

Brignol v Popeyes Louisiana Kitchen, Inc.

2020 NY Slip Op 30376(U)

February 10, 2020

Supreme Court, New York County

Docket Number: 152890/2016

Judge: Barbara Jaffe

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

PRESENT: HON. BARBARA JAFFE PART IAS MOTION 12EFM

Justice

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TUNISIA BRIGNOL,

Plaintiff,

- v -

INDEX NO. 152890/2016

MOTION DATE _____

MOTION SEQ. NO. 003

POPEYES LOUISIANA KITCHEN, INC., POPEYES
LOUISIANA KITCHEN, 239 ELMONT OPERATING
CORP., SYED RESTAURANTS ENTERPRISES,
INC., ROBERT SCHNEIDER, RONALD
SCHNEIDER, and BRIDG MGMT LLC,

Defendants.

**DECISION + ORDER ON
MOTION**

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The following e-filed documents, listed by NYSCEF document number (Motion 003) 59-97, 99-105
were read on this motion to strike pleadings.

By notice of motion, plaintiff moves pursuant to CPLR 3124 and 3126 for orders
compelling defendants to comply with her discovery demands, and imposing sanctions for their
noncompliance. Defendants oppose.

By notice of cross motion, defendants cross-move pursuant to 22 NYCRR § 130-1 for an
order imposing sanctions and costs on plaintiff, and for an order compelling her to comply with
their discovery demands. Plaintiff opposes.

I. PLAINTIFF'S MOTION TO COMPEL

By compliance conference order dated June 19, 2019, as pertinent here, defendants were
ordered to respond plaintiff's post-deposition demands and good faith letters dated July, 17,
2018, April 23, 2019, and May 5, 2019, and if responses were not received, plaintiff was given
an opportunity to move for an order compelling responses. Reserved to plaintiff therein is

entitlement to move for an order compelling the deposition of defendants' "night manager."
(NYSCEF 85).

Accordingly, plaintiff's motion is considered to the extent that it seeks an order striking defendants' answer, or in the alternative, compelling responses to the above-mentioned items and seeking the deposition of the night manager.

A. Motion to strike

While CPLR 3126 permits a court, *inter alia*, to issue an order striking pleadings, a party's failure to comply with an order of disclosure or willful failure to disclose information generally does not warrant the drastic remedy of striking a pleading absent a motion to compel compliance with discovery demands. (*See Michaluk v New York City Health and Hosps. Corp.*, 169 AD3d 496, 496 [1st Dept 2019] [as defendant never sought to compel disclosure or seek to preclude sanctions for failure to comply with conference orders, motion to dismiss premature given the lack of evidence that plaintiffs' delay willful, contumacious or in bad faith]; *W&W Glass, LLC v 1113 York Ave. Realty Co. LLC*, 83 AD3d 438, 438 [1st Dept 2011] [absent prior motions by plaintiff to compel disclosure, motion to strike answer premature]).

B. Motion to compel

Pursuant to CPLR § 3101(a), "[t]here shall be full disclosure of all matter material and necessary in the prosecution or defense of an action . . ." What is "material and necessary" is generally left to the court's sound discretion and may include "any facts bearing on the controversy which will assist preparation for trial by sharpening the issues and reducing delay and prolixity." (*Andon ex rel. Andon v 302-304 Mott St. Assocs.*, 94 NY2d 740, 746 [2000], quoting *Allen v Crowell-Collier Pub. Co.*, 21 NY2d 403, 406 [1968]).

A party may seek an order compelling compliance or a response to any request, notice,

interrogatory, demand, question, or order under CPLR article 31. (CPLR 3124).

1. Good faith letters

While defendants had been directed in conference orders to respond to plaintiff's good faith letters, nothing in the orders identify what plaintiff had sought (NYSCEF 74, 77, 78, 83, 85), and plaintiff does not submit copies of the letters with her motion papers. Consequently, plaintiff offers no basis for determining whether defendants had complied with the orders. (*Zeitlin v Greenberg, Margolis, Ziegler, Schwartz, Dratch, Fishman, Franzblau & Falkin, P.A.*, 262 AD2d 406, 406 [2d Dept 1999] [denying motion to compel where the plaintiffs failed to include copies of discovery requests in motion papers]).

2. Post-deposition demands

Absent any denial in plaintiff's reply that defendants complied with her post-deposition demands, plaintiff admits that defendants' responses (NYSCEF 91) are adequate.

3. Motion to compel deposition of night manager

On April 22, 2019, defendants produced the general manager of defendant Syed Restaurants Enterprises, Inc.'s for a deposition in which she testified, as pertinent here, that she was present and working on the day of plaintiff's accident and had learned about it from the restaurant's owner. (NYSCEF 79). On May 23, 2019, the owner testified that in May or April of 2015, he had received a letter dated April 29, 2015 from "Popeyes" regarding plaintiff's accident, and that as a result, he had contacted the general manager who told him that she had no information and that the night manager had personal knowledge of the accident.

Thereafter, the owner spoke with the night manager, who told him the following: He saw an elderly woman sitting in the dining room and was told by an unidentified person to get water or ice for her. Upon returning to the dining room, the woman was gone; an ambulance had taken

her away. According to the owner, the night manager did not get the name of the woman. An incident report was prepared by the night manager at the owner's request. (NYSCEF 61).

The incident report, dated March 24, 2015, reflects that a customer suffered a trip and fall at the store. Although not signed, it is reported therein that its author had observed an elderly woman seated in the dining room when an ambulance arrived, and that the woman had reported having tripped and fallen near the drive-through window. (NYSCEF 82).

To be entitled to another deposition, plaintiff must demonstrate that those already deposed had insufficient knowledge or were otherwise inadequate and that there is a substantial likelihood that the additional person sought possesses material and necessary information. (*Hayden v City of New York*, 26 AD3d 262 [1st Dept 2006]).

Neither witness produced by defendants had personal knowledge of plaintiff's accident, and it is readily inferred from the testimony of the owner that the incident report had been prepared by the night manager. Consequently, there is a substantial likelihood that the night manager has information material and necessary to plaintiff's claims.

II. DEFENDANTS' CROSS MOTION FOR SANCTIONS AND TO COMPEL

A. Motion for sanctions

As plaintiff's motion is partially granted, it is not completely without merit in law, nor is there a sufficient basis for inferring that it is intended to delay or harass.

B. Motion to compel

Plaintiff, in reply, complies with defendants' request for medical authorizations; all that is addressed is their demand for Medicaid, cell phone, and IRS records.

As plaintiff testified that she was a Medicaid recipient while receiving treatment for the injuries sustained as a result of the incident (NYSCEF 103), defendants demonstrate their

entitlement to an authorization for those records. Beyond a recitation of boilerplate objections in her response to Medicaid records, plaintiff offers no argument as to why defendants are not entitled to those records.

Plaintiff's hospital record reflects that she was on her cellphone when the accident occurred (NYSCEF 96), and thus, access to her cellphone records as confirmation is warranted. That defendants relies on hearsay as the basis for obtaining the cell phone records is immaterial. (*See e.g., Cavaretta v George*, 270 AD2d 862, 862 [4th Dept 2000] [reliance upon hearsay evidence in support of motion for issuance of letters rogatory permissible]).

Defendants offer no basis for claiming entitlement to confidential tax records. (*See U.S. Bank Nat. Ass'n v Ventura*, 130 AD3d 919, 920 [2d Dept 2015] [party seeking disclosure pursuant to CPLR 3124 must satisfy "threshold requirement" of demonstrating that disclosure sought is "material and necessary"]]).

III. CONCLUSION

Accordingly, it is hereby

ORDERED, that plaintiff's motion is granted to the extent of directing defendants to produce defendants' night manager for a deposition within 30 days of the date of this order, and is otherwise denied; it is further

ORDERED, that defendants' cross motion is granted to the extent of directing defendants to provide plaintiff with authorizations for Medicaid and cell phone records, as requested in defendants' discovery demands, within 20 days of the date of this order, and is otherwise denied; and it is further

ORDERED, that the parties appear for a compliance conference on March 11, 2020 at 2:15 pm at 60 Centre Street, Room 341, New York, New York.

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2/10/2020
DATE

BARBARA JAFFE, J.S.C.

CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	
	<input type="checkbox"/>	GRANTED	<input type="checkbox"/>	DENIED	<input checked="" type="checkbox"/> OTHER
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>	SUBMIT ORDER	
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/> REFERENCE