

**Barreto v Lopez**

2019 NY Slip Op 34586(U)

August 9, 2019

Supreme Court, Orange County

Docket Number: Index No. EF001572/17

Judge: Robert A. Onofry

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SUPREME COURT-STATE OF NEW YORK  
IAS PART-ORANGE COUNTY

Present: HON. ROBERT A. ONOFRY, J.S.C.

SUPREME COURT : ORANGE COUNTY

-----X  
NILSA BARRETO,

Plaintiff,

– against–

JUAN E. LOPEZ,

Defendant.

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.

-----X  
JUAN E. LOPEZ,

Third-Party Plaintiff,

– against–

Index No. EF001572/17

**DECISION AND ORDER**

JESUS BARRETO, JR.,

Third-Party Defendant.

Motion Date: June 19, 2019

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The following papers numbered 1 through 4 were read and considered on a motion by the third-party Defendant for an order, pursuant to CPLR § 3216, dismissing the third-party complaint for failure to comply with disclosure or, in the alternative, for an order, pursuant to CPLR §§3124 and 3126, compelling the third-party Plaintiff to appear for an examination before trial by a date certain, or else be precluded from testifying at trial.

Notice of Motion- Chang Affirmations- Exhibits A-E ..... 1-3  
Affirmation in Opposition- Chao ..... 4

Upon the foregoing papers, it is hereby,

ORDERED, that the motion is granted in part and denied in part.

**Factual/Procedural Background**

The Plaintiff Nilsa Barreto commenced this action against the Defendant Juan Lopez to recover damages arising from a motor vehicle accident.

Lopez commenced a third-party action against Jesus Barreto, Jr., alleging that Barreto was negligent in the happening of the accident.

Barreto moves to dismiss the third-party complaint for failure to comply with disclosure, or to compel disclosure.

In support of his motion, Barreto submits an affirmation from his counsel, Chi Wai Chuck Chang.

As relevant background, Chang asserts as follows.

The main action was commenced on February 21, 2017.

Lopez answered on May 17, 2017.

Lopez commenced a third-party action against Barreto on or about December 13, 2017.

At a Court conference held on April 10, 2018, the Court ordered that examinations before trial be held on or before September 1, 2018.

The Plaintiff was examined, but the examination of Barreto was adjourned.

At a Court conference on February 27, 2019, the Court ordered examinations before trial completed by April 1, 2019, and scheduled a further compliance conference for April 23, 2019.

Thereafter, Barreto was deposed.

However, Lopez has not been deposed in the third-party action.

Chang asserts that Barreto is unable to prepare an adequate defense or continue in the third-party action without questioning Lopez.

Thus, Chang argues, the Court should either dismiss the third-party complaint, or compel Lopez to appear for an examination before trial under penalty of preclusion.

In opposition to the motion, counsel for Lopez, Daniel Chao, argues that the branch of the motion which seeks dismissal of the third-party complaint should be denied because there is no evidence that Lopez has engaged in willful and contumacious conduct concerning disclosure.

Indeed, he asserts, although Lopez has been unable to attend an examination before trial to date,

he has produced all other demanded disclosure in a timely manner.

Thus, he argues, the Court should do no more than compel an examination before trial.

#### Discussion/Legal Analysis

Initially, it is noted, a Note of Issue has been filed in this action.<sup>1</sup>

After the filing of a note of issue, there are two separate and distinct methods to obtain further disclosure. The first, pursuant to the Uniform Rules for Trial Courts (hereinafter the Uniform Rules) (22 NYCRR) § 202.21(d), provides:

Where unusual or unanticipated circumstances develop subsequent to the filing of a note of issue and certificate of readiness which require additional pretrial proceedings to prevent substantial prejudice, the court, upon motion supported by affidavit, may grant permission to conduct such necessary proceedings.

*See e.g., Lopes v. Ross*, 126 A.D.3d 766 [2<sup>nd</sup> Dept. 2015]; *Blinds To Go (U.S.), Inc. v. Times Plaza Development, L.P.*, 111 A.D.3d 775 [2<sup>nd</sup> Dept. 2013].

The second, pursuant to 22 NYCRR 202.21(e), provides:

[w]ithin 20 days after service of a note of issue and certificate of readiness, any party to the action or special proceeding may move to vacate the note of issue, upon affidavit showing in what respects the case is not ready for trial, and the court may vacate the note of issue if it appears that a material fact in the certificate of readiness is incorrect, or that the certificate of readiness fails to comply with the requirements of this section in some material respect.

Here, Barreto has not moved under either provision.

However, the Court notes, this motion was made within 20 days of the date that the Note of Issue was filed.

Thus, the Court will consider the arguments on the merits.

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<sup>1</sup> Although the Note of Issue does not contain the caption of the third-party action, this is not controlling, as there has been no severance of the two actions. *Eaton Elec., Inc. v. Dormitory Authority of State of N.Y.*, 21 Misc.3d 1135[S. Ct.Kings, 2008].

In general, CPLR 3101(a) provides for “full disclosure of all matter material and necessary in the prosecution or defense of an action.” The test is one of usefulness and reason. *Allen v Crowell-Collier Publishing Company*, 21 NY2d 403 (1968); *Friel v Papa*, 56 A.D.3d 607 [2<sup>nd</sup> Dept. 2008]; *Beckles v Kingsbrook Jewish Medical Center*, 36 A.D.3d 733 [2<sup>nd</sup> Dept. 2007].

Pursuant to CPLR 3124: “If a person fails to respond to or comply with any request, notice, interrogatory, demand, question or order under this article, except a notice to admit under section 3123, the party seeking disclosure may move to compel compliance or a response.”

Further, pursuant to CPLR 3126, the court has the authority to impose a penalty or sanction against any party who “refuses to obey an order for disclosure or wilfully fails to disclose information which the court finds ought to have been disclosed.” *Nicolia Ready Mix, Inc. v Fernandes*, 37 AD3d 568 [2<sup>nd</sup> Dept. 2007]. Remedies include, *inter alia*, striking out pleadings or parts thereof; precluding the party from presenting evidence as to the subject matter of the disclosure demands, and the imposition of a money sanction. *Allen v Crowell-Collier Publishing Company*, 21 NY2d 403 (1968); *Nicolia Ready Mix, Inc. v Fernandes*, 37 AD3d 568 [2<sup>nd</sup> Dept. 2007]. The drastic remedy of striking a pleading or ordering preclusion is not appropriate absent a clear showing that the failure to comply was the result of willful, deliberate or contumacious conduct or its equivalent. *Allen v Crowell-Collier Publishing Company*, 21 NY2d 403 (1968); *Laskin v. Friedman*, 90 A.D.3d 617 [2<sup>nd</sup> Dept. 2011]. Willful and contumacious conduct may be found when a party engages in repeated, unexcused failures to meaningfully comply with disclosure requests and court orders and directives. *Rawlings v. Gillert*, 78 A.D.3d 806 [2<sup>nd</sup> Dept. 2010]; *Giano v. Ioannou*, 78 A.D.3d 768 [2<sup>nd</sup> Dept. 2010]. The burden of establishing that a failure or refusal to provide disclosure was the result of willful,

deliberate or contumacious conduct rests with the party seeking an order of preclusion.

*Goodman, Rackower & Agiato v. Lieberman*, 260 A.D.2d 599 [2<sup>nd</sup> Dept. 1999].

Pursuant to 22 NYCRR 202.7(a)(2), a motion relating to disclosure or to a bill of particulars must be supported by an affirmation stating that counsel has conferred with counsel for the opposing party in a good faith effort to resolve the issues raised by the motion.

Here, Barreto demonstrated a good faith effort to obtain the requested examination before trial.

However, he did not demonstrate that Lopez has engaged in willful or contumacious behavior as to the same. Thus, that branch of his motion which seeks to dismiss the third-party complaint for failure to comply with disclosure is denied.

However, he is clearly entitled conduct an examination before trial of Lopez. Thus, that branch of his motion which seeks to compel an examination is granted.

Therefore, Barreto is directed to schedule, and Lopez is directed to appear, for an examination on or before October 1, 2019. If Lopez fails to appear, he will be precluded from testifying as to liability at the trial on the third-party complaint.

The Court further notes that jury selection, on the issue of liability, is currently scheduled for January 13<sup>th</sup>, 2020. The trial date will remain intact.

Accordingly, and for the reasons cited herein, it is hereby,

ORDERED, that the motion is granted in part and denied in part, as set forth herein; and it is further,

ORDERED, that in conformity with the foregoing, Counsel for Third Party Defendant Barreto is directed to schedule, and Defendant/Third Party Plaintiff Juan E. Lopez is directed to appear for, an examination before trial on or before October 1, 2019; and it is further

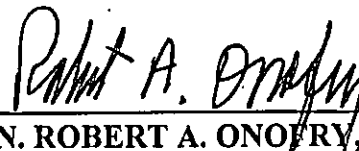
ORDERED, that in conformity with the foregoing, absent compliance with the foregoing, Lopez will be precluded from offering any testimony at trial, on the issue of liability; and it is further

ORDERED, that the parties, by and through counsel, are directed to appear for a status/pre-trial conference on Wednesday, October 30, 2019, at 9:15 p.m., at the Orange County Court House, 285 Main Street, Court room #3, Goshen, New York.

The foregoing constitutes the decision and order of the Court.

Dated: August 9, 2019  
Goshen, New York

ENTER

  
HON. ROBERT A. ONOFRY, J.S.C.

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