

<b>Munoz v Jamaica Bldrs. LLC</b>
2023 NY Slip Op 35029(U)
September 21, 2023
Supreme Court, Queens County
Docket Number: Index No. 717477/2020
Judge: Tracy Catapano-Fox
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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF QUEENS



-----X  
BONIFACIO MUNOZ,

Index No. 717477/2020

Plaintiff,

Part 6

Motion Date: September 11, 2023

-against-

Calendar No. 31

Sequence No. 3

JAMAICA BUILDERS LLC, 153 JAMAICA HOUSING DEVELOPMENT FUND CORPORATION, THE CITY OF NEW YORK, NEW YORK CITY DEPARTMENT OF HOUSING PRESERVATION AND DEVELOPMENT, NEW DESTINY HOUSING CORPORATION, JAMAICA OWNER LLC, BFC PARTNERS, L.P., JAMAICA RETAIL OWNER LLC, SMJ DEVELOPMENT LLC, 153 JAMAICA DEVELOPER LLC, BFC PARTNERS DEVELOPMENT LLC, SMJ JAMAICA LLC, BFC ASSOCIATES, LLC, RISE DEVELOPMENT PARTNERS, LLC, RISE CONCRETE LLC, and CONCRETE SUPERSTRUCTURES, INC.,

Defendants.

-----X  
RISE DEVELOPMENT PARTNERS, LLC and RISE CONCRETE LLC,

Third Party Plaintiff,

-against-

ARO CONSTRUCTION GROUP INC.,

Third Party Defendant.

-----X  
JAMAICA BUILDERS, LLC,

Second Third Party Plaintiff,

-against-

CITY SAFETY COMPLIANCE CORP.,

Second Third Party Defendant.

-----X

The following papers numbered EF160-EF222 read on this motion by defendants RISE DEVELOPMENT PARTNERS, LLC and RISE CONCRETE LLC, JAMAICA BUILDERS LLC, 153 JAMAICA HOUSING DEVELOPMENT FUND CORPORATION, JAMAICA OWNER LLC, and JAMAICA RETAIN OWNER LLC for an Order dismissing plaintiff’s Complaint pursuant to CPLR §3126(3), or alternatively precluding plaintiff from producing evidence as to the treatment set forth in plaintiff’s eighth Supplemental Bill of Particulars, and this cross-motion by plaintiff for sanctions against the moving defendants and for an Order severing the third party action and second third party action pursuant to CPLR §603, directing the moving defendants to refrain from filing any further discovery motions, and directing the parties to submit a Certification Order no later than September 25, 2023 and file a Note of Issue by a date certain.

Papers  
Numbered

Notice of Motion, Affirmation, Exhibits.....	EF160-EF166
Notice of Cross-Motion, Affirmation, Exhibits.....	EF189-EF197
Transcript of Oral Argument.....	EF222

Upon the foregoing papers and oral argument before the Court, it is ordered that these motions are determined as follows:

Defendants Rise Development Partners, LLC and Rise Concrete LLC, Jamaica Builders LLC, 153 Jamaica Housing Development Fund Corporation, Jamaica Owner LLC, and Jamaica Retain Owner LLC’s motion for an Order dismissing plaintiff’s Complaint pursuant to CPLR §3126(3) or alternatively precluding plaintiff from producing evidence as to the treatment set forth in plaintiff’s eighth Supplemental Bill of Particulars is denied, as defendants failed to demonstrate that plaintiff acted in a wilful or contumacious manner with respect to discovery.

Plaintiff’s cross-motion to sever the third party action and second third party action is granted, as plaintiff demonstrated that he is prejudiced by the delay in completing discovery in the third party action and second third party action. (*See generally Anderson v. Singh*, 305 A.D.2d 620 [2d Dept. 2003].) Plaintiff’s motion for sanctions is granted solely to the extent that defendants shall not file any further discovery motions without leave of the Court. Plaintiff’s motion directing

the parties to submit a Certification Order no later than September 25, 2023 is granted, and plaintiff is directed to file a Note of Issue in the main action no later than October 27, 2023.

Plaintiff commenced this action to recover for personal injuries sustained on September 15, 2019, while he was working at 153-24 90<sup>th</sup> Road/153-19 Jamaica Avenue in Jamaica, New York. Plaintiff filed the Summons and Complaint on October 2, 2020 and issue was subsequently joined.

Defendants argue that plaintiff's Complaint should be dismissed because plaintiff failed to submit discovery responses establishing his identity or sufficient responses to their Notices for Discovery and Inspection. Defendants further argue that plaintiff served an eighth Supplemental Bill of Particulars that was insufficient, as it was not accompanied by any medical records or authorizations for treatment. Additionally, plaintiff's counsel refused to produce plaintiff for a further deposition pursuant to the injury and treatment alleged in the eighth Bill of Particulars. Based upon the foregoing, defendants argue that plaintiff's Complaint should be dismissed, or alternatively, plaintiff should be precluded from offering testimony with respect to his eighth Bill of Particulars.

Plaintiff opposes defendants' motion and cross-moves to sever the third party action and second third party action. Plaintiff argues that defendants' motion should be denied and the actions should be severed because defendants have unreasonably delayed plaintiff's trial in the main action. Specifically, plaintiff argues that defendants violated the undersigned's June 8, 2023 Order wherein defendants were directed to complete depositions within sixty days. Plaintiff's counsel further argues that plaintiff Munoz has been sufficiently identified via photographs at the accident site, an accident report, Department of Buildings paperwork, and his deposition testimony. Plaintiff also argues that defendants are not entitled to further paper discovery and a further deposition based upon the eighth Supplemental Bill of Particulars, as plaintiff has already exchanged authorizations and made the parties aware of the lumbar injury in prior Bills of Particulars. Plaintiff further argues defendants were on notice of this injury and the newest Bill of Particulars merely serves as updated and continuing treatment. Plaintiff's counsel further argues that plaintiff Munoz will continue to treat up until the time of trial. Based upon the foregoing, plaintiff argues that the Complaint should not be dismissed, defendants are not entitled to further discovery in the main action, the actions should be severed, and defendants should be sanctioned for the frivolous motion.

The nature and decree of a penalty to be imposed pursuant to CPLR §3126 lies within the trial court's discretion. (*Lucas v. Stam*, 147 A.D.3d 921 [2d Dept. 2017].) However, the striking of a pleading is a drastic remedy that may only be warranted upon a clear showing that the failure to comply with discovery demands was wilful and contumacious. (*Id.*; see also *Lazar, Sanders, Thaler & Assoc. LLP v. Lazar*, 131 A.D.3d 1133 [2d Dept. 2015].) Wilful and contumacious

conduct may be inferred from a party's repeated failure to comply with court-ordered discovery, coupled with inadequate explanations for the failures to comply, or a failure to comply with court-ordered discovery over an extended prior of time. (*255 Butler Assoc., LLC v. 255 Butler, LLC*, 208 A.D.3d 831, 834 [2d Dept. 8/31/2022].)

Severance is generally not appropriate where the claims against the defendants involve common factual and legal issues, and the interests of judicial economy and consistency of verdicts will be served by having a single trial. (*New York Cent. Mut. Ins. Co. v. McGee*, 87 A.D.3d 622, 624 [2d Dept. 2011].) However, it is within the trial court's discretion to grant or deny a severance. (*Shanley v. Callanan Industries, Inc.*, 54 N.Y.2d 52, 57 [1981].) When making the determination, the trial court must weigh the interests of judicial economy and consistency of verdicts that would be served by having a single trial, against any potential prejudice resulting from the delay. (*New York Schools Ins. Reciprocal v. Milburn Sales Co., Inc.*, 138 A.D.3d 940, 941 [2d Dept. 2016].)

Defendants' motion is denied, as defendants failed to establish that plaintiff acted in a wilful or contumacious manner with respect to discovery. Defendants' argument that plaintiff failed to provide adequately identifying information is without merit, as plaintiff's counsel demonstrated that plaintiff identified himself at his deposition and was identified in a number of documents, including the accident report and Department of Buildings paperwork. Defendants' argument that they are entitled to further discovery based upon the last Bill of Particulars is also without merit, as plaintiff demonstrated that the information contained therein constituted continuing treatment. (*See Alicino v. Rochdale Vil., Inc.*, 142 A.D.3d 937, 939 [2d Dept. 2016].) Accordingly, defendants' motion to dismiss plaintiff's Complaint or preclude plaintiff from testifying with respect to his eighth Supplemental Bill of Particulars is denied.

Plaintiff's cross-motion to sever the action is granted, as plaintiff demonstrated that he is prejudiced by the delay caused by ongoing discovery in the third party and second third party action. The Court has held multiple discovery conferences over several months and issued numerous Orders, yet discovery remains ongoing. Plaintiff demonstrated that defendants failed to comply with the Undersigned's June 8, 2023 Order, and defendants conceded that they could have contacted the Court to address issues that arose rather than ignore the Court Order. Plaintiff's counsel has maintained the position of trial readiness in the main action for several months and has thereby demonstrated prejudice by the delayed discovery in the third party actions. Accordingly, plaintiff's cross-motion to sever the action is granted. Plaintiff's motion to impose sanctions upon defendants is granted, solely to the extent that defendants shall not file any further discovery motions without leave of the Court.

Accordingly, defendants' motion for an Order dismissing plaintiff's Complaint pursuant to CPLR §3126(3), or alternatively precluding plaintiff from producing evidence as to the treatment set forth in the eighth Supplemental Bill of Particulars is denied. Plaintiff's cross-motion to sever

the third party and second third party action pursuant to CPLR §603 is granted. Plaintiff's motion to impose sanctions is granted solely to the extent that defendants shall not file any further discovery motions without leave of the court. Plaintiff's motion to direct the parties to submit a Certification Order no later than September 25, 2023 is granted, and plaintiff is directed to file a Note of Issue in the main action no later than October 27, 2023.

This constitutes the decision and Order of the Court.

Dated: September 21, 2023

*Tracy Catapano-Fox*

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Hon. Tracy Catapano-Fox, J.S.C.

