

<b>Nishiyama v Irizarry</b>
2021 NY Slip Op 31993(U)
March 11, 2021
Supreme Court, Queens County
Docket Number: 701056/2019
Judge: Leslie J. Purificacion
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.
This opinion is uncorrected and not selected for official publication.

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

**FILED**

Present: HONORABLE LESLIE J. PURIFICACION IA Part 39  
Justice

**3/11/2021  
02:40 PM**

Seitaro Nishiyama, x  
Plaintiff,

Index  
Number 701056/2019

**COUNTY CLERK  
QUEENS COUNTY**

-against-

Boris Irizarry and Atlas Floral Decorators, Inc.,

Motion  
Date September 17, 2020

Defendants, x

Motion Seq. Nos. 1 & 2

The following numbered papers read on this motion by defendants Boris Irizarry and Atlas Floral Decorators, Inc. (collectively "defendants"), for an order pursuant to CPLR § 3126, striking the complaint of plaintiff Seitaro Nishiyama ("plaintiff"), or alternatively, for an order pursuant to 22 NCYRR § 202.21, vacating the plaintiff's note of issue and striking this matter from the trial calendar and for an order pursuant to CPLR § 3124, compelling plaintiff to furnish outstanding disclosure; by separate notice of motion by plaintiff for an order pursuant to CPLR § 3212, for partial summary judgment on the issue of liability, and for an order pursuant to CPLR § 3212 (c), scheduling an immediate trial on the issue of damages; and by notice of cross motion by plaintiff for an order pursuant to CPLR § 3126, striking defendants' answer, or in the alternative, for an order pursuant to CPLR § 3124, compelling defendants to provide responses to the outstanding disclosure requests.

Papers  
Numbered

Notices of Motion - Affidavits - Exhibits .....	EF 15-37
Notice of Cross Motion - Affidavits - Exhibit.....	EF 38-45
Answering Affidavits - Exhibits .....	EF 47-50
Reply Affidavits .....	EF 51-53

Upon the foregoing papers it is ordered that the motions and cross motion are determined as follows:

This is an action sounding in negligence, to recover damages for personal injuries that plaintiff allegedly sustained on or about November 19, 2017, in a motor vehicle collision. Plaintiff has alleged that a vehicle owned by defendants and operated by Boris Irizarry during the course of his employment with Atlas Floral Decorators, Inc., came into contact with plaintiff's vehicle, which caused plaintiff to sustained serious injuries. Plaintiff has also alleged that Atlas Floral Decorators, Inc., is responsible for the collision complained under the doctrine of respondeat superior. The summons and complaint in this action was filed on or about January 18, 2019. The court notes that plaintiff filed the note of issue and certificate of readiness on or about June 9, 2020.

Defendants now move to strike plaintiff's complaint or alternatively, to vacate plaintiff's note of issue and to strike this matter from the trial calendar and to compel plaintiff to furnish outstanding disclosure. Plaintiff moves for partial summary judgment on the issue of liability and to schedule an immediate trial on the issue of damages, and subsequently cross-moves to strike defendants' answer, or in the alternative, to compel defendants to provide responses to the outstanding disclosure requests.

In support of the branch of their motion to strike plaintiff's complaint, defendants argue that plaintiff has failed to provide requested disclosure in compliance with various demands dated June 17, 2020, and June 19, 2020, and that they are prejudiced in their defense of the action due to the outstanding disclosure. In support of the branch of his motion to strike defendants' answer, plaintiff argues that while the requested disclosure has been provided, defendants have failed to provide responses to the plaintiff's request dated June 19, 2019, or to plaintiff's demands dated May 29, 2020.

CPLR § 3101 (a) provides that "[t]here shall be full disclosure of all matter material and necessary in the prosecution or defense of an action, regardless of the burden of proof." "CPLR § 3126 provides that a court may, in its discretion, impose a wide range of penalties upon a party that 'refuses to obey an order for disclosure' or 'wilfully fails to disclose information which the court finds ought to have been disclosed'" (*Morano v Westchester Paving & Sealing Corp.*, 7 AD3d 495, 496 [2d Dept 2004], quoting CPLR § 3126). "The penalties set forth by the statute include: (1) deciding the disputed issue in favor of the prejudiced party, (2) precluding the disobedient party from producing evidence at trial on the disputed issue, or (3) striking the pleadings of the disobedient party" (*Morano v Westchester Paving & Sealing Corp.*, 7 AD3d at 496; see *Holloway v Sta. Bar Corp.*, 112 AD3d 784, 785 [2d Dept 2013]).

"While the nature and degree of the penalty to be imposed pursuant to CPLR § 3126 are matters of discretion ... 'the drastic remedy of striking an answer is inappropriate absent a clear showing that the failure to comply with discovery demands is willful, contumacious,

or in bad faith” (*Morano v Westchester Paving & Sealing Corp.*, 7 AD3d at 496 [internal citation omitted], quoting *Kubacka v Town of N. Hempstead*, 240 AD2d 374, 375 [2d Dept 1997]; see *JNG Constr., Ltd. v Roussopoulos*, 170 AD3d 1136, 1139 [2d Dept 2019]).

Based upon a review of the record before the court on the branches of both defendants’ and plaintiff’s motion and cross motion to strike the other party’s pleadings, the court has determined that neither defendants, nor plaintiffs, have sufficiently satisfied their burdens on this branch of their respective motion and cross motion. Neither defendants, nor plaintiffs, have made a sufficient, clear showing that the failure to comply with discovery demands in this matter was willful, contumacious, or in bad faith (*Morano v Westchester Paving & Sealing Corp.*, 7 AD3d at 496). Therefore, neither defendants, nor plaintiff is entitled to strike the pleadings of the other party.

Alternatively, defendants have moved to vacate plaintiff’s note of issue and to strike this matter from the trial calendar and to compel plaintiff to furnish outstanding disclosure. Plaintiff has also cross-moved, in the alternative, to compel defendants to provide responses to the outstanding disclosure requests. CPLR § 3124, provides that “[i]f a person fails to respond to or comply with any request, notice, interrogatory, demand, question or order under this article, except a notice to admit under section 3123, the party seeking disclosure may move to compel compliance or a response.”

The Uniform Rules for Trial Courts (22 NYCRR) § 202.21(e), entitled “Vacating note of issue,” provides the following:

“Within 20 days after service of a note of issue and certificate of readiness, any party to the action or special proceeding may move to vacate the note of issue, upon affidavit showing in what respects the case is not ready for trial, and the court may vacate the note of issue if it appears that a material fact in the certificate of readiness is incorrect, or that the certificate of readiness fails to comply with the requirements of this section in some material respect.”

Although defendants have demonstrated that relevant disclosure remains outstanding in this matter, given the length of time that this matter has been ongoing, in the interest of judicial economy and public policy that favors a resolution of actions on the merits, the court will not vacate the note of issue and certificate of readiness. However, taking into consideration that defendants and plaintiff have both demonstrated that significant prejudice would result without the material and relevant outstanding disclosure in each others’ possession, as well as taking into account defendants’ responses provided in their opposition to plaintiff’s instant cross motion, to the extent that the parties have not provided requested disclosure, the parties are directed to expeditiously complete all outstanding disclosure within

60 days of service of a copy of this order with notice of entry. Defendants are directed to file and serve a copy of this order with notice of entry on plaintiff.

In light of the above determination and the fact that both parties have shown that relevant disclosure remains outstanding in this matter, the court will not address the merits of plaintiff's motion for partial summary judgment on the issue of liability and for a trial on the issue of damages. The parties' remaining contentions have been considered and found to be without merit.

Accordingly, the alternative branch of defendants' motion to compel plaintiff to furnish outstanding disclosure is granted to the extent discussed above, plaintiff is directed to provide all outstanding disclosure within 60 days of service of a copy of this order with notice of entry, and defendants' motion is denied in all other respects. Defendants are directed to serve a copy of this order with notice of entry upon plaintiff. Plaintiff's motion for partial summary judgment on the issue of liability and for a trial on the issue of damages is denied. The alternative branch of plaintiff's cross motion to compel defendants to provide responses to outstanding disclosure requests is granted the extent discussed above, defendants are directed to provide all outstanding disclosure within 60 days of service of a copy of this order with notice of entry, and plaintiff's cross motion is denied in all other respects.

Dated:

**MAR 11 2021**

\_\_\_\_\_  
Hon. Leslie J. Purificacion, J.S.C.

**FILED**

**3/11/2021  
02:40 PM**

**COUNTY CLERK  
QUEENS COUNTY**