

**Clarke v Judlau Contr., Inc.**

2023 NY Slip Op 30424(U)

February 9, 2023

Supreme Court, New York County

Docket Number: Index No. 160288/2017

Judge: Frank P. Nervo

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. FRANK P. NERVO PART 04

Justice

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ADRIAN H. CLARKE

Plaintiff,

- v -

JUDLAU CONTRACTING, INC.,

Defendant.

-----X

INDEX NO. 160288/2017

MOTION DATE 11/23/2022

MOTION SEQ. NO. 002

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 002) 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 116, 117

were read on this motion to/for STRIKE PLEADINGS.

Plaintiff and defendant, by respective motion and cross-motion, seek orders striking their adversary's pleadings, sanctions, and, alternatively, compelling discovery. By way of background, the Court received a letter motion seeking to compel discovery in this matter (NYSCEF Doc. No. 68), and the Court, via order, directed the parties to comply with the Part Rules, which require requests for conferences include a proposed joint discovery order, prohibit letter motions, and further require formal motions for discovery disputes that cannot be resolved via a request for conference and proposed joint order (NYSCEF Doc. No. 69). The Court did not receive a request for

conference or proposed discovery order following counsel conferring regarding same; instead, the Court received the instant motion and cross-motion.

As an initial matter, the instant competing motions seeking to strike an opposing party's pleadings and sanctions against counsel highlight the reasoning underscoring the Part Rule advising that compliance conferences are no longer held in the ordinary course – namely, that serial compliance conferences are ineffective, the deadlines imposed therein are typically ignored by counsel, and matters languish with longstanding incomplete discovery (Part IV Rules. at VI. B. ii. “Absent extraordinary circumstances, this Part does not hold compliance conferences. Discovery disputes shall be resolved by motion...”). As such, compliance conferences do not best serve the parties and are not an effective use of the Court's limited resources – nor have they ever been.

CPLR § 3101(a) directs that there “shall be full disclosure of all matter material and necessary to the prosecution or defense of an action, regardless of the burden of proof” (*Forman v. Henkin*, 30 NY3d 656, 661 [2018]). The test utilized is “one of usefulness and reason” (*id.*).

CPLR § 3126(3) provides that the Court may strike a pleading when it finds, inter alia, that a party has refused to obey an order for disclosure or willfully fails to disclose information that ought to have been disclosed. This remedy is drastic and should only be imposed when the movant has “clearly shown that its opponent’s nondisclosure was willful, contumacious or due to bad faith” (*Commerce v Indus. Ins. Co. v. Lib-Com Ltd.*, 266 AD2d 142 [1st Dept 1999]). A pattern of default, lateness, and failure to comply with court orders can give rise to an inference of willful and contumacious conduct (see *Merchants T v F, Inc. v. Kase v Druker*, 19 AD3d 134 [1st Dept 2005]; see also *Shah v. Oral Cancer Prevention Intl., Inc.*, 138 AD3d 722 [2d Dept 2016]).

As the Court of Appeals has repeatedly underscored, “our court system is dependent on all parties engaged in litigation abiding by the rules of proper practice. The failure to comply with deadlines not only impairs the efficient functioning of the courts and adjudication of claims, but it places jurists unnecessarily in the position of having to order enforcement remedies to respond to the delinquent conducts of members of the bar, often to the detriment of the litigants they represent. Chronic noncompliance with deadlines breeds disrespect for the dictates of the Civil Practice law and Rules and a culture in which cases can linger for years without resolution” (*Gibbs v.*

*St. Barnabas Hosp.*, 16 NY3d 74 [2010]). Compliance requires a timely response and good faith effort to provide a meaningful response (*Kihl v. Pfeffer*, 94 NY2d 118, 123 [1999]). Disregard of discovery deadlines will not be tolerated (*Andrea v. Arnone, Hedin, Casker, Kennedy & Drake, Architects & Landscape Architects, P.C.*, 5 NY3d 514, 521 [2005]; see also *Arpino v. F.J.F. & Sons Elec. Co., Inc.*, 102 AD3d 201, 208 [2d Dept 2012]).

“A party that permits discovery to ‘trickl[e] in [with a] cavalier attitude should not escape adverse consequence” (*Henderson-Jones v. City of New York*, 87 AD3d 498, 504 [1st Dept 2011] quoting *Figdor v. City of New York*, 33 AD3d 560, 561 [1st Dept 2006]). “[U]pon learning that a party has repeatedly failed to comply with discovery orders, [trial courts] have an affirmative obligation to take such additional steps as are necessary to ensure future compliance” (*Figdor v. City of New York*, 33 AD3d 560, 561 [1st Dept 2006]).

Here, the instant motions are replete with examples of compliance and conference orders being ignored, resulting in yearslong outstanding routine discovery, including depositions (see e.g. NYSCEF Doc. Nos. 42, 45, 48, and 49). In effect, the parties seek this Court to excuse their own noncompliance while punishing their adversary for same. It appears to the Court that the parties

would have been better served by counsel conferring to resolve the routine discovery attendant to this uncomplicated Labor Law matter via a proposed discovery order, as suggested by the Court's earlier order regarding requests for conferences (NYSCEF Doc. No. 69, "requests must comport with the Part Rules and contain, inter alia, a single joint letter from all counsel and a single joint proposed order from all counsel... Upon receipt of the complying joint letter and proposed order, the Court will schedule a conference, if necessary, or issue an appropriate order"). Notwithstanding, the Court issues the instant discovery order without the benefit of a joint proposed order following a meet/confer among counsel.

Plaintiff contends that defendant refuses to proceed with depositions absent a Court order. Defendant contends, essentially, that outstanding medical authorizations preclude deposing plaintiff and that the attendant medical records must be reviewed prior to a deposition of plaintiff. It is beyond cavil that depositions in a matter such as this are required. However, directing the deposition of plaintiff occur in the face of outstanding medical authorizations for the injuries at issue makes little sense, and is certain to result in further depositions of plaintiff.

Counsel for the defendant represents that defendant City requires medical authorizations be processed by an outsourced vendor, leading to significant delays in receiving medical records. While a party is, of course, free to utilize any vendor of its choice, the City's policy or requirement that a specific vendor be utilized by counsel does not form a basis to prejudice plaintiff or delay the resolution of this matter. To the extent that COVID related delays are likewise blamed for delays in receiving medical records, the Court notes that countless matters of a similar nature involving medical records have come before the Court following the COVID shutdowns of early 2020, and discovery in those matters has progressed, nevertheless. Accordingly, the Court does not find this a plausible excuse for failing to complete discovery.

It is, therefore,

**ORDERED** that within 14 days of this order plaintiff shall provide authorizations for medical records related to any neck or back injuries, including but not limited to accidents/injuries on or about: August 7, 2007, November 17, 2010; October 31, 2011; June 3, 2012, September 30, 2012, April 28, 2014, August 3, 2015; December 8, 2015; and November 11, 2016, as well as the subsequent injury on June 24, 2021; and it is further

ORDERED that the failure to timely provide authorizations, as above, may result in striking plaintiff's complaint, absent extraordinary circumstances as found by the Court in its discretion; and it is further

ORDERED that the Court provides defendant with six months to process the above authorizations and review the contents of the medical records related to same. The Court will not further adjourn such time, absent extraordinary circumstances – delays related to the use of an outsourced vendor or COVID are not extraordinary; and it is further

ORDERED that plaintiff is reminded of his obligation to supplement disclosure of any additional injury or condition to his neck/spine/back pursuant to CPLR § 3101(h) and 22 NYCRR 202.20-c(d). The failure to supplement disclosure of any injury or condition to the body parts at issue here may result in sanctions, in the Court's discretion, including but not limited striking of pleadings or preclusion of evidence at trial; and it is further

ORDERED that all parties shall serve courtesy copies of any outstanding discovery demand not otherwise addressed by this order within 20 days of this order. All parties shall respond to any discovery demand within 20 days of

receipt of courtesy copy. The failure to timely serve a courtesy copy of an outstanding discovery demand shall constitute waiver of the discovery sought therein; the failure to timely respond to a timely served courtesy copy shall result in sanctions, including but not limited to sanctions against counsel and striking of pleadings, in the Court's discretion; and it is further

**ORDERED** that plaintiff shall appear for a deposition either in-person or via electronic means on September 13, 2023, at 10:00am and such deposition shall proceed day-to-day without interruption until its completion and comply with the Uniform Rules, including § 202.20-b; and it is further

**ORDERED** that defendant shall appear for a deposition either in-person or via electronic means on October 11, 2023, at 10:00am and such deposition shall proceed day-to-day without interruption until its completion and comply with the Uniform Rules, including §§ 202.20-b and 202.20-d; and it is further

**ORDERED** that all parties shall serve notice of any non-party deposition at least 30-days prior to such deposition and all non-party depositions shall be completed by December 15, 2023; and it is further

**ORDERED** that non-party depositions may occur either in-person or via electronic means and shall and comply with the Uniform Rules, including § 202.20-b; and it is further

**ORDERED** that all post-deposition demands shall be served no later than 20 days following deposition giving rise to same; responses thereto shall be served within 20 days of receipt of demand; and it is further

**ORDERED** that the failure to appear for a deposition, as above, may result in sanctions, including but not limited to the striking of pleadings, as may be appropriate in the Court's discretion; and it is further

**ORDERED** that the failure to timely notice non-party depositions shall constitute waiver of same; and it is further

**ORDERED** that the failure to timely serve post-deposition demands shall constitute waiver of same; and it is further

**ORDERED** that the failure to timely serve a response, in compliance with the Uniform Rules, to a timely post-deposition demand may result in

sanctions, including but not limited to the striking of pleadings and sanctions against counsel, as may be appropriate in the Court's discretion; and it is further

**ORDERED** that the parties are reminded all demands and responses thereto shall comply with the Uniform Rules; and it is further

**ORDERED** that defendant shall notice an independent medical exam (IME) of plaintiff at least 30 days prior to exam date; and it is further

**ORDERED** that the independent medical exam (IME) of plaintiff shall be completed no later than December 15, 2023; and it is further

**ORDERED** that defendant shall serve a copy of the IME report on all parties no later than 30 days following examination; and it is further

**ORDERED** that the failure to timely notice plaintiff's IME shall constitute waiver of same; and it is further

ORDERED that the failure to appear for a timely noticed IME examination may result in sanctions, including but not limited to the striking of pleadings, as may be appropriate in the Court’s discretion; and it is further

ORDERED that the failure to timely serve a copy of the IME report may result in sanctions including but not limited to the striking of pleadings and sanctions against counsel, as may be appropriate in the Court’s discretion; and it is further

ORDERED that the note of issue deadline is extended to March 3, 2024, and counsel are reminded of the Part Rules requiring extension of the note of issue by motion; and it is further

ORDERED that the dates, deadlines, and directives herein may not be adjourned or modified absent Court order.

THIS CONSTITUTES THE DECISION AND ORDER OF THE COURT.

2/09/2023  
DATE

CHECK ONE:  CASE DISPOSED  DENIED  NON-FINAL DISPOSITION

APPLICATION:  GRANTED  GRANTED IN PART  OTHER

CHECK IF APPROPRIATE:  SETTLE ORDER  SUBMIT ORDER

INCLUDES TRANSFER/REASSIGN  FIDUCIARY APPOINTMENT  REFERENCE

HON. FRANK P. NERVO  
J.S.C.