

**Mesiti v Weiss**

2018 NY Slip Op 33805(U)

June 12, 2018

Supreme Court, Sullivan County

Docket Number: 1179-2015

Judge: Mark M. Meddaugh

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At a term of the Supreme Court of the State of New York, held in and for the County of Sullivan, at Monticello, New York, on June , 2018

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF SULLIVAN

-----X  
ANNAMARIA MESITI,

Plaintiff,

-against-

EVELYN WEISS AND LINDA KRAUS,

Defendants.

-----X

**Present:** Hon. Mark M. Meddaugh,  
Acting Justice, Supreme Court

**Appearances:** Basch & Keegan, LLP  
By: Derek J. Spada, Esq.  
*Attorneys for the Plaintiff*  
307 Clinton Avenue, PO Box 4235  
Kingston, New York 12402

Law Office of Bryan M. Kulak, Esq.  
By: Bryan M. Kulak, Esq.  
*Attorney for the Defendants*  
90 Crystal Run Road, Suite 409  
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**MEDDAUGH, J.:**

The defendants applied to this Court, by Notice of Motion, dated April 16, 2018, for an Order, pursuant to CPLR § 3126(3) striking the complaint for failure to comply with outstanding discovery demands and precluding the plaintiff from offering any testimony or evidence in relation to her alleged injuries. The defendants also seek costs of the motion pursuant to CPLR §§ 8106, 8202 and sanctions for failing to provide discovery. The plaintiff opposes the motion and claims she is not aware of any discovery demands that remain unanswered.

**DECISION/ORDER**

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Plaintiff commenced this action on June 1, 2015 to recover for injuries she sustained in a automobile accident which occurred on July 10, 2013, at the intersection of Broadway and Jefferson Street, Monticello, New York. On August 17, 2015, the defendants appeared in this action with the service of an Answer. The defendants also served discovery demands and a Notice to Produce. Discovery was exchanged with plaintiff's prior attorney. The defendants claim they served a second Notice to Produce on October 20, 2016. Discovery continued with plaintiff's new counsel, Bash & Keegan. The defendants allege they served a third Notice to Produce on April 4, 2018. The defendants claim the written discovery provided by the plaintiff is "woefully inadequate" and fails to address the demands in the three outstanding Notices to Produce. The defendants claim the plaintiff is in violation of four discovery orders from the Court: May 31, 2016, November 17, 2016, January 17, 2018 and May 11, 2018. The defendants maintain they have explained to the plaintiff at the court conferences what discovery material they deem outstanding. The defendants claim the plaintiff has failed "to disclose her injuries stemming from seven (7) prior and post accidents."

In opposition to the motion to preclude, the plaintiff's attorney maintains he failed to serve the defendants with a bill of particulars and discovery responses. The attorney claims when he discovered his omission, he immediately served the discovery responses on May 4, 2018. Plaintiff's attorney claim he does not know which discovery demands remain unanswered. The plaintiff contends the failure to respond to the discovery demands is not willful.

A trial Court must use its sound discretion in resolving discovery disputes. (*Ardon v. 302-304 Mott St. Assocs.*, 94 NY2d 740 [2000]). Pursuant to CLR 3124, it is well established that disclosure provisions are to be liberally construed and a trial court is afforded broad discretion in managing

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disclosure. (*McMahon v. Manners*, 158 AD3d 616 [2<sup>nd</sup> Dept. 2018]). CPLR § 3101(a) requires full disclosure of all evidence material and necessary for the prosecution or defense of an action, regardless of the burden of proof. (*Forman v. Henkin*, 30 NY3d 656 [2018]).

A trial court is vested with broad discretion in overseeing the discovery and disclosure process and only a clear abuse of that discretion will justify appellate review. (*Lue v. Finkelstein & Partners, LLP*, 67 AD3d 1187 [3<sup>rd</sup> Dept. 2009]). CPLR § 3126 authorizes the court to fashion an appropriate remedy, the nature and degree of which is a matter committed to the court's sound discretion and will not be disturbed absent a clear abuse of the court's discretion. (*Those Certain Underwriters at Lloyds, London v. Occidental Gems, Inc.*, 11 NY3d 843 [2008]). This Court adheres to the policy of favoring the resolution of actions on the merits rather than by dismissal. (*Maniscalco v. Mount Sinai Medical Center*, 128 AD3d 1029 [2<sup>nd</sup> Dept. 2015]). Discretion in compelling compliance and imposing penalties for noncompliance in discovery matters is soundly vested in the trial court. (*Sugar Foods De Mexico v. Scientific Scents, LLC*, 88 AD3d 1194 [3<sup>rd</sup> Dept. 2011]).

This Court, utilizing its discretion in managing disclosure, denies defendants' motion to dismiss the complaint pursuant to CPLR § 3126. It appears the plaintiff has failed to adequately respond to three Notices to Produce. At the last conference on May, 9, 2018, the defendants outlined the discovery they considered outstanding. The plaintiff is hereby directed to comply with all outstanding discovery requests within thirty (30) days from the date of this Decision/Order.

Failure to timely comply with the outstanding discovery, will allow this Court to entertain all motions for preclusion, for the striking of the pleadings, the dismissal of the action, rendering a judgment by default against the disobedient party and the imposition of sanctions. (*see*, CPLR §

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3126). "The nature and degree of the penalty to be imposed against a party who refuses to comply with court-ordered discovery is a matter within the discretion of the court." (*Raville v. Elnomany*, 76 AD3d 520 [2<sup>nd</sup> Dept. 2010]).

Defendants request for costs is denied. (*see*, CPLR § 8106). Defendants' application for sanctions is also denied. (*Penna Realty Roofing, Inc.* 122 AD3d 821 [2<sup>nd</sup> Dept. 2014]).

**WHEREFORE**, based on the foregoing, the Court directs the plaintiff to comply with the outstanding Notices to Produce and is hereby

**ORDERED** that the defendants' motion to dismiss the complaint is denied. The plaintiff is hereby directed to comply with all discovery requests pursuant to CPLR 3124.

This memorandum shall constitute the Decision and Order of this Court. The original Decision and Order, together with the motion papers have been forwarded to the Clerk's office for filing. The filing of this Order does not relieve counsel from the obligation to serve a copy of this order, together with notice of entry, pursuant to CPLR § 5513(a).

Dated: June 12, 2018  
Monticello, New York

**ORIGINAL**

ENTER: Mark M. Meddough  
HON. MARK M. MEDDAUGH  
Acting Supreme Court Justice

**Papers Considered:**

1. Notice of Motion, dated April 16, 2018
2. Affirmation of Bryan M. Kulak, Esq., dated April 16, 2018
3. Affirmation of Derek J. Spada, Esq., dated May 16, 2018
4. Affirmation of Bryan M. Kulak, Esq. dated May 22, 2018