

Pruden v 133 W. 145 LLC
2019 NY Slip Op 33574(U)
December 5, 2019
Supreme Court, New York County
Docket Number: 152991/2019
Judge: W. Franc Perry
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. W. FRANC PERRY PART IAS MOTION 23EFM

Justice

-----X

TIFFANY PRUDEN

Plaintiff,

- v -

133 W 145 LLC,

Defendant.

-----X

INDEX NO. 152991/2019
MOTION DATE N/A
MOTION SEQ. NO. 001

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 001) 6, 7, 8, 9, 10, 11, 12, 13, 14, 15

were read on this motion to/for DISCOVERY

This personal injury/negligence action arises out of plaintiff Tiffany Pruden’s alleged slip and fall on the staircase of a building owned by defendant 133 W 145 LLC. Defendant now moves, pursuant to CPLR 3126, for an order striking plaintiff’s complaint for failure to provide discovery, along with an order precluding plaintiff from offering any evidence at trial in support of the instant claims. In the alternative, pursuant to CPLR 3043 and 3124, defendant is seeking to compel plaintiff to provide full and complete responses to defendant’s discovery demands within 10 days. Defendant is further seeking the costs associated with this motion.

Plaintiff commenced this action by filing a summons and complaint on March 21, 2019. Defendant served its answer and discovery demands on June 10, 2019. In the demands, defendant requested a verified bill of particulars, Medicare/Medicaid information and document production, among other demands. Pursuant to a letter dated August 7, 2019, defendant stated that it was making a “good faith attempt” to obtain outstanding discovery from plaintiff.

NYSCEF Doc. No. 13.

Defendant filed and served the instant motion on August 30, 2019. The record indicates that, on September 30, 2019, plaintiff requested a preliminary conference and submitted a bill of particulars. See NYSCEF Doc. Nos. 16, 17. In the request for a preliminary conference, counsel for plaintiff affirmed the following: "Plaintiff(s) has attempted to conduct discovery in good faith, but despite these attempts, discovery has not been completed." NYSCEF Doc. No. 16, Tanenbaum affirmation, ¶ 5. A preliminary conference is scheduled on December 17, 2019.

Pursuant to CPLR 3126, courts have discretion to impose various sanctions for failing to comply with outstanding discovery requests. These may include making an order "prohibiting the disobedient party . . . from producing in evidence designated things or items of testimony," or making "an order striking out pleadings . . ." CPLR 3126 (2) and (3). "However, public policy favors the resolution of cases on the merits." *Stone v Zinoukhova*, 119 AD3d 928, 929 (2d Dept 2014).

As a result of plaintiff's alleged failure to comply with discovery demands, defendant is seeking to preclude plaintiff from introducing any evidence at trial in support of her claims and is also seeking dismissal of the complaint. "The striking of a party's pleadings should not . . . 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 Manhattan & Bronx Surface Tr. Operating Auth.*, 286 AD2d 303, 304 (1st Dept 2001). Here, however, as shown below, defendant has not "conclusively shown that the [plaintiff's] actions were willful or in bad faith." *Dauria v City of New York*, 127 AD2d 459, 460 (1st Dept 1987). The record indicates that, shortly after defendant moved for the instant relief, plaintiff requested a

compliance conference and e-filed a bill of particulars.¹ Plaintiff acknowledges the delay and claims that she is attempting to comply with any outstanding discovery.

Furthermore, there is no indication that plaintiff was repeatedly served with discovery demands or that the court issued an order related to discovery compliance. The parties are scheduled for a preliminary conference on December 17, 2019. *See e.g. Hassan v Manhattan & Bronx Surface Tr. Operating Auth.*, 286 AD2d at 305 (“there is no evidence that defendants served plaintiffs with repeated demands for such a bill. . . . [T]here was no motion practice at all prior to defendants’ motion to preclude and dismiss and there is no evidence of plaintiffs’ failure or repeated failures to comply with outstanding court orders regarding discovery”). Accordingly, for the reasons set forth above, in its discretion, the court denies defendant’s motion pursuant to CPLR 3126 and declines to impose any sanctions.

Pursuant to CPLR 3124, “[i]f a person fails to respond to or comply with any request, notice, interrogatory, demand, question or order under this article . . . the party seeking disclosure may move to compel compliance or a response.” In the alternative, defendant is seeking to have the court compel plaintiff to comply with the outstanding discovery requests.

Citing CPLR 3043, “[b]ills of particulars in personal injury actions,” defendant moved to compel plaintiff to provide outstanding discovery. On a motion brought pursuant to CPLR 3124, the burden is on the party seeking the disclosure to establish a basis for the production sought. *Rodriguez v Goodman, M.D.*, 2015 NY Slip Op 31412(U), *5 (Sup Ct, NY County 2015). As noted, plaintiff did respond to the request for the verified bill of particulars. Accordingly, as defendant failed to satisfy its burden, its request for a motion to compel is denied.

¹ Although NYSCEF specified that the bill of particulars was filed on September 30, 2019, a complete un-redacted version was unavailable for viewing.

Defendant's additional request for costs is also denied. Accordingly, it is

ORDERED that 133 W 145 LLC's motion seeking to strike the complaint, to preclude plaintiff from offering evidence or to compel plaintiff to fully respond to discovery demands is denied in its entirety; and it is further

ORDERED that counsel are directed to appear for a status conference in Room 307, 80 Centre Street, New York, New York, on December 17, 2019, at 9:30 AM.

12/5/2019
DATE



W. FRANC PERRY, 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: