

**Sutton v Duenas**

2020 NY Slip Op 33115(U)

September 22, 2020

Supreme Court, New York County

Docket Number: 159807/2019

Judge: Adam Silvera

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART IAS MOTION 22

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TROY SUTTON,

Plaintiff,

- v -

SONYHA A. DUENAS, GERALD W. DIXON, EVELYN A. PENA,  
ANABEL MARTINEZ and BEAVER CONCRETE  
CONSTRUCTION CO., INC.,

Defendants.

INDEX NO. 159807/2019

MOTION DATE 08/05/2020

MOTION SEQ. NO. 001 +002

**DECISION AND ORDER**

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HON. ADAM SILVERA:

The following e-filed documents, listed by NYSCEF document number (Motion 001) 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55

were read on this motion to/for COMPEL/PRECLUDE.

Before the Court is motion sequence 001 and 002. In motion sequence 001 defendants Gerald W Dixon and Evelyn A. Pena’s motion for an Order pursuant to CPLR § 3042(c) to preclude plaintiff from giving testimony or evidence at trial as to said defendants’ Demand for Bill of Particulars; or in the alternative, for an Order pursuant to CPLR § 3124 to compel plaintiff to respond to defendants’ discovery demands. In motion sequence 002 defendant Beaver Concrete Construction Co., Inc., moves for an Order pursuant to CPLR § 3126(3) to strike plaintiff’s complaint for failure to provide discovery.

On October 23, 2019 counsel for defendants Gerald W Dixon and Evelyn A. Pena served a demand for bill of particulars and for discovery and inspection on plaintiff’s counsel (Mot 001, Exh B). On November 25, 2019 counsel for said defendants made a good faith attempt to obtain responses in a letter addressed to plaintiff (*id.*, Exh C).

On December 5, 2019 counsel for defendant Beaver Concrete Construction Co., Inc. served demands for a bill of particulars and discovery demands for Medicare/Medicaid information for disclosure and production of necessary and relevant discovery, including adverse party statements, photos, witnesses, experts, collateral sources, IRS records, collateral source information, authorizations and medical and employment authorizations and Medicare/Medicaid information (Mot 002, Exh B). On April 13, 2020 defendants corresponded with plaintiff's counsel requesting response to the demands (*id.*, Exh C). Defendants allege that to date plaintiff has not responded to defendants correspondence requesting outstanding discovery.

On December 4, 2019, this Court issued a Case Scheduling Order which stated that all demands be served by December 20, 2019, and responses served by plaintiff by December 29, 2019 (*id.*, Exh D, ¶3). Defendants allege that plaintiff has willfully refused and/or neglected to respond to defendants' requests.

Under CPLR §3124, "if a person fails to respond or comply with any request, notice, interrogatory, demand, or question ... the party seeking disclosure may move to compel compliance or a response." A party may move to compel further discovery pursuant to CPLR §3124 when said party demonstrates that it has made a "good faith effort to bring about a non-judicial resolution to any remaining discovery disputes" (*Barber v Ford Motor Co.*, 250 AD2d 552, 553 [1st Dep't 1998]). While the disclosure provisions of the CPLR are ordinarily to be construed liberally, 'the scope of permissible discovery is not entirely unlimited and the trial court is invested with broad discretion to supervise discovery and to determine what is 'material and necessary' as that phrase is used in CPLR 3101(a)" (*Auerbach v Klein*, 30 AD3d 451, 452 [2d Dept 2006]).

The Court notes that “[i]t is well settled that a court should not resort to striking an answer for failure to comply with discovery directives unless noncompliance is clearly established to be both deliberate and contumacious. Moreover, even where the proffered excuse is less than compelling, there is a strong preference in our law that matters be decided on their merits.” *Catarine v Beth Israel Med. Ctr.*, 290 AD2d 213, 215 (1<sup>st</sup> Dep’t 2002)(internal citations omitted). Contrary to defendants’ averment that plaintiff did not respond to outstanding demands, in opposition to both motions, plaintiff attaches responses to defendants’ demands for bill of particulars, discovery and inspection (Docs 33-38).

In plaintiff’s opposition papers, plaintiff notes that it has since e-filed and served upon defendants the bills of particulars and discovery responses. Plaintiff notes that there was a delay in responding due to difficulty in identifying the subcontractor involved in the incident, because plaintiff underwent multiple surgeries, and difficulty obtaining necessary authorizations and medical records due to the Covid-19 pandemic. Upon review of plaintiff’s response the Court does not find that plaintiff was wilful or negligent in its delay and ultimate response to defendants’ demands. Plaintiff has provided the outstanding responses sought by defendant; however, the Court does agree with defendants that the responses are incomplete and overbroad.

Thus, the Court is within its discretion to compel plaintiff to provide defendants with a Supplemental Verified Bill of Particulars in which plaintiff list specific injuries; provide all outstanding medical reports and authorizations for specific injuries; list specific amount of lost earnings and confinement to bed/home; provide special damages; provide employment, tax and school authorizations. Thus, defendants’ motions are denied in part and granted so as to compel plaintiff to provide the above-mentioned discovery.

Accordingly, it is

ORDERED that the branches of defendants' motions motion sequence 001 and 002 to preclude and strike are denied; and it is further

ORDERED that the branches of defendants' motions motion sequence 001 and 002 are to compel plaintiff to provide the above-mentioned outstanding discovery are granted; and it is further

ORDERED that plaintiff provide the above-mentioned outstanding discovery in the form of a Supplemental Verified Bill of Particulars within 30 days; and it is further

ORDERED that plaintiff provide the above-mentioned outstanding authorizations within 60 days; and it is further

ORDERED that within 30 days of entry, plaintiff shall serve a copy of this decision/order upon defendant with notice of entry.

This Constitutes the Decision/Order of the Court.

9/22/2020  
DATE

HON. ADAM SILVERA JSC

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