

Colon v Raymour Furniture Co. Inc.

2020 NY Slip Op 35529(U)

July 21, 2020

Supreme Court, Bronx County

Docket Number: Index No. 31229/2018E

Judge: John R. Higgitt

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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 14

-----X
COLON, RAMON

Index No. 31229/2018E

- against -

Hon. JOHN R. HIGGITT,

RAYMOUR FURNITURE COMPANY INC., et ano
-----X

J.S.C.

The following papers in the NYSCEF System were read on this motion to **STRIKE ANSWER**, duly submitted as No. on the Motion Calendar of **July 1, 2020**

	<u>NYSCEF Doc. Nos.</u>
Notice of Motion – Order to Show Cause - Exhibits and Affidavits Annexed	44-58
Notice of Cross-Motion – Order to Show Cause - Exhibits and Affidavits Annexed	
Answering Affidavits and Exhibits	61-67
Replying Affidavits and Exhibits	68-69

Upon plaintiff’s June 9, 2020 notice of motion and the affirmation and exhibits submitted in support thereof; defendants’ June 25, 2020 affirmation in opposition and the exhibits submitted therewith; plaintiff’s June 26, 2020 affirmation in reply; and due deliberation; plaintiff’s motion for an order striking defendants’ answer for failure to respond completely to plaintiff’s discovery demands or for an order compelling defendants’ complete responses to plaintiff’s April 9, 2019 and May 12, 2020 demands, compelling defendants to provide affidavits regarding their discovery responses, compelling all parties’ depositions, and extending the time to file the note of issue is granted in part.

STRIKE ANSWER / COMPEL DISCOVERY

Defendants assert that plaintiff has not submitted the requisite affirmation of good faith required on the motion. Any motion relating to disclosure must include “an affirmation that counsel has conferred with counsel for the opposing party in a good faith effort to resolve the issues raised by the motion” (22 NYCRR § 202.7[a][2]). The good faith requirement applies by its terms to any discovery-related application, not just applications to strike pleadings or for particular sanctions for failure to disclose, and the regulation states that the motion cannot be filed without it. Such affirmation must provide a substantive description of the efforts undertaken to confer and avoid motion practice (*see 241 Fifth Ave. Hotel, LLC v GSY Corp.*, 110 AD3d 470 [1st Dept 2013]). Failure to do so is, standing alone, sufficient ground to deny the motion (*see Jackson v Hunter Roberts Constr. Grp., L.L.C.*, 139 AD3d 429 [1st Dept 2016]; *Perez De Sanchez v Trevz Trucking LLC*, 124 AD3d 527 [1st Dept 2015]).

“Good faith” contemplates communication *between* parties (*see Fulton v Allstate Ins. Co.*, 14 AD3d 380 [1st Dept 2005]), not communication *at* a party. Good faith entails “constructive dialogue” (*Nikpour v City of New York*, 179 Misc 2d 928, 930 [Sup Ct, N.Y. County 1999]), and “diligent effort” (*Baez v Sugrue*, 300 AD2d 519, 521 [2d Dept 2002]). The motion discloses no circumstances warranting disregard of this requirement (*cf. Lu Huang v Di Yuan Karaoke*, 28 Misc 3d 920 [Sup Ct, Queens County 2010]). The affirmation submitted here discloses no efforts undertaken by the parties to comply with the good faith requirement. Attendance at a mandatory, court-ordered conference is not a good-faith effort of the kind envisioned by the regulation (*see Arma v East Islip Union Free School Dist.*, 2016 NY Slip Op 31823[U] [Sup Ct, Suffolk County 2016]). Service of a single letter is not a good-faith effort of the kind envisioned by the regulation (*see Nouveau El. Indus., Inc. v N.Y. Marine & Gen. Ins. Co.*, 2018 NY Slip Op 30202[U] [Sup Ct, N.Y. County 2018]; *241 Fifth Ave. Hotel, LLC, supra*). Accordingly, at least with respect to plaintiff’s May 12, 2020 letter, insofar as it constitutes a demand

Check one:

- Case Disposed in Entirety
- Case Still Active

Motion is:

- Granted
- Denied
- GIP
- Other

Check if appropriate:

- Schedule Appearance
- Fiduciary Appointment
- Settle Order
- Submit Order

seeking additional discovery, plaintiff's failure to exercise good faith requires denial of the motion. The exchange of a discovery demand is not a good faith effort to avoid motion practice. If a party wishes to obtain discovery from another party, service of a written demand is *required* under CPLR 3120. Furthermore, service of a discovery demand is not a good faith effort because it does not constitute a "conferral" with opposing counsel (*see Kelly v N.Y.C. Transit Auth.*, 162 AD3d 424 [1st Dept 2018] ["Defendant's motion was properly denied because it related to discovery, and defendant failed to submit an affirmation demonstrating its good faith effort to resolve the issues raised in the motion or that there was 'good cause why no such conferral . . . was held' (Uniform Rules for Trial Cts [22 NYCRR] § 202.7[a][2], [c]; *see Perez De Sanchez v Trevz Trucking LLC*, 124 AD3d 527, 998 N.Y.S.2d 626 [1st Dept 2015]; *Molyneaux v City of New York*, 64 AD3d 406, 882 N.Y.S.2d 109 [1st Dept 2009])."]).

In any event, defendants responded that they were conducting a search for the requested items and would supplement their response if the search yielded responsive material.

With respect to the April 2019 demands, they have been the subject of three court orders directing defendants' response.

With respect to plaintiff's combined demands, paragraph 1 sought witness information. Defendants attached the police report and stated they were not aware of any witnesses other than those named in the report.

Paragraph 2 sought plaintiff's statements. Defendants stated they were not in possession of such statements, other than the police report.

Paragraph 3 sought insurance information. Defendants objected to the demand as vague, overly broad, and unduly burdensome, and attached responsive documents.¹

Paragraph 4 sought reports. Defendants objected to the demand as vague, overly broad, and unduly burdensome, and attached responsive documents.

Paragraph 5 sought photographs and videos. Defendants objected to the demand as vague, overly broad, and unduly burdensome, and attached photographs.

Paragraph 6 sought expert witness information. Defendants stated that they had not yet designated experts and would supplement the response in accordance with CPLR 3101(d).

Paragraph 7 sought surveillance material. Defendants objected to the demand as vague, overly broad, unduly burdensome and requiring the production of privileged material, and stated that they were not in possession of surveillance depicting or alleging to depict plaintiff.

Paragraph 8 sought property damage estimates and reports. Defendants objected to the demand as vague, overly broad, and unduly burdensome, and attached responsive documents.

Paragraph 9 sought plaintiff's hospital and medical records received as a result of authorizations. Defendants objected to the demand as vague, overbroad and unduly burdensome.

With respect to plaintiff's demand for discovery and inspection, paragraph 1 sought surveillance footage of the subject. Defendants responded that they were not in possession of documents responsive to this demand.

Paragraph 2 sought internal policies and/or procedures, in effect on the accident date, pertaining to motor vehicle operation and/or motor vehicle accidents. Defendants objected to the demand as vague, overly broad, unduly burdensome and requiring the production of privileged material, and attached responsive documents.

¹ Plaintiff did not submit any documents that defendants appended to their discovery responses; accordingly, the court cannot state whether such responses were inadequate.

Paragraph 3 sought training manuals, operation manuals and/or safety guidelines, in effect on the accident date, pertaining to motor vehicle operation and/or motor vehicle accidents. Defendants objected to the demand as vague, overly broad, unduly burdensome and requiring the production of privileged material, and attached responsive documents.

Paragraph 4 sought statements in connection with the subject incident. Defendants objected to the demand as vague, overly broad, unduly burdensome and requiring the production of privileged material, and stated that they were not in possession of additional statements.

Paragraph 5 sought property damage records. Defendants objected to the demand as vague, overly broad, and unduly burdensome, and attached responsive documents.

Paragraph 6 sought collision and incident reports. Defendants objected to the demand as vague, overly broad, and unduly burdensome, and stated that they were not in possession of such records, other than the police accident report.

Paragraph 7 sought repair and maintenance records for defendants' motor vehicle for six months prior to the accident date. Defendants objected to the demand as vague, overly broad, and unduly burdensome, and attached responsive documents.

Paragraph 8 sought inspection records for defendants' motor vehicle for six months prior to the accident date. Defendants objected to the demand as vague, overly broad, and unduly burdensome, and attached responsive documents.

Paragraph 9 sought motor vehicle operation violations issued to defendant Harrison for two years prior to the accident date. Defendants objected to the demand as vague, overly broad, unduly burdensome and requiring the production of privileged material, and attached responsive documents.

Paragraph 10 sought motor vehicle operation complaints against defendant Harrison for two years prior to the accident date. Defendants objected to the demand as vague, overly broad, and unduly burdensome, and stated that they were unaware of any oral or written complaints.

Paragraph 11 sought defendant Harrison's driver log for one week prior to the accident date. Defendants objected to the demand as vague, overly broad, and unduly burdensome, attached responsive documents, stated that their search for the log was ongoing, and stated that same would be provided under separate cover.

Paragraph 12 sought defendant Harrison's operation log for one week prior to the accident date. Defendants objected to the demand as vague, overly broad, and unduly burdensome, and attached responsive documents.

Paragraph 13 sought driver vehicle inspection reports for defendants' motor vehicle for one week prior to the accident date. Defendants objected to the demand as vague, overly broad, and unduly burdensome, and attached responsive documents.

Paragraph 14 sought electronically-stored information for defendants' motor vehicle for 48 hours prior to the accident date. Defendants objected to the demand as vague, overly broad and unduly burdensome, and stated that they were not in possession of documents responsive to the demand.

Paragraph 15 sought defendant Harrison's medical clearance card. Defendants objected to the demand as vague, overly broad, and unduly burdensome, and attached responsive documents.

With respect to each of plaintiff's demands, defendants attached responsive documents, stated that they were not in possession of the requested documents or stated that they were conducting a search for same.

Defendants do not explain their delay in responding; however, to the extent plaintiff enumerates discovery deficiencies in reply, moving to compel a party's compliance with discovery that has not been demanded is improper (*see Canales v State of N.Y.*, 51 Misc 3d 648 [Ct Cl 2015]).

"The drastic sanction of striking pleadings is only justified when the moving party shows conclusively that the failure to disclose was wilful, contumacious or in bad faith" (*Christian v City of New York*, 269 AD2d 135, 137 [1st Dept 2000]). Willfulness and contumacy may be established by the violation of multiple court orders without reasonable excuse (*see Watson v City of N.Y.*, 157 AD3d 510 [1st Dept 2018]). The sanction of preclusion may be imposed even where the failure to disclose was neither willful nor contumacious (*see Vandashield Ltd v Isaacson*, 146 AD3d 552 [1st Dept 2017]). To avoid the imposition of a sanction, the non-disclosing party must set forth a reasonable excuse for the failure to disclose (*see Sage Realty Corp. v Proskauer Rose LLP*, 275 AD2d 11 [1st Dept 2000]).

The court retains broad discretion in supervising discovery (*see Crooke v Bonofacio*, 147 AD3d 510 [1st Dept 2017]), and any CPLR 3126 sanction imposed should be commensurate with and proportionate to the nature and extent of the disobedience (*see Merrill Lynch, Pierce, Fenner & Smith, Inc. v Global Strat Inc.*, 22 NY3d 877 [2013]; *Christian, supra*). Under the circumstances, where defendants have responded to plaintiff's demands, albeit untimely, a monetary sanction is appropriate (*see Vizcaino v Western Beef, Inc.*, 161 AD3d 632 [1st Dept 2018]).

COMPEL DEPOSITIONS

Plaintiff's correspondence to defendants indicated that defendants' depositions could not be conducted in the absence of the exchange of outstanding discovery. The June 17, 2020 decision of the undersigned, determining defendants' motion to compel plaintiff's production of discovery, indicates that discovery from plaintiff, too, remains outstanding. That decision was only recently entered. Accordingly, because the court finds no circumstances warranting defendants' forfeiture of their priority of deposition (*see Bennett v Riverbay Corp.*, 40 AD3d 319 [1st Dept 2007]), depositions shall occur after a reasonable opportunity to complete the exchange of documentary discovery ordered on June 17 and herein.

AFFIDAVIT

The aspect of plaintiff's motion compelling defendants' production of affidavits regarding their discovery searches (*see generally Jackson v New York*, 185 AD2d 768 [1st Dept 1992]) is denied as premature. A party demanding discovery is not always entitled to a *Jackson* affidavit when the responding party does not produce or denies being in possession of documentary evidence requested (*see e.g. Stern v Starwood Hotels & Resorts Worldwide, Inc.*, 2020 NY Slip Op 30304[U] [Sup Ct, N.Y. County 2020]; *MBIA Ins. Corp. v Countrywide Home Loans, Inc.*, 2012 NY Slip Op 33962[U] [Sup Ct, N.Y. County 2012]). Furthermore, if an affidavit is warranted, it need not necessarily comport with *Jackson* (*see e.g. Parkinson v Fedex Corp.*, 2020 NY Slip Op 03202 [1st Dept 2020]; *Simoni v Fifth on the Park Condo, LLC*, 2018 NY Slip Op 31462[U] [Sup Ct, N.Y. County 2018]) and need merely be "suitably detailed" (*NorthE Group Inc. v Consol. Edison Co. of N.Y. Inc.*, 67 Misc 3d 1210[A], 2020 NY Slip Op 50487[U], at *2 [Sup Ct, N.Y. County 2020]), or demonstrate reasonable diligence (*see Rubin v Sabharwal*, 2019 NY Slip Op 33503[U] [Sup Ct, N.Y. County 2019]). Here, defendants have never been directed to specifically produce any particular item of discovery (*cf. Metropolitan Bridge & Scaffolds Corp. v N.Y.C. Hous. Auth.*, 168 AD3d 569 [1st Dept 2019]; *Vazquez v Lambert Houses Redevelopment Co.*, 110 AD3d 450 [1st Dept 2013]; *Longo v Armor Elevator Co.*, 307 AD2d 848 [1st Dept 2003]), defendants have not denied being able to locate documents expected to exist (*cf. Henderson-Jones v City of N.Y.*, 87 AD3d 498 [1st Dept 2011]) and defendants have not failed to produce specific documents "repeatedly" ordered by court (*see Ramirez v N.Y.C. Hous. Auth.*, 57 AD3d 231 [1st Dept 2008]);

Jackson, supra). In addition, plaintiff has not demonstrated why defendants' unequivocal responses are so inadequate, unresponsive or unreliable to as to require an affidavit.

EXTEND NOTE OF ISSUE

The aspect of plaintiff's motion for an order extending his time to file a note of issue is denied as premature. The court has not yet set a date by which plaintiff is to file a note of issue and certificate of readiness for trial. This occurs at the final status conference, at which the parties stipulate that all discovery is complete. The next status conference is calendared for September 25, 2020. While standards-and-goals dates, calculated from the filing of a Request for Judicial Intervention (*see* 22 NYCRR § 202.6) and determined by case complexity as defined in 22 NYCRR §§ 202.12(b), 202.19(b)(2), are a useful gauge in determining whether an action is progressing as should be expected (*see Grant v Rattoballi*, 57 AD3d 272, 274 [1st Dept 2008] ["The standards and goals component of the differentiated case management rule provides a roadmap and timetable for arriving at a conclusion in civil cases and thus facilitates the speedy resolution of those cases"] [citation and quotation marks omitted]), it is the order of the court that determines when plaintiff's note of issue is due in the Twelfth Judicial District.

Accordingly, it is

ORDERED, that plaintiff's motion for an order striking defendants' answer for failure to respond completely to plaintiff's discovery demands or for an order compelling defendants' complete responses to plaintiff's April 9, 2019 and May 12, 2020 demands, compelling defendants to provide affidavits regarding their discovery responses, compelling all parties' depositions, and extending the time to file the note of issue is granted solely to the extent that, (1) within 60 days after service of a copy of this order with written notice of its entry, defendants shall complete all searches for documents claimed to be ongoing and shall supplement their discovery responses as to the results of document searches claimed to be ongoing, and (2) plaintiff's deposition shall be completed within 60 days after service of a copy of this order with written notice of its entry, and defendants' depositions shall be completed within 30 days after completion of plaintiff's deposition; and it is further

ORDERED, that the motion is otherwise denied; and it is further

ORDERED, that, within 30 days after service of a copy of this order with written notice of its entry, defendants' counsel shall pay to plaintiff's counsel the sum of \$100.00 as costs on the motion (*see* CPLR 8106, 8202).

Future motions shall be made to the attention of Hon. Ben R. Barbato, J.S.C.

This constitutes the decision and order of the court.

Dated: July 21, 2020


Hon. John B. Higgitt, J.S.C.