

Torres v Gleason Ave. Assoc., LLC

2025 NY Slip Op 35176(U)

April 21, 2025

Supreme Court, Bronx County

Docket Number: Index No. 30560/2020E

Judge: Paul L. Alpert

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SUPREME COURT OF THE STATE OF NEW YORK
BRONX COUNTY

PRESENT: HON. PAUL L. ALPERT PART 26

Justice

-----X

MICHAEL TORRES,

Plaintiff,

- v -

GLEASON AVENUE ASSOCIATES, LLC, GILMAN
MANAGEMENT CORP.

Defendant.

-----X

INDEX NO. 30560/2020E
MOTION DATE 11/13/2024
MOTION SEQ. NO. 002

DECISION + ORDER ON
MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 002)
were read on this motion to/for STRIKE PLEADINGS

Notice of Motion, Affirmation in Support & Exhibits.....1

The plaintiff moves for an order pursuant to CPLR §3126 (2) striking the defendants'
answer for their willful failure to provide discovery pursuant to the court's order dated
September 20, 2024; an order pursuant to CPLR §3126 (3) precluding the defendants from using
photographs exchanged in their April 19, 2023 discovery responses in support of any dispositive
motions and at the time of trial; and an order to extend the time to file a note of issue. The
motion is unopposed by the defendants.

On April 19, 2023, the defendants responded to the plaintiff's Notice to Produce and
Notice of Discovery and Inspection and included five photographs of the interior stairs, lobby
and signage allegedly depicting the area where the plaintiff fell. On August 2, 2023, the
defendants produced Carmen Moscat, a porter at the building where the plaintiff had his
accident. At her deposition Ms. Moscat was shown the five photographs and testified that she
did not take the photographs. On August 30, 2023, the plaintiff served post-ebt demands
requesting the metadata for the photographs. The defendants failed to respond to those demands.

On September 20, 2024 the court ordered the defendants to provide metadata for the five photographs that were exchanged by the defendant's on April 19, 2023 or provide a "Jackson Affidavit." To date, the defendants have failed to provide the metadata for the photographs or a Jackson Affidavit despite the plaintiff's alleged numerous attempts in calling and emailing the defendants.

CPLR §3126 provides that "If a party or 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 under a party's control, refuses to obey an order for disclosure or wilfully fails to disclose information which the court finds ought to have been disclosed, the court may make such orders with regard to the failure or refusal as are just..."

CPLR §3126 (2) allows the court to make "an order prohibiting the disobedient party from supporting or opposing designated claims or defenses, from producing in evidence designated things or times of testimony, or from introducing any evidence of the physical, mental or blood condition sought to be determined, or from using certain witnesses."

CPLR §3126 (3) also provides that the court may make "an order striking out pleadings or parts thereof, or staying 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."

"It is well settled that the drastic remedy of striking a party's pleading pursuant to CPLR §3126 for failure to comply with a discovery order is appropriate only where the moving party conclusively demonstrates that the nondisclosure was willful, contumacious or due to bad faith" (*McGilvery v. New York City Tr. Auth.*, 213 AD2d 322 [1st Dept. 1995]). "Willful and contumacious behavior can be inferred by a failure to comply with court orders, in the absence of adequate excuses" (see *Johnson v. City of New York*, 188 AD2d 302 [1st Dept. 1992]; *Nunez v.*

City of New York, 37 AD3d 434 [2nd Dept. 2007]; *Henderson-Jones v. City of New York*, 87 AD3d 498 [1st Dept. 2011]). Courts have stricken a defendant's answer after the plaintiff has established the defendant's failure to comply with successive disclosure orders (see *Reidel v. Ryder, TRS, Inc.*, 13 AD3d 170 [1st Dept. 2004]; *Rodriguez v. United Bronx Parents, Inc.*, 70 AD3d 492 [1st Dept. 2010]).

The plaintiff's motion to strike the defendants' answer is denied. The plaintiff established that the defendants failed to comply with one disclosure order dated September 20, 2024 but he has not demonstrated that the failure to comply with the order was willful, contumacious or due to bad faith. The plaintiff's motion to preclude the defendants from using the photographs to support a dispositive motion and from using the photographs at the time of trial is granted to the extent of directing the defendants to provide the metadata to the five photographs they provided to the plaintiff on April 19, 2023 or provide a Jackson Affidavit within 45 days from the date of this decision/order. Failure of the defendants to provide the metadata for the photographs or a Jackson Affidavit will result in the defendants from being precluding in using the photographs to support a dispositive motion and from using the photographs at trial. The plaintiff's branch of the motion to extend the time to file a note of issue is granted and the plaintiff shall file the note of issue by August 21, 2025.

Based on the foregoing, it is hereby:

ORDERED AND ADJUDGED, that the plaintiff's motion pursuant to CPLR §3126 for an order of preclusion is granted; and it is further,

ORDERED AND ADJUDGED, that the plaintiff's motion pursuant to CPLR §3126 to strike the defendants' answer is denied, and it is further,

ORDERED AND ADJUDGED, that the plaintiff's motion to extend the time to file a note of issue is granted and the plaintiff shall file the note of issue by August 21, 2025, and it is further,

ORDERED AND ADJUDGED, that the plaintiff shall serve a copy of this decision and order upon the defendants within twenty (20) days of notice of entry.

This constitutes the decision and order of the court.

4/21/2025
DATE

PAUL L. ALPERT, J.S.C.

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