF NEW YORK  
DUTCHESS COUNTY

Present:

Hon. MARIA G. ROSA

Justice.

\_\_\_\_\_  
THOMAS K. GARBETT, X

Plaintiff,

DECISION AND ORDER

-against-

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WAPPINGERS CENTRAL SCHOOL DISTRICT,  
Defendant.

\_\_\_\_\_  
WAPPINGERS CENTRAL SCHOOL DISTRICT, X  
Third-Party Plaintiff,

-against-

SITWORKS SERVICES NY CORP.,  
Third-Party Defendant.

\_\_\_\_\_ X

The following papers were read and considered on defendant's motion to strike.

NOTICE OF MOTION  
AFFIRMATION IN SUPPORT  
EXHIBITS 1-12

AFFIRMATION IN OPPOSITION  
EXHIBITS A&B

REPLY AFFIRMATION  
EXHIBITS 13&14

Plaintiff commenced this action seeking damages for personal injuries allegedly sustained while he was working for third-party defendant Siteworks Services NY Corp. ("Siteworks"). The injury allegedly occurred while he was performing work on a boiler defendant/third-party plaintiff Wappingers Central School District ("the district") owned. The district commenced a third-party action against Siteworks seeking indemnification and alleging that Siteworks breached a contractual obligation to obtain insurance. The district now moves for sanctions pursuant to CPLR §3126(3) based upon Siteworks' alleged failure to provide discovery.

On November 9, 2015, the district deposed Thomas Garbett, plaintiff's son and principal of Siteworks. At the examination the district demanded Siteworks provide follow-up information, including the name and address of Siteworks' insurance broker, copies of correspondence with the broker, a copy of Siteworks' work log, names and addresses of other workers working in the boiler room on the date of the accident, copies of records relating to job box talks and the name of the foreman responsible for the project. By letter dated November 20, 2015, the district advised Siteworks that it sought to depose the Siteworks' employee who informed the school principal of plaintiff's accident. Siteworks did not respond to the letter. The district followed up with a letter dated December 1, 2015 advising Siteworks of its intention to depose Siteworks' employee Paul Desser as well as the yet to be identified employee who reported the accident. The district requested that Siteworks identify such individuals by name and address and further advise the district if it was unable to produce them. Siteworks did not respond. On January 8, 2016, the district served Siteworks with a formal notice to produce the aforementioned discovery.

At a compliance conference before this court on January 14, 2016, the court directed Siteworks to respond to the discovery demand. On January 21, 2016 the district served Siteworks with an additional notice to produce demanding the name, address and personnel file of Paul Desser. That notice was followed up with a letter advising Siteworks that it had yet to provide discovery as directed by the court. Having received no response, the district contacted the court requesting a discovery conference. A telephone conference was conducted with this court's Principal Court Attorney on March 1, 2016. At such conference the court directed Siteworks to produce on or before March 15, 2016 all records of work performed on the project, job box talks, to provide the names and last known addresses of Paul Desser and the employee who reported the accident to the school principal. Following the conference, the district served Siteworks with an additional notice to produce demanding information relating to employee Paul Desser and the names and addresses of all current and former employees of Siteworks present on the date of plaintiff's accident. Siteworks did not respond to any of this court's directives or the district's demand and this motion followed.

CPLR §3126 gives this court discretion to impose a wide range of penalties on a party who fails to obey an order for disclosure or disclose information that the court finds ought to have been disclosed. See Morano v. Westchester Paving & Sealing Corp., 7 AD3d 495 (2<sup>nd</sup> Dept. 2004). However, "the drastic remedy of striking an answer is inappropriate absent a clear showing that the failure to comply with discovery demands is willful, contumacious, or in bad faith." Kubacka v. Town of N. Hempstead, 240 AD2d 374 (2<sup>nd</sup> Dept. 1997).

Siteworks made a production in response to the district's motion for sanctions. It urges the court to excuse its failure to timely respond to the discovery demands, alleging that such failure does not rise to the level of willful and contumacious conduct. Notably, Siteworks offers no substantive explanation for its failures to comply with discovery deadlines and court directives. The court may find that a party's conduct is willful and contumacious if the party repeatedly fails to comply with court ordered discovery and offers inadequate explanations for the failure to comply.

As the district points out in its reply, the responses served in opposition to the motion for sanctions are both untimely and inadequate. Thomas Garbett testified at his deposition as to the existence of documents related to the job and relevant insurance policies in effect. Moreover, through the course of this litigation the district has repeatedly demanded contact information for Paul Desser and that Siteworks produce him as a employee. Garbett's deposition testimony strongly inferred that Desser was a Siteworks' employee. When asked if he has an employee designated as supervisor, he responded that he has "a guy" that goes around and makes sure the workers have ample materials. He then identified that person as Paul Desser. He further stated that Desser conducted the job box talks and believed he kept written records pertaining to those talks. Siteworks belated discovery responses merely deny possession of any correspondence or documents relating to its insurance policy and state that it is not in possession of any records related to job box talks or safety certificates relative to the job. Its response to plaintiff's notice to produce states for the first time that Desser was not a direct employee of Siteworks, and gives the name of two employees allegedly working at the time of the accident. The local addresses provided are for a transient motel, with one permanent address being in Trinidad and the other allegedly unknown.

A party should not have to resort to motion practice to obtain a response to valid discovery demands. Siteworks did not make a timely response to plaintiff's repeated demands. Such failure was in directed violation of court orders and directives. When it finally did respond, the response was inadequate.

Based on the foregoing, it is hereby

ORDERED that the district's motion is granted to the extent that Siteworks shall pay all costs and reasonable attorney's fees the district incurred in making the motion for sanctions pursuant to CPLR §3126. The school district shall provide Siteworks with a statement and supporting documentation of such costs and fees to be received by June 3, 2016. Siteworks shall then pay such costs and fees by June 13, 2016. It is further

ORDERED that Siteworks' answer shall be stricken if, by June 13, 2016 it fails to provide the district with a complete response to its demands. Such response should provide the requested documents or contain an affidavit completely complying with the requirements of Jackson v. New York, 185 AD2d 768 for each and every document that Siteworks cannot produce because such document is not in their possession, custody or control. Siteworks shall further produce an affidavit of a competent individual stating all efforts made to obtain the contact information for all former employees present at the job on the date of plaintiff's accident. It is further

ORDERED that the district shall have leave to conduct further discovery with respect to non-party Paul Desser. It is further

ORDERED that a conference will be held before this court on June 16, 2016 at 9:45 a.m. to ensure compliance with this order.

This constitutes the decision and order of this court.

Dated: May 23 2016  
Poughkeepsie, New York

ENTER:

  
MARIA G. ROSA, J.S.C.

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Pursuant to CPLR Section 5513, an appeal as of right must be taken within thirty days after service by a party upon the appellant of a copy of the judgment or order appealed from and written notice of its entry, except that when the appellant has served a copy of the judgment or order and written notice of its entry, the appeal must be taken within thirty days thereof.