

<b>Johnson v Daddy Greens LLC</b>
2021 NY Slip Op 32326(U)
November 15, 2021
Supreme Court, Kings County
Docket Number: Index No. 514167/19
Judge: Lawrence S. Knipel
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At an IAS Term, Part 57 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on the 15<sup>th</sup> day of November, 2021.

P R E S E N T:

HON. LAWRENCE KNIPEL,

Justice.

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SANDRA JOHNSON,

Plaintiff,

- against -

Index No. 514167/19

DADDY GREENS LLC and NADINE CUMMINGS,

Defendants.

-----X

The following e-filed papers read herein:

NYSCEF Doc Nos:

Notice of Motion/Order to Show Cause/  
Petition/Cross Motion and  
Affidavits (Affirmations) Annexed \_\_\_\_\_  
Opposing Affidavit (Affirmation) \_\_\_\_\_  
Reply Affidavit (Affirmation) \_\_\_\_\_

115-127      128-133      136-148  
129-133    135, 137-148    151-156  
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Upon the foregoing papers in this personal injury action, defendant Nadine Cummings (Cummings) moves (in motion sequence [mot. seq.] seven) for an order, pursuant to CPLR 3212, granting her summary judgment dismissing the complaint.

Plaintiff Sandra Johnson (Johnson) cross-moves (in mot. seq. eight) for an order: vacating the court's January 25, 2021 order of preclusion (Preclusion Order), pursuant to CPLR 5015, or, alternatively (2) modifying the Preclusion Order, pursuant to CPLR 5015.

Defendant Daddy Greens LLC (Daddy Greens) cross-moves (in mot. seq. nine) for an order, pursuant to CPLR 3212, granting it summary judgment dismissing the complaint.

### *Background*

On June 26, 2019, Johnson commenced this personal injury action by filing a summons and a verified complaint alleging that on or about November 16, 2018, while she was at Daddy Greens, a pizzeria at 352 Malcolm X Boulevard in Brooklyn, she was seriously injured due to a dangerous and defective bench upon which she was sitting.

On October 3, 2019, Cummings answered the complaint, denied the material allegations therein except admitted that on November 16, 2018, she owned the building at 352 Malcolm X Boulevard in Brooklyn and leased a portion of it to Daddy Greens. Cummings asserted affirmative defenses and the following cross claims against Daddy Greens for: (1) indemnification and contribution; (2) breach of its contractual obligation to carry general liability insurance in favor of Cummings; (3) contractual indemnification; and (4) breach of its contractual obligation to maintain and repair the leased space.

On October 17, 2019, Daddy Greens answered the complaint, denied the material allegations therein, asserted affirmative defenses and asserted the following cross claims against Cummings for: (1) contribution; (2) common law indemnification; (3) contractual indemnification; and (4) breach of her contractual obligation to purchase general liability insurance for Daddy Greens' benefit. After issue was joined, discovery ensued.

On January 5, 2021, Daddy Greens moved for an order, pursuant to CPLR 3124 and 3126, dismissing the complaint based on Johnson's alleged failure to produce discovery in violation of prior court orders, precluding Johnson from offering any evidence at trial, or, alternatively, compelling Johnson to appear for her deposition and independent medical

examination (IME) after producing the outstanding document discovery. On January 13, 2021, Johnson cross-moved for an order compelling party depositions, or, alternatively, precluding defendants from testifying.

*The January 25, 2021 Preclusion Order*

By the January 25, 2021 Preclusion Order, which was entered on February 4, 2021, this court granted Daddy Greens' motion and Johnson's cross motion to the extent that:

- "1) The following discovery shall be completed to the extent not done pursuant to the order of this court (Colon, J.) dated 10/13/20, as follows:
    - "a) Plaintiff to provide authorizations to both defendants as demanded in Daddy Greens['] 12/2/19, 3/11/20, 4/7/20, 7/13/20 and 10/7/20 demands, and Cummings 3/16/20 demand, on or before March 4, 2021
    - "b) Plaintiff shall appear for her EBT on or before May 20, 2021
    - "c) Defendant Daddy Greens to appear for EBT on or before May 27, 2021,
    - "d) Defendant Cummings to appear for EBT on or before June 3, 2021,
- "EBTs shall be conducted either in person, in a location where social distancing can occur and personal protective gear worn or via Skype. All parties are directed to cooperate with EBT scheduling.
- "e) Plaintiff to appear for IME(s) on or before July 8, 2021. Defendants to designate (and/or redesignate) on or before June 4, 2021, reports to be exchanged within 45 days.
- "2) Plaintiff shall file the note of issue on or before August

20, 2021.

*“Failure to comply with this order will result in the non-complying party being precluded from offering evidence, without the need for further motion, pursuant to CPLR 3126 (2) without further order of the court. This is a self[-]executing order”* (emphasis added).

### ***Cummings’ Instant Discovery Motion***

On April 1, 2021, Cummings moved for summary judgment dismissing the complaint “on the grounds that, by operation of the Court’s January 25, 2021 order, plaintiff is precluded from offering evidence pursuant to CPLR 3126 (2)” and “[s]ince plaintiff cannot offer evidence, by operation of law plaintiff cannot make out a prima facie case . . .” Cummings submits an attorney affirmation asserting that Johnson did not serve authorizations until March 16, 2021 (12 days late) and that her “response was incomplete” because she raised an objection to one item and stated that another item would be provided “under a separate cover.”

### ***Johnson’s Cross Motion to Vacate the Preclusion Order***

On April 19, 2021, Johnson opposed Cummings’ summary judgment motion and cross-moved for an order vacating or modifying the Preclusion Order. Johnson submits an attorney affirmation asserting that the Preclusion Order “should be vacated due to exigent circumstances existing in Plaintiff’s life that made it difficult for Plaintiff’s counsel to contact the Plaintiff and properly comply with Defendant’s demands.” Specifically, plaintiff’s counsel affirms that “due to Plaintiff not having a working phone, her fear of leaving her home due to the Covid-19 pandemic, and her daughter suffering from illness;

our office was unable to adequately communicate with the Plaintiff.” Johnson seeks an order vacating the Preclusion Order, or, since she has complied with defendants’ demands,<sup>1</sup> an order modifying the Preclusion Order to extend the deadline for her to comply. Plaintiff’s counsel argues that Johnson’s alleged failure to comply with discovery was not “willful or contumacious.”

Johnson submits an affidavit attesting that:

“[d]uring the period beginning in late-December 2020 until March 2021, my telephone service was disabled and extremely limited. I was unable to receive or make telephone calls or receive messages as desired. It was not until I was able to change my data plan that I could freely make and receive telephone calls and messages. I later learned that staff members from Krentsel Guzman Herbert, LLP attempted to reach me by telephone during this period and were unsuccessful.

“To make matters worse, during the same period, my daughter who is my constant caretaker, became ill due to what we thought was COVID-19. She was unable to come to my home and be in my presence as normal. Consequently, my daughter was also unable to convey to me that the staff at Krentsel Guzman Herbert, LLP were also reaching out to her in an effort to get a hold of me, which I later learned was the case.

“Because of my age and comorbidities, I was extremely hesitant to go outside my home and encounter others during the last few months due to COVID-19. This contributed to the difficulty my lawyers faced when trying to reach me during the early part of this year.

“With that being said, as soon as I learned my lawyers were

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<sup>1</sup> Plaintiff’s counsel asserts that Johnson provided responses and authorizations in response to all of Cummings’ demands “except for her 2005 primary care physician[,]” which Johnson is “diligently searching for . . .”

diligently attempting to contact me for information, I called and went to my lawyers' office and explained my circumstances. I have since provided my lawyers with alternate means to reach me so that this never happens again."

Johnson also submitted an affidavit from Doreen Amritt (Amritt), a paralegal in her attorneys' office, who describes her efforts to reach Johnson about the outstanding discovery from February 2021 until March 2021.

Cummings, in opposition, submits an attorney affirmation asserting that "[t]here is no question that Justice Knipel gave a firm deadline for plaintiff to comply under penalty of preclusion, and plaintiff failed to comply." Cummings' attorney also argues that Johnson's cross motion is "procedurally defective" because CPLR 5015 (a) (5) is inapplicable to the Preclusion Order at issue here, which "is not based on any prior judgment or order . . ."

#### ***Daddy Greens' Summary Judgment Cross Motion***

On May 5, 2021, Daddy Greens opposed Johnson's cross motion to vacate or modify the Preclusion Order and cross-moved for summary judgment dismissing the complaint based on the Preclusion Order. Daddy Greens submits an attorney affirmation asserting that "there has been ongoing numerous motion practice due to the recalcitrance and contumacious behavior of the plaintiff in failing to comply with prior court orders."

Johnson opposed Daddy Greens' summary judgment cross motion by submitting an attorney affirmation and affidavits from Johnson and Amritt, which are identical to plaintiff's opposition to Cummings' summary judgment motion. Johnson's counsel asserts

that Johnson responded to defendants' discovery demands and provided authorizations on March 16, 2021, with the exception of her 2005 primary care physician's medical records, for which she is diligently searching. Johnson's counsel asserts that there is no prejudice to defendants warranting dismissal or preclusion because "all party deposition[s] in this matter have been completed and Plaintiff's IME is scheduled to be completed July 1, 2021."

### *Discussion*

It is well-settled that "[a] trial court has the discretion to grant a motion to vacate (or modify) its own order in the interest of justice" (*Armstrong Trading, Ltd. v MBM Enterprises*, 29 AD3d 835, 836 [2006]). "In general, the supervision of disclosure is left to the broad discretion of the trial court, which must balance the parties' competing interests" (*JPMorgan Chase Bank, Nat. Ass'n v Levenson*, 149 AD3d 1053, 1054 [2017] [internal quotation marks omitted]).

Here, defendants seek summary judgment dismissing the complaint based on the Preclusion Order, which required Johnson to provide defendants with authorizations on or before March 4, 2021. Johnson cross-moves to vacate the Preclusion Order or modify that portion of the Preclusion Order which required her to provide the authorizations on or before March 4, 2021, on the ground that she was unable to communicate with her counsel, she suffered personal hardships during the COVID-19 pandemic and she provided the requested authorizations to defendants on March 16, 2021. Under the circumstances presented here, where there was only a short delay (12 days) in providing the requested

authorizations, Johnson's conduct was not willful or contumacious, the delay did not prevent the parties from moving forward with depositions, the COVID-19 pandemic contributed to the delay and there is no discernable prejudice to defendants, an order modifying the Preclusion Order to excuse the slight delay is warranted. Consequently, defendants' summary judgment motion and cross motion are denied. Accordingly, it is

**ORDERED** that Cummings' summary judgment motion (mot. seq. seven) is denied; and it is further

**ORDERED** that Johnson's cross motion (mot. seq. eight) is granted to the extent that the Preclusion Order is modified so as to allow the short delay in plaintiff's furnishing of the subject authorizations; and it is further

**ORDERED** that Daddy Greens' summary judgment cross motion (mot. seq. nine) is denied.

This constitutes the decision and order of the court.

E N T E R,

J. S. C.

HON. LAWRENCE KNIPEL  
ADMINISTRATIVE JUDGE