

NB v 380 Lenox Meat Corp.

2025 NY Slip Op 30676(U)

February 28, 2025

Supreme Court, New York County

Docket Number: Index No. 451878/2022

Judge: Emily Morales-Minerva

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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. EMILY MORALES-MINERVA PART 42M

Justice

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INDEX NO. 451878/2022

N B, ECHO HOWARD,

MOTION DATE 12/08/2024

Plaintiff,

MOTION SEQ. NO. 001

- v -

380 LENOX MEAT CORP., KINGS GROUP NY CORP.,
PIONEER SUPERMARKETS, THE LENOX CONDOMINIUM
LLC, ASSOCIATED SUPERMARKET GROUP

DECISION + ORDER ON
MOTION

Defendants.

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 39, 40, 41, 42, 43,
44, 45, 46, 47, 48, 49

were read on this motion to/for DISCOVERY

APPEARANCES:

Milber Makris Plousadis and Seiden, Purchase, NY (Otto Cheng,
Esq., of counsel), for defendant KINGS GROUP NY CORP.

EMILY MORALES-MINERVA, J.S.C.

In this personal injury action, defendant KINGS GROUP NY
CORP. (Kings Group) moves, unopposed, by notice of motion
(sequence number 001), for an order, pursuant to CPLR § 3126,¹

¹ CPLR § 3126 provides, "If any party, or a person who at the time a
deposition is taken or an examination or inspection is made is an officer,
director, member, employee or agent of a party or otherwise under a party's
control, refuses to obey an order for disclosure or willfully fails to
disclose information which the court 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: 1. an order that the issues to
which the information is relevant shall be deemed resolved for purposes of
the action in accordance with the claims of the party obtaining the order; or
2. an order prohibiting the disobedient party from supporting or opposing
designated claims or defenses, from producing in evidence designated things
or items of testimony, or from introducing any evidence of the physical,
mental or blood condition sought to be determined, or from using certain
witnesses; or 3: an order striking out pleadings or parts thereof, or staying

precluding infant plaintiff N.B., ECHO HOWARD (plaintiff) from testifying and proffering documentary evidence at trial; or, alternatively, for an order, pursuant to CPLR § 3124,² compelling plaintiff to appear for deposition.

For the reasons set forth below, defendant's motion (seq. no. 001) is denied entirely.

BACKGROUND

Plaintiff N.B., an infant by his mother and natural guardian ECHO HOWARD (plaintiff), was injured when he was struck by a wooden board that fell from an overhead sidewalk scaffolding located at 380 Lenox Avenue, New York, New York (premises) (see New York State Court Electronic Filing System [NYSCEF] Doc. No. 001, Complaint). Defendant KINGS GROUP NY CORP. (Kings Group) owns and maintains the premises where the scaffolding was located (see id.).³

On October 1, 2021, plaintiff commenced the instant action

further proceedings until the order is obeyed, or dismissing the action or any part thereof, or rendering a judgment by default against the disobedient party."

² CPLR § 3124 provides, "If a person fails to respond to or comply with any request, notice, interrogatory, demand, question or order under this article, except a notice to admit under section 3123, the party seeking disclosure may move to compel compliance or a response."

³ The matter was previously discontinued without prejudice against defendants 380 LENOX CORP., PIONEER SUPERMARKETS, and ASSOCIATED SUPERMARKETS GROUP (see NYSCEF Doc. No. 37, Stipulation of Discontinuance, dated April 4, 2024). Defendant THE LENOX CONDOMINIUM LLC has never appeared nor participated in this action.

against Kings Group⁴ and on March 21, 2022, Kings Group answered (see NYSCEF Doc. No. 007, Answer). On that same date, Kings Group served a Notice of Deposition upon plaintiff, scheduled for August 17, 2022 (see NYSCEF Doc. No. 008, Notice to Take Deposition Upon Oral Examination). Plaintiff failed to appear for said deposition.

Thereafter, the court (L. Headley, J.S.C.) ordered that plaintiff "may amend the summons and complaint to include the now-adult plaintiff as a party in his own capacity [] parties to contact the court when all parties are identified for a [preliminary conference] order" (see NYSCEF Doc. No. 38, Stipulation and Order, dated May 14, 2024 [L. Headley, J.S.C.]). Plaintiff, to date, has not amended the summons and complaint to reflect his now-adult status and capacity to proceed on his own behalf, nor has a conference been held with the court.

Now, Kings Group moves (seq. no. 001) for an order, pursuant to CPLR § 3126, precluding plaintiff from testifying and proffering documentary evidence at trial; or, alternatively, for an order, pursuant to CPLR § 3124, compelling plaintiff to appear for deposition.

Plaintiff does not appear or otherwise oppose the motion.

⁴ The instant action was commenced in Supreme Court, Bronx County, but pursuant to a so-ordered stipulation (J. Tuitt, J.S.C., Supreme Court, Bronx County), the matter was transferred to Supreme Court, New York County (see NYSCEF Doc. No. 26, Stipulation and Order to Change Venue, dated October 15, 2022 [J. Tuitt, J.S.C.]).

ANALYSIS

CPLR § 3101 (a) generally governs disclosure, directing that "[t]here shall be full disclosure of all matter material and necessary in the prosecution or defense of an action, regardless of the burden of proof" (emphasis added). The "'statute embodies the policy determination that liberal discovery encourages fair and effective resolution of disputes on the merits, minimizing the possibility for ambush and unfair surprise'" (Forman v Henkin, 30 NY3d 656, 661 [2018], quoting Spectrum Sys. Intl. Corp. v Chemical Bank, 78 NY2d 371, 376 [1991]).

Accordingly, our governing Court of Appeals has long "emphasized that '[t]he words, "material and necessary", are . . . to be interpreted liberally to require disclosure, upon request, of any facts bearing on the controversy which will assist preparation for the trial by sharpening the issues and reducing delay and prolixity. The test is one of usefulness and reason" (Forman v Henkin, 30 NY3d 656, 661 [2018], quoting Allen v Crowell-Collier Publ. Co., 21 NY2d 403, 406, [1968], citing Andon v 302-304 Mott St. Assoc., 94 NY2d 740, 746 [2000]).

"If a person fails to respond to or comply with any request, notice, interrogatory, demand, question or order [for discovery] the party seeking disclosure may move to compel compliance or a response" (CPLR § 3124). However, "no motion [relating to disclosure] shall be filed with the court unless there have been served and filed with the motion papers . . . an affirmation that counsel has conferred with counsel for the opposing party in a good faith effort to resolve the issues raised by the motion" (Uniform Civil Rules for the Supreme Court and County Court [22 NYCRR] § 202.7).

Where the failure or refusal to comply with a disclosure order exists, the "court may make such orders . . . as are just," including "prohibiting the disobedient party from producing in evidence designated things or items of testimony [] or from using certain witnesses" (see CPLR § 3126 [2]). However, "the court must determine that the party's failure to comply with a disclosure order was willful, deliberate and contumacious" before invoking the drastic remedy of preclusion pursuant to CPLR § 3126 (2) (Holliday v Jones, 36 AD3d 557, 558 [1st Dept 2007] citing Vatel v City of New York, 208 AD2d 524 [2d Dept 1994]). In order to warrant the remedy of preclusion, the moving party must "establish a pattern of willful non-

compliance with discovery" (Westchester Med. Ctr. v Amoroso, 110 AD3d 580 [1st Dept 2013] [emphasis added]).

Here, Kings Group has not established a pattern of plaintiff's willful non-compliance with discovery, and therefore, preclusion pursuant to CPLR § 3126 (2) is not appropriate. No court orders exist requiring plaintiff to appear for deposition on or before a certain date, and, aside from the Notice of Deposition served upon plaintiff on March 21, 2022, no further notices or demands for plaintiff's deposition were made (see Westchester Med. Ctr., 110 AD3d at 581) [finding that "although defendant alleges that plaintiff failed to respond to a demand for a bill of particulars over a 2 ½ year period of time, no preliminary conference order existed and no further demands or motions seeking plaintiff's compliance with the lone discovery request were brought or made"]).

Likewise, Kings Group's alternative request for an order, pursuant to CPLR § 3124, compelling plaintiff to appear for deposition on a date certain, is denied. Kings Group's good faith affirmation is deficient, in that it does not indicate the "time, place and nature of the consultation and the issues discussed and any resolutions" (148 Magnolia, LLC v Merrimack Mut. Fire Ins. Co., 62 AD3d 486, 497 [1st Dept. 2009]; see also Amato v Verizon New York Inc., 205 AD3d 406 [1st Dept 2022]).

Kings Group's emails to plaintiff were answered by either a responsive email, or a subsequent phone call (see NYSCEF Doc. No. 41, Affirmation of Good Faith). Further, Kings Group and plaintiff participated in a phone call on October 7, 2024, but the details of the conversation are absent.

Instead, because plaintiff has failed to amend the summons and complaint in accordance with the court's (L. Headley, J.S.C.) May 14, 2024 order, and has otherwise been silent for nine months as to his intention to proceed, this matter is scheduled for a virtual status conference on April 9, 2025. The court, at said conference, will set deadlines for completion of discovery and the filing of note of issue. Failure of plaintiff to appear at the scheduled call of calendar on this matter on April 9, 2025, at 12:00 P.M. may result in a dismissal of this action (see 22 NYCRR § 202.27 [b]).

Accordingly, it is

ORDERED that motion (sequence no. 001) of defendant KINGS GROUP NY CORP. is denied entirely; it is further

ORDERED that this case is scheduled for a virtual status conference in Part 42M, on April 9, 2025 at 12:00 P.M.; it is further

ORDERED that, within (10) days of this order, defendant KINGS GROUP NY CORP. shall serve a copy of this order on

plaintiff's counsel David R. Lewis, Esq., and defendant shall also file such notice via NYSCEF with proof of such service.

FAILURE TO APPEAR AT THE SCHEDULED CALL OF THE CALENDAR ON THIS MATTER MAY RESULT IN A DISMISSAL OF THIS ACTION PURSUANT TO THE UNIFORM CIVIL RULES FOR THE SUPREME COURT AND THE COUNTY COURT.

02/28/2025
DATE

Emily Morales-Minerva
EMILY MORALES-MINERVA, J.S.C.

CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	DENIED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	
	<input type="checkbox"/>	GRANTED			<input type="checkbox"/>	GRANTED IN PART	<input type="checkbox"/> OTHER
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER			<input type="checkbox"/>	SUBMIT ORDER	
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN			<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/> REFERENCE