

<b>Rivas v City of New York</b>
2017 NY Slip Op 31863(U)
August 24, 2017
Supreme Court, New York County
Docket Number: 157111/2015
Judge: Kathryn E. Freed
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SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY

PRESENT: HON. KATHRYN E. FREED  
*Justice*

PART 2

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BRIANNA RIVAS, TAJUANA RIDEOUT, TAJUANA RIDEOUT  
Plaintiff,

INDEX NO. 157111/2015

MOTION DATE \_\_\_\_\_

- v -

MOTION SEQ. NO. 001

THE CITY OF NEW YORK, THE NEW YORK CITY  
DEPARTMENT OF EDUCATION,

**DECISION AND ORDER**

Defendant.

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The following e-filed documents, listed by NYSCEF document number 8, 9, 10, 11, 12, 13, 14, 15, 16, 17

were read on this application to/for Dismissal

Upon the foregoing documents, it is

Ordered that the motion is **granted in part**.

Defendants The City of New York and The New York City Department of Education move for an order 1) pursuant to CPLR 3126, dismissing the complaint served by plaintiffs Brianna Rivas, an infant, by her mother and natural guardian, Tajuana Rideout, and Tajuana Rideout individually or, in the alternative, precluding plaintiffs from alleging liability or damages based on their failure to provide discovery; 2) pursuant to CPLR 3042, precluding plaintiffs from introducing

evidence at trial based on their failure to provide a bill of particulars; 3) allowing defendants to enter judgment in their favor, along with statutory costs and disbursements; and 4) for such other and further relief as this Court deems just and proper. The motion, which is unopposed, is **granted in part** to the extent of directing plaintiff to provide a bill of particulars and all outstanding discovery within 30 days of the service of this order with notice of entry.

**Factual and Procedural Background:**

This action arises from an incident on April 21, 2014 in which plaintiff Brianna Rivas was allegedly injured when she tripped and fell at 216 East 120<sup>th</sup> Street, also known as P.S. 96, premises allegedly owned, operated, and/or maintained by defendants . Doc. 11.<sup>1</sup> On or about July 14, 2015, plaintiff Rivas, by Tajuana Rideout, her mother and natural guardian (collectively “plaintiffs”), commenced the captioned action seeking to recover damages for Rivas’ injuries on the ground that they were caused by the negligence of the defendants The City of New York (“The City”) and The New York City Department of Education (“DOE”). Id. Rideout also brought a claim alleging loss of consortium. Id.

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<sup>1</sup> Unless otherwise noted, all references are to the documents filed with NYSCEF in connection with this matter.

The City and DOE joined issue by service of their answer on October 29, 2015. Doc. 12. Concomitantly with the service of their answer, the City and DOE served combined discovery demands, including a demand for a verified bill of particulars. Docs. 13 and 14. To date, the City and DOE have not received a response to these discovery requests despite a written good faith request for the same dated August 31, 2016. Doc. 15. Plaintiffs neither objected to the demands nor requested an extension of time in which to respond to the same.

After the August 31, 2016 letter failed to prompt a response from plaintiffs, the City and DOE filed the instant motion on March 20, 2017. Doc. 8. The City and DOE move 1) pursuant to CPLR 3126, to dismiss the complaint based on plaintiffs' failure to provide discovery or, in the alternative, precluding plaintiffs from alleging liability or damages based on said failure; 2) pursuant to CPLR 3042, precluding plaintiffs from introducing evidence at trial based on their failure to provide a bill of particulars; 3) to enter judgment in their favor upon dismissal of the complaint, along with statutory costs and disbursements; and 4) for such other and further relief as this Court deems just and proper. Plaintiffs do not oppose the motion.

**Conclusions of Law:**

CPLR 3042(a) states, in pertinent part, that:

Within thirty days of service of a demand for a bill of particulars, the party on whom the demand is made shall serve a bill of particulars complying with each item of the demand, except any item to which the party objects, in which event the reasons for the objection shall be stated with reasonable particularity. The assertion of an objection to one or more of the items in the demand shall not relieve the party on whom the demand is made from the obligation to respond in full within thirty days of service of the demand to the items of the demand to which no objection has been made.

CPLR 3042(c) provides that “[i]f a party fails to respond to a demand in a timely fashion or fails to comply fully with a demand, the party seeking the bill of particulars may move to compel compliance, or, if such failure is willful, for the imposition of penalties pursuant to subdivision (d) of this rule.” Subdivisions (c) and (d) provide that sanctions for the failure to respond to a demand for a bill of particulars may be granted only when such failure is willful. Therefore, before the sanction of preclusion can be granted or a pleading stricken, a showing of “willful or contumacious conduct” is necessary. *See Fairbanks Capital Corp. v Nagel*, 289 AD2d 99, 101 (1<sup>st</sup> Dept 2001).

In the case at bar, it is clear that plaintiffs failed to provide the City and DOE with a bill of particulars. However, this fact alone is insufficient to grant the movants’ desired remedy of dismissing the complaint, or of precluding plaintiffs

from introducing evidence of the alleged claims at this juncture. See *Kovačs v Castle Restoration and Construction, Inc.*, 262 AD2d 165, 165-166 (1<sup>st</sup> Dept 1999).

Similarly, the branch of the motion by the City and DOE seeking to strike the complaint or to preclude plaintiffs pursuant to CPLR 3126 due to their failure to provide responses to defendants' combined discovery demands is denied. The movants have failed to establish that plaintiffs' conduct, i.e., their failure to respond to the movants' demands and one good faith request for compliance, was willful, contumacious, or in bad faith. See *Nat. Cas. Co. v Amer. Home Assur. Co.*, 102 AD3d 553, 554 (1<sup>st</sup> Dept 2013); *Armstrong v B.R. Fries & Assocs., Inc.*, 95 AD3d 697, 698 (1<sup>st</sup> Dept 2012).

Even if plaintiff's conduct had been willful and contumacious, "the extreme penalty of dismissal should not be imposed in the absence of any prior notice to [plaintiffs] that such a sanction might be imminent." *Armstrong, supra*, at 698. The motion papers are devoid of any indication that plaintiffs had been warned, prior to the filing of this motion, that their complaint would be dismissed, or that they would be precluded from introducing testimony or evidence, if they did not provide certain discovery. For the same reason, this Court declines to impose costs on plaintiff for the movants' expenses in making this motion.

The Court does direct, however, that pursuant to CPLR 3124, plaintiff must respond to the movants' combined discovery demands dated October 29, 2015 within 30 days of service of this order with notice of entry. Should plaintiffs fail to provide a response to the combined discovery demands within that time period, then the City and DOE shall be able to renew this motion, and this Court may impose sanctions against plaintiffs including, but not limited to, preclusion, dismissal, and costs. This Court further directs plaintiffs to provide a verified bill of particulars pursuant to CPLR 3042 (c) within 30 days of service of this order with notice of entry, and their failure to do so will result in defendants' ability to renew the motion seeking the penalties enumerated immediately above.

Therefore, in accordance with the foregoing, it is hereby:

ORDERED that the motion is denied insofar as it seeks to dismiss the complaint, to preclude plaintiff from introducing evidence at trial, to enter judgment in favor of defendants, and to recover the costs of this motion; and it is further

ORDERED that the motion is granted to the extent that plaintiffs are directed to respond to defendants' demand for a verified bill of particulars and to defendants'

combined discovery demands, both dated October 29, 2015, within thirty days after service of this order with notice of entry; and it is further

ORDERED that defendants shall have leave to renew the instant motion if plaintiffs fail to comply with this order within thirty days of service of this order with notice of entry and, upon such renewed motion, defendants may seek sanctions against plaintiffs including, but not limited to, preclusion, dismissal, and costs; and it is further,

ORDERED that this case is scheduled for a preliminary conference on October 31, 2017 at 2:15 PM in Room 280 at 80 Centre Street; and it is further,

ORDERED that this constitutes the decision and order of the Court.

HON. KATHRYN FREED  
JUSTICE OF SUPREME COURT



KATHRYN E. FREED, J.S.C.

8/24/2017  
DATE

CHECK ONE:	<input type="checkbox"/> CASE DISPOSED	<input type="checkbox"/> DENIED	<input checked="" type="checkbox"/> NON-FINAL DISPOSITION	<input type="checkbox"/> OTHER
APPLICATION:	<input type="checkbox"/> GRANTED		<input checked="" type="checkbox"/> GRANTED IN PART	
CHECK IF APPROPRIATE:	<input type="checkbox"/> SETTLE ORDER		<input type="checkbox"/> SUBMIT ORDER	
	<input type="checkbox"/> DO NOT POST		<input type="checkbox"/> FIDUCIARY APPOINTMENT	<input type="checkbox"/> REFERENCE