

Grandelli v Clyburn
2019 NY Slip Op 31309(U)
May 8, 2019
Supreme Court, New York County
Docket Number: 152664/2017
Judge: Adam Silvera
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**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART IAS MOTION 22**

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LOUIS GRANDELLI, AS THE ADMINISTRATOR OF THE
ESTATE OF MARIA LOURDES MUNOZ CARMONA,
DECEASED, AND JUAN TRINIDAD CRESPO, AND, ALVARO
TRINIDAD MUNOZ, INDIVIDUALLY,

Plaintiff,

- v -

RANCE CLYBURN, S&E BRIDGE & SCAFFOLD, INC.,

Defendant.

INDEX NO. 152664/2017

MOTION DATE 01/07/2019

MOTION SEQ. NO. 001

DECISION AND ORDER

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HON. ADAM SILVERA:

The following e-filed documents, listed by NYSCEF document number (Motion 001) 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49

were read on this motion to/for DISMISSAL

Before the Court is defendants Rance Clyburn and S&E Bridge & Scaffold, LLC's motion to dismiss plaintiffs' Complaint pursuant to CPLR 3124 and 3126 for plaintiffs' alleged contumacious refusal to comply with several So-Ordered Stipulations, discovery demands, and good-faith correspondences; or, in the alternative to preclude plaintiffs' from introducing any evidence at trial against defendants' regarding damages; or, in the alternative, to issue a Conditional Order of Dismissal directing that plaintiffs' counsel provide outstanding discovery within 20 days or the Complaint is dismissed with prejudice; or, in the alternative, enforcing the So-Ordered Stipulations of this Court; and, compel plaintiffs to provide the outstanding discovery. Plaintiffs oppose the motion and cross-move for an Order to strike defendants' Answer for failure to appear for deposition.

The suit at bar stems from a motor vehicle accident which occurred on December 9, 2016, at or near West 39th Street at the intersection of 10th Avenue, in the County, City and State of New York when a vehicle operated by defendant Rance Clyburn and owned by defendant S&E Bridge & Scaffold, LLC, struck and killed plaintiff decedent, Maria Lourdes Munoz Carmona while she was a pedestrian crossing within the crosswalk.

Pursuant to CPLR 3126 the Court may impose penalties upon any party who “willfully fails to disclose information which the Court determines ought to have been disclosed.” CPLR 3126[3] provides the drastic sanction of dismissing a party’s pleadings for failure “to comply with outstanding discovery requests or court-ordered discovery obligations.” “[W]hen a party fails to comply with a court order and frustrates the disclosure scheme set forth in the CPLR, it is well within the Trial Judge’s discretion to dismiss [its pleading]” (*Kihl v Pfeffer*, 94 NY2d 118, 122-23 [1999]). “[T]he striking of a party’s pleadings should not, however, be imposed except in instances where the party seeking disclosure demonstrates conclusively that the failure to disclose was willful, contumacious or due to bad faith” (*Hassan v Mahattan and Bronx Surface Transit Operating Authority*, 286 AD2d 303, 288 [1st Dept 2001] [finding that a five year delay in serving a bill of particulars did not warrant dismissal of a personal injury claim where “there was no motion practice at all prior to defendants’ motion to preclude and dismiss”] citing *Dauria v City of New York*, 127 AD2d 459, 460 [1st Dept 1987]). The failure to comply with court-ordered discovery or failure to proffer any excuse for “failure to comply, indicates willful, contumacious and evasive conduct” (*Austin v Coin Devices Corp.*, 234 AD2d 155, 156 [1st Dept 1996]).

Here, defendants allege that there have been significant discovery demands and Court orders which have been ignored relative to the production of discovery responses and documents

concerning plaintiff's business affairs, including evidence of her business income, wages, household income, and an executed employment offer to support plaintiffs' proposition that plaintiff would have been earning a particular salary had she not been involved in the accident at issue. Defendants aver that plaintiffs have failed to provide the abovementioned discovery in the seven months since it was demanded.

In support of their motion defendants attach So-Ordered Stipulations from Compliance Conferences held on March 5, 2018, June 11, 2018, July 18, 2018, and October 5, 2018 (Mot, Exh F, K, L, & N). The So-Ordered Stipulations executed between the parties provide that plaintiff would exchange employment records, tax information, respond to defendants' post-EBT demands, and copy of plaintiff's "business agenda." Defendants also attach several good-faith correspondences requesting said discovery (*id.*, Exh M & O). Defendants requested the outstanding discovery and informed plaintiffs that defendants would file a motion seeking plaintiffs' response to their requests (*id.*, Exh O).

Defendants allege that plaintiffs' failure to provide substantive responses to defendants' demands for discovery is evidence of willful and contumacious behavior that warrants an order striking plaintiffs' pleadings. In opposition, plaintiffs aver that they have provided discovery responses and complied with defendants' requests. Plaintiffs attach to their opposition the requested employment offer letter, tax returns, authorizations for decedent plaintiff's prior business records, and 14 other requested discovery items (Aff in op, Exh A). Plaintiffs have demonstrated that they have not willfully and contumaciously withheld discovery. The Court notes that here, as in *Hassan*, "there was no motion practice at all prior to defendants' motion to preclude and dismiss" (*Hassan*, 286 AD2d 303 at 288). Further, plaintiffs have provided the requested discovery attached in their opposition as Exhibit A. Thus, plaintiffs have demonstrated

that they have not engaged in willful, contumacious and evasive conduct and defendants' motion is denied in its entirety.

Plaintiffs' cross-motion for an Order to strike defendants' Answer for failure to appear for deposition is also denied. The Court notes that "[i]t is well settled that a court should not resort to striking an answer for failure to comply with discovery directives unless noncompliance is clearly established to be both deliberate and contumacious. Moreover, even where the proffered excuse is less than compelling, there is a strong preference in our law that matters be decided on their merits" (*Catarine v Beth Israel Med. Ctr.*, 290 AD2d 213, 215 [1st Dep't 2002][internal citations omitted]).

Plaintiffs have failed to establish that defendants' alleged failure to comply with discovery was both deliberate and contumacious. Furthermore, in defendants' opposition papers, defendants' deny having refused to appear for deposition; rather, defendants claim to have located defendant driver Rance Clyburn and contacted plaintiffs several time to provide them with dates that they were available to conduct the deposition (Aff in Op to Cross-Mot, Exh C, E, G). Thus, defendants alleged failure to produce defendant Clyburn for deposition, does not amount to deliberate and contumacious behavior, where it has been demonstrated that said defendant was ready, willing, and able to appear for such deposition. As such the instant cross-motion is denied. The Court directs defendant Rance Clyburn to appear for deposition on or before July 15, 2019, at a time and place mutually agreed upon by the parties. No adjournments are to be granted and should defendant not appear for deposition, defendants will be subject to sanctions to be determined at the next Compliance Conference.

Accordingly, it is

ORDERED that defendants' motion to dismiss plaintiffs' Complaint pursuant to CPLR 3124 and 3126 for plaintiffs' alleged contumacious refusal to comply with several So-Ordered Stipulations, discovery demands, and good-faith correspondences; or, in the alternative to preclude plaintiffs' from introducing any evidence at trial against defendants' regarding damages; or, in the alternative, to issue a Conditional Order of Dismissal directing that plaintiffs' counsel provide outstanding discovery within 20 days or the Complaint is dismissed with prejudice; or, in the alternative, enforcing the So-Ordered Stipulations of this Court; and, compel plaintiffs to provide the outstanding discovery is denied; and it is further

ORDERED that plaintiffs' cross-motion to strike defendants' Answer for failure to appear for deposition is denied; and it is further

ORDERED that all parties appear for a Compliance Conference in room 106 of 80 Centre Street on July 19, 2019 at 9:30 am.

This constitutes the Decision/Order of the Court.

5/8/2019
DATE


ADAM SILVERA, J.S.C.

CHECK ONE:	<input type="checkbox"/> CASE DISPOSED	<input checked="" type="checkbox"/> DENIED	<input checked="" type="checkbox"/> NON-FINAL DISPOSITION	<input type="checkbox"/> OTHER
	<input type="checkbox"/> GRANTED		<input type="checkbox"/> GRANTED IN PART	
APPLICATION:	<input type="checkbox"/> SETTLE ORDER		<input type="checkbox"/> SUBMIT ORDER	
CHECK IF APPROPRIATE:	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN		<input type="checkbox"/> FIDUCIARY APPOINTMENT	<input type="checkbox"/> REFERENCE