

Calder v Cofta

2007 NY Slip Op 30215(U)

March 8, 2007

Supreme Court, Queens County

Docket Number: 0014684

Judge: Patricia P. Satterfield

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Short Form Order

NEW YORK STATE SUPREME COURT - QUEENS COUNTY

Present: HONORABLE PATRICIA P. SATTERFIELD IAS TERM, PART 19

Justice

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RYAN CALDER, an infant by Father and Natural

Index No: 14684/04

Guardian, HENRY CALDER and HENRY
CALDER, individually,

Motion Date: 12/6/06

Motion Cal. No: 6

Plaintiffs,

-against-

GERALD H. COFTA,

Defendant.

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The following papers numbered 1 to 10 read on this motion for an order by defendant Gerald H. Cofta, pursuant to sections 3212 and 3126 of the CPLR, dismissing the complaint upon the ground that plaintiff is precluded from offering evidence at trial for failing to fully submit to physical examinations pursuant to a stipulation and prior court orders, or, in the alternative, precluding plaintiff from offering any medical evidence at the time of trial, and upon preclusion, for an order dismissing the matter.

	PAPERS NUMBERED
Notice of Motion-Affidavits-Exhibits.....	1 - 4
Affirmation in Opposition-Exhibits.....	5 - 7
Reply-Exhibits.....	8 - 10

Upon the foregoing papers, it is ordered that the motion is disposed of as follows:

The is an action for personal injuries allegedly sustained by the infant plaintiff as a result of an accident between his scooter and the motor vehicle owned and operated by defendant Gerald H. Cofta (“defendant”) at or near 45-25 48th Street, Woodside, New York, on May 12, 2003. Notwithstanding several court orders, beginning with the Preliminary Conference order dated February 15, 2005; continuing with the Compliance Conference order dated January 11, 2006, and several “so ordered” stipulations dated May 17, 2006; and concluding with a order dated August 21, 2006 (Schulman, J.), directing plaintiff to appear for a physical examination by defendant’s doctor, plaintiff has not submitted to a full physical examination. The September 20, 2006 medical report of Dr. Leigh Jay Lachman, a plastic and reconstructive surgeon, who examined plaintiff with respect to his complaints of nasal deformity and facial pain, set forth that

plaintiff refused to allow examination of his ears, inside of his nose, throat or neck, and refused to permit a photograph to be taken. It is upon the foregoing that defendants moves to dismiss the complaint upon the ground that plaintiff is precluded from offering evidence at trial for failing to fully submit to examinations pursuant to a stipulation and prior court orders, or, in the alternative, an order precluding plaintiff from offering any medical evidence at the time of trial, and upon preclusion, for an order dismissing the matter.

In opposition, counsel for plaintiff states that “[w]ithout any court order permitting photographs of my client’s nose or body my office denied the doctor’s request and specifically informed the doctor he would require a court order for permission to take photos.” Plaintiff’s counsel also argues that the attempt to examine inside the plaintiff’s nose, ears, throat and neck was “invasive” and “dangerous to the infant’s health.” In rebuttal, counsel for defendant argues that the very physical examination sought to be conducted by defendant’s doctor was conducted by plaintiff’s Otolaryngologist, Dr. Daniel S. Arick, as set forth in his report of November 1, 2005. Defendant concludes:

Plaintiff’s refusal to allow Dr. Lachman to perform a complete examination can only be construed as a failure to appear for an examination. As such, plaintiff is precluded from offering medical evidence at the time of trial as per Judge Schulman’s order dated August 21, 2006.

Justice Schulman’s order incorporated by reference, the stipulation of the parties that “plaintiff shall appear for IME within 45 days.” With respect to that outstanding discovery, the August 21, 2006 order set forth that “the failure of a party to comply with said stipulation will result in that party being precluded from offering evidence at trial with respect to those items of discovery outlined in the stipulation that have not been provided, without further need of application to this court.”

It is well settled that the stipulation, which effectively became “so ordered” by its inclusion in Justice Schulman’s August 21, 2006 order, represents a conditional order of preclusion, which became absolute upon plaintiff’s failure to comply. Koslosky v. Khorramian, 31 A.D.3d 716 (2d Dept. 2006); Echevarria v. Pathmark Stores, Inc., 7 A.D.3d 750 (2d Dept. 2004); Hall v. Penas, 5 A.D.3d 549 (2d Dept. 2004); Michaud v. City of New York, 242 A.D.2d 369 (2d Dept. 1997); Clissuras v. Concord Vil. Owners, 233 A.D.2d 475 (2d Dept. 1996). For this Court not to impose the agreed-upon sanction when plaintiff did not comply with the stipulation would constitute error. See, Ferrantello v. St. Charles Hospital. and Rehabilitation Center, 249 A.D.2d 263 (2d Dept. 1998); Smith v. City of New York, 239 A.D.2d 337 (2d Dept. 1997). In order to avoid the harsh impact of preclusion, the defaulting party is required to demonstrate a reasonable excuse for the failure to timely comply, and the existence of a meritorious claim. Hall v. Penas, *supra*; Koslosky v. Khorramian, *supra*; Clissuras v. Concord Village Owners Inc., *supra*; Tirone v. Staten Island University Hosp., 264 A.D.2d 415; Fellicciardi v. Town of Brookhaven, 205 A.D.2d 495, 496 (2d Dept. 1994) . Here, plaintiff did neither. Since the order of preclusion prevents him from making a prima facie case, the complaint must be dismissed. See, Lewin v. County of Suffolk, 18 A.D.3d 621 (2d Dept. 2005); Koslosky v. Khorramian, *supra*; Jenkinson v. Naccarato, 286 A.D.2d 420 (2d Dept. 2001); Tirone v. Staten Island University Hosp., 264 A.D.2d 415 (2d Dept. 1999); Michaud v. City of New York, *supra*; Clissuras v. Concord Vil. Owners, *supra*.

Accordingly, the motion by defendant requesting an order dismissing the complaint is granted, and the complaint hereby is dismissed.

Dated: March 8, 2007

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J.S.C.