

Jean-Charles v Fischler
2017 NY Slip Op 32907(U)
November 28, 2017
Supreme Court, Rockland County
Docket Number: 032619/2015
Judge: Thomas E. Walsh II
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ROCKLAND

-----X
RUDOLF JEAN-CHARLES

Plaintiff,

-against-

DECISION & ORDER
Index No. 032619/2015

Motion # 1 - MD
Motion #2 - MD
DC - N
Adj: 12/4/17

AMANDA M. FISCHLER and LORI BROWN,

Defendant(s).

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Hon. Thomas E. Walsh, II, J.S.C.

The following papers numbered 1- 5 read on Defendant's Motion to Dismiss (Motion #1) Plaintiff's Complaint pursuant to *Civil Practice Law and Rules* § 3126(3) and for such other and further relief as this Court may deem just and proper; and also considered in conjunction with Plaintiff's Notice of Motion (Motion #2) for an Order (a) granting Summary Judgment on the issue of liability, (b) dismissing certain affirmative defenses raised by defendant, (c) for such other and further relief as this Court deems just and proper:

<u>PAPERS</u>	<u>NUMBER</u>
NOTICE OF MOTION (MOTION #1)/AFFIRMATION OF KIRBY J.SMITH, ESQ./EXHIBITS (A-G)	1
NOTICE OF CROSS-MOTION (MOTION #2)/AFFIRMATION OF JEFFREY M. ADAMS, P.C./EXHIBITS (A-D)	2
AFFIRMATION OF JEFFREY M. ADAMS, ESQ. IN OPPOSITION/EXHIBIT 1	3
REPLY AFFIRMATION OF KIRBY J. SMITH, ESQ.	4
AFFIRMATION OF KIRBY J. SMITH, ESQ. IN OPPOSITION/EXHIBIT A	5

The instant action is one for personal injuries based on a motor vehicle accident that occurred on February 14, 2013 at or near North Airmont Road at or about its intersection with

the New York State Thruway, Suffern, New York. Plaintiff alleges that Defendant struck his car by a car registered to and owned by Defendants. According to Plaintiff as a result of the accident he sustained multiple injuries.

Plaintiff commenced the instant action by service of a Summons and Verified Complaint on June 18, 2015. Defendant joined issued with the filing of a Verified Answer and discovery demands on July 14, 2015.

Defendant filed the instant motion seeking an Order pursuant to Civil Practice Law and Rules § 3126(3) dismissing the Plaintiff's Complaint due to the willful failure to comply with Defendant's Notice to Produce and demand for special authorizations or in the alternative pursuant to Civil Practice Law and Rules § 3124 directing that the Plaintiff comply with all prior demands and notices.

According to Defendant a Notice to Produce dated November 10, 2015 (the year was a typo and should have been 2016) demanded the following: (a) all W2 statements of the Plaintiff in his possession for the ten years prior to 2013 from all employees, (b) all IRS records in the Plaintiff's possession for any tax year in which he filed taxes and (c) fully executed IRS from 4508 plus photograph identification per the IRS requirements for release of all tax records for the years 2003 through 2013. Defendant states that the Plaintiff refuses to comply with the Defendant's Notice to Produce and sent a letter dated November 18, 2016 in which Plaintiff objected to Defendant's Notice to Produce. Specifically, Plaintiff stated in the letter that he objected to the demands and refused to respond. According to Defendant, Plaintiff's letter failed to articulate specific reasons for the refusal to respond and as such Plaintiff's Complaint is appropriate based on Plaintiff's willful and contumacious conduct.

Defendant states that they served a demand for specific authorizations dated November 7, 2016 and again Plaintiff willfully and contumaciously refused to respond to Defendant's demand. According to Defendant, Plaintiff stated that Defendant's demands were overly broad and does not provide appropriate names and addresses. However, Defendant states that the specific authorizations individually lists each facility, periods of treatment and practitioners and meet the standards articulated in Civil Practice Law and Rules § 3130.

In opposition the Plaintiff states that the "thrust of defendant's request is that they seek tax records for the ten (10) years prior to this occurrence." Further, Plaintiff submits that the

Defendant's request for ten (10) years of tax records is improper and that Plaintiff has failed to make a proper showing for the extensive tax records requested. As to the Authorizations for Geico (no-fault carrier), Mario Nelson, M.D., White Plains Hospital, Rockland Diagnostic Imaging, Good Samaritan Hospital, SportsCare Physical Therapy of NY - Spring Valley, Michael P. Greany D.C., Orangetown Orthopedics, Jack Stern, M.D. and Seth L. Neubardt, M.D., Plaintiff states that all of those documents were provided on October 9, 2015. Plaintiff also submits that authorizations for Premier Orthopedics of Westchester and Rockland Orangetown Orthopedics, Brain and Spine Surgeons of New York, Rockland Diagnostic Imaging and Good Samaritan Hospital were provided to Defendant on February 4, 2016. Additionally, Plaintiff states that authorizations for Michael P. Greany, D.C. and Geico were provided on May 12, 2016 and an unrestricted authorization for Rockland Diagnostic Imaging was provided on August 12, 2016.

As to any other requests made by the Defendant, Plaintiff submits that they are not properly before the Court. Specifically, Plaintiff asserts that the Defendant has failed to make a proper showing and demonstration of need. Plaintiff's argument includes a recitation of the case law regarding discovery and the limitations, but fails to relate the case law to the specific documents requested by the Defendant.

Pursuant to Civil Practice Law and Rules § 3126:

- 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 party.

The Court has broad discretion in making determinations concerning matters of disclosure including the nature and degree of the penalty to be imposed under Civil Practice Law and Rules § 3126. [*Stone v. Zinoukhova*, 119 AD3d 928 (2d Dept 2014); *Silberstein v. Maimonides Medical Center*, 109 AD3d 812 (2d Dept 2013); *Raville v. Elnomany*, 76 AD3d 520 (2d Dept 2010)]. The striking of a pleading may be appropriate where the movant has made a clear showing that the failure to comply with the discovery demands is willful or contumacious. [*Silberstein v. Maimonides Medical Center*, 109 AD3d 812 (2d Dept 2013)]. Further, the Court can infer that a party is acting willfully or contumaciously through repeated failures to respond to demands or to comply with discovery orders, coupled with inadequate explanations for the failure to comply. [*Stone v. Zinoukhova*, 119 AD3d 928 (2d Dept 2014); *Silberstein v. Maimonides Medical Center*, 109 AD3d 812 (2d Dept 2013)]. However, public policy favors the resolution of cases on their merits, and the drastic remedy of striking a pleading should not be imposed unless the failure to comply is clearly willful and contumacious. [*Stone v. Zinoukhova*, 119 AD3d 928 (2d Dept 2014)].

The Defendant's motion is denied without prejudice based on Plaintiff's compliance with the discovery requests of Defendant as delineated. Plaintiff is directed to comply with any additional discovery requested by Defendant within thirty (30) days of the date hereof.

In light of the fact that discovery has not yet been completed as the examinations before trial of any of the parties have not yet occurred, the Court finds Plaintiff's motion for summary judgment to be premature. [*Lantigua v. Mallick*, 263 A.D.2d 467, 468 (2d Dept. 1999)]. Plaintiff has failed to demonstrate his entitlement to the summary relief he has requested and the motion therefore must be and is hereby denied in its entirety.

In arriving at this decision the Court has reviewed, evaluated and considered all of the issues framed by these motion papers and the failure of the Court to specifically mention any particular issue in this Decision and Order does not mean that it has not been considered by the Court in light of the appropriate legal authority.

Accordingly it is hereby,


ORDERED that Defendant's Motion to Dismiss (Motion #1) is denied without prejudice; and it is further

ORDERED that Plaintiff's Notice of Cross Motion for Summary Judgment (Motion #2) is denied as premature; and it is further

ORDERED that both parties shall appear on **MONDAY DECEMBER 4, 2017 at 9:30 a.m.** for a previously scheduled court appearance.

The foregoing constitutes the Decision and Order of this Court on Motion #1 and Motion #2.

Dated: New City, New York
November 28, 2017



HON. THOMAS E. WALSH, II
Justice of the Supreme Court

TO:

JEFFREY M. ADAMS, ESQ.
ADAMS LAW FIRM, P.C.
Attorney for Plaintiff
(via e-file)

THE LAW OFFICES OF CRAIG P. CURCIO
Attorney for Defendants AMANDA M. FISCHLER and LORI BROWN
(via e-file)