

<b>Williams v County of Nassau</b>
2019 NY Slip Op 34328(U)
July 19, 2019
Supreme Court, Nassau County
Docket Number: Index No. 601745-17
Judge: Robert A. Bruno
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**SHORT FORM ORDER**

**SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NASSAU**

**PRESENT: HON. ROBERT A. BRUNO, J.S.C.**

-----X  
MICHAEL WILLIAMS AND MELISSA WILLIAMS,

TRIAL/IAS PART 12

Plaintiffs,

*-against-*

Index No.: 601745-17  
Submission Date: 5-3-19  
Motion Sequence: 006,007

COUNTY OF NASSAU, LI LOCKSMITH & ALARM  
CO., INC., AND SUNRISE INSTALLATION, INC.,

**DECISION & ORDER**

Defendants.  
-----X

**Papers Numbered**

*Sequence #006*

Notice of Motion, Affirmation & Exhibits.....	1
Affirmation in Opposition .....	2
Reply Affirmation.....	3

*Sequence #007*

Notice of Motion, Affirmation & Exhibits.....	1
Affirmation in Opposition .....	2
Reply Affirmation.....	3

Upon the foregoing papers, the following motions are determined as set forth below:

Sequence #006. Plaintiffs' motion for an Order (1) pursuant to CPLR §2221, granting renewal and reargument of the Order of this Court dated December 20, 2018, and served with Notice of Entry on December 26, 2018, which declined to strike the defendant COUNTY OF NASSAU'S Answer; and striking the Answer of the defendant, COUNTY OF NASSAU; and (2) pursuant to CPLR §3212, granting plaintiffs summary judgment on the issue of liability in light of the Court's December 20, 2018 Order.

Sequence #007. Motion by defendant LI LOCKSMITH & ALARM CO., INC. for an Order pursuant to CPLR §3126 and/or CPLR §3124, striking the co-defendant, COUNTY OF NASSAU's Answer, along with any/all cross claims and counter claims, for its failure to comply with Court ordered discovery, or, in the alternative, issuing a conditional order striking the co-defendant, COUNTY OF NASSAU's Answer should it not comply with the previously Court Ordered Discovery within 20 days.

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This is an action to recover damages for personal injuries allegedly sustained by plaintiff MICHAEL WILLIAMS on January 19, 2016 at the Nassau County Courthouse on 262 Old Country Road in Mineola, New York (the "Courthouse"). Plaintiffs claim that the accident occurred when the West side door at the Courthouse slammed shut, striking and seriously injuring plaintiff MICHAEL WILLIAMS. The Court refers to the parties' submissions for a more complete recitation of the facts and procedural history underlying the instant motions.

Plaintiff's Motion to Reargue and Renew (Seq. 006)

Plaintiffs previously moved to strike the answer of defendant COUNTY OF NASSAU (the "COUNTY") based upon their contention that the COUNTY wilfully failed to provide responses to plaintiffs' repeated discovery demands and Orders of the Court. By Short Form Order dated December 20, 2018, and entered December 26, 2018 (the "Prior Order") (*Mot. Exh. GG*) the Court granted plaintiffs' motion, to the extent that it found sufficient evidence of wilfulness to warrant sanctions. Rather than strike the Answer in its entirety, however, the Court devised a more narrowly tailored sanction:

The Court finds that the information sought by plaintiffs is relevant to the issues of: (i) the COUNTY's duty with respect to the inspection, maintenance and repair of the subject door; (ii) the existence of a defective or dangerous condition in the subject door on the date of the accident; (iii) the COUNTY's prior notice of such condition and its failure to remedy it; (iv) the existence of a causal relationship between the condition complained of and plaintiff's injury. Accordingly, the Court holds that the above issues are resolved in plaintiffs' favor, in accordance with their claim of negligence on the part of the COUNTY. The COUNTY may still assert its affirmative defenses sounding in comparative negligence, and other pleaded defenses not inconsistent with the COUNTY's negligence.

Plaintiffs now move to reargue and renew the prior motion, and upon reargument and/or renewal, to strike the COUNTY's Answer in its entirety.

*Reargument.* The Court finds that plaintiffs have not articulated a sufficient basis for reargument of the Prior Order. Leave to reargue requires a showing that the Court overlooked or misapprehended matters of fact or law in determining the prior motion. CPLR §2221(d). At bar, plaintiffs admittedly agree with the Court's finding that the COUNTY's conduct was sanctionable. They disagree only with the Court's exercise of discretion in determining the nature and degree of the penalty to be imposed. See *Arpino v F.J.F. & Sons Elec. Co., Inc.*, 102 AD3d 201, 209.

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Plaintiffs specify no issues of fact or law that the Court overlooked or misapprehended. At most, they imply that the Court did not give due consideration to their concern that they might be left without an accountable defendant – that the COUNTY may seek to amend their Answer and move to dismiss on the theory that plaintiff MICHAEL WILLIAMS was a “special employee” of the COUNTY whose claims are barred by Workers Compensation Law. The Court did not overlook this argument.<sup>1</sup> Rather, the Court exercised its discretion on the basis of the facts and circumstances presently before it.

*Renewal.* Plaintiffs offer new information, discovered after the decision in the Prior Order which, in plaintiffs’ view, warrants the ultimate sanction of striking the COUNTY’s answer. That is: (i) that the COUNTY’s only proffered excuse for their non-compliance was, at best, incorrect; and (ii) that the COUNTY’s December 18, 2019 discovery response was, at best incorrect.

The Court finds that the new information provides no basis for renewal, insofar as it would not change the prior determination. See CPLR 2221(e)(2).

With respect to the COUNTY’s excuse that the handling attorney had left the office, the Court held, in the Prior Order, that: “The COUNTY’s explanation that it encountered changes in personnel, or other difficulties tantamount to law office failure, is insufficient to excuse its conduct.” Thus, insofar as the Court had already rejected the COUNTY’s proffered excuse, any evidence that the excuse was inaccurate would not alter the determination.

Similarly, the new information, that other individuals performed work at the subject door who were not identified in December 18, 2019 discovery response, would not change the prior determination. On the prior motion, the Court imposed dispositive sanctions based upon the COUNTY’s “ongoing pattern of delay or neglect over an extended period of time, including its repeated disregard of discovery deadlines, the piecemeal manner in which it provided discovery, and the provision of information which was inaccurate, if not intentionally false.” Evidence of the additional omission is merely cumulative. The Court finds that the sanction imposed remains sufficient, even in the face of the new information presented.<sup>2</sup>

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<sup>1</sup> The Prior Order expressly states that “the Court has considered the remaining contentions of the parties and finds that they do not require discussion or alter the determination herein.”

<sup>2</sup> That is not to say that the Court licenses further non-compliance, or would not impose the ultimate sanction of striking the pleading in appropriate circumstances.

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Plaintiff's Motion for Summary Judgment (Seq. 006)

Plaintiffs move for summary judgment on the issue of the COUNTY's liability, based upon the Court's Prior Order, which resolved certain issues in plaintiffs' favor, namely: (i) the COUNTY's duty with respect to the inspection, maintenance and repair of the subject door; (ii) the existence of a defective or dangerous condition in the subject door on the date of the accident; (iii) the COUNTY's prior notice of such condition and its failure to remedy it; (iv) the existence of a causal relationship between the condition complained of and plaintiff's injury.

The Court finds that the resolution of the above issues in plaintiffs' favor establishes the negligence of the COUNTY as a matter of law. See *Pasternack v Laboratory Corp. of America Holdings*, 27 NY3d 817 (2016). Plaintiffs are not required to demonstrate the absence of comparative negligence. *Rodriguez v City of New York*, 31 NY3d 312 (2018).

To the extent that the COUNTY pleads an "act of God" defense (see Answer, Ninth Affirmative Defense, ¶ 14) (*Mot. Exh. C*), the Court finds that it is insufficient to defeat summary judgment. First, the defense is wholly speculative and unsupported by evidentiary fact. Counsel's conjecture that "it may have been a windy day, with an Act of God contributing to the closing of the door" (see *Affirmation in Opposition*, ¶ 18) lacks probative value. Second, "[f]or a loss to be considered the result of an act of God, human activities cannot have contributed to the loss in any degree." *Cangialosi v Hallen Constr. Corp.*, 282 AD2d 565 (2d Dept. 2001). The act of God defense is thus not available here, in view of the Court's prior determination resolving issues related to the COUNTY's negligence in plaintiff's favor.

LI LOCKSMITH's Motion to Strike (Seq. 007)

LI LOCKSMITH & ALARM CO., INC. ("LI LOCKSMITH") moves to strike the COUNTY's Answer, along with any and all cross claims and counter claims, based upon the COUNTY's non-compliance with its discovery demands and Court ordered discovery, or in the alternative, for a conditional order striking the Answer in the event of non-compliance within twenty (20) days.

The following events pertinent to LI LOCKSMITH's motion are gleaned from the parties' submissions and organized in the form of a timeline, for ease of reference.

08/24/18 LI LOCKSMITH served a Notice for Discovery and Inspection as to the COUNTY, seeking, among other things, true and accurate copies of all service

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requests, invoices and contracts relating to the repair, maintenance or servicing of any of the doors at the Courthouse (*Mot. Exh. H*).

- 09/11/18 LI LOCKSMITH served a Supplemental Notice for Discovery and Inspection as to the COUNTY, seeking, among other things, witness information, photographs of the accident site, incident reports, and any correspondence between the COUNTY and LI LOCKSMITH (*Mot. Exh. I*).
- 10/3/18 A Final Compliance Conference Order was entered into, requiring the COUNTY to provide a response to LI LOCKSMITH's 8/24/18 and 9/11/18 demands within twenty (20) days (*Mot. Exh. J*).
- 11/12/18 LI LOCKSMITH issued a so-called "good faith" letter to the COUNTY (*Mot. Exh. K*).
- 12/18/18 Oral argument on plaintiffs' motion for discovery sanctions was heard before Justice Diamond.
- 12/20/18 The Court issued its decision on plaintiffs' motion (*Mot. Exh. L*).
- 01/09/19 Another Final Compliance Conference Order was entered into, requiring the COUNTY to provide a response to LI LOCKSMITH's 8/24/18 and 9/11/18 demands within fourteen (14) days (*Mot. Exh. M*).
- 01/25/19 Plaintiffs filed the above motion to reargue and renew.
- 01/28/19 LI LOCKSMITH issued another so-called "good faith" letter to the COUNTY (*Mot. Exh. N*).
- 02/08/19 LI LOCKSMITH filed the instant motion.

The COUNTY provided responses to LI LOCKSMITH's discovery demands as part of its opposition to the instant motion. See Response to Combined Demands (*Aff. In Opp, Exh. 1*); Response to Supplemental Notice for Discovery and Inspection (*Aff. In Opp, Exh. 2*); Response to Demand for Expert Witness Information (*Aff. In Opp, Exh. 3*); and Response to Demand for Insurance Disclosure (*Aff. In Opp, Exh. 4*). The COUNTY argues that, insofar as all demands have been satisfied, the motion has been rendered academic.

In Reply, LI LOCKSMITH continues to seek sanctions, based upon the untimeliness, incompleteness, and contradictory nature of the COUNTY's responses. Specifically, LI LOCKSMITH notes the COUNTY's response indicating that it is not in possession of any work

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and/or service requests pertaining to any doors at the Courthouse between January 19, 2011 and February 19, 2016 (see *Aff In Opp.*, *Exh. 1*, at ¶¶ 4-5). According to LI LOCKSMITH, this response directly contradicts a prior response to plaintiffs' discovery demands. The COUNTY's December 18, 2018 response to plaintiffs' demands included five work orders involving the subject door prior to the date of the accident (see *Reply Aff.*, *Exh. A*, ¶1). (Notably, none of these involved LI LOCKSMITH, and the response indicated that there were no other records responsive to this request.) In LI LOCKSMITH's view, this response is part of a pattern of wilful and contumacious conduct on the part of the COUNTY, and sanctions must be imposed to remedy the prejudice to LI LOCKSMITH.

LI LOCKSMITH asserts that the relief should not be limited to striking the COUNTY's cross claims against LI LOCKSMITH. According to LI LOCKSMITH, the COUNTY's non-compliance has hindered LI LOCKSMITH's ability to defend against plaintiffs' direct claims. Accordingly, LI LOCKSMITH argues, the COUNTY's Answer should be stricken. In the alternative, LI LOCKSMITH asserts that preclusion is necessary to protect LONG ISLAND LOCKSMITH against any future untimely production of evidence inconsistent with the evidence presented to date, which shows that LI LOCKSMITH received no service requests and performed no work at the subject location prior to the accident.

The Court finds that the COUNTY's conduct, as it relates to the discovery demanded by LI LOCKSMITH, does not warrant the drastic remedy sought. LI LOCKSMITH attempts to piggyback its grievances onto those of the plaintiffs, for which the Court has already imposed a substantial penalty. Viewed independently, the delay in responding to LI LOCKSMITH's discovery demands, although not insignificant, does not, as yet, demonstrate an ongoing pattern of delay or neglect over an extended period of time, so as to support an inference of wilfulness or contumaciousness. The Court notes that the COUNTY was simultaneously engaged in responding to plaintiffs' demands and motion practice, and appeared for all Court conferences and hearings. The Court notes further that LI LOCKSMITH's objections to the COUNTY's responses, other than with respect to their untimeliness, are general and conclusory. LI LOCKSMITH offers only one specific challenge – that is, with respect to the COUNTY's inconsistent or inaccurate response regarding work orders. As to the remainder of the COUNTY's Response to Combined Demands, the Response to Supplemental Notice for Discovery and Inspection, the Response to Demand for Expert Witness Information, and the Response to Demand for Insurance Disclosure, LI LOCKSMITH is silent. It cites no specific instances of incompleteness or inconsistency in any of the other responses.

In view of the foregoing, the Court need not reach the issue of the nature and extent of the penalty to be imposed.

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The Court has considered the remaining contentions of the parties and finds that they do not require discussion or alter the determination herein. Based upon the foregoing, it is

**ORDERED**, that plaintiffs' motion for leave to renew and reargue the Prior Order (*Sequence #006*) is *denied*; and it is further

**ORDERED**, that plaintiffs' motion for partial summary judgment on the issue of the COUNTY's negligence (*Sequence #006*) is *granted*; and it is further

**ORDERED**, that LI LOCKSMITH's motion to strike the COUNTY's Answer and all cross-claims against it (*Sequence 007*) is *denied*.

All matters not decided herein are denied.

This constitutes the Decision and Order of this Court.

Dated: July 19, 2019  
Mineola, New York

ENTER:



Hon. Robert A. Bruno, J.S.C.

**ENTERED**

JUL 23 2019

**NASSAU COUNTY  
COUNTY CLERK'S OFFICE**