

Bakharev v Hardial
2018 NY Slip Op 33477(U)
December 11, 2018
Supreme Court, Queens County
Docket Number: 703470/2016
Judge: Cheree A. Buggs
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Short Form Order

NEW YORK SUPREME COURT-QUEENS COUNTY

Present: **HONORABLE CHEREÉ A. BUGGS**
Justice

IAS PART 30

EUGENE BAKHAREV,

Index No. 703470/2016

Plaintiff,

Motion

Date: November 7, 2018

-against-

Motion Cal. No.: 6

MICHAEL G. HARDIAL, MICHAEL HARDIAL,
KEILA MARI GONZALEZ, RAFAEL GONZALEZ,
ZEBINISIO SUBKHANOVA and BELLA
PYETROSYAN,

Motion Sequence No.: 5

Defendants.

The following e-file papers numbered 44-51, 65-69 submitted and considered on this motion by plaintiff Eugene Bakharev seeking an Order striking the answer of defendants Keila Mari Gonzalez and Rafael Gonzalez for failure to comply with discovery.

Papers
Numbered

Notice of Motion-Affidavits-Exhibits.....	EF 44-51
Affirmation in Opposition-Affidavits-Exhibits....	EF 65
Reply Affirmation-Affidavits-Exhibits.....	EF 66-69

FILED
DEC 19 2018
COUNTY CLERK
QUEENS COUNTY

This matter involves a three car accident which occurred on December 27, 2015 on the eastbound Long Island Expressway (hereinafter "LIE") near the exit of the Brooklyn Queens Expressway (hereinafter "BQE"). Plaintiff Eugene Bakharev (hereinafter "Bakharev") was a passenger in the vehicle being driven by defendant Zebinisio Subkhanova and Bella Pyetrosyan. Bakharev seeks an Order striking the answer of defendants Keila Mari Gonzalez and Rafael Gonzalez (collectively "Gonzalez") for failing to comply with discovery. Gonzalez was the first car in the collision, and had broken down on the highway. Following Gonzalez' deposition testimony on May 22, 2018, Bakharev contended that he served post-deposition discovery on May 23, 2018 upon Gonzalez requiring a response in thirty (30) days, which included the following:

1. All documents showing who and/or what owned the subject vehicle (the vehicle driven by and/or occupied, and/or under the control and custody of Keila Marie Gonzalez at the time of the subject accident;

2. All documents showing when the subject vehicle last had a NYS Inspection Sticker affixed to and/or placed on it prior to the subject accident;

3. All records showing repair, maintenance, and/or inspection of the subject vehicle 1 year prior to the date of accident up to and including the date of the accident;

4. Any title to the subject vehicle that resulted from the vehicle being transferred after the accident, from who and/or what owned it at the time of the subject accident, to any other person and/or entity;

5. All records relating to the removal of fluids from the subject vehicle as a result of and/or in furtherance of its (sic) being salvaged, scrapped, junked, stored, compacted, transported after the accident, broken down and/or recycled, either partially and/or in its entirety;

6. All records showing fuel purchased for use in the subject vehicle, from 1 month prior to the date of the subject accident, up to and including the date of the subject accident;

7. Any photograph and/or video of the scene of the subject accident and/or vehicles involved in the subject accident;

8. Any photograph and/or video of the occupants of the subject vehicle and/or the plaintiff involved in the subject accident;

9. A copy of the registration for the subject vehicle which was current on the date of the subject accident. In lieu thereof, a report certified by the NYS Department of Motor Vehicles showing who and/or what owned the subject vehicle at the time of the subject accident;

10. All correspondence from any entity and/or person sent to and/or otherwise transmitted to Keila Marie Gonzalez and/or Rafael Gonzalez regarding any "recall" or mechanical advisory(ies) of any type regarding the subject vehicle;

11. All documents reflecting the names of all mechanic's, businesses, junk yards(s), salvage businesses, insurance companies, and/or other entities that had physical custody of the subject vehicle after the time of the subject accident to 3 months thereafter.

Plaintiff maintained that the information sought is material and relevant to this case. Gonzalez' vehicle broke down on the LIE and Gonzalez has failed to offer a sufficient explanation for the

vehicle becoming inoperable. Gonzalez failed to exchange relevant information sought by plaintiff, including information related to the inspection or maintenance of the Gonzalez vehicle as requested in the demand.

Gonzalez submitted a response to plaintiff's discovery on or about July 11, 2018, objecting in part to the plaintiff's post-discovery demand and providing a response to certain items. Gonzalez related that they were not in possession of any documents related to item 3, that they had forwarded copies of photographs in response to item 7, and that the majority of the demands were overbroad, irrelevant or vague. Gonzalez also maintained that the plaintiff failed to demonstrate that their failure to comply with discovery was willful and contumacious warranting the drastic remedy of striking a pleading under CPLR §3126. Defendant Keila Marie Gonzalez appeared for her deposition in this matter on May 22, 2018, and responded to every question posed by plaintiff's counsel. The plaintiff's demand included a request for repair records together with information to determine if gas was removed from the vehicle after the accident, fuel purchase receipts, documents showing how much fuel was purchased before the accident, how much was paid and where it was purchased. The information related to plaintiff's demands are found in the defendant's deposition transcript, which was annexed to the opposition papers. Questions 2,3,4 and 5 of plaintiff's discovery demand were properly objected to as these demands sought information outside the scope of discovery. As for question 6 of plaintiff's discovery demand, Gonzalez testified that she did not run out of gas, that she had put a half a tank of gas in the car earlier that day. She further testified that the car started right away after getting into it when she left Manhattan in the Times Square area, proceeding home. Responses to plaintiff's demands 7 and 8 were already provided. Demand 9 of plaintiff's discovery demand related to a copy of the registration is objectionable since defendant already informed plaintiff's counsel who owned the vehicle. Demand 10 of plaintiff's discovery demand sought recall information related to the vehicle, which was asked and answered during the Gonzalez deposition. Demand 11 of plaintiff's discovery demand was objected to, but over objection, defense counsel spoke to the owner defendant Raphael Gonzalez and he stated a junker facility came to his home and gave him \$100 and took the vehicle away, and that Mr. Gonzalez could not recall the name of the junker. Gonzalez offered to provide an affirmation to that effect. Therefore, plaintiff has failed to provide a basis for any additional discovery or and failed to demonstrate how additional discovery sought will lead to any additional relevant evidence.

In response, plaintiff stated that his theory of liability against Gonzalez is that the Gonzalez vehicle ran out of gas on the LIE on the date of the accident. Gonzalez testified that while driving on the LIE at 35 miles per hour, she suddenly and without any warnings began slowing down and the vehicle stopped on its own. Neither of the defendants Gonzalez took any steps to ascertain the cause of the alleged stopping of the vehicle after the accident, and these defendants expect the Court to accept the mere conclusion that defendants' vehicle suffered a mechanical failure without a single detail to support this defense.

Pursuant to CPLR §3126, "[i]f any party, or a person who at the time a deposition is taken or an examination or inspection is made...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: (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 judgment by default against the disobedient party.” The drastic remedy of striking a pleading is inappropriate absent a clear showing that the failure to comply with discovery demands or orders was willful or contumacious. (*See Teitelbaum v Maimonides Med. Ctr.*, 144 AD3d 1013 [2d Dept 2016].) It is clear that willful and contumacious conduct can be inferred from a party’s repeated noncompliance with court-ordered discovery, coupled with either no excuses or inadequate explanations. (*See Lucas v Lawrence Stam*, 147 AD3d 921 [2d Dept 2017]; *Arpino v F.J.F. & Sons Elec. Co., Inc.*, 102 AD3d 201 [2d Dept 2012].)

Upon the Court’s consideration of the papers submitted in support of and in opposition to the motion, the plaintiff’s motion is granted to the extent that defendants Gonzalez are precluded from presenting any evidence at the time of trial related to any documents which were not produced as demanded in plaintiff’s discovery demand, items 2 through 6, 9 and 10.

Therefore, the plaintiff’s motion is granted to the extent stated above.

This constitutes the decision and Order of the Court.

Dated: December 11, 2018


Hon. Chereé A. Buggs, JSC

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