

Conde v Sajjad

2024 NY Slip Op 34800(U)

December 13, 2024

Supreme Court, Queens County

Docket Number: Index No. 714520/2020

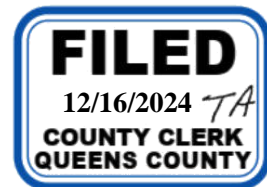
Judge: Maurice E. Muir

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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

LASANA CLIFF CONDE AND CAMARA
MOUSSA,

Plaintiffs,

-against-

SYED SAJJAD, PAKISTAN CONSULATE OF
12 E 65 ST. and CT OSPINA-MORALES,

Defendants.

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Index No.: 714520/2020

Motion Date: 9/5/24

Motion Cal. No. 12

Motion Seq. No. 4

SYED SAJJAD, PAKISTAN CONSULATE
OF 12 E 65 ST.,

Third-Party Plaintiffs,

-against-

VIA TRANSPORTATION, INC. and
CT OSPINA MORALES,

Third-Party Defendants.

The following electronically filed (“EF”) documents read on this motion by plaintiffs for an order: 1) pursuant to CPLR § 3126, striking defendant CT OSPINA-MORALES’s Answer for failing to appear for a court ordered deposition; or 2) precluding defendant CT OSPINA-MORALES from offering testimony at the time of trial; and 3) granting such other and further relief as to this Honorable Court may seem just and proper.

Notice of Motion-Affirmation-Exhibits-Service..... Papers
Numbered
EF 156 – 166

Affirmation in Opposition..... EF 167
 Affirmation in Opposition..... EF 168
 Reply Affirmation..... EF 169
 Affirmation in Opposition..... EF 170

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

This is a personal injury action in which plaintiffs seek to recover damages for injuries allegedly sustained as a result of a motor vehicle accident that occurred on April 11, 2018 on Third Avenue, in New York County, New York. At the time of the accident, plaintiffs were passengers in the vehicle operated by Morales. As a result, on August 31, 2020, the plaintiffs commenced the instant action; and on October 12, 2020, issue was joined. Moreover, on May 3, 2022, the Honorable Robert McDonald granted the plaintiffs’ motion for summary judgment on the issue of liability. Now, the plaintiffs seek the above-mentioned relief pursuant to CPLR § 3126.

Pursuant to CPLR § 3126, it states, in relevant part, that “[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]; see also *Honghui Kuang v. MetLife*, 159 AD3d 878 [2d Dept 2018]; *Turcano v. Schwaber*, 180 AD3d 206 [2d Dept 2020]). Furthermore, “[t]he nature and degree of the penalty to be imposed pursuant to CPLR 3126 rest within the discretion of the Supreme Court (see *Friedman, Harfenist, Langer & Kraut v. Rosenthal*, 79 AD3d 798 [2d Dept 2010]; *Estaba v. Quow*, 101 AD3d 940 [2d Dept 2012]; *Morson v. 5899 Realty, LLC*, 171 AD3d 916 [2d Dept 2019]). Furthermore, “[w]hen a party fails to comply with a court order and frustrates the disclosure scheme set forth in the CPLR, it is well within the Trial Judge’s discretion [to dismiss a pleading]” (*Kihl v. Pfeffer*, 94 NY2d 118, 122 [1999]; *Honghui Kuang v. MetLife*, 159 AD3d 878 [2d Dept 2018]; *Empire Enters, I.J.J.A., Inc. v. Daimler Buses of N. Am., Inc.*, 172 AD3d 819 [2d Dept 2019]).

Moreover “[w]hile 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 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. (*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, the CT Ospina-Morales ("Mr. Morales") failed to comply with the court's orders (e.g., PCO, CCO, etc.); and he failed to provide the court with a reasonable explanation for his non-compliance with said orders over a considerable amount of time. Contrary to defense counsel's contentions, it is well settled law that "[t]he fact that defendant has disappeared or made himself unavailable provides no basis for denying a motion to strike a defendant's answer, particularly in the face of continued defaults in appearance for examination before trial." (*Carmona v. HUB Properties Trust*, 186 AD3d 1485 [2d Dept 2020]; see also *Bouri v. Jackson*, 177 AD3d 947 [2d Dept 2019]; *Sepulveda v. 101 Woodruff Avenue Owner, LLC*, 166 AD3d 835 [2d Dept 2018]; *Honghui Kuang v. MetLife*, 159 AD3d 878 [2d Dept 2018]; *C.K. v. City of New York*, 216 AD3d 753 [2d Dept 2023]).

Accordingly, it is hereby

ORDERED that branch of the plaintiff's motion to strike CT Ospina-Morales' answer, pursuant to CPLR § 3126, is denied without prejudice; and it is further,

ORDERED, that CT Ospina-Morales shall appear for an examination before trial on or before February 20, 2025, either via Skype for Business, Zoom, Skype, Microsoft Teams, in person, or its equivalent; and it is further,

ORDERED that if CT Ospina-Morales fails to comply with the directives of this Order, he shall be precluded from presenting evidence and testimony at the time of trial on damages and from moving for or opposing any and all dispositive motions; and it is further,

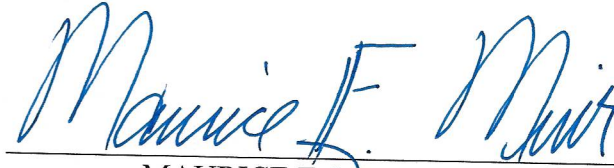
ORDERED that any other requested relief not expressly addressed herein has nonetheless been considered by this Court and is hereby denied; and it is further,

ORDERED that plaintiff shall serve a copy of this decision and order with notice of entry

upon the defendant via certified mail and NYSCEF on or before December 30, 2024.

The foregoing constitutes the decision and order of the court.

Dated: December 13, 2024
Long Island City, NY



MAURICE E. MUIR, J.S.C.

