

Flores v Acosta

2019 NY Slip Op 33933(U)

March 12, 2019

Supreme Court, Nassau County

Docket Number: 603085/16

Judge: Denise L. Sher

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This opinion is uncorrected and not selected for official publication.

SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK

PRESENT: HON. DENISE L. SHER
Acting Supreme Court Justice

STEVEN FLORES,

Plaintiff,

- against -

BENJAMIN ACOSTA a/k/a NESTOR GUERRA, NOBER
BENITEZ, ENTERPRISE HOLDINGS, INC., PATRICIA
BUCHENBERGER and THOMAS E. BUCHENBERGER,

Defendants.

TRIAL/IAS PART 35
NASSAU COUNTY

Index No.: 603085/16
Motion Seq. Nos.: 02, 03
Motion Dates: 01/18/19
01/28/19

The following papers have been read on these motions:

	Papers Numbered
<u>Notice of Motion (Seq. No. 02), Affirmations and Exhibits</u>	<u>1</u>
<u>Affirmation in Opposition to Motion (Seq. No. 02) and Exhibits</u>	<u>2</u>
<u>Reply Affirmation to Motion (Seq. No. 02) and Exhibit</u>	<u>3</u>
<u>Notice of Cross-Motion (Seq. No. 03) and Affirmation</u>	<u>4</u>
<u>Affirmation in Opposition to Cross-Motion (Seq. No. 03)</u>	<u>5</u>

Upon the foregoing papers, it is ordered that the motions are decided as follows:

Defendant Enterprise Holdings, Inc. (“Enterprise”) moves (Seq. No. 02), pursuant to CPLR § 3126, for an order precluding defendant Nober Benitez (“Benitez”) from offering any testimony at the time of trial, or, in the alternative, moves, pursuant to CPLR § 3124, for an order compelling defendant Benitez to comply with outstanding discovery demands, dated September 5, 2018. Defendant Benitez opposes the motion.

Defendant Benjamin Acosta a/k/a Nester Guerra (“Acosta”) cross-moves (Seq. No. 03), pursuant to CPLR § 3126, for an order precluding defendant Benitez from offering any testimony

at the time of trial, or, in the alternative, moves, pursuant to CPLR § 3124, for an order compelling defendant Benitez to comply with outstanding discovery demands, dated September 5, 2018, from defendant Enterprise, and September 27, 2018, from defendant Acosta. Defendant Benitez opposes the cross-motion.

In support of the motion (Seq. No. 02), counsel for defendant Enterprise submits, in pertinent part, that, “[t]his action arises from a motor vehicle accident which occurred on August 19, 2015.... One of the issues in the case is which individual defendant rented a vehicle from movant’s affiliate, doing business as Enterprise Rent A Car. According to the rental agreements, it was defendant Benitez who rented the vehicle.... Plaintiff, however, alleges that the vehicle was rented by co-defendant Benjamin Acosta who utilized the identification of Benitez.... As such, plaintiff alleges that the movant negligently failed to check (*sic*) renter’s identity.... Notably, co-defendant Acosta denied renting the subject vehicle from Enterprise and stated that it was defendant Benitez who allowed him to use the rental vehicle.... Benitez, in testimony, which was self-contradictory at times, denied renting the subject vehicle or signing the rental agreement.... Benitez testified that although he had (*sic*) driver’s license at all relevant times, he somehow did not possess it with him on the date of the accident.... As such, movant was not able to verify Benitez’ identity in general, to verify his signature and match it against (*sic*) one in the rental agreement. A copy of both sides of Benitez’ driver’s license had been requested by the movant on the record during his deposition.... Benitez also testified that he was able to obtain ‘the paper’ from Enterprise reflecting who was the renter of the subject vehicle.... Benitez testified that he still has ‘the paper’ and the movant asked on the record that Benitez preserves (*sic*) ‘the papers’ and provides (*sic*) it to his counsel.... Given plaintiff’s allegations and Benitez’ equivocal testimony, movant served its discovery demands, dated September 5, 2018, upon Benitez, seeking a copy of his driver’s license and the aforementioned ‘paper’ from Enterprise in

his possession.... Benitez, however, failed to respond to said demand. Thus, when (*sic*) parties appeared for a certification conference on October 2, 2018 and this Court directed that this matter be certified as ready for trial, the parties entered into (*sic*) stipulation, signed by all parties, which directed, *inter alia*, that defendant Benitez must respond to movant's discovery demands, dated September 5, 2018, within 30 days.... Benitez did not respond to this stipulation either and movant's discovery demands, dated September 5, 2018, remain outstanding.... In light of the foregoing, it is respectfully submitted that (*sic*) documents at issue, to wit, copies of Benitez' driver's license and 'the paper' from Enterprise in his possession, allegedly reflecting the renter's identity, are critical to movant's defenses in this case. Benitez' failure to respond to (*sic*) September 5, 2018 demand over the period of nearly four (4) months - even after counsel agreed to provide the response via (*sic*) October 2, 2018 stipulation - is willful and prejudicial to the moving defendant." *See* Defendant Enterprise's Affirmation in Support Exhibits A-H.

In opposition to the motion (Seq. No. 02), counsel for defendant Benitez submits, in pertinent part, that, "[a]s movant's counsel has failed to make the requisite 'good faith' effort, the motion must be denied. Since the movant's motion is one 'relating to disclosure', as required pursuant to 22 NYCRR §202.7(a), the movant's counsel, ... is mandated to 'confer', i.e., 'to have a conference or talk; meet for discussion' with opposing counsel 'in a good faith effort to resolve the issues raised by the motion.' Section 202.7(c) requires that in the 'good faith affirmation', plaintiff's counsel is to set forth the 'time, place and nature of the consultation.' (Emphasis added).... Notwithstanding the procedural infirmities inherent in movant's application requiring, as stated, its denial, the movant is absorbed with form over substance as the defendant Nober Benitez has, in fact, responded to the very discovery movant seeks, albeit to the identical demands served by plaintiff's counsel on September 10, 2018 ... and the identical demand served by the defendant Acosta on September 27, 2018.... All three (3) discovery demands (inclusive of

movant's September 7, 2018 demand ...) sought identical discovery, to wit: (1) Copy of the front and back of Nober Benitez's driver's license; and (2) Copy of paper Nober Benitez received from 'Junior' regarding subject rental vehicle. Because Acosta sought one more item of discovery, it was Acosta's discovery demand that was responded to on November 8, 2018 and served on all parties.... As to the two (2) items the instant movant seeks, the November 8, 2018 response responds accordingly. Does counsel really need Benitez to go through the process of generating a 'separate' response to assuage his concerns? Pragmatism, says no. This is especially so where one item relates to a public record and the other a 'paper's that (*sic*) for which a search continues. The defendant cannot create that which he does not have." *See* Defendant Benitez's Affirmation in Opposition Exhibits A-C.

In reply to the opposition, counsel for defendant Enterprise asserts, in pertinent part, that, "Benitez' opposition neither contains (*sic*) documents requested by the movant nor adequately explains the reasons for his failure to provide them.... Benitez' argument that movant did not comply with its good faith effort obligation is without merits (*sic*). After movant's discovery notice elicited no timely response from Benitez, I personally discussed it with his counsel, Mr. Sclafani. The discussion occurred in the first row of Justice Sher's courtroom public sitting area on October 2, 2018. In response to my inquiries, Mr. Sclafani asked to see a copy of movant's discovery notice, which I produced. After reviewing and discussing the outstanding items, Mr. Sclafani agreed to provide a response. This agreement was then documented via (*sic*) October 2, 2018 stipulation.... This verbal discussion was specifically mentioned in movant's good faith affirmation.... Next, Benitez argues that he had already responded to movant's demands, dated September 7, 2018, and that movant's motion is now moot (even though said response contained no documents requested by the movant). In support of his argument, Benitez attached his response to a different notice, served by a different defendant.... Even if (*sic*) Court construes Benitez' response to co-defendant's demands as a response to movant's demands as well, Benitez' response is plainly insufficient as it failed to produce any of the two requested

documents... Benitez' objection to movant's request to inspect a copy of his driver's license did not comply with CPLR 3122(a) which requires that objection to a discovery demand must 'state with reasonable particularity the reasons for each objection.' Here, Benitez interposed an unexplained objection which was accompanied by a citation to a case from the middle of the last century, dealing with a discovery demand for a public record, namely a driver's MV 104 report.... It leaves anyone guessing what was the ground for Benitez' objection. Regardless, (*sic*) Benson case has nothing to do with movant's request at bar since Benitez' driver (*sic*) license is not a public record but is in Benitez's exclusive possession. It was Benitez who placed his signature and information in (*sic*) the driver's license into controversy and it was Benitez who was not able to produce his license for inspection at the time of the deposition.... As such, Benitez' objection to inspection of his driver's license is procedurally and substantively infirm and a copy of his driver's license should be produced for movant's inspection to verify Benitez' testimony that he did not rent the vehicle. Similarly, Benitez' response to movant's request for a copy of movant's 'paper' identifying the renter - to wit, that 'search continuing' - is not satisfactory, especially at this post-note of issue stage. Such 'paper' is likely to contain information salient to Benitez' position in this case and his pending dispositive motion, and arguably should have been produced as an adverse party statement awhile ago. Benitez testified on September 7, 2018 that he has a copy of said 'paper' in his possession and a request to preserve was made on the record.... Neither Benitez' counsel's response to co-defendant's demands nor his opposition affirmation state that Benitez cannot find the paper. If Benitez undertook a search and cannot find the 'paper' and Benitez would like to amend his sworn testimony that he still possesses the 'paper', Benitez should supply an affidavit detailing his search efforts and their results. If Benitez still has the 'paper', this document should be produced." *See* Defendant Enterprise's Affirmation in Support Exhibits F-H; Defendant Benitez's Affirmation in Opposition Exhibit C.

CPLR § 3101(1) provides for "full disclosure of all matters material and necessary for the prosecution and defense of an action...." The discovery of any information or material reasonably

related to the issues which will assist in preparation for trial by sharpening the issues and reducing delay and prolixity are encouraged. The test is one of usefulness and reason. *See Allen v. Crowell-Collier Pub. Co.*, 21 N.Y.2d 403, 288 N.Y.S.2d 449 (1968).

Indeed, “the scope of permissible discovery is not entirely unlimited and the trial court is invested with broad discretion to supervise discovery and to determine what is ‘material and necessary’ as that phrase is used in CPLR 3101(a).” *Auerbach v. Klein*, 30 A.D.3d 451, 816 N.Y.S.2d 376 (2d Dept. 2006). *See also Stone v. Zinoukhova*, 119 A.D.3d 928, 990 N.Y.S.2d 567 (2d Dept. 2014); *Edwards v. Prescott Cab Corp.*, 110 A.D.3d 671, 972 N.Y.S.2d 629 (2d Dept. 2013); *Ural v. Encompass Ins. Co. of Am.*, 97 A.D.3d 562, 948 N.Y.S.2d 621 (2d Dept. 2012). Ultimately, “[i]t is incumbent on the party seeking disclosure to demonstrate that the method of discovery sought will result in the disclosure of relevant evidence or is reasonably calculated to lead to the discovery of information bearing on the claims.” *Gomez v. State of New York*, 106 A.D.3d 870, 965 N.Y.S.2d 542 (2d Dept. 2013) quoting *Vyas v. Campbell*, 4 A.D.3d 417, 775 N.Y.S.2d 375 (2d Dept. 2004).

New York has long favored “open and far-reaching pretrial discovery.” *Kavanagh v. Ogden Alliance Maintenance Corp.*, 92 N.Y.2d 952, 683 N.Y.S.2d 156 (1998) quoting *DiMichel v. South Buffalo Ry. Co.*, 80 N.Y.2d 184, 590 N.Y.S.2d 1 (1992) cert. den. sub. nom. *Poole v. Consolidated Rail Corp.*, 510 U.S. 816 (1993). Furthermore, pursuant to CPLR § 3124, disclosure provisions are to be liberally construed.

CPLR § 3126 provides the “[p]enalties for refusal to comply with order or to disclose.” It reads, “[i]f any party, or a person who at the time a deposition is taken or an examination or inspection is made is an officer, director, member, employee or agent of a party or otherwise under a party’s control, 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: 1. An order that the issues to which the information is relevant shall be deemed resolved for purposes of the

action in accordance with the claims of the party obtaining the order; or 2. an order prohibiting the disobedient party from supporting or opposing designated claims or defenses, from producing in evidence designated things or items of testimony, or from introducing any evidence of the physical, mental or blood condition sought to be determined, or from using certain witnesses; or 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 a judgment by default against the disobedient party.”

The nature and degree of the sanction to be imposed on a motion pursuant to CPLR § 3126 is a matter reserved to the sound discretion of the trial court. *See Dokaj v. Ruxton Tower Ltd. Partnership*, 91 A.D.3d 812, 938 N.Y.S.2d 101 (2d Dept. 2012). To invoke the drastic remedy of preclusion, the Court must determine that the party’s failure to comply with a disclosure order was the result of willful, deliberate and contumacious conduct or its equivalent. *See Arpino v. F.J.F. & Sons Elec. Co., Inc.*, 102 A.D.3d 201, 959 N.Y.S.2d 74 (2d Dept. 2012); *Zakhidov v. Boulevard Tenants Corp.*, 96 A.D.3d 737, 945 N.Y.S.2d 756 (2d Dept. 2012); *MacKenzie v. City of New York*, 125 A.D.3d 821, 1 N.Y.S.3d 840 (2d Dept. 2015); *6 Harbor Park Drive, LLC v. Town of North Hempstead*, 127 A.D.3d 1065, 5 N.Y.S.3d 887 (2d Dept. 2015); *Crystal Clear Development, LLC v. Devon Architects of New York, P.C.*, 127 A.D.3d 911, 7 N.Y.S.3d 361 (2d Dept. 2015); *De Leo v. State-Whitehall Co.*, 126 A.D.3d 750, 5 N.Y.S.3d 227 (2d Dept. 2015); *Pirro Group, LLC v. One Point St., Inc.*, 71 A.D.3d 654, 896 N.Y.S.2d 152 (2d Dept. 2010); *Assael v. Metropolitan Tr. Auth.*, 4 A.D.3d 443, 772 N.Y.S.2d 364 (2d Dept. 2004). Willful and contumacious conduct can be inferred from repeated non-compliance with court orders, *inter alia*, directing depositions, coupled with either no excuses, or inadequate excuses; or a failure to comply with court ordered discovery over an extended period of time. *See Prappas v. Papadatos*, 38 A.D.3d 871, 833 N.Y.S.2d 156 (2d Dept. 2007).

As previously stated, it is well settled that trial courts have broad discretion in supervising disclosure. *See Alberto v. Jackson*, 118 A.D.3d 733, 987 N.Y.S.2d 218 (2d Dept. 2014); *Caro v.*

Marsh USA, Inc., 101 A.D.3d 1068, 956 N.Y.S.2d 575 (2d Dept. 2012). The determination whether to strike a pleading or to preclude evidence for failure to comply with court-ordered disclosure lies within the sound discretion of the court. *See Palmieri v. Piano Exch., Inc.*, 124 A.D.3d 611, 1 N.Y.S.3d 315 (2d Dept. 2015); *6 Harbor Park Drive, LLC v. Town of North Hempstead, supra*; *Crystal Clear Development, LLC v. Devon Architects of New York, P.C.*, *supra*.

As the Court of Appeals stated in *Andrea v. Arnone, Hedin, Casker, Kennedy & Drake, Architects & Landscape Architects, P.C. (Habiterra Assoc.)*, 5 N.Y.3d 514, 806 N.Y.S.2d 453 (2005), “[l]itigation cannot be conducted efficiently if deadlines are not taken seriously” and “disregard of deadlines should not and will not be tolerated.” Compliance requires not only a timely response, but a good faith effort to provide a meaningful response. *See Arpino v F.J.F. & Sons Elec. Co., Inc.*, *supra*.

Although the Court has broad discretion in determining the appropriate sanction pursuant to CPLR § 3126, the “general rule is that a court should only impose a sanction commensurate with the particular disobedience it is designed to punish and go no further.” *See Rossal-Daub v. Walter*, 58 A.D.3d 992, 871 N.Y.S.2d 751 (3d Dept. 2009) *citing Landrigen v. Landrigen*, 173 A.D.2d 1011, 569 N.Y.S.2d 843 (3d Dept. 1991).

First, the Court notes that counsel for defendant Enterprise did indeed provide a Good Faith Affirmation with its moving papers which the Court finds satisfies the requirements set forth in 22 NYCRR 202.7(a)(2). 22 NYCRR 202.7(a)(2) reads that “[t]here shall be compliance with the procedures prescribed in the CPLR for the bringing of motions. In addition, except as provided in subdivision (d) of this section, no motion shall be filed with the motions papers ... (2) with respect to a motion relating to disclosure or to a bill of particulars, an affirmation that counsel has conferred with counsel for the opposing party in a good faith effort to resolve the issues raised by the motion.”

Furthermore, as to counsel for Benitez's contention that, "[a]s to the two (2) items the instant movant seeks, the November 8, 2018 response responds accordingly. Does counsel really need Benitez to go through the process of generating a 'separate' response to assuage his concerns? Pragmatism, says no," the Court, however, submits the rules of the Court "say yes." Defendant Benitez must reply to the demands of all parties in the instant action, just not pick and chose the demands he deems worthy of a response. Additionally, the Court finds that the responses provided by defendant Benitez to defendant Acosta's demand are clearly insufficient.

However, in the instant matter, the record does not clearly establish a pattern of wilfulness or contumacious conduct necessary to justify preclusion of defendant Benitez from offering any testimony at the time of trial. *See Warner v. Orange County Regional Medical Center*, 126 A.D.3d 887, 6 N.Y.S.3d 83 (2d Dept. 2015); *De Leo v. State-Whitehall Co.*, *supra* at 752; *Chong v. Chaparro*, 94 A.D.3d 800, 941 N.Y.S.2d 709 (2d Dept. 2012); *Hillside Equities, LLC v. UFH Apartments, Inc.*, 297 A.D.2d 704, 747 N.Y.S.2d 541 (2d Dept. 2002). Nevertheless, the Court does find that defendant Enterprise is indeed entitled to the outstanding discovery that it has outlined in their instant motion papers.

Accordingly, the branch of defendant Enterprise's motion (Seq. No. 02), pursuant to CPLR § 3126, for an order precluding defendant Benitez from offering any testimony at the time of trial, is hereby **DENIED at this time**.

The branch of defendant Enterprise's motion (Seq. No. 02), pursuant to CPLR § 3124, for an order compelling defendant Benitez to comply with outstanding discovery demands, dated September 5, 2018, is hereby **GRANTED**. And it is further

ORDERED that defendant Benitez must provide defendant Enterprise with a copy of both sides of defendant Benitez's driver's license, and must provide defendant Enterprise with a copy of the "paper" related to the rental car transaction obtained by "Junior" which is in defendant Benitez's possession, **on or before March 29, 2019**. If defendant Benitez cannot find the subject 'paper' and would like to amend his sworn testimony that he still possesses the

subject 'paper,' defendant Benitez should supply an affidavit detailing his search efforts and the results. And it is further

ORDERED that if defendant Benitez fails to comply with aforesaid conditions, counsel for defendant Enterprise may make an oral application to preclude defendant Benitez from offering any testimony at the time of trial.

With respect to defendant Acosta's cross-motion (Seq. No. 03), his counsel submits, in pertinent part that, "[y]our affirmant acknowledges the motion of defendant ENTERPRISE HOLDINGS, INC., dated December 24, 2018, and which seeks the same or similar relief as the instant cross motion.... Your affirmant hereby adopts, and incorporates by reference, the supporting Affirmation ... submitted in conjunction with, and in support of defendant ENTERPRISE HOLDINGS, INC.'s Motion to Preclude and/or Compel by a date certain. Your affirmant additionally adopts, and incorporates by reference, the Affirmation ... submitted in Reply, and further support, of defendant ENTERPRISE HOLDINGS, INC.'s Motion to Preclude and/or Compel by a date certain. Your affirmant respectfully submits that defendant NOBER BENITEZ should be precluded from testifying at trial as he has failed to respond to defendant ENTERPRISE HOLDINGS, INC.'s discovery demands dated September 5, 2018 and movant defendant BENJAMIN ACOSTA a/k/a NESTOR GUERRA's discovery demands dated September 27, 2018."

In opposition to the cross-motion (Seq. No. 03), counsel for defendant Benitez asks the Court to refer to defendant Benitez's opposition to defendant Enterprise's motion (Seq. No. 02) and "accept same in opposition to the present cross-motion."

Based upon the above, the branch of defendant Acosta's cross-motion (Seq. No. 03), pursuant to CPLR § 3126, for an order precluding defendant Benitez from offering any testimony at the time of trial, is hereby **DENIED at this time**.

The branch of defendant Acosta's cross-motion (Seq. No. 03), pursuant to CPLR § 3124, for an order compelling defendant Benitez to comply with outstanding discovery demands, dated

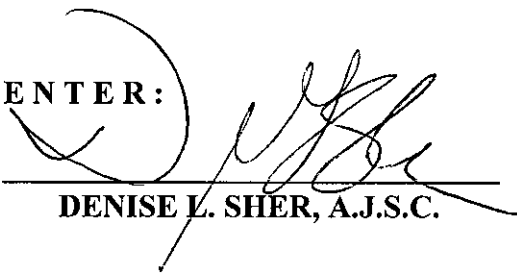
September 5, 2018, from defendant Enterprise, and September 27, 2018, from defendant Acosta, is hereby **GRANTED**. And it is further

ORDERED that defendant Benitez must provide defendant Acosta with a copy of both sides of defendant Benitez’s driver’s license, and must provide defendant Acosta with a copy of the “paper” related to the rental car transaction obtained by “Junior” which is in defendant Benitez’s possession, **on or before March 29, 2019**. If defendant Benitez cannot find the subject ‘paper’ and would like to amend his sworn testimony that he still possesses the subject ‘paper,’ defendant Benitez should supply an affidavit detailing his search efforts and the results. And it is further

ORDERED that if defendant Benitez fails to comply with aforesaid conditions, counsel for defendant Acosta may make an oral application to preclude defendant Benitez from offering any testimony at the time of trial.

All parties shall appear for a Pre-Trial Conference in Nassau County Supreme Court, Differentiated Case Management Part (DCM) at 100 Supreme Court Drive, Mineola, New York, on March 26, 2019, at 9:30 a.m.

This constitutes the Decision and Order of this Court.

ENTER:

DENISE L. SHER, A.J.S.C.

Dated: Mineola, New York
March 12, 2019

ENTERED
MAR 13 2019
NASSAU COUNTY
COUNTY CLERK'S OFFICE