

Tunstall v Burth

2016 NY Slip Op 32986(U)

August 23, 2016

Supreme Court, Nassau County

Docket Number: 602051/15

Judge: Denise L. Sher

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SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK

PRESENT: HON. DENISE L. SHER
Acting Supreme Court Justice

JAAMAL TUNSTALL,

TRIAL/IAS PART 37
NASSAU COUNTY

Plaintiff,

Index No.: 602051/15
Motion Seq. Nos.: 01, 02
Motion Dates: 06/28/16
06/28/16

- against -

SHALEETHEA S. BURTH, ANTHONY ROTELLA and
JAMES T. TUNSTALL,

Defendants.

The following papers have been read on these motions:

	Papers Numbered
<u>Notice of Motion (Seq. No. 01), Affirmations and Exhibits</u>	1
<u>Notice of Cross-Motion (Seq. No. 02), Affirmations and Exhibits</u>	2
<u>Affirmation in Partial Support of Cross-Motion (Seq. No. 02)</u>	3
<u>Affirmation in Opposition to Cross-Motion (Seq. No. 02) and Exhibit</u>	4
<u>Reply Affirmation to Cross-Motion (Seq. No. 02)</u>	5

Upon the foregoing papers, it is ordered that the motions are decided as follows:

Plaintiff moves (Seq. No. 01), pursuant to CPLR § 3126, for an order striking the Verified Answer with Cross Claim of defendant James T. Tunstall for willfully failing to comply with this Court's written and verbal Orders and for willfully and contumaciously failing to conduct the Examination Before Trial ("EBT") of defendant James T. Tunstall scheduled by this Court's written and verbal Orders; and moves, pursuant to CPLR § 3126, for an order precluding defendant James T. Tunstall from offering any evidence at the time of trial and/or prior to the

time of trial, in the form of any and all motions to dismiss or strike, motions for summary judgment and/or any other dispositive motions and including, but not limited to, the submission and/or reliance upon any affidavits and sworn statements; or moves, in the alternative, pursuant to CPLR § 3124, for an order compelling defendant James T. Tunstall to comply with this Court's written and verbal Orders and directives to appear and conduct his EBT and produce all outstanding documentary evidence prior to said EBT, for a date to be determined by this Court, and, in the event such EBT and documentary discovery is not completed, moves for an order striking defendant James T. Tunstall's Verified Answer with Cross Claim and for an order precluding defendant James T. Tunstall from offering any evidence at the time of trial and/or prior to the time of trial, in the form of any and all motions to dismiss or strike, motions for summary judgment and/or any other dispositive motions and including, but not limited to, the submission and/or reliance upon any affidavits and sworn statements; and moves for an order granting her an extension of time to serve and/or request further discovery and file a motion for summary judgment one hundred twenty (120) days from the date of completion of outstanding discovery.

Counsel for defendant James T. Tunstall opposes the motion and cross-moves (Seq. No. 02), pursuant to CPLR § 3126, for an order dismissing plaintiff's Verified Complaint upon the ground that plaintiff has unreasonably failed to submit to a Physical Examination or provide duly demanded discovery, or, in the alternative, moves for an order precluding plaintiff from offering any evidence regarding injuries or for an order compelling said examinations.

Plaintiff opposes defendant James T. Tunstall's cross-motion (Seq. No. 02). Defendants Shaleethea S. Burth ("Burth") and Anthony Rotella ("Rotella") submitted an Affirmation in

Partial Support of defendant James T. Tunstall's cross-motion (Seq. No. 02).

At the outset the Court would note that, pursuant to counsel for defendant James T. Tunstall's Reply Affirmation to Cross-Motion (Seq. No. 02), "[d]efendant's cross-motion for an Order pursuant to Rule 3126 of the CPLR dismissing plaintiff's complaint in the above-captioned action upon the ground that the plaintiff has unreasonably failed to submit to a Physical is hereby *withdrawn* (emphasis added). Although, to date Plaintiff has still not attended a physical examination scheduled by this office, upon information and belief, he did attend a physical examination scheduled by Co-Defendant on July 7, 2016. Additionally, Plaintiff has recently provided the outstanding discovery (authorizations) sought in my motion. Accordingly, your affirmant withdraws their cross-motion without prejudice."

Therefore, defendant James T. Tunstall's cross-motion (Seq. No. 02), pursuant to CPLR § 3126, for an order dismissing plaintiff's Verified Complaint upon the ground that plaintiff has unreasonably failed to submit to a Physical Examination or provide duly demanded discovery, or, in the alternative, for an order precluding plaintiff from offering any evidence regarding injuries or for an order compelling said examinations, is hereby **DENIED as the cross-motion has been withdrawn.**

The Court will now address plaintiff's motion (Seq. No. 01).

The instant action arises from personal injuries allegedly sustained by plaintiff as a result of a motor vehicle accident that occurred on October 1, 2013, at approximately 2:20 p.m., at or near the intersection of Uniondale Avenue and George Avenue, Town of Hempstead, County of Nassau, State of New York. The subject accident involved two vehicles - a 2013 Nissan owned and operated by defendant James T. Tunstall, in which plaintiff was a passenger at the time of the

subject accident, and a 2004 Oldsmobile owned by defendant Rotella and operated by defendant Burth.

Plaintiff commenced the instant action with the filing of a Summons and Verified Complaint on or about March 31, 2015. *See* Plaintiff's Affirmation in Support Exhibit A. Issue was joined by defendants Rotella and Burth on or about May 13, 2015. *See* Plaintiff's Affirmation in Support Exhibit B. Issue was joined by defendant James T. Tunstall on or about October 19, 2015. *See id.*

In support of the motion (Seq. No. 01), counsel for plaintiff submits, "[o]n June 3, 2015, Plaintiff responded to Defendants, **SHALEETHEA S. BURTH** and **ANTHONY ROTELLA**, by serving a Verified Bill of Particulars, Discovery Responses to Defendants' Combined Demands for Discovery and Plaintiff's Combined Demand (*sic*) Discovery Demands. On October 23, 2015, Plaintiff responded to Defendant, **JAMES T. TUNSTALL**, by serving a Verified Bill of Particulars, Discovery Responses to Defendant's Combined Demands for Discovery and Plaintiff's Combined Demand (*sic*) Discovery Demands,.... On July 14, 2015, a Preliminary Conference was held with all parties, which resulted in the issuance of a Preliminary Conference Order,.... On November 19, 2015, Jessica Kyeong Park of Munawar & Andrews-Santillo LLP, spoke with the court clerk in Judge Sher's chamber (*sic*) in Nassau County Supreme Court, and was informed that the examination before trial was mutually agreed (*sic*) and scheduled for all parties to be held on November 20, 2015, by Plaintiff's counsel Mindy Mollins and defendants' counsel for Defendants, **SHALEETHEA S. BURTH** and **ANTHONY ROTELLA**. On November 19, 2015, Jessica Kyeong Park of Munawar & Andrews-Santillo LLP, spoke with Danielle at Russo Apoznanski & Tambasco, the legal counsel for Defendant, **JAMES T. TUNSTALL** to confirm the examination of (*sic*) trial that was scheduled for

November 20, 2015. Danielle stated that they did not appear for the Compliance Conference that was held on November 10, 2015, and was not aware of the scheduled date.... Thereafter, on November 19, 2015, the legal counsel for Defendant, **JAMES T. TUNSTALL** informed all parties that they were not ready to proceed with the scheduled Court Ordered deposition for all parties as they were not able to locate their client. Plaintiff and Defendants, **SHALEETHEA S. BURTH** and **ANTHONY ROTELLA**'s examination (*sic*) before trial were held on November 20, 2015. Thereafter, on January 26, 2016, Charlie Baldwin, Esq. of Munawar & Andrews-Santillo LLP attended the Certification Conference before Judge Sher in Nassau Supreme Court. Court (*sic*) verbally ordered for the Non-Compliant Defendant's [defendant James T. Tunstall's] examination of (*sic*) trial to be scheduled. To date, the Non-Compliant Defendant has failed to appear for his Court Ordered deposition, is in default of the two (2) Court Orders and the numerous good faith efforts of Plaintiff to compel the Non-Compliant Defendant's deposition. Such behavior is the very essence of sanctionable conduct that requires this Court to strike their (*sic*) Answer. Moreover, the Non-Compliant Defendant has offered no legitimate excuses for the repeated and numerous failure (*sic*) to comply with this Court's Orders." See Plaintiff's Affirmation in Support Exhibits C and D.

In opposition to the motion (Seq. No. 01), counsel for defendant James T. Tunstall argues, "defendant should not be precluded from defending against the action at hand solely for failure of James T. Tunstall to appear for deposition.... Despite numerous attempts, this office has been unable to locate client James T. Tunstall in order to produce him for deposition. This office has made phone calls, left messages, and sent letters to Mr. Tunstall informing him of dates to appear for deposition. After many unsuccessful attempts, an investigator was dispatched to locate James Tunstall and convince him to appear for deposition. Investigator Phillip Mallor

has annexed an affidavit detailing the efforts to locate James Tunstall which including (*sic*) sending letters and investigators to multiple addresses.... Defendant does not intend to hinder or delay the prosecution of this matter, as evidenced by the fact that counsel has attempted on numerous occasions to contact James T. Tunstall in order to produce the witness for deposition. Counsel even went so far as sending an investigator who made multiple attempts to locate him. This office was ready and willing to produce defendant for his examination before trial scheduled, but due to circumstances outside of counsel's control as outlined above, the depositions did not go forward as planned. Defendant did not intentionally attempt to thwart this Honorable Court's directive or deny the plaintiff their (*sic*) day in Court. There was never any intent on the part of the defendant to avoid the obligation to produce James T. Tunstall for deposition. Further, there was never any willful and/or contumacious conduct on the part of the defendant's counsel. It is respectfully submitted that the plaintiff has not submitted any proof that the actions of the defendant were willful, deliberate and/or contumacious. In light of the aforementioned, and inasmuch as there has been no showing that there was a willful refusal to disobey the Court's order, the movant does not have the right to ask that the Answer of the defendant be stricken. The extreme penalty of striking a pleading for failure to comply with an order of disclosure should be granted only when the failure has been willful or contumacious. [citations omitted]." *See* Defendant James T. Tunstall's Affirmation in Opposition Exhibit H.

Counsel for defendant James T. Tunstall adds that, "[w]ithout a showing of willful or contumacious conduct by the defendant, it is appropriate for the Court to consider the interests involved and then strike an appropriate balance between the parties, not strike the defendant's pleadings. Therefore, the Answer of defendant James T. Tunstall, should not be stricken. In the alternative, defendant requests that the court select the alternative action proposed by plaintiff in

his motion, precluding defendant James T. Tunstall from testifying at the time of trial instead of striking defendant's Answer. In the case at bar, the prejudice to the defendant if the Answer is stricken far outweighs any prejudice to the plaintiff, for which none is evident. Plaintiff's complaint seeks significant damages. It would be unduly prejudicial to deny the defendants their right to defend against the plaintiff's accusations."

New York has long favored "open and far-reaching pretrial discovery." *Kavanaugh v. Ogden Allied Maintenance Corp.*, 92 N.Y.2d 952, 683 N.Y.S.2d 156 (1998) quoting *DiMichel v. South Buffalo Ry. Co.*, 80 N.Y.2d 184, 590 N.Y.S.2d 1(1992) cert. den. sub. nom. *Poole v. Consolidated Rail Corp.*, 510 U.S. 816 (1993). CPLR § 3101(1) provides for "full disclosure of all matters material and necessary in the prosecution or defense of an action...." This provision has been liberally construed to require disclosure of any information or material reasonably related to the issues "which will assist preparation for trial by sharpening the issues and reducing delay and prolixity. The test is one of usefulness and reason." *Allen v. Crowell-Collier Pub. Co.*, 21 N.Y.2d 403, 288 N.Y.S.2d 449 (1968). See also *Titleserv, Inc. v. Zenobio*, 210 A.D.2d 314, 619 N.Y.S.2d 769 (2d Dept. 1994). "The trial court is afforded broad discretion in supervising disclosure." *Those Certain Underwriters at Lloyds, London v. Occidental Gems, Inc.*, 11 N.Y.3d 843, 873 N.Y.S.2d 239 (2008). "If there is any possibility that the information is sought in good faith for possible use as evidence-in-chief or in rebuttal or for cross-examination, it should be considered evidence material . . . in the prosecution or defense." *Allen v. Crowell-Collier Pub. Co.*, supra.

Indeed, "the scope of permissible discovery is not entirely unlimited and the trial court is invested with broad discretion to supervise discovery and to determine what is 'material and necessary' as that phrase is used in CPLR 3101(a)." *Auerbach v. Klein*, 30 A.D.3d 451, 816

N.Y.S.2d 376 (2d Dept. 2006). *See also Ural v. Encompass Ins. Co. of Am.*, 97 A.D.3d 562, 948 N.Y.S.2d 621 (2d Dept. 2012). Ultimately, “[i]t is incumbent on the party seeking disclosure to demonstrate that the method of discovery sought will result in the disclosure of relevant evidence or is reasonably calculated to lead to the discovery of information bearing on the claims.” *Gomez v. State of New York*, 106 A.D.3d 870, 965 N.Y.S.2d 542 (2d Dept. 2013) quoting *Vyas v. Campbell*, 4 A.D.3d 417, 775 N.Y.S.2d 375 (2d Dept. 2004).

However, the full disclosure authorized by CPLR § 3101(a) does not mean uncontrolled and unfettered disclosure. *See Farrell v. E.W. Howell Co., LLC*, 103 A.D.3d 772, 959 N.Y.S.2d 735 (2d Dept. 2013); *Romance v. Zavala*, 98 A.D.3d 726, 950 N.Y.S.2d 390 (2d Dept. 2012).

Furthermore, pursuant to CPLR § 3124, disclosure provisions are to be liberally construed. Ultimately, a trial court is afforded broad discretion in managing disclosure. *See CPLR §§ 3124, 3101(a); Kavanagh v. Ogden Allied Maintenance Corp., supra.*

CPLR § 3126 provides the “[p]enalties for refusal to comply with order or to disclose.” It reads, “[i]f any party, or a person who at the time a deposition is taken or an examination or inspection is made is an officer, director, member, employee or agent of a party or otherwise under a party’s control, refuses to obey an order for disclosure or wilfully fails to disclose information which the court finds ought to have been disclosed pursuant to this article, the court may make such orders with regard to the failure or refusal as are just, among them: 1. An order 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; or 2. an order prohibiting the disobedient party from supporting or opposing designated claims or defenses, from producing in evidence designated things or items of testimony, or from introducing any evidence of the physical, mental or blood condition sought to be determined, or from using certain witnesses; or

3. an order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or any part thereof, or rendering a judgment by default against the disobedient party.”

The nature and degree of the sanction to be imposed on a motion pursuant to CPLR § 3126 is a matter reserved to the sound discretion of the trial court. *See Dokaj v. Ruxton Tower Ltd. Partnership*, 91 A.D.3d 812, 938 N.Y.S.2d 101 (2d Dept. 2012). The drastic remedy of striking a pleading for failure to comply with court ordered disclosure will be granted only where the conduct of the resisting party is shown to be willful and contumacious. *See Pirro Group, LLC v. One Point St., Inc.*, 71 A.D.3d 654, 896 N.Y.S.2d 152 (2d Dept. 2010). To invoke the drastic remedy of preclusion, the Court must determine that the party’s failure to comply with a disclosure order was the result of willful, deliberate and contumacious conduct or its equivalent. *See Arpino v. F.J.F. & Sons Elec. Co., Inc.*, 102 A.D.3d 201, 959 N.Y.S.2d 74 (2d Dept. 2012); *Assael v. Metropolitan Tr. Auth.*, 4 A.D.3d 443, 772 N.Y.S.2d 364 (2d Dept. 2004). Willful and contumacious conduct can be inferred from repeated non-compliance with court orders, *inter alia*, directing depositions, coupled with either no excuses, or inadequate excuses; or a failure to comply with court ordered discovery over an extended period of time. *See Prappas v. Papadatos*, 38 A.D.3d 871, 833 N.Y.S.2d 156 (2d Dept. 2007).

Pursuant to CPLR § 3126 when a party refuses “to obey an order for disclosure or willfully fails to disclose information which the court finds ought to have been disclosed pursuant to this article, the court may make such orders with regard to the failure or refusal as are just...” CPLR § 3126(3) authorizes the court to strike pleadings or grant a default judgment against the disobedient party. The court may certainly impose sanctions or strike pleadings where a party fails to provide disclosure pursuant to an order. *See SIEGEL, PRACTICE COMMENTARIES,*

3126:5. It is only proper to strike a pleading, however, where it appears that the failure to obey the court's order is "deliberate and contumacious." See *Sindeband v. McCleod*, 226 A.D.2d 623, 641 N.Y.S.2d 127 (2d Dept. 1996); *Ortiz v. Weaver*, 188 A.D.2d 290, 590 N.Y.S.2d 474 (1st Dept. 1992). "[W]here a party disobeys a court order and by his conduct frustrates the disclosure scheme provided by the CPLR, dismissal of the [pleading] is within the broad discretion of the court." See *Eagle Insurance Company of America v. Behar*, 207 A.D.2d 326 (2d Dept. 1994).

Although, as mentioned, the Court has broad discretion in determining the appropriate sanction pursuant to CPLR § 3126, the "general rule is that a court should only impose a sanction commensurate with the particular disobedience it is designed to punish and go no further." See *Rossal-Daub v. Walter*, 58 A.D.3d 992, 871 N.Y.S.2d 751 (3d Dept. 2009) citing *Landrigen v. Landrigen*, 173 A.D.2d 1011, 569 N.Y.S.2d 843 (3d Dept. 1991).

As the Court of Appeals stated in *Andrea v. Arnone, Hedin, Casker, Kennedy & Drake, Architects & Landscape Architects, P.C. (Habiterra Assoc.)*, 5 N.Y.3d 514, 806 N.Y.S.2d 453 (2005), "[l]itigation cannot be conducted efficiently if deadlines are not taken seriously" and "disregard of deadlines should not and will not be tolerated." Compliance requires not only a timely response, but a good faith effort to provide a meaningful response. See *Arpino v F.J.F. & Sons Elec. Co., Inc.*, *supra*.

Based upon the evidence presented in the papers before it and the arguments and case law detailed above, the Court, in its sound discretion, finds that the appropriate sanction in this matter is to preclude defendant James T. Tunstall from offering any evidence at the time of trial and/or prior to the time of trial, in the form of any and all motions to dismiss or strike, motions for summary judgment and/or any other dispositive motions and including, but not limited to, the submission and/or reliance upon any affidavits and sworn statements.

Accordingly, the branch of plaintiff's motion (Seq. No. 01), pursuant to CPLR § 3126, for an order striking the Verified Answer with Cross Claim of defendant James T. Tunstall for willfully failing to comply with this Court's written and verbal Orders, and for willfully and contumaciously failing to conduct the EBT of defendant James T. Tunstall scheduled by this Court's written and verbal Orders, is hereby **DENIED**.

The branch of plaintiff's motion (Seq. No. 01), pursuant to CPLR § 3126, for an order precluding defendant James T. Tunstall from offering any evidence at the time of trial and/or prior to the time of trial, in the form of any and all motions to dismiss or strike, motions for summary judgment and/or any other dispositive motions and including, but not limited to, the submission and/or reliance upon any affidavits and sworn statements, is hereby **GRANTED**.

The branch of plaintiff's motion (Seq. No. 01) for an order granting her an extension of time to serve and/or request further discovery and file a motion for summary judgment one hundred twenty (120) days from the date of completion of outstanding discovery is hereby **DENIED**.

This constitutes the Decision and Order of this Court.

ENTER:



DENISE L. SHER, A.J.S.C.

ENTERED

AUG 25 2016

**NASSAU COUNTY
COUNTY CLERK'S OFFICE**

Dated: Mineola, New York
August 23, 2016