Langona v Village of Garden City
2019 NY Slip Op 34343(U)
June 28, 2019
Supreme Court, Nassau County
Docket Number: Index No. 604559/2017
Judge: Antonio I. Brandveen
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SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present: **ANTONIO I. BRANDVEEN**
J. S. C.

NICOLE LANGONA, Plaintiff, - against - VILLAGE OF GARDEN CITY, TOWN OF HEMPSTEAD and COUNTY OF NASSAU, Defendants.	TRIAL / IAS PART 25 NASSAU COUNTY Action No. 1 Index No. 604559/2017 Motion Sequence No. 002

ALYSSA ANDINO, Plaintiff, - against - NICOLE LANGONA, KIMBERLY LANGONE, COUNTY OF NASSAU, TOWN OF HEMPSTEAD and INCORPORATED VILLAGE OF GARDEN CITY, Defendants.	TRIAL / IAS PART 25 NASSAU COUNTY Action No. 2 Index No. 605380/2017 Motion Sequence No. 004

The following papers having been read on this motion:

Notice of Motion, Affidavits, & Exhibits 1-2
Answering Affidavits 4-5
Replying Affidavits 6
Briefs: Plaintiff's / Petitioner's .....
Defendant's / Respondent's .....

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The motion by defendant County of Nassau ("County") for an "Order, pursuant to CPLR 2211 and/or 5015 dismissing the order striking County Defendant's Answer, " is denied in its entirety.

The actions at bar seek to recover damages for the personal injuries sustained by the plaintiffs on March 21, 2016, when plaintiff operator Nicole Langona lost control of her Jeep motor vehicle and hit a tree, allegedly due to a defective design and condition in the road, i.e., a dangerous dip and depression in Clinton Road in Garden City New York.

Defendant County has not complied with plaintiffs' discovery demands throughout the course of this litigation. On June 14, 2018, defendant County agreed, in a so-ordered stipulation (Brandveen, J.) to provide responses to plaintiff's March 27, 2018, demand within thirty days. The county failed to comply with that stipulation and order. At a further compliance conference conducted by the Court on October 17, 2018, this Court (Brandveen, J.) ordered, pursuant to a stipulation entered into with all parties, that defendant County was required to respond to plaintiff Langona's March 27 discovery demands "w/in 15 days (starting Friday) otherwise defendant County is precluded from presenting evidence and the answer is stricken." The discovery demanded pertained to the key claims by the plaintiffs relating to the design,, paving and maintenance of the subject roadway accident site. It was not until November 13, 2018, that the County served its unresponsive "response." At the next compliance conference on November 27, 2018, the court verbally informed the County that its answer was now deemed to be stricken due to the county's noncompliance with the order of October 17, 2018; however, that verbal statement was not formally reduced to a writing by the Court, nor was a proposed order striking defendant County's answer submitted to the Court.

> "A conditional order of preclusion requires a party to provide certain discovery by a date certain, or face the sanctions specified in the order (see Gibbs v St. Barnabas Hosp., 16 NY3d 74 [2010]; Hughes v Brooklyn Skating, LLC, 120 AD3d 758, 759 ; Wei Hong Hu v Sadiqi, 83 AD3d 820, 821). If the party fails to produce the discovery by the specified date, the conditional order becomes absolute (see Piemonte v JSF Realty, LLC, 140 AD3d 1145, 1146; Vitolo v Suarez, 130 AD3d 610, 611; Archer Capital Fund, L.P. v GEL, LLC, 95 AD3d 800, 801; Keenan v Fiorentino, 84 AD3d 740; Wei Hong Hu v Sadiqi, 83 AD3d at 821; Pugliese v Mondello, 67 AD3d 880, 881). To be relieved of the adverse impact of the conditional order of preclusion, a party is required to demonstrate a reasonable excuse for the failure to comply with the order and the existence of a potentially meritorious defense (see Archer Capital Fund, L.P. v GEL, LLC, 95 AD3d at 801; Wei Hong Hu v Sadiqi, 83 AD3d at 821)."

(Naiman v Fair Trade Acquisition Corp., 152 A.D.3d 779, 780). The Appellate Division,

Second Department has also held in this context that

> " '[t]o invoke the drastic remedy of preclusion, the court must determine that the offending party's lack of cooperation with disclosure was willful, deliberate, and contumacious' (Aha Sales, Inc. v Creative Bath Prods., Inc., 110 AD3d 1019, 1019, 973; see Watson v 518 Pa. Hous. Dev. Fund Corp., 160 AD3d 907, 910; Zakhidov v Boulevard Tenants Corp., 96 AD3d 737, 739). 'The willful and contumacious character of a party's conduct may be inferred from the party's repeated failure to comply with court-ordered discovery, and the absence of any reasonable excuse for those failures, or a failure to comply with court-ordered discovery over an extended period of time' (Watson v 518 Pa. Hous. Dev. Fund Corp., 160 AD3d at 910, quoting New York Timber, LLC v Seneca Cos., 133 AD3d 576, 577); see Aha Sales, Inc. v Creative Bath Prods., Inc., 110 AD3d 1019). "

(JNG Constr., Ltd. v Roussopoulos, 170 A.D.3d 1136, 1139.)

"Here, the willful and contumacious character of defendant [County's] conduct can be inferred from [its] repeated failures over an extended period of time, without an adequate excuse, to comply with the plaintiff's discovery demands, the Supreme Court's discovery orders, and the parties' discovery stipulation (see Hasan v 18-24 Luquer St. Realty, LLC, 144 AD3d 631, 632; Aha Sales, Inc. v Creative Bath Prods., Inc., 110 AD3d at 1020; Carabello v Luna, 49 AD3d 679, 680; Moog v City of New York, 30 AD3d 490, 491)" (JNG Constr., Ltd. v Roussopoulos, supra). Moreover, although "the court has discretion to accept law office failure as a reasonable excuse (see CPLR 2005) where that claim is supported by a detailed and credible explanation of the default at issue" (Scholem v. Acadia Realty L.P., 144 A.D.3d 1012, 1013), here however the proffered conclusory excuse that the "County's recent change of administration resulted in the shortage of staffing" is simply unacceptable under the circumstances (see, JNG Constr., Ltd. v Roussopoulos, supra at 1140; New St. Assoc., LLC v. Gach, __AD3d__, __ NYS3d__, 2019 NY Slip Op 04390 [2d Dept June 3, 2019]). Therefore, the wholly unsubtantiated allegation by defendant County of law office failure does not rise to the level of a reasonable excuse (see Fremont Inv. & Loan v. Fausta, 164 AD3d 1315, 1315). In any event, defendant County failed to demonstrate the existence of a potentially meritorious defense (see, New St. Assoc., LLC v Gach, supra).

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Accordingly, the motion by defendant County is denied in its entirety, and the Court formally orders, pursuant to its order dated October 17, 2018 (Brandveen, J.), that the answer of the County of Nassau is stricken in both Action No. 1 and Action No. 2, and the County is precluded from producing evidence in support of its defense at trial.

The foregoing constitutes the decision and order of this Court.

Dated: **June 28, 2019**

ENTER:

J. S. C.

HON. ANTONIO I. BRANDVEEN
J.S.C.

NOT FINAL DISPOSITION

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ENTERED
JUL 11 2019
NASSAU COUNTY
COUNTY CLERK'S OFFICE