

**Munoz v Penske Truck Leasing Co., L.P.**

2021 NY Slip Op 34276(U)

October 7, 2021

Supreme Court, Queens County

Docket Number: Index No. 720950/19

Judge: Janice A. Taylor

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This opinion is uncorrected and not selected for official publication.

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE JANICE A. TAYLOR IAS Part 15  
Justice

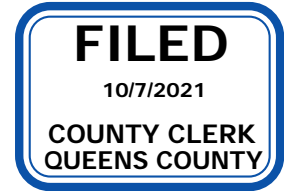
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JUAN MUNOZ,

Plaintiff(s),

- against -

Index No.: 720950/19  
Motion Date: 9/14/21  
Motion Cal. No.: 21  
Motion Seq. No.: 03

PENSKE TRUCK LEASING CO., L.P., DHL  
SUPPLY CHAIN, COMMERCIAL TRAILER LEASING,  
INC. and OMAR J. KNOWINGS,



Defendant(s).

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The following papers numbered 1 - 9 read on this motion by plaintiff, pursuant to CPLR 3126, to strike defendants' answer, or, alternatively, for an order of preclusion.

PAPERS  
NUMBERED

Notice of Motion-Affirmation-Exhibits-Service.....	1 - 4
Affirmation in Opposition-Exhibits-Service.....	5 - 7
Reply Affirmation-Service.....	8 - 9

Upon the foregoing papers, it is **ORDERED** that the above-referenced motion is decided as follows:

This personal injury action arises from an alleged automobile accident at or near the intersection of Woodhaven Boulevard and 67<sup>th</sup> Road, County of Queens, City and State of New York, involving plaintiff's motor vehicle and two tractor-trailer vehicles which were allegedly operated by defendant Omar J. Knowings, and owned by the other defendants (hereafter, "the DHL defendants"). According to plaintiff, the defendants have failed to respond to his disclosure demands, including that Mr. Knowings appear for a deposition, all in violation of the preliminary and compliance conference orders, dated November 5, 2020 and February 4, 2021, respectively.

Plaintiff now moves for the following relief, based on the purported disclosure failures described above: to strike the answers of all four defendants, or, alternatively to preclude them

from offering evidence opposing the allegations made in the complaint; and to compel defendants to supplement their response to plaintiff's combined demands, to respond to plaintiff's demand for a bill of particulars ("BP") regarding affirmative defenses, and provide the items demanded in plaintiff's March 10, 2021 notice for discovery and inspection. A party may move to compel another party who has failed to abide by a disclosure demand or order (see CPLR 3124), or seek more severe penalties, up to and including the striking of pleadings (see CPLR § 3126); such determinations are committed to the court's discretion (see *D'Alessandro v Nassau Health Care Corp.*, 137 AD3d 1195, 1197 [2d Dept 2016]). Preclusion and the striking of all, or part, of a party's pleading are "drastic remed[ies]," which require a finding "that the offending party's lack of cooperation with disclosure was willful, deliberate, and contumacious" (*Hasan v 18-24 Luquer St. Realty, LLC*, 144 AD3d 631, 632 [2d Dept 2016] [internal quotation marks omitted]). In addition,

"[t]he willful and contumacious character of a party's conduct may be inferred from the party's repeated failure to comply with court-ordered discovery, and the absence of any reasonable excuse for those failures, or a failure to comply with court-ordered discovery over an extended period of time" (*id* [internal quotation marks omitted]).

The court first addresses the branch of plaintiff's motion seeking to strike defendants' answers, or, alternatively, preclude them from offering evidence. It must be noted that plaintiff seeks these drastic remedies as against all four defendants, although he asserts that same is necessary to sanction the failure of defendant Knowings to appear for a deposition. Except for the belated responses to plaintiff's paper demands, addressed below, plaintiff has not identified any conduct specific to the DHL defendants which would warrant such a penalty. As such, the court denies this branch of the motion insofar as it pertains to these defendants.

With respect to defendant Knowings's conduct, the record demonstrates that the November 4, 2020 preliminary conference order directed that depositions of all parties be conducted within 90 days, and the February 4, 2021 compliance conference order directed Mr. Knowings to appear for his deposition on March 4, 2021, or on another mutually agreed upon date within 30 days thereof. The first indication in the record of an inability to conduct Mr. Knowings's deposition appears in the form of a March 2, 2021 email from defendants' counsel, advising that an adjournment of the March 4, 2021 date was needed because counsel could not reach Mr. Knowings, as he no longer worked for the DHL defendants. The email also indicates that defendants' counsel had previously advised plaintiff of the change in Mr. Knowings's employment status.

In opposition to plaintiff's motion, defendants' counsel

advises that an investigator retained by her firm in March of 2021 has, thus far, been unable to locate Mr. Knowings, and she offers to provide the investigative reports to this court for *in camera* review. Plaintiff opposes his exclusion from reviewing such reports, and argues that defendants' counsel's representation that investigative efforts were made should be rejected due to an absence of supporting details. Although the better practice would have been for defendants to have submitted an affidavit from their investigator attesting to his or her efforts to locate Mr. Knowings, the court need not delve deeply into this issue. It suffices that Mr. Knowings, a named party-defendant who has answered and appeared in this action, has failed to appear for his deposition, in violation of orders issued by the Preliminary and Compliance Conference Parts, thus, potentially raising an inference of willful and contumacious conduct. That Mr. Knowings may no longer be employed by the DHL defendants does not, on the limited facts of this record, relieve him of his disclosure obligations. However, since the record is silent as to the reason why the DHL defendants and shared counsel do not have Mr. Knowings's contact information, and when they lost contact with him, it is unclear whether Mr. Knowings has been made aware of these developments and the need for him to appear. The court is, therefore, inclined to afford him one final opportunity to sit for a deposition by a date certain before imposing the drastic penalties of striking his answer, or precluding him from offering evidence.

In addition, the court denies as moot those branches of plaintiff's motion seeking to compel defendants to respond, or supplement their responses, to plaintiff's combined demands, demand for a BP as to affirmative defenses, and the notice for discovery and inspection dated March 10, 2020. In opposition to the motion, defendants have established that they have since responded to these demands. Plaintiff does not deny that defendants have provided the responses demanded, but he takes issue with the adequacy of their response to the notice for discovery and inspection. The legitimacy of this demand, and the response thereto, should be addressed during a discovery conference before the Compliance Conference Part, as indicated below.

Accordingly, the above-referenced motion is granted to the extent that it is

**ORDERED** that, within 45 days of service of this order with notice of entry, defendant Omar J. Knowings shall sit for a deposition, to be scheduled for a date and time mutually agreeable to the parties, and which may be conducted virtually; and it is further

**ORDERED** that the failure of defendant Omar J. Knowings to appear for a deposition pursuant to the terms of this order, shall result in his being precluded from offering testimony at trial, or

for the purpose of dispositive motions; and it is further

**ORDERED** that the parties should contact the Compliance Conference Part to schedule a conference for the purpose of addressing defendants' response to plaintiff's notice for discovery and inspection dated March 10, 2020, and any other issues arising from prior demands and responses made by any party; and it is further

**ORDERED** that, in the future, the parties shall make diligent efforts to attempt to resolve any disclosure issues by, *inter alia*, complying with the outstanding discovery which was noticed by each side without resort to further motion practice, upon penalty of dismissal pursuant to CPLR § 3126.

The foregoing shall constitute the decision and order of this court.

Dated: October 7, 2021

  
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**JANICE A. TAYLOR, J.S.C.**

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