

Hixon v Congregation Beit Yaakov

2006 NY Slip Op 30554(U)

January 18, 2006

Supreme Court, New York County

Docket Number: 120547/01

Judge: Marcy S. Friedman

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

Hon. Mary S. Friedman

Index Number : 120547/2001

PART _____

HIXON, VERINA

vs

CONGREGATION BEIT YAAKOV

INDEX NO. _____

Sequence Number : 004

MOTION DATE _____

RENEWAL

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for _____

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...
Notice of Cross-Motion +
Answering Affidavits — Exhibits _____

PAPERS NUMBERED

1
2-5, 5a, 6, 7
8-12

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion *and cross-motions are*

DECIDED IN ACCORDANCE WITH
ACCOMPANYING DECISION/ORDER.

FILED

JAN 31 2006

CLERK OF THE COURT

Dated: 1/18/06

Mary S. Friedman

J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK
 COUNTY OF NEW YORK – PART 57

PRESENT: Hon. Marcy S. Friedman, JSC

_____ x

VERINA HIXON,

Plaintiff,

- against -

CONGREGATION BEIT YAAKOV, et al.,

Defendants.

Index No.: 120547/01

DECISION/ORDER

_____ x

In this property damage action, plaintiff Verina Hixon moves for “leave to renew and reargue an order of this court dated April 28, 2005 precluding [her] from testifying and offering evidence in her direct case.” Defendants Charles Mallea and MSM Architects PC (collectively “Mallea”) cross-move for sanctions. Defendant MRC II Contracting, Inc. (“MRC”) cross-moves, pursuant to CPLR 3216, to dismiss the complaint, based on the preclusion order. Defendants Robert Silman Associates, P.C. and The Office of Thierry Despont (collectively “Silman”), and defendant Congregation Beit Yaakov Ltd. (“Congregation”) each cross-move, pursuant to CPLR 3216, to dismiss the complaint and any cross-claims, based on the preclusion order.¹ Defendant Barney Skanska also cross-moves for dismissal on this ground and on the merits.

It is undisputed that, prior to this court’s issuance of a conditional preclusion order, plaintiff Hixon violated three discovery orders by failing to appear for a deposition. More particularly, by preliminary conference order dated January 8, 2004, plaintiff, and the plaintiffs in

¹A separate branch of Congregation’s motion for discovery from a co-defendant was withdrawn prior to submission of the motion.

several related actions, were required to complete their depositions by August 1, 2004. A compliance conference order, dated July 29, 2004, extended the plaintiffs' time until September 20, 2004 to appear for their depositions. It is further undisputed that while the other plaintiffs commenced their depositions, plaintiff Hixon failed to do so. A compliance conference order, dated October 28, 2004, granted a final extension for completion of all of the plaintiffs' depositions until November 22, 2004. Hixon again was not produced. At a compliance conference on March 10, 2005, the court issued a conditional preclusion order which provided: "[Plaintiff] Hixon will be deposed by 4/11/05 or be precluded from testifying as to damages."

The April 28, 2005 order, which is the subject of this motion, was not itself the preclusion order but was made on the record after hearing of an application by plaintiff to vacate the March 10, 2005 order. The court held that the March 10 conditional preclusion order was self-effectuating, and that plaintiff "wholly failed to demonstrate good cause for relief" from that order. (Transcript of April 28, 2005 order ["Tr."] at 15.)

Plaintiff does not argue on the instant motion that the court erred in issuing the March 10 conditional preclusion order. Nor does plaintiff dispute that the order was self-effectuating upon plaintiff's failure to submit to a deposition by April 11, the date specified in the order. Rather, plaintiff claims that her failure to comply with the March 10 order should have been excused and that the April 28 order, denying plaintiff's application to vacate the order of preclusion, should be set aside. Plaintiff's motion will accordingly be deemed a motion to renew and reargue the application to vacate that was determined by the April 28 order. Leave to renew and reargue is granted in the interests of justice. (See Tishman Constr. Corp. v City of New York, 280 AD2d 374, 376-377 [1st Dept 2001].)

It is well settled that a party will not be relieved of failure to comply with a conditional order of preclusion “in the absence of a reasonable excuse for the failure to comply and an affidavit of merit.” (Tejeda v 750 Gerard Props. Corp., 272 AD2d 124 [1st Dept 2000]. See Seven Acre Wood St. Assocs. v Petruccelli Eng’g, 3 AD3d 396 [1st Dept 2004]; Barriga v Sapo, 250 AD2d 795 [2d Dept 1998].)

Even if the “new evidence” that is proffered on this motion is considered, plaintiff fails to demonstrate grounds for relief from the March 10 order. Plaintiff does not deny that she was not produced for a deposition by the April 11 deadline set in that order, but claims that she was unable to appear because she underwent foot surgery in Switzerland on April 8. At the hearing of plaintiff’s April 28 application to vacate the preclusion order, plaintiff produced an unnotarized medical report, dated April 21, 2005 (Ex. G to plaintiff’s motion), stating that plaintiff was an inpatient at a Swiss clinic from April 8 to April 9 for excision and reconstruction of a “deformed, necrotic Metatarsalkopf II left foot with a free fragment.” This court held on the record on that date that this document was not competent evidence because it was not notarized, and that, even if it were competent, it would be insufficient to demonstrate an excuse for plaintiff’s failure to appear for the deposition because “[t]here is no showing that this was surgery that was required to be scheduled before the April 11 deposition date, nor is there any showing that Ms. Hixon could not have traveled to the United States for a deposition prior to the surgery.” (Tr. at 15.) Noting that the court would not interfere with a need for medical treatment, the court concluded, based on the submitted documents, that “there is no showing at all that this deposition could not have been conducted without interfering with Ms. Hixon’s health needs.” (Id. at 16.)

Significantly, although the court expressly identified the deficiencies in plaintiff's proof as to her excuse for not submitting to a deposition by the date set in the conditional preclusion order, the additional evidence that plaintiff submits on the instant motion continues to fail to make any showing that there were any medically necessary reasons for her to undergo the surgery on the April 8 date. The medical report that plaintiff now provides (Ex. C to P.'s Motion) is also unnotarized. In any event, the report does not so much as assert that the surgery was required to be scheduled before the April 11 deposition date. Nor does it state the date on which plaintiff became unable to travel. Plaintiff Hixon's affidavit adds no support for her claim that she was unable to appear for a deposition by April 11, and notably omits any claim that the surgery was needed on an emergency basis, or even that she felt too ill to travel so that she could appear for a deposition prior to the surgery.

The court does not lightly reject the surgery as a basis for relief from the preclusion order. It does so under the unique circumstances of this action in which plaintiff's continued failure to make any showing that the timing of the surgery was not elective, coupled with her wholly unexplained violation of three prior discovery orders, demonstrate that her non-compliance with the March 10 conditional preclusion order was willful.

In addition, plaintiff does not make any showing of the merit of her claim. The absence of any evidentiary detail as to the merits is of particular concern, given that plaintiff has brought a separate action in which she alleges that the same property was damaged during an overlapping time period by a cause other than that at issue in the instant action.

Contrary to plaintiff's contention, she is not entitled to relief from the preclusion order based on the mere facts that she sought only a short extension of the deposition date set in the

preclusion order, and that defendants would not have been prejudiced by this short delay. This contention ignores that plaintiff's burden is to demonstrate both a reasonable excuse for her non-compliance with the preclusion order and the merit of her claim. Moreover, even a short extension of the April 11 date would not have been de minimis under these circumstances in which plaintiff had already delayed her deposition for over eight months. The court is unpersuaded that it has misapprehended applicable law, and adheres to its April 28 order denying relief from the preclusion order.

The cross-motions of defendants MRC, Silman, and Congregation to dismiss based on the preclusion order must, however, be denied. The preclusion order prevents plaintiff Hixon from testifying as to damages. The court cannot say on this record that she will be unable to present other competent proof of damages. (Compare Barriga v Sapo, 250 AD2d 795, supra [summary judgment dismissing complaint proper where preclusion order prohibited plaintiffs from offering any evidence at trial as to damages].) The cross-motion of Mallea for sanctions is also without merit.

The cross-motion of Barney Skanska seeks dismissal of the complaint in part on the ground that it was not present at the work site until seven months after the premises was allegedly damaged. Plaintiff submits no opposition to defendant's prima facie showing to that effect. This motion will accordingly be granted.

It is accordingly hereby ORDERED that plaintiff's motion is granted to the following extent: Leave to renew and reargue is granted and, upon renewal and reargument, the court adheres to its April 28, 2005 decision and order; and it is further

ORDERED that the cross-motions of defendants Mallea, MRC, Silman, and

Congregation are denied; and it is further

ORDERED that the cross-motion of defendant Barney Skanska is granted to the extent of dismissing the complaint and all cross-claims against it; and the Clerk shall enter judgment accordingly; and it is further

ORDERED that the claims against the remaining defendants are severed and shall continue.

This constitutes the decision and order of the court.

Dated: New York, New York
January 18, 2006



MARCY FRIEDMAN, S.C.

FILED
JAN 31 2006