Short Form Order

NEW YORK SUPREME COURT – QUEENS COUNTY

Present: HONORABLE MAURICE E. MUIR
Justice

ANTHONY LUGO,

Plaintiff,

-against-

LOGAN BUS COMPANY, INC. SUFFOLK TRANSPORTATION SERVICE, INC., CITY OF NEW YORK, THE BOARD OF EDUCATION OF THE CITY OF NEW YORK, NEW YORK CITY DEPARTMENT OF EDUCATION and MARTHA SEDA,

Defendants.

IAS Part - 42

Index No.: 715062/2018

Motion Date: 11/4/21

Motion Cal. No. 16

Motion Seq. No. 3

The following electronically filed ("EF") documents read on this motion by Anthony Lugo ("Mr. Lugo" or "plaintiff") for an order: a) pursuant to CPLR §§ 3124 and 3126, striking Defendants, Logan Bus Company, Inc. ("Logan"), City of New York ("NYC"), the Board of Education of the City of New York ("Bd. of Ed."), New York City Department of Education, and Martha Seda (Ms. Seda") (collectively, the "City Defendants"), Answer for Ms. Seda's refusal to answer, upon direction from defense counsel, proper questions at her January 28, 2021 Examination Before Trial ("EBT"); b) pursuant to CPLR §§ 3124 and 3126, precluding the City Defendants from offering any evidence at trial on the issue of liability for Ms. Seda's refusal to answer, upon direction from defense counsel, proper questions at her January 28, 2021 EBT; or, in the alternative, c) compelling Ms. Seda to appear for a further EBT and provide full and sufficient responses to specific questions and questions flowing from any responses thereto; and d) granting such other and further relief as this Court deems just and proper.

Papers
Numbered

Notice of Motion-Affirmation-Exhibits-Service..... EF 62 - 67

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

BACKGROUND

This is an action to recover damages for personal injuries, which Anthony Lugo ("Mr. Lugo" or "plaintiff") allegedly sustained in a motor vehicle collision on November 20, 2017. On October 3, 2018, the plaintiff commenced this action against the defendants. On February 1, 2019, issue was joined, wherein the defendants interposed an answer. On May 2, 2019, the court issued a preliminary conference order ("PCO"), which directed the parties to conduct Examinations Before Trial ("EBT") on or before July 25, 2019, and to conduct independent medical examination(s) ("IME") within forty-five (45) days thereafter. Thereafter, on September 30, 2019, the court issued a compliance conference order ("CCO"), which directed the parties to complete EBTs on or before December 18, 2019. Thereafter, on February 26, 2021, the plaintiff filed the Note of Issue and Certificate of Readiness ("Note of Issue"), which was vacated on May 20, 2021. Now, counsel for plaintiff argues that "[a]t the January 28, 2021 EBT of Defendant, Seda, a series of questions were posed to [her]regarding Plaintiff's Exhibit "5" (Exhibit F), an MV-104 bearing Defendant Seda's signature which was exchanged by the City Defendants. Upon direction by defense counsel, [Ms.] Seda, refused to answer proper questions as to the circumstances of how [Ms.] Seda's signature came to be on the blank MV-104 which the City Defendants themselves exchanged. Moreover, plaintiff's counsel argues that defense counsel's objections and Ms. Seda's refusal to answer were wholly improper as there is no basis rooted in either the CPLR or applicable court rules which permits the objection and refusal. "The City Defendants' refusal to disclose information which ought to have been disclosed is evidence of willful and contumacious conduct."

LEGAL ANALYSIS

Pre-trial depositions are governed by CPLR § 3115 and by the Uniform Rules for the Conduct of Depositions set out at 22 NYCRR part 221. The Uniform Rules, as amended in 2006, sharply limit the appropriate scope of objections at a deposition. The Rules permit only those objections that would be waived under CPLR § 3115(b)-(d) if not interposed—principally an objection to the form of a question. (*See* 22 NYCRR § 221.1(a); CPLR § 3115.) Therefore, it would not be proper to object to a question merely to preserve the objection for the record, because the Uniform Rules themselves preserve *all* objections for the record except as they

expressly provide otherwise. (*See White v. Martins*, 100 AD2d 805 [1st Dept 1984]; *Ferraro v. New York Tel. Co.*, 94 AD2d 784, 785 [2d Dept 1983]; *Freedco Products, Inc. v. New York Tel. Co.*, 47 AD2d 654 [2d Dept 1975]; *Watson v. State of New York*, 53 AD2d 798 [3d Dept 1976]). Additionally, 22 NYCRR 221.1 provides that "[n]o objections shall be made at a deposition except those which, pursuant to subdivision (b), (c), or (d) of [CPLR 3115], would be waived if not interposed, and except in compliance with subdivision (e) of such rule. All objections made at a deposition shall be noted by the officer before whom the deposition is taken, and *the answer shall be given and the deposition shall proceed subject to the objections* and to the right of a person to apply for appropriate relief pursuant to Article 31 of the CPLR."

Furthermore, pursuant to 22 NYCRR 221.2 provide that "[a]n attorney shall not direct a deponent not to answer except as provided in CPLR § 3115 or this subdivision. Any refusal to answer or direction not to answer shall be accompanied by a succinct and clear statement of the basis therefor. If the deponent does not answer a question, the examining party shall have the right to complete the remainder of the deposition. Section 221.2 identifies three narrowly circumscribed circumstances in which a deponent may refuse to answer or the deponent's attorney may instruct him or her not to answer: (i) to "preserve a privilege or right of confidentiality"; (ii) to enforce a limitation set forth in a court order; and (iii) "when the question is plainly improper *and* would, if answered, cause significant prejudice to any person." (22 NYCRR 221.2(a)-(c) [*emphasis added*].) Any refusal to answer or instruction not to answer must "be accompanied by a succinct and clear statement of the basis therefor." (*Id.* § 221.2 [c].) Here, defense counsel failed to provide a succinct and clear statement for instructing Ms. Seda not to answer the question regarding her signature on the blank MV-104 form. In fact, defense failed to oppose the instant motion.

Due to Ms. Seda's refusal to answer those questions posed to her during the EBT, the plaintiff seeks to strike the defendants' answer. Pursuant to CPLR § 3126, "[i]f any party . . . refuses to obey an order for disclosure or willfully fails to disclose information which the courts finds ought to have been disclosed pursuant to this article, the court may make such orders with regard to the failure or refusal as are just, among them . . . an order striking out pleading or part thereof, or dismissing the action or any part thereof . . . ." (see *Fish & Richardson, P.C. v. Schindler*, 75 AD3d 219, 220 [1st Dept 2010]). "While actions should be resolved on the merits when possible, a court may strike [a pleading] upon a clear showing that a party's failure to

3 of 5

comply with disclosure order was the result of willful and contumacious conduct." (*Almonte v. Pichardo*, 105 AD3d 687 [2d Dept 2012]; *Harris v. City of New York*, 117 AD3d 790 [2d Dept 2014]; *Arpino v. F.J.F. & Sons Elec. Co., Inc.*, 102 AD3d 201 [2d Dept 2012]; *Zakhidov v. Boulevard Tenants Corp.*, 96 AD3d 737 [2d Dept 2012]; *see also Brannigan v. Door*, 44 AD3d 959 [2d Dept 2016]). "Willful and contumacious conduct may be inferred from a party's repeated failure to comply with court-ordered discovery, coupled with inadequate explanations for the failure to comply, or a failure to comply with court-ordered discovery over an extended period of time" (*Rock City Sound, Inc. v. Bashian & Farber, LLP*, 83 AD3d 685, 686-687 [2d Dept 2011]; [internal quotation marks and citations omitted]; *Teitelbaum v. Maimonides Med. Ctr.*, 144 AD3d 1013 [2d Dept 2016]; *Orgel v. Stewart Tit. Ins. Co.*, 91 AD3d 922 [2d Dept 2012].)

However, it is well settled law that the drastic remedy of striking an answer is inappropriate absent a clear showing that a defendant's failure to comply with discovery demands is willful and contumacious. (*Honghui Kuang v. MetLife*, 159 AD3d 878 [2d Dept 2018]; *Zubaidi v. Hasbani*, 136 AD3d 708 [2d Dept 2016] citing *Poveromo v. Kelley–Amerit Fleet Servs., Inc.*, 127 AD3d 1048 [2d Dept 2015]; *Dutchess Truck Repair, Inc. v. Boyce*, 120 AD3d 543 [2d Dept 2014]; *JP Morgan Chase Bank, N.A. v. New York State Dept. of Motor Vehs.*, 119 AD3d 903 [2d Dept 2014]). Therefore, the court will afford Ms. Seda another opportunity to appear for a deposition and to properly respond to all questions posed to her at the deposition. (*Honghui Kuang v. MetLife*, 159 AD3d 878 [2d Dept 2018]).

Accordingly, it is hereby

ORDERED that the plaintiff's motion to strike the defendants' answer, pursuant to CPLR §§ 3124 and 3126, is denied; and it is further,

ORDERED that Martha Seda shall appear for an additional examination before trial on or before December 30, 2021 at a place mutually agreed upon by the parties or via Skype for Business, Zoom, Skype, Microsoft Teams; and it is further,

ORDERED that the failure of Martha Seda to appear for an additional examination before trial on or before December 30, 2021 shall result in her being precluded from testifying and/or introducing any evidence at the time trial; and it is further,

ORDERED that plaintiff shall have leave to renew the instant motion if Martha Seda fails to comply with this order and, upon such renewed motion, plaintiff may seek further sanctions

against defendants including, but not limited to, striking defendants' answer, attorneys fees and costs; and it is further,

ORDERED that plaintiff shall serve, via NYSCEF and certified mail, a copy of this decision and order with notice of entry upon defendants and the clerk of this court on or before November 30, 2021.

The foregoing constitutes the decision and order of the court.

Dated: November 4, 2021
Long Island City, NY

FILED
11/5/2021
COUNTY CLERK
QUEENS COUNTY

Maurice E. Muir
MAURICE E. MUIR, J.S.C.