

**Peralta v City of New York**

2021 NY Slip Op 30784(U)

March 15, 2021

Supreme Court, New York County

Docket Number: 150874/2018

Judge: W. Franc Perry

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This opinion is uncorrected and not selected for official publication.

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

PRESENT: HON. W. FRANC PERRY

PART

IAS MOTION 23EFM

*Justice*

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INDEX NO. 150874/2018

JEAN CARLOS PERALTA,

MOTION DATE 07/27/2020

Plaintiff,

MOTION SEQ. NO. 003 004

- v -

THE CITY OF NEW YORK, COMMUNITY ASSOCIATION  
OF PROGRESSIVE DOMINICANS, INC.

**DECISION + ORDER ON  
MOTION**

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 003) 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 78, 79, 80, 81, 87, 88

were read on this motion to/for VACATE/STRIKE - NOTE OF ISSUE/JURY

The following e-filed documents, listed by NYSCEF document number (Motion 004) 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 82, 83, 84, 85, 89

were read on this motion to/for VACATE/STRIKE - NOTE OF ISSUE/JURY

In this action plaintiff alleges that she sustained injuries as the result of a physical altercation on November 24, 2009 between plaintiff (an infant at the time of the alleged incident), and another student attending Middle School 326 located at 401 West 64<sup>th</sup> Street, New York, New York. This is the second time that defendants have moved to vacate the note of issue, filed by plaintiff even though she admits that no discovery has been exchanged.

Plaintiff's counsel provides a litany of personal issues as an excuse for the failure to conduct discovery in this action, indicating that he is requesting a Preliminary Conference with the court to outline discovery. Yet, plaintiff ignores the fact that three Preliminary conferences have been scheduled by the court and two of those conferences, the first scheduled on October 1, 2019 and the second scheduled on January 21, 2020 were adjourned at plaintiff's request, the

third Preliminary Conference was scheduled on March 31, 2020 and was adjourned due to the ongoing pandemic.

Defendants have served various discovery demands including a demand for a Verified Bill of Particulars with service of their respective answers and the first good faith demand letter was sent to plaintiff on May 31, 2018 and on January 28, 2019, yet plaintiff has failed to comply with any of the discovery demands properly served by defendants. (NYSCEF Doc. Nos. 61, 71). Despite defendants' good faith efforts to obtain responses to the various discovery demands served upon plaintiff, no responses have been served and plaintiff inexplicably has filed her note of issue twice, without responding to a single discovery demand, including defendants' demands for a verified bill of particulars.

CPLR 3101 calls for the full disclosure of all evidence material and necessary in the prosecution or defense of an action (see *Allen v Crowell-Collier Publ. Co.*, 21 NY2d 403, 406, 235 N.E.2d 430, 288 N.Y.S.2d 449 [1968]). As such, "[l]iberal discovery is favored and pretrial disclosure extends not only to proof that is admissible but also to matters that may lead to the disclosure of admissible proof" (*Twenty Four Hour Fuel Oil Corp. v Hunter Ambulance*, 226 AD2d 175, 175-176, 640 N.Y.S.2d 114 [1st Dept 1996]). "The test of whether matter should be disclosed is 'one of usefulness and reason'" (*City of New York v Maul*, 118 AD3d 401, 402, 987 N.Y.S.2d 326 [1st Dept 2014], quoting *Allen*, 21 NY2d at 406).

CPLR 3126 provides a range of sanctions against a party who "refuses to obey an order for disclosure or willfully fails to disclose information which the court finds ought to have been disclosed." Sanctions include the dismissal of the offending party's complaint (see CPLR 3126 [3]), if the party seeking such a sanction establishes that the offending party's "repeated noncompliance has been 'dilatatory, evasive, obstructive and ultimately contumacious'" (*Arts4all*,

*Ltd. v Hancock*, 54 AD3d 286, 286, 863 N.Y.S.2d 193 [1st Dept 2008], *affd* 13 NY3d 812, 918 N.E.2d 945, 890 N.Y.S.2d 432 [2009] [internal citation omitted]). The "sanction should be commensurate with the particular disobedience it is designed to punish, and go no further than that" (*Brigham v Jaffe*, 189 AD3d 475, 476 [1st Dept 2020] [internal citation omitted]). CPLR 3124 also provides that party may move to compel compliance or discovery. It is within the court's discretion to grant a motion brought under CPLR 3124 or 3126 (see *Ruiz v Selzer*, 187 AD3d 558, 558, 130 N.Y.S.3d 657 [1st Dept 2020]; *Valencia v City of New York*, 188 AD3d 549, 550 [1st Dept 2020]).

Here, defendants have established that plaintiff's noncompliance was both deliberate and contumacious, however, given the personal issues outlined in plaintiff's affirmation in opposition, the court, in its discretion, will allow plaintiff one last opportunity to comply with all outstanding discovery demands or face dismissal. Defendants' motions to vacate the note of issue is granted. Additionally, defendants' motion to compel is granted and plaintiff is required to comply with all outstanding discovery demands in accordance with this conditional order. Accordingly, it is

ORDERED that the defendants' motions sequence numbers 003 and 004, to vacate the note of issue are granted and the note of issue is vacated and the case is stricken from the trial calendar; and it is further

ORDERED that, within 15 days from the entry of this order, movant shall serve a copy of this order with notice of entry on all parties and upon the Clerk of the General Clerk's Office (60 Centre Street, Room 119), who is hereby directed to strike the case from the trial calendar and make all required notations thereof in the records of the court; and it is further

ORDERED that, within 15 days from completion of discovery, the plaintiff shall cause the action to be placed upon the trial calendar by the filing of a new note of issue and certificate of readiness (for which no fee shall be imposed), to which shall be attached a copy of this order; and it is further

ORDERED that such upon the Clerk of the General Clerk's Office shall be made in accordance with the procedures set forth in the *Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases* (accessible at the "E-Filing" page on the court's website at the address [www.nycourts.gov/supctmanh](http://www.nycourts.gov/supctmanh)), and it is further

ORDERED that defendants' motion to compel is granted and the plaintiff's complaint is stricken unless, within 90 days from service of a copy of this order with notice of entry, plaintiff shall produce responses to all outstanding discovery demands served by defendants; and it is further

ORDERED that counsel for the parties are directed to confer with one another by telephonic or electronic means, within 30 days of receipt of plaintiff's discovery responses, and promptly thereafter send a joint e-mail message to the Part 23 Clerk [sfc-part23@nycourts.gov](mailto:sfc-part23@nycourts.gov) advising whether a status conference is necessary to schedule additional discovery.

3/15/2021

DATE

W. FRANC PERRY, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE