

SCAN

SHORT FORM ORDER

**SUPREME COURT - STATE OF NEW YORK
COUNTY OF NASSAU - PART 22**

**Present: HON. WILLIAM R. LaMARCA
Justice**

**DENISE CALANDRINO, JOSEPH CALANDRINO
Individually and as Parent and Natural
Guardian of ALEXA CALANDRINO, an infant
under the age of fourteen (14) years,**

**Motion Sequence # 002
Submitted November 28, 2005**

Plaintiffs,

-against-

INDEX NO: 13704/04

**KIMCO REALTY CORPORATION a/k/a KIMCO
CORPORATION, KIR COPIAGUE, LLP, TARGET
CORPORATION, and A-ARON SECURITY
SERVICES, INC.,**

Defendants.

The following papers were read on this motion:

Notice of Motion/Order to Show Cause.....	1
KIMCO's Affirmation in Opposition.....	2
TARGET's Affirmation in Opposition.....	3
A-ARON's Affirmation in Opposition.....	4
Reply Affirmation.....	5

Plaintiffs, DENISE CALANDRINO, JOSEPH CALANDRINO, individually and as the parent and natural guardian of ALEXA CALANDRINO, an infant under the age of fourteen (14) years, moves by order to show cause, pursuant to CPLR §3124, to compel defendants

to provide disclosure or, in the alternative, to strike defendants' answers, pursuant to CPLR §3126. A stay of scheduled depositions was granted in the initiating order to show cause, dated October 17, 2005. Defendants, KIMCO REALTY CORPORATION a/k/a KIMCO CORPORATION, (hereinafter referred to as "KIMCO"), KIR COPAIGUE, LLP (hereinafter referred to as "KIR"), TARGET CORPORATION (hereinafter referred to as "TARGET") and A-ARON SECURITY SERVICES, INC. (hereinafter referred to as "A-ARON") oppose the motion which is determined as follows:

In this action, plaintiffs seek to recover damages for personal injuries allegedly sustained by DENISE CALANDRINO and her daughter, ALEXA CALANDRINO, as a result of a physical assault on July 2, 2004 in the parking lot located near the TARGET store at 1149 Sunrise Highway, Copiague, New York. Plaintiffs allege severe and permanent injuries as a result of the negligent security provided by the defendants. The motion presently before the court arises from the parties' inability to resolve discovery issues.

It appears from the record that plaintiffs served three (3) notices for Discovery and Inspection, dated February 3, 2005, July 5, 2005 and August 22, 2005, respectively, on A-ARON, KIMCO and KIR, and contend that said defendants have failed to fully and properly comply. Defendants disagree as to the alleged relevance and crucial nature of the purportedly unanswered or incompletely answered demands. Notwithstanding a detailed Preliminary Conference Order, dated May 27, 2005, and a Compliance Conference Order, dated August 16, 2005, plaintiffs are dissatisfied, *inter alia*, with defendant A-ARON's response to nine (9) demands and with defendants, KIMCO and KIR's response to thirteen (13) demands contained in the First Notice for Discovery and Inspection addressed to said defendants. Defendants dispute the "stonewalling" charge leveled against them by

plaintiffs and counter that they have responded to the extent possible given the onerous and sometimes improper demands of plaintiffs.

While the court is mindful 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, by 1) a party, or the officer, director, member, agent or employee of a party” [CPLR 3101(a)(1)], competing interests must always be balanced, and the need for discovery must be weighed against any special burden to be borne by the opposing party. *Andon ex rel Andon v 302-304 Mott Street Associates*, 94 NY2d 740, 709 NYS2d 873, 731 NE2d 589 (C.A.2000). Although plaintiffs maintain that a party is not required to attend a deposition in the absence of prior compliance with discovery demands and that they will be severely hampered in their ability to question defendants given the deficiencies in the disclosure provided, under the circumstances extant, where defendants A-ARON, KIMCO and KIR appear to have made a good faith effort to comply with plaintiffs’ demands and have, in fact, complied with a substantial number of them, it is the judgment of the Court that the most expedient course would be for the parties to proceed with depositions, forthwith, rather than argue about the purported deficiencies in some of defendants’ responses. Additional document demands may be made at the completion of the depositions and further depositions scheduled if required.

While plaintiffs allege that defendant, TARGET CORPORATION, has attempted to frustrate discovery by refusing to turn over documents until a confidentiality agreement has been executed and by failing to move for a protective order, the record establishes that pursuant to the Compliance Order of this Court, dated August 16, 2005, defendant TARGET is not required to respond to plaintiffs’ discovery demands until a confidentiality

agreement is negotiated and executed by all parties. Notwithstanding the representation in the "other additional directives" set forth in the Preliminary Conference Order, dated May 27, 2005, that "all parties agree to agree on the terms and conditions of [a] confidentiality agreement," no such agreement has been reached. Plaintiffs, defendant A-ARON and defendant TARGET have been unable to agree on the wording of the confidentiality agreement and the execution of any such agreement was hampered during the period when TARGET was arranging to retain new counsel to be substituted in place of its original counsel. Now that new counsel for TARGET is in place, it behooves all concerned to proceed in good faith to expeditiously resolve any specific objections or changes to the confidentiality agreement proposed by defendant TARGET, and to do so within twenty (20) days from the date of this order. Within twenty (20) days thereafter, defendant TARGET, shall provide responses to defendants' notices for Discovery and Inspection and counsel shall thereafter promptly schedule a date for its deposition.

While the nature and degree of the penalty to be imposed pursuant to CPLR § 3126 are matters of discretion (*Morano v Westchester Paving & Sealing Corp.*, 7 AD3d 495, 776 NYS2d 83(2nd Dept. 2004), it is well settled that the drastic remedy of striking an answer is inappropriate absent a clear showing that the failure to comply with discovery demands is willful, contumacious, or in bad faith. CPLR § 3126; *Foncette v LA Express*, 295 AD2d 471, 744 NYS2d 429 (2nd Dept. 2002). No such showing has been made herein. Defendants represent that they have provided requested information to the extent possible and have indicated objections to certain of the demands in compliance with CPLR § 3122. Accordingly, it is hereby

ORDERED, that plaintiffs' motion to strike defendants answers is denied; and it is further

ORDERED, that the Examination Before Trial of the parties are directed to be conducted at the courthouse, located at 100 Supreme Court Drive, Mineola, New York, commencing with the deposition of plaintiffs at 9:30 A.M. on March 27, 2006 and continuing thereafter, day to day, with depositions of defendants KIMCO, KIR and A-ARON, until such depositions are completed; and it is further


ORDERED, that the stay of discovery proceedings granted in the initiating Order to Show Cause is vacated; and it is further

ORDERED, that all counsel are directed to appear for a previously scheduled Certification Conference on February 22, 2006 at 9:30 A.M. before the undersigned, at which time the outstanding issues of discovery and the time frame of the action will be discussed.

All further requested relief not specifically granted is denied.

This constitutes the decision and order of the Court.

Dated: February 21, 2006



WILLIAM R. LaMARCA, J.S.C.

ENTERED
FEB 27 2006
NASSAU COUNTY
COUNTY CLERK'S OFFICE

TO: Jay D. Umans, Esq.
Attorney for Plaintiffs
90 Merrick Avenue, 5th Floor
East Meadow, NY 11554

Mound Cotton Wollan & Greengrass, Esqs.
Attorneys for Defendant Target Corporation, Kimco Realty Corp. and Kir Copiague, LLP
855 Franklin Avenue
Garden City, NY 11530

Kaufman Borgeest & Ryan LLP
Attorneys for Defendant A-Aron Security Services, Inc.
200 Summit Lake Drive
Valhalla, NY 10595

calandrino-kimcorealty,#02/discovery