

Fernandez v Evergreen Power, LLC

2020 NY Slip Op 33177(U)

August 10, 2020

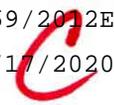
Supreme Court, Bronx County

Docket Number: 23069/2012

Judge: Laura G. Douglas

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX
PART 11 - DCM

Index No. 23069/2012

JUVENAL FERNANDEZ,

Plaintiff,

DECISION/ORDER

-against-

Present:
Hon. Laura G. Douglas
J.S.C.

EVERGREEN POWER, LLC, ASNAT REALTY, LLC,
CLASSIC ENVIRONMENTAL, INC., GRANT MACKAY
DEMOLITION CO., and GRANT MACKAY COMPANY, INC.,

Defendants.

EVERGREEN POWER, LLC, ASNAT REALTY, LLC,
GRANT MACKAY DEMOLITION CO., and GRANT MACKAY
COMPANY, INC.,

Third-Party Action

Third-Party Plaintiffs,

-against-

PJ MARIN CONSTRUCTION, INC.,

Recitation, as required by Rule 2219(a) of the C.P.L.R., of the papers considered in the review of this motion to dismiss plaintiff's complaint:

Papers

Numbered

Notice of Motion by Defendant Classic Environmental, Inc., Good Faith Affirmation of Shantae A. Johnson, Esq. dated September 13, 2017, Affirmation of Shantae A. Johnson, Esq. dated September 13, 2017 in Support of Motion, Memorandum of Law by Shantae A. Johnson, Esq. dated September 13, 2017, and Exhibits ("A" through "V").....	1
Affirmation of Michael F. Kremins, Esq. dated March 19, 2018 in Opposition to Motion and Exhibits ("A" through "C").....	2
Reply Affirmation of Christine-Marie Lauture, Esq. , Esq. dated March 22, 2018, Memorandum of Law in Reply by Christine-Marie Lauture, Esq. dated March 22, 2018 and Exhibits ("W" through "DD" "B").....	3

Upon the foregoing papers and after due deliberation, the Decision/Order on this motion is as

follows:

Defendant Classic Environmental, Inc. ("Classic") seeks an order pursuant to CPLR § 3126 dismissing the plaintiff's complaint as a penalty for his purported failure to provide court-ordered disclosure or an order dismissing his complaint pursuant to CPLR Rule 3216(a) and (e) as a penalty for his failure to prosecute this action. The motion is denied in its entirety.

The plaintiff seeks monetary damages for personal injuries allegedly sustained on November 2, 2011 following a workplace accident in which he fell down a shaft. Classic alleges that no new discovery has taken place in over two years and that the plaintiff has failed to comply with two court orders directing discovery. Classic notes that a 90-day demand pursuant to CPLR Rule 3216(b) was issued by Hon. Elizabeth A. Taylor, J.S.C. on April 12, 2017 directing the plaintiff to resume the prosecution of this action and file a note of issue by July 12, 2017. Classic avers that no note of issue has been filed.

The Preliminary Conference Order dated September 26, 2013 required the plaintiff to furnish a "new" bill of particulars detailing his Labor Law claims and setting forth any CPLR §1602 exceptions that he would rely on. The plaintiff was also directed to provide authorizations for the release of his pharmacy records, collateral sources, physical therapy, treating physicians, income tax returns, worker's compensation, union, prior injury claims, and non-privileged portion of his workers' compensation's attorney file, color copies of all photos, documentation related to his claim for special damages, and complete responses to combined demands. On February 24, 2014, the plaintiff served a bill of particulars upon Classic, who claims that items numbered "7" through "13", "15"- "22", "30", and "33" were non-responsive and vague. Following the plaintiff's supplemental responses on January 22, 2015, Classic contended that much of this disclosure still remained outstanding. Consequently, Classic filed a motion before Hon. Lizbeth Gonzalez, J.S.C. to dismiss the plaintiff's complaint for his failure to so comply. During the pendency of that motion, plaintiff's attorney filed a motion to be relieved as counsel. No opposition had been submitted to the motion to dismiss. The withdrawal motion was granted, resulting in a 60-day stay to permit the plaintiff to retain new counsel.

On January 26, 2017, this case appeared before Hon. Elizabeth A. Taylor, J.S.C. on a status calendar for old, inactive cases. The plaintiff failed to appear. Pursuant to Judge Taylor's request, Classic served a copy of the withdrawal order upon the plaintiff and advised him to appear for a status conference on April 12, 2017. The plaintiff again failed to appear. Consequently, Judge Taylor issued a 90-Day Demand directing that the plaintiff resume the prosecution of this case and file a note of issue

by July 12, 2017. This 90-Day Notice and a letter to appear before Judge Taylor on May 12, 2017 was served upon the plaintiff. While the plaintiff did not file a note of issue, he did appear *pro se* before Judge Taylor on May 12, 2017. After correspondence with Judge Gonzalez, Classic's pending motion to dismiss was denied by Judge Taylor in a Decision/Order dated June 30, 2017 in light of the plaintiff's *pro se* status at the time of that motion. Classic then sent several letters to the plaintiff requesting that he provide the outstanding disclosure, but states that it has received no response.

Opposition to the instant motion is submitted by the plaintiff's new attorney, who formally appeared in this action on or about March 12, 2018. The plaintiff contends that all documents ordered to be disclosed have been provided, that Classic has failed to demonstrate that the plaintiff's conduct was willful and contumacious, and that Classic will incur no prejudice if this case were to be heard on its merits.

The ultimate penalty of dismissal for disclosure-related violations is reserved for those instances where the offending party has been willful or contumacious in frustrating discovery; otherwise, a litigant should be afforded reasonable latitude before his case is dismissed (see *Shure v. New York Cruise Lines, Inc.*, 59 AD3d 292 [1st Dept 2009]). Allowances are made when the offending party is self-represented (see *Corsini v. U-Haul International, Inc.*, 212 AD2d 288 [1st Dept 1995] and *Kaplan v. KCK Studios, Inc.*, 238 AD2d 264 [1st Dept 1997]) or when the misconduct was by the party's attorney (see *Bako v. V.T. Trucking*, 143 AD2d 561 [1st Dept 1988]).

Here, Classic has not satisfied its burden. There is no indication that the plaintiff intentionally deprived Classic of timely and necessary discovery. The plaintiff should not be prevented from litigating his case because his prior attorney missed certain disclosure deadlines or furnished incomplete discovery (see *DeRiggi v. Brady*, 72 AD3d 575 [1st Dept 2010]). Similarly, the plaintiff should not be so harshly penalized for having to seek out a new attorney. The Court notes that the plaintiff did provide a bill of particulars and certain authorizations for the release of medical records both through his previous attorney and his current attorney.

In order to avoid dismissal under the 90-day demand issued pursuant to CPLR § 3216, the plaintiff must demonstrate a reasonable excuse for the failure to serve and file a note of issue and a meritorious cause of action (see *Caraballo v. Montefiore Medical Center*, 89 AD3d 638 [1st Dept 2011]). Here, the plaintiff's affidavit and various verified pleadings sufficiently set forth a meritorious claim that he was injured while at work due to the defendants' negligence in permitting an unsafe hole to exist on the second floor. The plaintiff's failure to file a note of issue is excused by his good faith efforts to

retain new counsel and appearance before the Court at the May 12, 2017 conference. These reveal an intent to proceed with this action.

Under these circumstances and in light of the strong policy to resolve matters on their merits, the motion is denied. Classic is free to pursue other, less severe, remedies, such as preclusion, a missing witness charge, or spoliation sanctions, to address any undue prejudice incurred by any delay in disclosure. A further discovery scheduling conference will be scheduled.

Accordingly, it is hereby

ORDERED that all parties appear for a status conference in Part 11 at 9:30 a.m. on September 21, 2020 as permitted by current public health and safety rules and court directives.

The foregoing constitutes the Decision/Order of this Court.

DATED: August 10, 2020
Bronx, New York



HON. LAURA G. DOUGLAS
J.S.C.