

Matthew v Turst

2018 NY Slip Op 30673(U)

April 16, 2018

Supreme Court, New York County

Docket Number: 158881/15

Judge: Adam Silvera

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This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK – NEW YORK COUNTY
PRESENT: Hon. Adam Silvera Part 22**

LISA MATTHEW,

Plaintiff,

-against-

**DL PETERSON TURST, AMY M. WEBER, MICHELLE
MARTE, and ROGER RODRIGUES,**

Defendants.

DECISION/ORDER

**INDEX NO. 158881/15
MOTION SEQ NO 001**

ADAM SILVERA, J. :

Upon the foregoing papers, it is ordered that plaintiff Lisa Matthew’s motion for leave to amend the Complaint and to compel defendants’ deposition is granted for the reasons set forth below. Plaintiff moves to compel defendants, Michelle Marte and Roger Rodrigues (hereinafter Defendants), to (1) appear for their Court Ordered depositions; or (2) pursuant to CPLR 3126 strike the Defendants’ answer and (3) preclude Defendants from introducing evidence at trial for this action for their failure to appear for Court Ordered depositions; to (4) extend plaintiff’s time to file Note of Issue; pursuant to CPLR 3025, and (5) to grant plaintiff leave to amend the Complaint. No opposition was filed.

BACKGROUND

Plaintiff alleges that, on December 4, 2014, plaintiff’s motor vehicle was involved in an accident with two motor vehicles: one owned by defendant DL Peterson Trust and operated by defendant Amy M. Weber and the other motor vehicle owned by defendant Michelle Marte and operated by defendant Roger Rodrigues.

DISCUSSION

Here, plaintiff seeks to compel Defendants to appear for their Court Ordered depositions. The court may, upon a showing of unanticipated circumstances, compel depositions of parties. (See *Geraci v Creative Leasing Concepts, Inc.*, 219 AD2d 497, 498 [1st Dep't App Div 1995] [finding that the court did not improperly refuse to compel depositions sought by defendant absent some reasonable excuse for not having undertaken depositions "before the case was put on the calendar or a showing of subsequently developing unusual or unanticipated circumstances"]). Here, plaintiff has demonstrated that Defendants have failed to comply with five court orders to appear for depositions. Plaintiff's motion to compel is granted. Failure to appear for deposition may result in an order precluding Defendants from introducing evidence or testifying at trial for this action.

Plaintiff also seeks to extend it's time to file the note of issue. No date has been set by the court as to the Note of Issue, which, will be discussed on June 1, 2018, the date of the previously scheduled status conference. Thus, plaintiff's motion to extend is denied as moot.

Plaintiff further moves strike Defendants' answer and preclude Defendants from introducing evidence at trial for this action. Under CPLR 3216, the court may order the "extreme sanction" of striking a party's pleadings. (*Helms v Gangemi*, 265 AD2d 203, 204 [1st Dep't App Div. 1999] [finding that repeated failure to comply with disclosure demands as directed by the IAS court warranted striking defendant's pleadings].)

While it is within the courts discretion to strike Defendants' answer and preclude Defendants from introducing evidence at trial, this is an extreme remedy reserved for cases in which a party has willfully and contumaciously failed to appear for examination before a trial and provide complete responses to discovery demands. (*Tsai v Hernandez*, 284 AD2d 116, 117

[1st Dep't App Div 2001] [finding that behavior such as deliberate destruction of evidence, repeated failures to appear for scheduled depositions, and failure to provide responsive answers when appearing are evidence of willful, contumacious, or bad faith behavior]). Plaintiff fails to provide concrete evidence of such willful, contumacious, or bad faith conduct by the Defendants. Thus, plaintiff's motion to strike Defendants' answer and preclude Defendants from introducing evidence at trial for this action is denied.

Finally, plaintiff seeks leave to amend their Complaint. Pursuant to CPLR 3025(b), "[a] party may amend his pleading, or supplement it by setting forth additional or subsequent transactions or occurrences, at any time by leave of court or by stipulation of all parties." Leave to amend pleadings is generally freely granted, absent prejudice and surprise resulting from the delay. (*Edenwald Contr. Co. v City of New York*, 60 NY2d 957, 959 [1983]; *See also Antwerpse Diamantbank N.V. v Nissel*, 27 AD3d 207, 208 [1st Dep't 2006]). To find prejudice, there must be some indication that a party has been hindered in the preparation of his case or prevented from taking some measure in support of his position. (*See Abdelnabi v NYC Transit Authority*, 273 AD2d 114, 115 [1st Dep't 2000]).

Plaintiff has discovered that Inventiv Health, Inc. owned the vehicle operated by defendant Weber at the time of the incident. The Court notes that the defendants did not file opposition to plaintiff's motion and counsel for defendants DL Peterson Trust, Amy Weber and Inventiv Health, Inc. agreed with plaintiff counsel pursuant to a stipulation dated February 16, 2018, to add Inventiv Health, Inc. as a defendant to the present action. Thus, no prejudice has even been alleged, and plaintiff's motion to amend is granted.

Accordingly, it is

ORDERED that plaintiff's motion to amend is granted and the caption in this action is amended to read as follows:

LISA MATTHEW,

Plaintiff,

-against-

Index No. 155591/17

INVENTIV HEALTH, INC., DL PETERSON TRUST, AMY M.
WEBER, MICHELLE MARTE, and ROGER RODRIGUES,

Defendants.

And it is further;

ORDERED that all future papers filed with the court bear the amended caption; and it is further

ORDERED that plaintiff shall serve and file the amended summons and complaint upon the additional party, and mail a copy to the other defendants, within 30 days, together with a copy of this order with notice of entry; and it is further

ORDERED that within 30 days of entry of this order plaintiff shall serve a copy, with notice of entry, upon all parties, the County Clerk (Basement of 60 Centre) and the Clerk of Trial Support (Room 148 of 60 Centre), who shall mark their records to reflect the amendment to the caption; and it is further

ORDERED that the defendants shall serve an answer to the amended complaint within 20 days from the date of said service; and it is further

ORDERED that, within 14 days of receipt of defendant Inventiv Health, Inc.'s answer, plaintiff shall serve a copy of all prior pleadings and previously exchanged discovery, including

all deposition transcripts, if any; and it is further

ORDERED that the part of plaintiff's motion to strike defendants' answer and preclude defendants from introducing evidence and/or testify at trial for this action is denied; and it is further

ORDERED that the part of plaintiff's motion which seeks to extend plaintiff's time to file the note of issue is denied as moot

ORDERED that the part of plaintiff's motion to compel is granted; and it is further

ORDERED that defendants Marte and Rodrigues shall appear for deposition at the office of counsel for plaintiff, on a date and at a time convenient for the parties on or before June 1, 2018; and it is further

ORDERED that counsel are directed to appear for a status conference in Room 103, 80 Centre Street, New York, NY, on June 1, 2018, at 9:30 AM; and it is further

This constitutes the Decision/Order of the Court.

Dated:

ENTER:



Hon. Adam Silvera, J.S.C.