

**Ford v Finest Bread Inc.**

2020 NY Slip Op 35678(U)

October 6, 2020

Supreme Court, Bronx County

Docket Number: Index No. 31672/2018E

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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 INDIA M. FORD

Index No. 31672/2018E

-against-

Hon. MARY ANN BRIGANTTI

FINEST BREAD INC. and RADHAMES A. CRUZ

Justice Supreme Court

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The following papers numbered 1 to 5 were read on this motion (Seq No. 4) to **DISMISS COMPLAINT** noticed on July 22, 2020.

Notice of Motion - Order to Show Cause - Exhibits and Affidavits Annexed	No(s).	1-3
Answering Affidavit and Exhibits	No(s).	4-5
Replying Affidavit and Exhibits	No(s).	

Upon the foregoing papers, the defendants move for an order pursuant to CPLR § 3126, striking the plaintiff's complaint for failing to provide outstanding discovery or in the alternative, precluding plaintiff from offering any evidence at trial or pursuant to CPLR §3124 and compelling plaintiff to provide responses to defendants' discovery demands. Plaintiff opposes the motion.

The cause of action is for personal injuries allegedly sustained by the plaintiff in a motor vehicle accident that occurred on June 26, 2017 on Atlantic Avenue near the intersection of Wyona Street in Kings County.

Defendants assert that on November 16, 2018, they served several discovery demands on the plaintiff including demands for authorizations relating to plaintiff's previous accidents from May 2, 2016, July 18, 2012, and April 8, 2006. Plaintiff subsequently filed a motion for summary judgment on the issue of liability. However, plaintiff later withdrew the motion but also failed to respond to discovery demands. Defendants then filed a motion to compel discovery on or about April 2, 2019 but withdrew same once the plaintiff filed a Verified Bill of Particulars. On July 30, 2019, after a preliminary conference was held, plaintiff was ordered to provide authorizations for prior/subsequent treatment to the same body parts injured in the current accident and if there were none, plaintiff was directed to advise of same within thirty (30) days. However, plaintiff failed to comply. At a compliance conference held on November 19, 2019, plaintiff was again directed to furnish said authorizations.

Plaintiff's examination before trial (EBT) was held on January 17, 2020 but defendants allege that it was not completed as to damages and at the conclusion of the EBT, defendants reserved their right to "reconvene" at a later date to conclude plaintiff's EBT. On January 27, 2020, defendants filed a motion to compel outstanding discovery from the plaintiff. The motion was resolved at a compliance conference held on March 3, 2020. In that order, plaintiff was directed to respond to defendants' demands for records and authorizations, including the authorizations involving prior injuries. Said order also directed the completion of defendants' outstanding EBT as well as the completion of plaintiff's EBT. A letter was

then sent by defendants' counsel to plaintiff's counsel attempting to resolve the discovery issues. After receiving no response, a second letter was sent on April 1, 2020 and then a third letter was sent on May 4, 2020. A second demand for discovery and inspection was also sent by defendants' counsel to plaintiff's counsel on May 4, 2020, to no avail.

Defendants argue that plaintiff's failure to comply with outstanding discovery is willful and contumacious and plaintiff's complaint should be dismissed. In the alternative, plaintiff should be precluded from presenting evidence as to those matters not disclosed or compelled to provide discovery. Defendants acknowledge that there has been an ongoing pandemic but they assert that plaintiff should have at least responded to multiple good faith efforts made by the defendants.

Plaintiff opposes the motion and argues that discovery has been complied with and plaintiff has already appeared for a deposition. Plaintiff's counsel alleges that he made a record at the beginning of plaintiff's EBT stating that the plaintiff would not be produced again for a continued deposition. After an argument between counsel, the court was contacted but a ruling was not made and the parties were instead directed to proceed with the EBT. Plaintiff's counsel objects to a further deposition of the plaintiff and argues that defendants have failed to appear for a deposition and have yet to provide an affidavit of no excess insurance. Moreover, since courts have "suspended all deadlines" during the pandemic there is no basis for a preclusion order.

CPLR §3124 permits a court to compel disclosure if a party fails to comply with discovery demands. CPLR §3126, "...broadly empowers a trial court to craft a conditional order – an order 'that grants the motion and imposes [a] sanction 'unless within a specified time the resisting party submits to the disclosure'" (citation omitted). *Gibbs v. St. Barnabas Hospital*, 16 N.Y.3d 74 [2010].

All parties herein have failed to comply with outstanding discovery demands. Accordingly, defendants' motion is granted to the extent that both the plaintiff and the defendants shall comply with all outstanding discovery requested in the compliance conference order of March 3, 2020, within thirty (30) days of the date of this order with notice of entry. Moreover, after a review of the transcript of plaintiff's EBT, it is apparent that the EBT did not commence on January 17, 2020 until well after 1:00pm. The plaintiff appeared almost an hour late and then counsel for both the plaintiff and the defendants spent an inordinate amount of time arguing before contacting the court and being directed to proceed with the EBT. The EBT then concluded for the day at 4:37pm due to a scheduling conflict with the court reporter. Therefore, notwithstanding plaintiff's counsel's objections to further producing the plaintiff, the court hereby orders the plaintiff to be produced in order to conclude her EBT, within sixty (60) days of the date of this order with notice of entry. Any remaining deposition of the defendants shall also take place within sixty (60) days of the date of this order with notice of entry. Failure of any of the parties to comply may result in preclusion upon further application to this Court.

This matter is scheduled for a status conference on December 1, 2020. The parties are directed to review this Part's Amended Rules (amended September 29, 2020) for new procedures governing Status/Compliance conferences.

This constitutes the Decision and Order of this Court.

**Dated: OCTOBER 6, 2020**

Hon. *Mary Ann Brigantti*  
**MARY ANN BRIGANTTI J.S.C.**

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- 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