

Rivas v Solares

2022 NY Slip Op 35004(U)

August 25, 2022

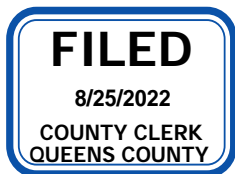
Supreme Court, Queens County

Docket Number: Index No. 717027/2019

Judge: Maurice E. Muir

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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 MAURICE E. MUIR
Justice

LEONCIO CABA RIVAS, YERFIL FERNANDEZ,
and ANYISBEL MERCEDES REYES,

IAS Part - 42

Plaintiffs,

Index No. 717027/2019

-against-

Motion Date: 8/25/22

ROMAN SOLARES, ABREU ALBANERY,
UNITED PARCEL SERVICE GENERAL SERVICES
CO., UNITED PARCEL SERVICE, JOHN DOE ONE
(FIRST AND LAST NAME BEING FICTITIOUS
AND UNKNOWN), JOHN DOE TWO (FIRST AND
LAST NAME BEING FICTITIOUS AND
UNKNOWN), and JOHN DOE CORPORATION
(COMPANY NAME BEING FICTITIOUS AND
UNKNOWN),

Motion Cal. No. 5

Motion Seq. No. 4

Defendants.

The following electronically filed (“EF”) documents read on this motion by Yerfil Fernandez (“Mr. Fernandez” or “movant”) for order: (i) striking Defendants’, United Parcel Services General Services Co., and United Parcel Service, Verified Answer for failing to provide complete responses to Plaintiff’s discovery demands, or, in the alternative; (ii) compelling Defendants, United Parcel Services General Services Co., and United Parcel Service, to provide complete responses to Plaintiff’s Notice of Discovery dated January 25, 2022, by a date certain under the threat of conditional sanctions, pursuant to CPLR §§ 3124 and 3126, or in the alternative; (iii) precluding Defendants, United Parcel Services General Services Co., and United Parcel Service, from testifying at the time of trial due to their repeated failure to provide court ordered discovery; (iv) compelling Defendants, United Parcel Services General Services Co., and United Parcel Service, to appear for a deposition, by a date certain, under the threat of

conditional sanctions, pursuant to CPLR §§ 3124 and 3126; (v) extending Plaintiff's time to file the Note of Issue and Certificate of Readiness; (vi) setting this matter down for a further conference, and; (vii) granting such other and further relief as this Court may deem just and proper.

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Affirmation in Opposition-Exhibits	EF 117-119

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

This is an action for damages for personal injuries Leoncio Caba Rivas ("Mr. Rivas"), Yerfil Fernandez ("Mr. Fernandez") and Anyisbel Mercedes Reyes ("Ms. Reyes") (collectively, the "plaintiffs") allegedly sustained in a motor vehicle collision, which occurred on July 17, 2019. As a result, on October 4, 2019, the plaintiffs commenced the instant action against the defendants. On December 20, 2019, issue was joined, wherein Abreu Albanery ("Mr. Abreu") interposed an answer. On or about July 20, 2020, the court issued a preliminary conference order ("PCO"), which ordered the parties to conduct examinations before trial ("EBTs") on or before July 24, 2020, and to conduct independent medical examinations ("IMEs") forty-five (45) days thereafter. Thereafter, on July 1, 2021, the court issued a compliance conference order ("CCO"), which states, in relevant part, that "[n]o motion for discovery shall be made without an Affirmation from the movant that a conference with the court was first requested and either held or denied; the absence of such an Affirmation shall result in denial of the motion."

Notwithstanding the same, the plaintiffs failed to request a virtual conference with the Preliminary Conference Part to resolve the instant discovery dispute; and they failed to attach an affirmation indicating that it informed the Preliminary Conference Part of the pending discovery dispute. As such, the plaintiffs' noncompliance with the CCO warrants partial denial of the instant motion. (see generally *Sparakis v. Gozzer Corp.*, 177 AD3d 1011 [2d Dept 2019]; *Nationstar Mortgage, LLC v. Jackson*, 192 AD3d 813 [2d Dept 2021]; *Metropolitan Bridge & Scaffolds Corp. v. New York City Housing Authority*, 168 AD3d 569 [1st Dept 2019]). Furthermore, the plaintiffs' affirmation of good faith is insufficient to show that counsel conferred with defense counsel(s) in a good faith effort to resolve those issues raised by the motion. The affirmation required by the court's rules must indicate "... the time, place and

nature of the consultation and 'the issues discussed' and any resolution, or shall indicate good cause why no such conferral with counsel for opposing parties was held" (see 22 NYCRR § 202.7[c]; *Starzyk v. Heslinga*, 177 AD3d 624 [2d Dept 2019]). Upon the failure to satisfy this requirement, denial of the motion is warranted. (*Bronstein v. Charm City Housing, LLC*, 175 AD3d 454 [2d Dept 2019]; *Roye v. Gelberg*, 172 AD3d 1260 [2d Dept 2019]; *Cashbamba v. 1056 Bedford LLC*, 172 AD3d 415 [1st Dept 2019]; *Murphy v. County of Suffolk*, 115 AD3d 820 [2d Dept 2014]; *Ponce v. Miao Ling Liu*, 123 AD3d 787 [2d Dept 2014]).

Notwithstanding the same, it is well settled law that the drastic remedy of striking an answer is inappropriate absent a clear showing that a defendants' failure to comply with discovery demands is willful and contumacious. (*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]). Here, defendants failed to comply with the PCO and the CCO; and a considerable amount of time has elapsed since the court issued the same. Moreover, the defendants failed to provide the court with a reasonable explanation for its non-compliance with the court's previous orders. As such, if the defendants fail to appear for an EBT as ordered herein, the court will be compelled to strike their answer. (*Sheikh v. Poplaro*, 2022 NY Slip op 04753 [2 Dept 2022]).

Accordingly, it is hereby

ORDERED that plaintiffs' motion to strike United Parcel Services General Services Co. and United Parcel Service answer is denied; and it is further,

ORDERED, that United Parcel Services General Services Co. and United Parcel Service shall appear for an examination before trial on or before November 10, 2022 either by Skype for Business, Zoom, Skype, Microsoft Teams, in person, or its equivalent; and it is further,

ORDERED that if United Parcel Services General Services Co. and United Parcel Service fails to comply with any part this order, it shall be precluded from presenting evidence and testimony at the time of trial and precluded from opposing any dispositive motions; and it is further,

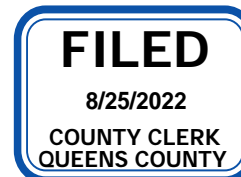
ORDERED a Note of Issue shall not be filed until the Court directs or the parties certify, via stipulation and/or Certification, that all discovery is complete; and it is further,

ORDERED that any other requested relief not expressly addressed herein has nonetheless been considered by this Court and is hereby denied; and it is further,

ORDERED that plaintiffs shall serve a copy of this decision and order with notice of entry upon the defendants on or before September 15, 2022.

The foregoing constitutes the decision and order of the court.

Dated: August 25, 2022
Long Island City, New York



A handwritten signature in black ink that reads "Maurice E. Muir". The signature is written in a cursive style and is positioned above a horizontal line.

MAURICE E. MUIR, J.S.C.