

Jeulin v P.C. Richard & Son, LLC
2018 NY Slip Op 32479(U)
October 3, 2018
Supreme Court, New York County
Docket Number: 157405/2016
Judge: Adam Silvera
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART IAS MOTION 22-----X
MICHEL JEULIN,

Plaintiff,

- v -

P.C. RICHARD AND SON, LLC, P.C. RICHARD AND SON
SERVICE COMPANY, INC., PENSKE TRUCK LEASING
CORPORATION, PENSKE TRUCK LEASING CO., L.P., JOHN
DOE, A FICTITIOUS NAME INTENDED TO BE THE OPERATOR
OF THE DEFENDANTS' VEHICLEDefendant.
-----XINDEX NO. 157405/2016MOTION DATE 09/17/2018MOTION SEQ. NO. 002**DECISION AND ORDER**

HON. ADAM SILVERA:

The following e-filed documents, listed by NYSCEF document number (Motion 002) 32, 33, 34, 35, 36, 37, 38, 53, 54, 56, 57, 58

were read on this motion to/for

AMEND CAPTION/PLEADINGS

Upon the foregoing documents, it is ORDERED that plaintiff's motion to amend the complaint is granted. The branch of plaintiff's motion to deem plaintiff's deposition waived and to compel defendants' deposition is denied. Plaintiff moves pursuant to CPLR 1024 and 3025(b) to amend the Complaint and Caption of this action to replace "John Doe" with "Elmer Pullman," the true name of the defendant previously named as "John Doe" and pursuant to CPLR 3103 for an order deeming plaintiff's deposition waived and pursuant to CPLR 3124 to compel defendants to appear for depositions. Defendants do not oppose the branch of plaintiff's motion to amend, however defendants do oppose the branch of the motion to waive and compel deposition and cross-move to dismiss plaintiff's complaint for failure to comply with court orders and discovery demands.

This action stems from an incident which occurred on March 5, 2016, at or near West 100th Street in the County, City and State of New York in which plaintiff was struck and

allegedly seriously injured by a vehicle owned by defendant Penske Truck Leasing Corporation, leased by PC Richardson and Son, and operated by defendant "John Doe."

Cross-Motion to Dismiss

Preliminarily, the Court shall address defendants cross-motion to dismiss plaintiff's complaint. Under CPLR §3124, "if a person fails to respond or comply with any request, notice, interrogatory, demand, or question ... the party seeking disclosure may move to compel compliance or a response." A party may move to compel further discovery pursuant to CPLR §3124 when said party demonstrates that it has made a "good faith effort to bring about a non-judicial resolution to any remaining discovery disputes" (*Barber v Ford Motor Co.*, 250 AD2d 552, 553 [1st Dep't 1998]).

Under CPLR 3126, when a party refuses to obey an order to disclose or appear for deposition, the Court may issue an order precluding said party from testifying at the time of trial and/or providing affidavits as to substantive motions. The Court has discretion pursuant to CPLR §3126 to dismiss a complaint or answer for abuses of the discovery process; however, movants must show that the non-compliant parties' delay in providing responses was a "willful" or "contumacious" failure to provide discovery (*Arts4all, Ltd v Hancock*, 54 AD3d 286, 288 [1st Dep't 2008]).

Here, upon review of the papers the Court has determined that the facts at bar do not rise to a "willful" or "contumacious" failure to provide discovery that warrants dismissal of the Complaint. Dismissal of a Complaint is a harsh sanction and rarely granted. Plaintiff has failed to comply with three prior compliance conference orders to provide defendant with authorizations for radiological examinations and related treatment. Defendant states that plaintiff did however, provide co-defendant with such authorizations. Plaintiff affirms that it has indeed already

provided such authorizations to defendant. The Court finds that plaintiff's failure to furnish defendant with said authorizations does not rise to the level of "willful" or "contumacious" absent further evidence. Defendant Thus, the branch of defendants' motion requesting to dismiss plaintiff's Complaint is denied.

Motion to Amend

Plaintiff's motion pursuant to CPLR 1024 and 3025(b) to amend the Complaint and Caption of this action to replace "John Doe" with "Elmer Pullman," the true name of the defendant previously named as "John Doe" is granted. 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 (*See Edenwald Contr. Co. v City of New York*, 60 NY2d 957, 959 [1983]; *Antwerpse Diamantbank N.V. v Nissel*, 27 AD3d 207, 208 [1st Dep't 2006]).

To find prejudice, there must be some indication that the defendant 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, at the time of commencement of the action, was unaware of the operator of the vehicle and has since determined the operator to be Elmer Pullman. Plaintiff has set forth a basis for late service on Pullman since he was only recently identified through discovery and has demonstrated that there is no prejudice. No opposition was filed, and no prejudice has been raised. Thus, plaintiff's motion to amend is granted.

Depositions

The branch of plaintiff's motion requesting this court to deem plaintiff's deposition as waived is denied. Plaintiff alleges that defendants have refused to go forward with plaintiff's deposition and thus waived them. Defendant has not refused to go forward with plaintiff's deposition without basis. Defendant is allegedly waiting on the receipt of authorizations regarding plaintiff's medical history from plaintiff in order to proceed with plaintiff's deposition. Thus, plaintiff's motion to deem plaintiff's deposition as waived is denied.

The branch of plaintiff's motion to compel defendant's deposition is denied. Plaintiff has yet to be deposed. Plaintiff must first appear for deposition and furnish the outstanding authorizations it owes to defendant pursuant to this Court's Order dated June 22, 2018, in order for defendant to appear for deposition. Thus, plaintiff's motion to compel defendant's deposition is denied.

Accordingly, it is ORDERED that the branch of plaintiff's motion to amend is granted and the caption read as follows:

-----X
MICHAEL JEULIN,

Plaintiff,

-against-

Index No. 157405

P.C. RICHARD AND SON, LLC, P.C. RICHARD
AND SON SERVICE COMPANY, INC., PENSKE
TRUCK LEASING CORPORATION, PENSKE
TRUCK LEASING CO., L.P. AND ELMER PULLMAN

Defendants
-----X

And it is further;

ORDERED that the branch of plaintiff's motion to deem plaintiff's deposition waived is denied; and it is further

ORDERED that the branch of plaintiff's motion to compel defendants to appear for depositions is denied; and it is further

ORDERED that plaintiff provide defendant with a fresh set of the authorizations listed in the June 22, 2018 Order; and it is further

ORDERED that plaintiff's deposition be held within 60 days of defendant's receipt of the above-mentioned authorizations; and it is further

ORDERED that defendants cross-motion to dismiss plaintiff's complaint is denied; and it is further

ORDERED that within 30 days of entry of this order plaintiffs 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

This Constitutes the Decision/Order of the Court

10/3/18

DATE



ADAM SILVERA, J.S.C.

CHECK ONE:

☐

CASE DISPOSED

☐

GRANTED

☐

DENIED

☐

SETTLE ORDER

☐

INCLUDES TRANSFER/REASSIGN

☒

NON-FINAL DISPOSITION

☒

GRANTED IN PART

☐

SUBMIT ORDER

☐

FIDUCIARY APPOINTMENT

☐

OTHER

☐

REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: