

**Washington v County of Nassau**

2016 NY Slip Op 33058(U)

November 15, 2016

Supreme Court, Nassau County

Docket Number: 605029/2014

Judge: Julianne T. Capetola

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This opinion is uncorrected and not selected for official publication.

At a Term of the Supreme Court  
of the State of New York held in  
and for the County of Nassau,  
100 Supreme Court Drive,  
Mineola, New York, on the 15<sup>th</sup>  
day of November 2016

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P R E S E N T:

HON. JULIANNE T. CAPETOLA  
Justice of the Supreme Court

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ERNESTINE WASHINGTON,  
Plaintiff,

**DECISION AND  
ORDER ON MOTION**  
Index No: 605029/2014  
Motion Sequence: 001, 002

- against -

COUNTY OF NASSAU, NASSAU INTER-  
COUNTY EXPRESS, VEOLIA  
TRANSPORTATION SERVICES, INC.,  
CLARENCE D. EDWARDS, JONATHAN O.  
TALIT and MICHAEL TALIT.,

Defendants.

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The following papers were read on these Motions:  
Defendants Jonathan O. Talit and Michael Talit's Notice of Motion  
Defendants County of Nassau, Nassau Inter-County Express, Veolia Transportation  
Services, Inc. and Clarence D. Edwards' Notice of Cross-Motion  
Plaintiff's Affirmation in Opposition to Jonathan O. Talit and Michael Talit's Motion

Defendants Jonathan O. Talit and Michael Talit's (hereinafter referred to as "Talit Defendants") have moved for an order pursuant to NYCRR 212.21(e) vacating the note of issue filed in this case, for an order pursuant to CPLR §3126 precluding Nassau Defendants from testifying or offering medical evidence for failure to provide discovery, and for an order extending time to file a motion for summary judgment. Defendants County of Nassau, Nassau Inter-County Express, Veolia Transportation Services, Inc. and Clarence D. Edwards (hereinafter referred to as "Nassau Defendants") have cross-moved for an order vacating the note of issue filed in this case, for an order pursuant to CPLR §3126 compelling Talit Defendants to produce certain items of discovery, and for an order extending time to file a motion for summary judgment. Plaintiff has opposed the motion by Talit Defendants, and Nassau Defendants' motion was deemed submitted without opposition on November 10, 2016.

NYCRR 202.21(e) states, in relevant part, that,

“Within 20 days after service of a note of issue and certificate of readiness, any party to the action or special proceeding may move to vacate the note of issue, upon affidavit showing in what respects the case is not ready for trial, and the court may vacate the note of issue if it appears that a material fact in the certificate of readiness is incorrect, or that the certificate of readiness fails to comply with the requirements of this section in some material respect”.

CPLR §3126 states:

“If 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 part”

In order to prevail on a motion to preclude pursuant to CPLR §3126, the moving party bears the burden of demonstrating that the “failure to comply with discovery demands is willful, contumacious, or in bad faith”. *Herrera v. City of New York*, 238 A.D.2d 475 (2d Dept. 1997) (internal citations omitted). Absent such a showing, a resolution of the action on the merits is the favored course. *Id.* Willful and contumacious conduct can be inferred from repeated, unexplained or inadequately explained failure to comply with disclosure requests and court orders and directives over a significant period of time. *Rawlings v. Gillert*, 78 A.D.3d 806 (2d Dept. 2010). Upon a showing by the moving party of willfulness, the burden shifts to the defendant to offer a reasonable excuse the its default. *Herrera v. City of New York, supra.*

Talit Defendants argue that Nassau Defendants have failed to provide certain outstanding items of discovery. Talit Defendants' papers are dated October 10, 2016. In opposition, Plaintiff argues that Nassau Defendants have, in fact, have provided all outstanding discovery, having provided same on or about October 6, 2016. Nassau Defendants argue in their cross-motion that their discovery responses were mailed to Plaintiff and Talit Defendants on October 10, 2016, as confirmed with an annexed affidavit of service and a copy of the discovery responses.

Nassau Defendants argue in their motion that Talit Defendants have failed to provide color photographs depicting damage to their vehicle demanded on the date of deposition, September 12, 2016. This single item of discovery was requested only approximately two months ago and, pursuant to CPLR §3126, Nassau Defendants cannot, at this early juncture, demonstrate that Talit Defendants' failure to comply was willful, contumacious or in bad faith. However, it is clear that the outstanding item is necessary for Nassau Defendants to proceed to trial.

In light of Nassau Defendants having provided outstanding discovery responses, the motion by Talit Defendants is rendered academic.

With regard to Nassau Defendants' cross-motion, which was submitted without opposition from Talit Defendants, said motion shall be granted to the limited extent that Talit Defendants shall be compelled to comply with the outstanding demand, and denied in all other respects.

In accordance with the forgoing, it is hereby:

ORDERED, that the motion filed by Defendants Jonathan O. Talit and Michael Talit is hereby denied as moot; and it is further

ORDERED, that the motion filed by Defendants County of Nassau, Nassau Inter-County Express, Veolia Transportation Services, Inc. and Clarence D. Edwards is hereby granted to the limited extent that Defendants Jonathan O. Talit and Michael Talit are hereby ordered to provide color copies of the photographs in question to all counsel within ten (10) days of service of this order upon them. The remaining relief requested in that motion is hereby denied; and it is further

[\* 4] ORDERED, that Defendants County of Nassau, Nassau Inter-County Express, Veolia Transportation Services, Inc. and Clarence D. Edwards shall serve a copy of this order upon all parties with ten (10) days of their receipt hereof.

This constitutes the decision and order of the Court.

**ENTER**



HON. JULIANNE T. CAPETOLA  
J.S.C.

**ENTERED**

NOV 18 2016

NASSAU COUNTY  
COUNTY CLERK'S OFFICE