

Battista v 2104 LLC
2021 NY Slip Op 31710(U)
May 5, 2021
Supreme Court, New York County
Docket Number: 159650/2016
Judge: Shawn T. Kelly
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART IAS MOTION 57

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JOHN BATTISTA,
Plaintiff,

INDEX NO. 159650/2016

MOTION DATE 02/11/2021

- v -

2104 LLC., ENVIOS DE VALORES LA NACIONAL CORP.,
YANET DE LA CRUZ, ALBERTO RIVERA,

MOTION SEQ. NO. 002

Defendant.

**DECISION + ORDER ON
MOTION**

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2104 LLC.
Plaintiff,

Third-Party
Index No. 596042/2018

-against-

ENVIOS DE VALORES LA NACIONAL CORP., YANET DE LA
CRUZ, ALBERTO RIVERA

Defendant.

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HON. SHAWN TIMOTHY KELLY:

The following e-filed documents, listed by NYSCEF document number (Motion 002) 81, 82, 83, 84, 85, 86, 87, 88, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115

were read on this motion to/for DISCOVERY

Upon the foregoing documents, it is

In this slip and fall case, plaintiff moves pursuant to CPLR §3124 and §3126 to compel necessary and material discovery from defendant 2104 LLC and/or for defendant 2014 LLC to be precluded from offering testimony or evidence on liability or damages at any trial, hearing, or motion on this case and/or in the alternative, striking defendant's Answer for willfully and contumaciously failing to provide discovery. Specifically, plaintiff contends that 2104 LLC

failed to respond to its May 4, 2020¹ demand and its September 1, 2020² demand. Further, plaintiff argues that for items which 2104 LLC states that there are no responsive documents in its possession, plaintiff is entitled to a Jackson affidavit stating the name of the person with knowledge who conducted the search, when the search was conducted, what was searched and the search result (*see Jackson v City of New York*, 185 AD2d 768, 586 NYS2d 952 [1st Dept 1992]).

In opposition, 2104 LLC alleges that it has properly responded to all discovery requests and further cross moves for an order pursuant to CPLR §3124, compelling plaintiff to provide authorizations for medical records and films for Integra Partners, Dr. Eric Yosha, and North Shore University Hospital as well as authorizations to interview plaintiff's medical providers.

Discovery

The court has held multiple discovery conferences in this matter: a preliminary conference on July 28, 2017 and status conferences on March 12, 2020, October 28, 2020, December 8, 2020, an January 7, 2021. Plaintiff contends that the following items from his May 4, 2020 demand remain outstanding: 1) copies of the responses defendant 2104 served to the third party defendant; 3) property manager at the time of the accident and last known address if no longer employed 4) Name or entity name that did repairs and/or improvement to the sidewalk in question for two years prior to and including the date of the accident, 5) Copy of violations, summonses or notices concerning the sidewalk in front of 2104 Amsterdam Avenue for two years prior to and including the date of the accident, 6) Copy of the incident or accident reports relating to this accident.

¹ Plaintiff argues that Items 1, 3, 4, 5 and 6 remain outstanding.

² Plaintiff argues that Items 1, 2, 3, 4, 5, 6, 7, 8, 9, 10 and 11 remain outstanding.
159650/2016 BATTISTA, JOHN vs. 2104 LLC.
Motion No. 002

Plaintiff alleges that the following items are outstanding from his September 1, 2020 demand: 1) Copy of the contracts in effect for snow and ice removal at the time of the accident, 2) Copy of all records concerning snow and ice removal for three months prior to and including the date of the accident 3) Name and/or entity name of persons responsible to clean snow and ice at or near the time of the accident, 4) Copy of the rules in effect for the premises sidewalk concerning snow and ice removal, 5) Last known address of any persons that are no longer employed by defendant who were responsible for snow and ice at the time of the accident, 6) Plaintiff demands all prior incident reports concerning slip and falls on snow and ice for two years prior to and including the date of the accident, 7) Plaintiff demanded all prior lawsuits pleadings for snow and ice cases for two years prior to and including the date of the accident, 8, 9, 10 and 11) Demands for photos videos statement and accident reports.

Defendant 2104 LLC's main argument in opposition is that it has already provided sufficient responses to these demands, and that to the extent that it has not, plaintiff's demands can be renewed with specificity after depositions are completed.

CPLR §3101(a) allows for the "full disclosure of all evidence material and necessary in the prosecution or defense of an action regardless of the burden of proof." CPLR § 3124 grants the court the power to compel a party to provide discovery demanded. CPLR § 3126 grants the court the power to sanction a party that fails to comply with a court's discovery order.

The nature and degree of the penalty to be imposed for a party's failure to comply with an order is a matter within the sound discretion of the court (*see* CPLR §3126; *Silberstein v Maimonides Medical Center*, 109 AD3d 812, 971 NYS2d 167 [2nd Dept 2013]). The striking of a pleading is a drastic remedy and is only warranted where a clear showing has been made that

the noncompliance with an order was willful, contumacious or due to bad faith (*Mateo v City of New York*, 274 AD 2d 337, 711 NYS. 2d 396 [1st Dept 2000]).

Plaintiff has failed to demonstrate that defendant 2104 LLC's actions were willful and contumacious. However, discovery responses remain outstanding. Defendant 2104 LLC is to provide complete responses, or *Jackson* affidavits as appropriate, within thirty (30) days of this order.

Cross Motion

Defendant 2104 LLC cross moves pursuant to CPLR §3124, compelling plaintiff to provide authorizations. Specifically, on January 15, 2019, 2104 LLC served plaintiff with a Supplemental Demand for authorizations from medical providers Integra Partners, Dr. Neil Watnick, Dr. Dana Doromal, Dr. Eric Yousha, and North Shore Medical Facility. On January 30, 2019 and February 11, 2019, Plaintiff responded with authorizations for billing records from the aforementioned medical providers.

Discovery orders dated 4/4/19, 8/8/19, 12/19/19 and 3/12/20 indicate that plaintiff was to further respond to 2104 LLC's Supplemental Demands but repeatedly failed to do so. Defendant 2104 LLC contends that this failure to provide authorizations is preventing the parties from proceeding with depositions. Despite a October 23, 2020 order requiring that defendant 2104 LLC and plaintiff to correspond in an effort to resolve deficiencies in plaintiff's response, plaintiff did not provide any new authorizations for medical records.

Defendant 2104 LLC has demonstrated that the medical authorizations requested are material and plaintiff must provide the authorizations within thirty (30) days of this order.

Accordingly, it is hereby

ORDERED that the plaintiff's motion for an order of preclusion is granted to the extend discussed and plaintiff's motion to strike is denied; and it is further

ORDERED that defendant 2104 LLC, having refused to comply with orders of this court, and having failed to present any excuse for such conduct, will be hereby precluded from offering any evidence in opposition to the plaintiff's claim of liability unless the discovery responses and Jackson affidavits as appropriate, are transmitted to plaintiff's counsel within 30 days from service of a copy of this order with notice of entry and, within 15 days after said 30-day period, an affirmation of compliance by defendant's counsel is filed with the Clerk of the Part and a copy thereof is served upon counsel for plaintiff; and it is further

ORDERED that defendant 2104 LLC's motion to compel is granted and plaintiff is to provide the requested medical authorizations within 30 days from service of a copy of this order with notice of entry and, within 15 days after said 30-day period, an affirmation of compliance by plaintiff's counsel is filed with the Clerk of the Part and a copy thereof is served upon counsel for defendant 2104 LLC; and it is further

ORDERED that filing with the Clerk of the Part shall be made by filing with the New York State Courts Electronic Filing System; and it is further

ORDERED that counsel are directed to appear for a remote compliance conference, link to be provided via email by the Part Clerk, on August 3, 2021 at 10:00 AM.

5/5/2021

DATE

SHAWN TIMOTHY KELLY, J.S.C.

CHECK ONE:

CASE DISPOSED
GRANTED DENIED
SETTLE ORDER
INCLUDES TRANSFER/REASSIGN

NON-FINAL DISPOSITION
GRANTED IN PART
SUBMIT ORDER
FIDUCIARY APPOINTMENT

OTHER
REFERENCE