

SCAN

SHORT FORM ORDER

mod

SUPREME COURT - STATE OF NEW YORK

Present:

HON. UTE WOLFF LALLY,

Justice

TRIAL/IAS, PART 10
NASSAU COUNTY

SHEILA GEORGE and LESLIE GEORGE,

Plaintiff(s),

MOTION DATE:12/13/06

INDEX NO.:5127/02

-against-

SEQ. NO.2,3,4,5

MARSHALLS OF MA, INC., et al.,

Defendant(s)

The following papers read on the motions & cross motions to compel discovery :

Notice of Motion/ Order to Show Cause.....	1-4
Notice of Cross Motion.....	5-8
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3rd Notice of Cross Motion.....	13-15
Answering Affidavits.....	16,17
Replying Affidavits.....	18-23
Briefs:	

Upon the foregoing papers, it is ordered that the motion by plaintiff for an order pursuant to CPLR 3124, 3126 and 22 NYCRR 130-1.1 compelling defendant American Industrial Cleaning Co., Inc. (hereinafter "American") to produce a witness with knowledge for an examination before trial; striking the answer of said defendant if it fails to produce said witness; striking the answer of defendants Sullivan Service Co., Inc., and Sullivan Service Co., Inc., d/b/a SPC Contract Management (hereinafter "Sullivan") for their failure to appear for a examination before trial in compliance with the preliminary conference order dated December 15, 2005; and for sanctions against said defendants for their frivolous behavior

necessitating the making of this motion; cross motion by defendants Sullivan for an order pursuant to 22 NYCRR 130-1.1 awarding sanctions in their favor against plaintiff for making a frivolous motion; cross motion by defendants Marshalls of MA, Inc. and The TJX Companies, Inc. d/b/a Marshalls (hereinafter Marshalls) and defendant American for an order compelling plaintiff to appear for a further examination before trial limited to questions arising out of plaintiff's medical treatment, including a fourth surgical procedure to her knee since her examination before trial of March 8, 2006 are disposed of as follows.

This is an action to recover money damages for personal injuries sustained by plaintiff when she allegedly tripped and fell at the Marshalls store located at 1989 Front Street, East Meadow, New York, on March 26, 1999. It is claimed that she fell as the result of a dangerous, hazardous, slippery, unsafe and wet condition at said premises.

It is further alleged that as the result of said fall plaintiff injured her right knee, necessitating four separate surgical procedures, the last of which was performed two months after her examination before trial.

The court has been, and is, troubled by the acrimonious relationship between counsel, which has been demonstrated at conferences with this court's law clerk, preventing amicable resolution of some of the issues raised in these motions, and readily apparent in the various motion papers currently before the court, and the court will deal with the various requests for sanctions later.

So much of plaintiff's motion which seeks to compel American to appear for a further examination before trial with a witness with knowledge and striking said defendant's answer is withdrawn as per plaintiffs' reply affirmation dated November 6, 2006.

That portion of plaintiffs' motion which seeks to strike the answer of Sullivan for failure to provide discovery and appear for an examination before trial in accordance with the preliminary

conference order is denied.

It is well settled that this court has broad discretion to oversee discovery and that a party cannot be compelled to produce for discovery that which does not exist (Wilensky v JRB Mktg. & Opinion Research, 161 AD2d 651; Rosado v Mercedes-Benz of N.Am., 103 AD2d 395). The proper procedure, which has been followed herein, when a party claims the non-existence of discovery material, is a detailed affidavit, by an employee or officer with direct knowledge of the facts concerning the past and present status of the disputed documents and the current status of the party from which discovery is sought (Wilensky, supra; see also Abbadessa v Spring, 291 AD2d 363; Mercado v St. Andrews Housing Dev. Fund Co., 289 AD2d 148; Longo v Armor Elevator Co., Inc., 278 AD2d 127).

The remainder of plaintiffs' motion seeking the imposition of sanctions in accordance with 22 NYCRR 130-1.1 is also denied. The delay occasioned herein was not caused by willful and contumacious behavior of the nature that would in any way result in this court imposing sanctions or striking a pleading (Martin v Hall, 283 AD2d 615; Mohammed v 919 Park Place Owners Corp., 245 AD2d 615). So much of defendants' cross motions which seek to compel plaintiff to appear for a further examination before trial are granted. Plaintiff allegedly sustained an injury to her right knee which has resulted in fourth surgical procedures. The deposition of plaintiff was held after the first three. Thereafter, there was a fourth. Defendants are entitled to discovery related thereto. Therefore, plaintiff is directed to appear for a further examination before trial at the lower level of this court on February 14, 2007 at 9:30 a.m., limited solely to questions relating to the fourth surgical procedure and her condition before and after said surgery.

Finally, the request for sanctions contained in Sullivan's cross motion is denied.

Although the court continues to question the behavior of the attorneys, it does not believe that said behavior rises to the

level of necessitating a hearing to determine who is most responsible for said behavior, and declines to order such a hearing at this time. If, however, this behavior continues the court may choose to revisit this issue in the future.

Dated: JAN 11 2007

Michael J.S.C.

ENTERED

JAN 16 2007

**NASSAU COUNTY
COUNTY CLERK'S OFFICE**