

<b>Bunstine v Kivimaki</b>
2021 NY Slip Op 32031(U)
July 12, 2021
Supreme Court, Westchester County
Docket Number: 65482/2019
Judge: Joan B. Lefkowitz
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To commence the statutory time period for appeals as of right [CPLR 5513(a)], you are advised to serve a copy of this order, with notice of entry upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF WESTCHESTER - COMPLIANCE PART

-----X  
CHARLES W. BUNSTINE II ALSO KNOWN AS:  
CHARLES W. BUNSTINE, CHARLES WILLIAM  
BUNSTINE, CHARLES BUNSTINE,

Plaintiff,

**DECISION & ORDER**

Index No. 65482/2019  
Seq. No. 4

-against-

ULLA-MAIJA KIVIMAKI,

Defendant.

-----X  
LEFKOWITZ, J.

The following papers were read on this motion by defendant for an order (1) pursuant to CPLR § 3126(3) dismissing the complaint of plaintiff for failing to provide complete and proper responses to Defendant’s Demand for Documents Which Will Be Used to Establish Economic Loss, Defendant’s Demand for Income Information and Authorization or IRS Records, Defendant’s Combined Notice for Discovery and Inspection and Demand for Authorizations, and Demand for Employment Records Authorizations, dated October 21, 2020; or, in the alternative, (2) pursuant to CPLR § 3126(2) precluding the plaintiff from offering any evidence or providing testimony at the time of trial with respect to any responses which have not been received; or, in the alternative, (3) pursuant to CPLR § 3124 compelling plaintiff to provide complete and proper responses to Defendant’s Demand for Documents Which Will Be Used to Establish Economic Loss, Defendant’s Demand for Income Information and Authorization or IRS Records, Defendant’s Combined Notice for Discovery and Inspection and Demand for Authorizations, and Demand for Employment Records Authorizations, dated October 21, 2020; and (4) for such other and further relief as this Court deems just and proper:

- Notice of Motion (Amended)- Affirmation in Support - Exhibits A-K
- Affidavit in Opposition of Plaintiff
- Affirmation in Further Support
- Affidavit of Service

Upon the foregoing papers, this motion is determined as follows:

Plaintiff commenced this action against the defendant by the electronic filing of a Summons and Verified Complaint on September 27, 2019. Issue was joined by service of a Verified Answer on behalf of the defendant dated November 13, 2019.

In support of the motion, defendant asserts that defendant served numerous discovery demands to plaintiff on October 21, 2020. Despite two Court orders and good faith efforts, defendant alleges that plaintiff has yet to provide necessary and complete responses to defendant's discovery demands.

### *Procedural History*

On February 26, 2020, plaintiff filed a motion seeking to enjoin defendant from making defamatory statements about plaintiff, directing defendant to immediately remove plaintiff's name from her websites and titles, descriptions, meta data, and content, directing defendant to eliminate plaintiff's name and any reference to him that might be understood by her prior statements to reference him, and directing defendant to eliminate any statements made by defendant referencing "trademark fraud" and the trademark "Ulla-Maija." On that same date, plaintiff filed a second motion seeking summary judgment. The Court was then closed due to the COVID-19 pandemic. Upon the reopening of the Court, defendant filed opposition papers as well as a cross-motion to dismiss on May 7, 2020. By way of Decision and Order, all three motions were decided by Hon. Mary H. Smith on August 17, 2020 (NYSCEF Doc. #'s 58, 59, 60). Plaintiff's motion for a preliminary injunction was denied as was his motion for summary judgment. Defendant's motion to dismiss also was denied on the ground that plaintiff's Complaint sufficiently stated a claim for defamation.

A Preliminary Conference was held on September 30, 2020. Pursuant to the Order, discovery demands were to be served on or before October 21, 2020 and all responses to discovery demands were to be served no later than October 28, 2020. On October 21, 2020, defendant served her combined discovery demands.

A Compliance Conference was held on November 18, 2020. Pursuant to the Order issued on November 24, 2020, plaintiff was instructed to respond to defendant's October 21, 2020 demands by no later than December 18, 2020 (NYSCEF Doc. #64). Plaintiff failed to appear for this conference. Plaintiff served and filed responses to defendant's October 21, 2020 discovery demands on January 3, 2021 and January 4, 2021. In his responses, plaintiff objected to many of defendant's discovery demands to produce documents and authorizations with respect to his allegations of defamation which inherently would include claims of financial harm/economic loss.

On January 15, 2021, the defendant wrote to plaintiff advising his discovery responses and objections were inadequate and improper. On that same date, the defendant also wrote to this Court requesting a conference to seek assistance to resolve the multiple aforementioned discovery issues. The Court issued a motion briefing schedule for defendant to move to compel disclosure, preclusion, dismissal, and related relief on February 1, 2021.

A further Compliance Conference was scheduled before the Court on February 2, 2021. Plaintiff again failed to appear.

*The Parties' Contentions*

Defendant argues that despite two Court orders and defendant's counsel's good faith efforts to obtain discovery from plaintiff in response to defendant's October 21, 2020 discovery demands, plaintiff has refused to comply. As a result, defendant asserts that her efforts to conduct meaningful discovery and defend against plaintiff's claims have been frustrated. Defendant asserts that the discovery sought from plaintiff is necessary and proper in order to defend this litigation and that without this discovery, the defendant is prejudiced from investigating or defending her claim.

Defendant's discovery demands included Defendant's Demand for Documents Which Will Be Used to Establish Economic Loss, Defendant's Demand for Income Information and Authorization or IRS Records, Defendant's Combined Notice for Discovery and Inspection and Demand for Authorizations, and Demand for Employment Records Authorizations.

Specifically, defendant's counsel advised that (1) with respect to Plaintiff's Response to Defendant's Demand for a Bill of Particulars, plaintiff's objections to items numbered 4, 5, 17, 18, 19, 20, and 21 concerning economic loss were improper given that the allegations in the Complaint allege a claim for defamation including economic damages and, thus, defendant is entitled to examine any and all discovery that indicates whether there has been an economic loss or not and the value, if any, of such a claim; (2) with respect to plaintiff's Response to Defendant's Notice to Produce, plaintiff's objection to items number 7, 8, and 10 concerning economic loss were improper for the same reason; and (3) while plaintiff's response to Demand for Names and Address of All Witnesses states plaintiff does not intend to call any witnesses in this matter, defendant was entitled to the name and contact information for any witness to any of the allegations referenced in the Complaint regardless of whether plaintiff intends on calling any witnesses or not.

Plaintiff pro se opposes the motion. In a lengthy affidavit, plaintiff argues his theory of the case through a comprehensive recitation of the facts and a summary of the law. In addition, plaintiff attempts to re-litigate his past lawsuits against the defendant and to use his repeated law suits as evidence in the case at bar. The Court will not summarize these arguments as they are not relevant to the issues in this motion.

With respect to plaintiff's opposition to the issues in the motion before the Court, the plaintiff argues he is not required to produce the demanded discovery for economic damages because he is bringing claims for defamation per se as opposed to claims for defamation. A claim for defamation per se does not require proof of special damages, while a claim for defamation does. Notwithstanding this argument, plaintiff fails to address the import of Justice Mary Smith's Decision and Order issued on August 17, 2020, in which Justice Smith denied defendant's motion to dismiss the plaintiff's Complaint and found that it sufficiently alleges a claim for defamation (not defamation per se).

### *Legal Analysis/Discussion*

CPLR § 3101(a) requires “full disclosure of all matter material and necessary in the prosecution or defense of an action.” The phrase “material and necessary” is “to be interpreted liberally to require disclosure, upon request, of any facts bearing on the controversy which will assist preparation for trial by sharpening the issues and reducing delay and prolixity. The test is one of usefulness and reason” (*Allen v Crowell-Collier Publishing Co.*, 21 NY2d 403 [1968]; *Foster v Herbert Slepoy Corp.*, 74 AD3d 1139 [2d Dept 2010]). Although the discovery provisions of the CPLR are to be liberally construed, “a party does not have the right to uncontrolled and unfettered disclosure” (*Merkos L’Inyonei Chinuch, Inc. v Sharf*, 59 AD3d 408 [2d Dept 2009]; *Gilman & Ciocia, Inc. v Walsh*, 45 AD3d 531 [2d Dept 2007]). “It is incumbent on the party seeking disclosure to demonstrate that the method of discovery sought will result in the disclosure of relevant evidence or is reasonably calculated to lead to the discovery of information bearing on the claims” (*Foster v Herbert Slepoy Corp.*, 74 AD3d 1139 [2d Dept 2010]). The trial court has broad discretion to supervise discovery and to determine whether information sought is material and necessary in light of the issues in the matter (*Auerbach v Klein*, 30 AD3d 451 [2d Dept 2006]; *Feeley v Midas Properties, Inc.*, 168 AD2d 416 [2d Dept 1990]).

As stated in *Vargas v Lee*, 170 AD3d 1073, 1075 [2d Dept 2019]

[i]f there is any possibility that the information is sought in good faith for possible use as evidence-in-chief or for cross-examination or in rebuttal, it should be considered [matter] 'material' in the action" (*Shutt v Pooley*, 43 AD2d at 60; see *Fell v Presbyterian Hosp. in City of N.Y. at Columbia-Presbyt. Med. Ctr.*, 98 AD2d 624, 625, 469 NYS2d 375 [1983]; see also *Manzo v Westchester Rockland Newspapers*, 106 AD2d 492, 492, 482 NYS2d 834 [1984]; see generally 6-3101 Weinstein- Korn-Miller, NY Civ Prac CPLR ¶ 3101.07). "Indeed, as the name suggests, the purpose of discovery is to determine if material relevant to a claim or defense exists" (*Forman v Henkin*, 30 NY3d at 664). "In many if not most instances, a party seeking disclosure will not be able to demonstrate that items it has not yet obtained contain material evidence" (*id.*). "A party seeking discovery must satisfy the threshold requirement that the request is reasonably calculated to yield information that is . . . relevant" (*id.* at 661).

CPLR § 3126 provides that if any party “wilfully fails to disclose information which the court finds ought to have been disclosed,” the court may, *inter alia*, issue an order of preclusion or an order striking the pleadings, dismissing the action, or rendering judgment by default against the disobedient party. “The nature and degree of the penalty to be imposed on a motion pursuant to CPLR 3126 is a matter generally left to the discretion of the Supreme Court” (*Carbajal v Bobo*

*Robo*, 38 AD3d 820 [2d Dept 2007]). To invoke the drastic remedy of striking a pleading a court must determine that the party's failure to disclose is wilful and contumacious (*Greene v Mullen*, 70 AD3d 996 [2d Dept 2010]; *Maiorino v City of New York*, 39 AD3d 601 [2d Dept 2007]). "Wilful and contumacious conduct can be inferred from repeated noncompliance with court orders ... coupled with no excuses or inadequate excuses" (*Russo v Tolchin*, 35 AD3d 431, 434 [2d Dept 2006]; see also *Prappas v Papadatos*, 38 AD3d 871, 872 [2d Dept 2007]).

The elements of a cause of action to recover damages for defamation are (1) a false statement that tends to expose a person to public contempt, hatred, ridicule, aversion, or disgrace, (2) published without privilege or authorization to a third party, (3) amounting to fault as judged by, at a minimum, a negligence standard, and (4) either causing special harm or constituting defamation per se (see *Levy v Nissani*, 179 AD3d 656, 657-658 [2d Dept 2020]; *Gugliotta v Wilson*, 168 AD3d 817, 818 [2d Dept 2019]). "Special damages contemplate the loss of something having economic or pecuniary value" (*Lieberman v Gelstein*, 80 NY2d 429, 434-435 [1992][internal quotation marks omitted]). A statement is defamatory per se if it (1) charges the plaintiff with a serious crime; (2) tends to injure the plaintiff in her or his trade, business, or profession; (3) imputes that the plaintiff has a loathsome disease; or (4) imputes unchastity to a woman (see *id.* at 435; *Levy v Nissani*, 179 AD3d at 658; *Epifani v Johnson*, 65 AD3d 224, 234 [2d Dept 2009]). "When statements fall within one of these categories, the law presumes that damages will result, and they need not be alleged or proven" (*Lieberman v Gelstein*, 80 NY2d at 435).

"The doctrine of the law of the case seeks to prevent relitigation of issues of law that have already been determined at an earlier stage of the proceeding" (*Ahmed v Carrington Mtge. Servs., LLC*, 189 AD3d 960, 962 [2d Dept 2020] citing *Brownrigg v New York City Hous. Auth.*, 29 AD3d 721, 722 [2d Dept 2006]; see *People v Evans*, 94 NY2d 499, 502-503 [2000]). In contrast to res judicata and collateral estoppel, which are rigid rules of limitation, "law of the case is a judicially crafted policy that expresses the practice of courts generally to refuse to reopen what has been decided, [and is] not a limit to their power" (*Matter of Mazur Bros. Realty, LLC v State of New York*, 117 AD3d 949, 952 [2d Dept 2014] quoting *People v Evans*, 94 NY2d at 503).

With these principles in mind, the Court now turns to the defendant's motion. Defendant argues that plaintiff should be sanctioned pursuant to CPLR § 3126 in the alternative by the dismissal of plaintiff's Complaint, the preclusion of plaintiff's evidence or testimony at trial on the issues of special damages and/or witnesses to the occurrences in the Complaint, or by compelling plaintiff to provide the outstanding discovery as a result of plaintiff's failure to fully and completely respond to defendant's October 21, 2020 discovery demands. Defendant submits that the discovery, having been properly served, remains outstanding in violation of two Court orders and that plaintiff's conduct in failing to abide by the Court's orders constitutes willful and contumacious conduct warranting the drastic relief requested.

In defense of his failure to provide outstanding discovery, plaintiff argues that his Complaint pleads a cause of action sounding in defamation per se, and not defamation. Accordingly, plaintiff argues he is not required to provide evidence of economic loss, as such is not an element of defamation per se. Plaintiff states he did not provide information regarding witnesses to the occurrences in the Complaint as he does not intend to call witnesses at trial.

Upon consideration of the submissions and a review of the NYSCEF file, the motion is granted to the extent that plaintiff is directed to provide responses to defendant's outstanding discovery demands as hereinafter directed or be precluded from offering evidence and/or testimony at trial on the issue of special damages and with regard to witnesses to the acts alleged in the Complaint. Notwithstanding plaintiff's argument that his Complaint sounded in defamation per se and not defamation, this Court is bound by the Decision and Order of the Hon. Mary Smith issued on August 17, 2020. In her Decision, Justice Smith denied defendant's motion to dismiss the Complaint and found that it sufficiently stated a claim for defamation, as opposed to defamation per se. As plaintiff did not move to re-argue this Decision, and it has not been overturned, Judge Smith's determination is the law of the case (*Ahmed v Carrington Mtge. Servs., LLC*, 189 AD3d 960, 962 [2d Dept 2020] citing *Brownrigg v New York City Hous. Auth.*, 29 AD3d 721, 722 [2d Dept 2006]; see *People v Evans*, 94 NY2d 499, 502-503 [2000]).

Given Justice Smith's determination that plaintiff's Complaint stated a claim for defamation, plaintiff is obligated to respond to defendant's discovery demands regarding special damages, as such are an element of the claim (see *Levy v Nissani*, 179 AD3d 656, 657-658 [2d Dept 2020]; *Gugliotta v Wilson*, 168 AD3d 817, 818 [2d Dept 2019]). In addition, plaintiff must provide information regarding witnesses to the events detailed in the Complaint, even if plaintiff does not intend to call such witnesses at trial. To the extent that plaintiff has violated this Court's orders with respect to the provision of such discovery, plaintiff's conduct is deemed to be willful and contumacious warranting relief pursuant to CPLR § 3126. Accordingly, plaintiff shall be precluded from offering evidence or testimony at trial with respect to special damages and witnesses not disclosed, unless the outstanding discovery is timely provided in accordance with the terms of this Decision and Order.

All other arguments raised on this motion and evidence submitted by the parties in connection thereto have been considered by this Court, notwithstanding the specific absence of reference thereto.

Accordingly, it is

ORDERED that the defendant's motion is granted in part; and it is further

ORDERED that plaintiff shall provide complete responses to defendant's outstanding discovery demands dated October 21, 2020 with respect to the issues of special damages and witness information on or before August 19, 2021. To the extent that plaintiff does not have any documents relating to special damages in his possession or control, and/or to the extent plaintiff is unaware of any witnesses to the events detailed in his Complaint, plaintiff is directed to upload to NYSCEF an affidavit so stating on or before August 19, 2021; and it is further

ORDERED that to the extent plaintiff fails to provide responses to defendant's outstanding discovery demands as directed herein, defendant shall upload to NYSCEF an affirmation of non-compliance, together with a proposed order of preclusion, on or before August 22, 2021; and it is further

ORDERED that counsel are directed to appear for a virtual conference via Microsoft Teams before Court Attorney Referee Robert Pierson on August 23, 2021 at 3:00 P.M.; and it is further

ORDERED that defendant shall serve a copy of this decision and order upon plaintiff with notice of entry within 10 days of entry.

Dated: White Plains, New York  
July 12, 2021

Joan B.  
Lefkowitz

Digitally signed by Joan B. Lefkowitz  
DN: CN=Joan B. Lefkowitz, E=jlefkowi@nycourts.gov  
Reason: I am the author of this document  
Location: your signing location here  
Date: 2021.07.12 13:56:28-04'00'  
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HON. JOAN B. LEFKOWITZ, J.S.C.

TO:

All Counsel by NYSCEF

cc: Compliance Part