

Magito v Manley

2007 NY Slip Op 33729(U)

November 16, 2007

Supreme Court, New York County

Docket Number: 0105863/2003

Judge: Eileen A. Rakower

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

PRESENT: Rakower

PART 5

Index Number : 105863/2003
MAGITO, ROBERT
 vs.
MANLEY, EDWARD
 SEQUENCE NUMBER : 001
 COMPEL DISCLOSURE

INDEX NO. _____
 MOTION DATE _____
 MOTION SEQ. NO. _____
 MOTION CAL. NO. _____

this motion to/for _____

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...
 Answering Affidavits — Exhibits _____
 Replying Affidavits _____

PAPERS NUMBERED

1

2, 3

4

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

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

FILED

NOV 20 2007

DECIDED IN ACCORDANCE WITH ACCOMPANYING DECISION / ORDER

CLERK'S OFFICE NEW YORK

Dated: 11/16/07

EILEEN A. RAKOWER
J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate DO NOT POST REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 5

-----X
ROBERT MAGITO,

Plaintiff,

Index No.
105863/05

- against -

Mot. Seq.: 001

DECISION/ORDER

EDWARD MANLEY, JOHN A.M. MANLEY, OTTO
E.M. MANLEY, LINCOLN ORENS, as Trustee under
agreement dated December 5, 1950 with
MARGUERITA M. MANLEY for the benefit of
FRANCES MANLEY and THE CITY OF NEW YORK,

Defendants.
-----X

HON. EILEEN A. RAKOWER

Plaintiff brings this action for personal injuries allegedly sustained when he tripped and fell on the sidewalk adjacent to 91 University Place New York, New York on May 28, 2002. Plaintiff now moves to compel defendants Edward Manley, John A.M. Manley, Otto E.M. Manley, Lincoln Orens, as Trustee under agreement dated December 5, 1950 with Marguerita M. Manley for the benefit of Frances Manley ("Manley") and the City of New York ("City") to produce requested discovery or, if the discovery is not produced, to strike Manley and City's answers. Both Manley and City oppose plaintiff's motion.

Plaintiff, in support of his motion, submits a so-ordered stipulation dated May 29, 2007; a so-ordered stipulation dated August 14, 2007 ("orders") and a "Second Notice for Discovery and Inspection" ("D&I") dated August 20, 2007. Plaintiff argues that Manley and City have failed to respond and/or comply with the two orders and the D&I demands.

City, in opposition, argues that it has fully complied with the orders and has responded to plaintiff's D&I demands. The combined orders direct the City to produce the following items: (1) a copy of the Big Apple Pot Hole map and (2) a

courtesy copy of City's response to the Case Scheduling Order. The May 29, 2007 order schedules City's EBTs for June 1, 2007 and the August 14, 2007 order reschedules the EBTs for November 7, 2007. City submits its "Response to the Compliance Conference Orders Dated May 29, 2007 and August 14, 2007." Appended to the response is a copy of the Big Apple Map and a copy of the response to the Case Scheduling Order. City submits an affidavit of service showing that plaintiff was served with the above items on October 22, 2007. This motion was fully submitted on November 5, 2007, prior to City's scheduled EBT.

The May 29, 2007 order directs Manley and plaintiff to produce a witness for EBT on June 11, 2007 and to designate an IME within 45 days of plaintiff's EBT. The August 14, 2007 order directs Manley to provide a copy of the "lease for tenant." Manley claims, and plaintiff does not dispute, that it produced its witness on June 11, 2007 and it submits a letter it sent to plaintiff dated July 3, 2007 designating the IME doctor. Further, Manley submits a copy of its "Response to Plaintiff's Letter Dated June 13, 2007," which was served on August 10, 2007. Appended to the response is a copy of the requested lease.

CPLR §3126 states:

If any party, or a person who at the time a deposition is taken or an examination or inspection is made is an officer, director, member, employee or agent of a party or otherwise under a party's control, refuses to obey an order for disclosure or wilfully fails to disclose information which the court finds ought to have been disclosed pursuant to this article, the court may make such orders with regard to the failure or refusal as are just, among them:

(3) an order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or any part thereof, or rendering a judgment by default against the disobedient party.

Pursuant to CPLR §3126, a court may impose sanctions when a party willfully fails to disclose information which the court finds ought to have been disclosed. The sanction of striking a party's answer is warranted when a party repeatedly and persistently fails to comply with several disclosure orders issued by the court. (*Yoon v. Costello*, 29 A.D.3d 407[1st Dept. 2006]). Further, striking the answer is warranted

[* 4]
when a party fails to demonstrate a reasonable excuse for their delay or default. *Id.* at 79.

Both City and Manley have shown that they have complied with the two court discovery orders and that they have served proper responses to plaintiff's D&I demands. The motion is not being considered as to City's deposition, as it is premature.

Wherefore it is hereby

ORDERED that plaintiff's motion is denied.

This constitutes the Decision and Order of this Court.

All other relief requested is denied.

DATED: November 16, 2007



EILEEN A. RAKOWER, J.S.C.

FILED
NOV 20 2007
COUNTY CLERK'S OFFICE
NEW YORK