

Llanos v Casale Constr. Servs., Inc.
2019 NY Slip Op 34083(U)
January 28, 2019
Supreme Court, Westchester County
Docket Number: 60625/17
Judge: Joan B. Lefkowitz
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To commence the statutory time period for appeals as of right [CPLR 5513(a)], you are advised to serve a copy of this order, with notice of entry upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER - COMPLIANCE PART

-----X
LIZA LLANOS,

Plaintiff,

DECISION & ORDER

-against-

Index No. 60625/17
Motion Date: Jan. 7, 2019
Seq. No. 1

CASALE CONSTRUCTION SERVICES, INC. f/k/a
CASALE EXCAVATING, INC. d/b/a CASALE
INCORPORATED and THE COUNTY OF
WESTCHESTER,

Defendants.
-----X

LEFKOWITZ, J.

The following papers were read on this motion by defendant County of Westchester for an order of preclusion pursuant to CPLR 3126(b) and for costs on the motion:

- Order to Show Cause
- Affirmation in Support - Exhibits A-K
- Affirmation in Opposition - Exhibits A-B
- Affidavit of Service
- NYSCEF file

Upon the foregoing papers and proceedings held on January 28, 2019, this motion is determined as follows:

This negligence action was commenced by plaintiff against defendant Casale Construction Services, Inc. (hereinafter “Casale”) on July 19, 2017. Casale interposed an Answer on August 30, 2017. On or about February 7, 2018, plaintiff filed a Supplemental Summons and Complaint naming the County of Westchester (hereinafter “County”) as a defendant. County interposed an (Amended) Answer to the Complaint on March 23, 2018.

Plaintiff seeks damages for personal injuries allegedly suffered on or about February 18, 2017 in the southernmost parking lot of Playland Amusement Park (hereinafter “Playland”) in Rye, New York. Plaintiff alleges that defendants, while performing or causing to be performed sewer excavation and construction work in the lot, negligently failed to barricade or otherwise protect a twenty (20) foot deep trench, into which plaintiff fell and sustained injuries.

On the instant motion, defendant County seeks an order pursuant to CPLR 3126(b),

precluding plaintiff from calling Michelle and Sergio Davila¹ as witnesses, or to otherwise offer any evidence at trial, as a result of plaintiff's failure to disclose the identity of these witnesses prior to certifying the matter trial ready. County further seeks an award of costs for the motion.

On November 13, 2017 the parties entered into a so-ordered (Lefkowitz, J.) Preliminary Conference Stipulation (NYSCEF Doc. 7), which, *inter alia*, directed the parties to exchange the names and addresses of all witnesses by December 13, 2017.

Multiple compliance conferences were conducted during which discovery deadlines were established. At a conference held on June 20, 2018, it was ordered that subpoenas for non-parties were to be served no later than July 6, 2018 and that non-party examinations before trial were to be completed by August 10, 2018 (NYSCEF Doc. 14). At a further conference on October 16, 2018, after the parties and several non-party witnesses had been deposed, it was ordered that the deposition of non-party consultant John Marafioti and any other non-party witnesses be completed on or before November 16, 2018 (NYSCEF Doc. 22).

A final compliance conference was held on November 30, 2018, at which time the parties consented to the entry of a Trial Readiness Stipulation and Order (NYSCEF Doc. 25) certifying that all discovery was complete and that all party and non-party depositions had been completed.²

Approximately two weeks later, on December 15, 2018, counsel for plaintiff served defendants with a letter indicating they had discovered a witness to the condition of the accident site prior to the accident, and providing notice of plaintiff's intention to call Michelle Davila (a co-worker of plaintiff) and her husband Sergio, as witnesses (NYSCEF Doc. 24). Plaintiff did not move to vacate the Trial Readiness Stipulation and Order or the note of issue to permit the depositions of these non-party witnesses.

Defendant County asserts, and plaintiff does not dispute, that at no time prior to the filing of the Trial Readiness Stipulation and Order had plaintiff provided the names of these witnesses, despite the fact that Ms. Davila and plaintiff are co-workers, and despite plaintiff's return to work, upon information and belief, more than one year before the Trial Readiness Stipulation and Order was entered.

Upon defendant County's objection to the Davila witnesses, a further conference was held on December 20, 2018. The dispute was not resolved at the conference and a briefing schedule was issued for the instant motion.

Defendant County alleges that plaintiff's late disclosure, if permitted, will result in

¹ County further seeks to preclude plaintiff from calling or offering evidence by any other non-party witness not timely disclosed.

² At the 11/30/18 conference the court was notified that defendant Casale had served, but plaintiff had not received, a response to an outstanding discovery demand.

prejudice to the defendants as they will be unable to question the more than eight witnesses who testified about any contentions which might ultimately be made by Michelle and Sergio Davila during their depositions. County asserts it would be further prejudiced by its inability to question plaintiff about any conversations had with the non-party witnesses and when those conversations first took place in relation to when their identity was disclosed.

Plaintiff opposes the motion and alleges that the e-filed disclosure at issue was done prior to the filing of the note of issue and immediately upon plaintiff learning of the witnesses. Plaintiff asserts that Michelle and Sergio Davila are collateral witnesses who are capable of rebutting defendants' suggestion that plaintiff and her husband removed the protective fencing around the construction site themselves prior to plaintiff sustaining injuries.

Plaintiff further contends that there was no intentional delay by plaintiff or her counsel, as plaintiff produced records and was deposed timely,³ unlike defendants whom, they allege, did not produce witnesses for depositions nor or complete physical examinations in accordance with the court's orders.

On a CPLR 3126 motion to preclude as a consequence of a party's failure to timely complete discovery, "the nature and degree of the penalty . . . is a matter generally left to the discretion of the Supreme Court" (*Carbajal v Bobo Robo, Inc.*, 38 AD3d 820 [2d Dept 2007]). To invoke the drastic remedy of striking a pleading or of preclusion a court must determine that the party's failure to disclose is willful and contumacious (*see Greene v Mullen*, 70 AD3d 996 [2d Dept 2010]; *Kingsley v. Kantor*, 265 AD2d 529 [2d Dept 1999]). Willful and contumacious conduct can be inferred from repeated noncompliance with court orders or a failure to comply with court-ordered discovery over an extended period of time, coupled with the lack of an adequate excuse for the failure (*see Mei Yan Zhang v Santana*, 52 AD3d 484 [2d Dept 2008]; *Carbajal*, 38 AD3d at 820; *Prappas v Papadatos*, 38 AD3d 871 [2d Dept 2007]).

"As the Court of appeals has noted, the failure of attorneys to comply with court-ordered deadlines has increasingly become a problem in our court system. (*see Gibbs v St. Barnabas Hosp.*, 16 NY3d 74, 81 [2010]; *Andrea v Arnone, Hedin, Casker, Kennedy & Drake Architects & Landscape Architects, P.C.*, 5 NY3d 514, 521 [2005]; *Kihl v Pfeffer*, 94 NY2d 118, 123 [1999]). Compliance requires not only a timely response, but a good-faith effort to provide a meaningful response (*see Kihl v Pfeffer*, 94 NY2d at 123; *see also Garcia v City of New York*, 5 AD3d 725, 726 [2d Dept 2004]; *Gomez v Gateway Demolition Corp.*, 293 AD2d 649, 650 [2d Dept 2002]). The failure to comply with deadlines and provide good faith responses to discovery demands 'impairs the efficient functioning of the courts and the adjudication of claims' (*see Gibbs v St. Barnabas Hosp.*, 16 NY3d at 81; *Kihl v Pfeffer*, 94 NY2d at 123)." *Arpino v F.J.F. & Sons Elec. Co., Inc.*, 102 AD3d 201, 207 [2d Dept 2012].

Here, defendant County has established entitlement to the preclusion of testimony and evidence proffered by non-party witnesses Michelle and Sergio Davila. At a conference on

³ Except for the plaintiff's late disclosure alleged herein.

November 30, 2018, all counsel stipulated that discovery was complete and consented to the issuance of a Trial Readiness Stipulation and Order. While plaintiff's counsel contends that his client and Michelle Davila, her co-worker, had not discussed the facts of the accident prior to December, 2018, this contention defies credulity. In addition, the allegation that Ms. Davila was first discovered as a witness in December, 2018 is alleged solely by counsel in an affirmation containing conclusory assertions which were not corroborated in an affidavit of plaintiff.

Upon these facts, the Court concludes that the failure to disclose Michelle Davila and her husband as witnesses prior to the issuance of a Trial Readiness Stipulation and Order, is wilful and contemptuous behavior justifying the preclusion of evidence and testimony by the proposed non-party witnesses, Michelle and Sergio Davila.

In view of the foregoing, it is

ORDERED that Michelle and Sergio Davila are precluded from offering evidence or testimony at the trial of this action; and it is further

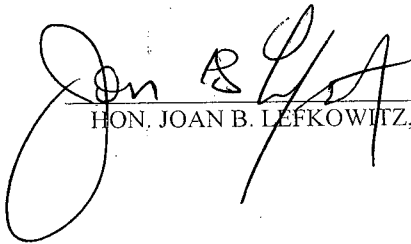
ORDERED that the branch of the motion seeking costs is denied; and it is further

ORDERED that movant shall serve a copy of this order with notice of entry upon plaintiff within seven (7) days of its entry; and it is further

ORDERED that all relief not specifically addressed herein is denied.

This constitutes the decision and order of the Court.

Dated: White Plains, New York
January 28, 2019


HON. JOAN B. LEFKOWITZ, J.S.C.

TO:

All counsel by NYSCEF

cc: Compliance Part Clerk