

Paulino v City of New York

2007 NY Slip Op 33731(U)

November 16, 2007

Supreme Court, New York County

Docket Number: 0114291/2004

Judge: Eileen A. Rakower

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

PRESENT: RAKOWER
Justice

PART 5

Index Number : 114291/2004
PAULINO, WILFREDO
vs.
CITY OF NEW YORK
SEQUENCE NUMBER : 002
STRIKE ANSWER

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

this motion to/for _____

PAPERS NUMBERED
1
2
3

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

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):

DECIDED IN ACCORDANCE WITH
ACCOMPANYING DECISION / ORDER

FILED

NOV 20 2007
COUNTY CLERK'S OFFICE
NEW YORK

Dated: 11/16/07

[Signature]

EILEEN A. RAKOWER

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
WILFRED PAULINO,

Plaintiff,

Index No.
114291/04

- against -

Mot. Seq.: 002

DECISION/ORDER

THE CITY OF NEW YORK, POLICE DETECTIVE
SALVATORE ZISA and other police officers whose
identities are yet unknown,

Defendants.
-----X

HON. EILEEN A. RAKOWER

Plaintiff brings this action for alleged false arrest, malicious prosecution, false imprisonment, violation of plaintiff's civil rights under 42 USC §1983, intentional torts and negligence arising from an arrest which occurred at the corner of 144th Street and Broadway New York, New York on July 29, 2002. Plaintiff now moves to strike defendant the City of New York's ("City") answer pursuant to CPLR 3126. City opposes the motion.

At issue here is the deposition of the arresting officer, Salvatore Zisa. ("Zisa") An order produced after a compliance conference which was held on June 12, 2007 stated, in relevant part:

City to produce either PO Zisa or another officer w/knowledge of plaintiff's arrest for EBT on 9/3/07 @52 Duane St. @10 AM.

The EBT was scheduled in error as September 3, 2007 was a holiday. Alternatively, plaintiff wanted Zisa produced on Friday, August 31, 2007. When City failed to produce Zisa on that date, the parties appeared before the court and the court issued a conditional order which stated, in relevant part:

City is to produce PO Zisa on 9/4/07 at 11:30 a.m. at 52 Duane Street, 4th Floor, for a deposition, to be held on that day through completion.

* 3]

Failure to produce PO Zisa as noted above will be deemed WILLFUL & CONTUMACIOUS.

City produced Zisa on September 4, 2007 but plaintiff claims that he was a know nothing witness and that City is in violation of the June 12, 2007 order because it directed City to produce either PO Zisa or another officer *with knowledge* of plaintiff's arrest. Plaintiff argues that Zisa was not properly prepared for the EBT and that the only document pertaining to plaintiff's arrest that was shown to Zisa was the arrest report. Plaintiff appends Zisa's deposition transcript to his motion:

Q: . . . am I correct, that if I were to ask you any questions concerning Wilfredo Paulino and what transpired on July 29, 2002, as you sit here today, your answer would be I have no specific recollection; is that correct?

A: I have no personal recollection of the case.

Q: So then, your answer would be yes to that, right?

A: Yes. (Zisa Deposition Page 23, Lines 8-20).

. . .

Q: Mr. Rosenberg informed me that he showed you some documents in order to see if he could refresh your recollection about the events of that evening . . . is that correct?

A: It's correct.

Q: Do you remember what documents you were shown?

A: I was shown one particular document, an arrest printout . . .

Near the end of the deposition, plaintiff's attorney asked Zisa if he was in "pain and discomfort" and ended the deposition abruptly "in view of the apparent discomfort that the witness is in . . . and the answers that have been given."

A municipality has the right to choose its first witness and determine which of its officers with knowledge of the facts may appear for pretrial examination. (Colicchio by Colicchio v. City of New York, 181 A.D.2d 528[1st Dept. 1992]). 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]).

[* 4]

Here, City complied with court orders when it produced Zisa, the arresting officer, on the date ordered by the court. Further, City is within its rights to select which methods are used to prepare its own witness. If plaintiff wishes to examine additional witnesses, it is his burden to establish that Zisa's testimony was insufficient to produce testimonial and documentary evidence which is material and necessary to the prosecution of the action. (Id. at 529).

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.
HON. EILEEN A. RAKOWER

FILED
NOV 20 2007
CLERK'S OFFICE
NEW YORK