

Aragundi v Andino

2020 NY Slip Op 35314(U)

October 13, 2020

Supreme Court, Bronx County

Docket Number: Index No. 26586/2018E

Judge: Mary Ann Brigantti

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This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX, PART 15**

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**Narcisa Almendares Aragundi and
Ethel Aragundi Navarrete**

Index №. 26586/2018E

-against-

Hon. MARY ANN BRIGANTTI

Raul Andino and Caltron Security Services Corp.

Justice Supreme Court

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The following papers NYSCEF Doc. # 40 to 52 were read on this motion (Seq. No. 001)
To STRIKE/COMPEL noticed on April 6, 2020 .

Notice of Motion - Order to Show Cause - Exhibits and Affidavits Annexed	NYSCEF Doc. # 40-52
Answering Affidavit and Exhibits	NYSCEF Doc. # 55-56
Replying Affidavit and Exhibits	NYSCEF Doc. # 54

Upon the foregoing papers, it is ordered that this motion is granted to the extent indicated herein:

The motor vehicle accident giving rise to this matter occurred on May 25, 2017. The action was begun by the filing of a summons and complaint on or about June 6, 2018. Issue was joined by the filing of the defendant’s answer on or about July 19, 2018. A preliminary conference was held on April 30, 2019; thereafter compliance conferences were held on August 13, 2019 and October 15, 2019. Plaintiffs were deposed on November 7, 2019, and the defendant on January 10, 2020. A further court conference was held on January 28, 2020. At that time, a “so ordered” stipulation was entered into that the defendant was to notice IMEs within 30 days, and the exams held within 30 days thereafter. It also ordered that the defendants were to respond to the plaintiffs’ post EBT demand within 30 days of receipt.

Plaintiff now moves to compel defendants to comply with the aforesaid post EBT demands, or, alternatively to strike their answer because of their failure to comply; to preclude defendants from holding IMEs because of their failure to notice them in response to the order of January 28th, as well as prior orders; and to strike the defendants’ answer due to the spoliation of evidence or, alternatively, for an order directing that plaintiffs are entitled to a jury charge at the time of trial that a negative inference can be drawn against defendants because of their failure to supply certain demanded discovery. Defendants oppose the motion, and indicate that the response to plaintiff’s post EBT demands had been supplied, and that the demand by plaintiffs for an authorization to obtain defendants’ cell phone records from the time of the accident is too broad and, in any event, release of such information by a cell phone carrier would require a subpoena. Finally, defendants claim they are still entitled to hold IMEs because the failure to schedule the examinations after the final court order of January 28, 2020 was because of the

ongoing pandemic. In reply, plaintiffs acknowledge receipt of the response but claim it is insufficient.

The specific items in dispute will be addressed individually:

1. IMEs

The compliance conference order of April 30, 2019 stated that physical examinations should be designated within 30 days of the completion of plaintiff's EBTs and held within 30 days thereafter. The subsequent court orders of August 13, 2019 and October 15, 2019 merely referred back to that previous order. Since the EBTs of the plaintiffs were held on November 7, 2019, the physical examinations should have been designated by approximately December 7, but were not. However, there was a subsequent so-ordered stipulation of the parties dated January 28, 2020 which allowed the defendant an additional 30 days to designate physical examinations. This apparently was not done, as defendants admit, but they blame the onset of the coronavirus crisis as the reason. Although the 30-day time period for designation envisioned in the order of January 28, 2020 would have expired prior to the court's shut down, and the general societal shut down because of the pandemic, it must nevertheless be taken into account. Indeed, plaintiffs argue that the court should "fashion a remedy" given that defendants failed to comply with the original time limit by which the exams were to be designated, as well as the terms of the final so-ordered stipulation.

Accordingly, defendants are to designate physical examinations within 30 days of the date this order is served on them with notice of its entry. Failure to do so will waive their right to such examinations.

2. Police Report

At the deposition of defendant Andino, he was shown a copy of the police report but testified that he was in possession of a different report which contained another version of the accident. Plaintiffs demanded a copy of this other version, and in their response defendants stated they were "following up" with the defendant and would supply it if he was in possession of it. Since defendant Andino admitted to possessing it at his deposition, and in their response the defendant indicated it would be supplied if found, the defendants are to supply this document within 30 days of the date this order is served on them with notice of its entry or, within the same time period, supply an affidavit from the defendant as to the efforts made to locate the document.

3. Corporate Accident Report

Defendant Andino also testified that he prepared a report for his supervisor since, at the time the accident happened, he was in the course of his employment with defendant Caltron. In their response to plaintiffs' demand for a copy of this report defendants once again indicated that they were "attempting" to obtain a copy of the report and would forward it if it were received. Accordingly, there are to supply a copy of this report within 30 days of the date this order is served upon them with notice of its entry, or provide an affidavit from a person with actual knowledge as to the efforts made to locate it.

4. Cell Phone Records/ Photos

Defendant Andino testified that after the accident occurred he took photographs on his cell phone which showed the position of the vehicles after contact. Plaintiffs sought copies of the photographs, arguing that they are relevant since there are differing versions of the accident between the plaintiffs and the defendant driver, and evidence of the position of the vehicles after contact would be probative. In the response to the plaintiffs' post-EBT demands, defendants' counsel stated that the phone is no longer "in possession" and that the photos had never been downloaded to any other device. Plaintiffs have therefore demanded an authorization to obtain records from the cell phone carrier to see if the photos may be able to be retrieved from the "cloud". Plaintiffs further argue that the failure of the defendants to retain the photographs constituted spoliation of evidence for which their answer should be stricken.

A party that seeks sanctions for spoliation of evidence must show that the party having control over the evidence possessed an obligation to preserve it at the time of its destruction, that the evidence was destroyed with a "culpable state of mind," and "that the destroyed evidence was relevant to the party's claim or defense such that the trier of fact could find that the evidence would support that claim or defense" (*VOOM HD Holdings LLC v. EchoStar Satellite L.L.C.*, 93 A.D.3d 33, 45 [1st Dept.2012]). Where the evidence is determined to have been intentionally or wilfully destroyed, the relevancy of the destroyed documents is presumed; on the other hand, if the evidence is determined to have been negligently destroyed, the party seeking spoliation sanctions must establish that the destroyed documents were relevant to the party's claim or defense (*Pegasus Aviation I, Inc. v Varig Logistica S.A.*, 26 NY3d 543, 547-48 [2015]).

Here, it has not yet been established that the photographs do not exist since defendant's response was that they would be provided if they should become "available". Accordingly, defendants are to make a search and are to provide the photographs within 30 days from the date this order is served upon them with notice of its entry. If they are unable to produce the photographs, then an affidavit from someone with personal knowledge must be supplied specifying the efforts undertaken to locate the photographs or specifically stating what is meant in the response by stating the phone in which the photographs were taken is no longer "in possession". Such an affidavit must include the identification of the cell phone carrier, the name of the person or entity on the cell phone account, the account number, and when the phone was

last "in possession". Defendants are also to supply the requested authorization to obtain the cell phone records, but the authorization is to be limited to only the date of the accident.

The motion to strike the defendant's answer because of spoliation of evidence or, alternatively, for a "negative inference" charge at trial is denied with leave to renew pending the extent of defendants' compliance with this order.

This matter is scheduled for a ~~virtual~~ ^{virtual} status conference on ~~November 24, 2020~~ ^{January 21, 2021}. The parties are to review this Part's Amended Rules (amended 9/2020) for new procedures governing Status/Compliance conferences.

MB
JSC

This constitutes the decision and order of the court.

Dated: OCTOBER 13, 2020 Hon. *Mary Ann Brigantti*
MARY ANN BRIGANTTI, J.S.C.

- 1. CHECK ONE..... CASE DISPOSED IN ITS ENTIRETY CASE STILL ACTIVE
- 2. MOTION IS..... GRANTED DENIED GRANTED IN PART OTHER
- 3. CHECK IF APPROPRIATE..... SETTLE ORDER SUBMIT ORDER SCHEDULE APPEARANCE
- FIDUCIARY APPOINTMENT REFEREE APPOINTMENT