

Capogrosso v Metropolitan Dental Assoc.

2007 NY Slip Op 34533(U)

February 22, 2007

Supreme Court, New York County

Docket Number: 103294/05

Judge: Eileen Bransten

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

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ELEANOR CAPOGROSSO,

Plaintiff,

-against-

Index No. 103294/05
Motion Date: 1/30/07
Motion Seq. No.: 004

METROPOLITAN DENTAL ASSOCIATES, D.D.S.,
225 BROADWAY, P.C., STEVEN I. MITGANG, D.D.S.,
PASQUALE SCELSO, D.D.S.,

Defendants.

FILED

FEB 27 2007

NEW YORK
COUNTY CLERK'S OFFICE

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PRESENT: EILEEN BRANSTEN, J.

Pursuant to CPLR 3126, defendant Paul Cohen, D.D.S. d/b/a Metropolitan Dental Associates, 225 Broadway, P.C. ("Metropolitan") moves for dismissal of the action commenced by plaintiff Eleanor Capogrosso ("Ms. Capogrosso"). Defendants Pasquale Scelso, D.D.S. ("Dr. Scelso") and Steven I. Mitgang, D.D.S. ("Dr. Mitgang") request dismissal of plaintiff's case, but they do not move or cross-move for such relief. Ms. Capogrosso opposes dismissal.

Background

In this dental malpractice action – commenced March 10, 2005 – Ms. Capogrosso alleges that defendants negligently provided dental treatment to her from 2000 to 2004, causing injuries to her teeth and gums.

On October 25, 2005, the parties appeared in Court for a preliminary conference, at which time they agreed and the Court ordered plaintiff's deposition to be taken on or before

January 28, 2006. Affirmation in Support of Motion (“Aff.”), at ¶ 4. The Court also directed plaintiff to file the Note of Issue by June 30, 2006. Aff., Ex. C, at 4,6.

Two months later, on January 17, 2006, the parties met for a compliance conference; they had not completed plaintiff’s deposition and represented that they were unable to do so by the Court-ordered date. Aff., at ¶ 4. Thus, the Court reluctantly adjourned the date for plaintiff’s deposition to March 23, 2006. *Id.*; Aff., Ex. D, at 1.

On March 23, 2006, counsel for the three defendants appeared prepared to depose Ms. Capogrosso. Aff., at ¶ 5. After waiting for 90 minutes, however, they learned that plaintiff’s counsel and Ms. Capogrosso would not be attending. *Id.*

Two weeks later, on April 4, 2006, the parties appeared for a second compliance conference. Aff., at ¶ 6. Again, they had not complied with their Court-ordered disclosure schedule. *Id.* This time, the Court directed plaintiff to appear for a deposition before April 24, 2006 (three weeks later). *Id.*

On May 23, 2006, the parties appeared for a conference and yet again informed the Court that plaintiff had still not appeared for deposition. Aff., at ¶ 7. The Court admonished plaintiff to follow Court Orders and adjourned the deposition to June 27, 2006 (more than one month later). Aff., Ex. F, at 1. Nonetheless, plaintiff did not appear for her deposition before June 27, 2006 as scheduled nor did she obtain Court permission for an adjournment. Aff., at ¶ 8.

On July 11, 2006, James L. Lutfy (“Mr. Lutfy”) of Lutfy & Santora moved by Order to Show Cause to be relieved as plaintiff’s counsel because of her alleged failure to cooperate in prosecution of the action. Affirmation in Opposition (“Opp.”), at 2. The Court directed personal service of the Order to Show Cause by July 18, 2006 and oral argument of the motion on August 15, 2006. By Order dated August 16, 2006, the Court granted Lutfy & Santora’s motion to withdraw as counsel and gave plaintiff 60 days (two months) to find new counsel. Aff., at ¶ 10. The Court further ordered Ms. Capogrosso to appear with or without counsel on October 17, 2006 for a compliance conference. *Id.*

On October 17, 2006, Ms. Capogrosso appeared and advised the Court that she was unable to obtain new counsel – allegedly because Lutfy & Santora held a lien on the case. Aff., at ¶ 11. Ms. Capogrosso then moved by Order to Show Cause for an order discharging that lien. The Court denied the motion. Nonetheless, Ms. Capogrosso was given one last 45-day extension (more than six additional weeks beyond the two months already provided) to find new counsel.

On December 5, 2006, Ms. Capogrosso appeared in Court without counsel for a compliance conference. Aff., at ¶ 12. The Court ordered Ms. Capogrosso to proceed with her deposition, with or without counsel, on or before December 15, 2006 (more than one year and nine months after the action was commenced) and directed that all deposition dates were final and were “not to be adjourned for any reason.” Aff., Ex. K, at 1. The Order further

stated that, “Ms. Capogrosso is to proceed with disclosure with or without an attorney as directed on the record * * *. Even if plaintiff does not have an attorney, she is to appear for the scheduled EBTs or face dismissal of her case.” Aff., Ex. K, at 2. Nonetheless, Ms. Capogrosso informed defense counsel that, in flagrant violation of this Court’s Orders, she would not appear for her deposition. Aff., at ¶ 13. Indeed, she failed to appear. *Id.*

Metropolitan now moves for dismissal of plaintiff’s action for failure to comply with Court Orders directing her to appear for deposition. Dr. Scelso and Dr. Mitgang also request dismissal of plaintiff’s case, but do not move or cross-move for such relief.

In opposition, Ms. Capogrosso – a New York attorney – argues that she failed to appear for her deposition because she does not have an attorney. Opp., at ¶ 2.

Analysis

Pursuant to CPLR 3126, a court may dismiss the action of any party who willfully “refuses to obey an order for disclosure” or “unreasonably neglects to proceed generally in an action.” *Kihl v. Pfeffer*, 94 N.Y.2d 118, 121 (1999) (dismissed for plaintiff’s repeated failure to respond to interrogatories); *John R. Souto Co., Inc. v. Coratolo*, 293 A.D.2d 288 (1st Dept. 2002) (dismissed for plaintiff’s failure to respond to defendants’ requests to depose him); *see also, Raymond v. Rutherford*, 12 A.D.3d 355 (2d Dept. 2004) (dismissed for plaintiff’s failure to provide authorizations and appear for a medical examination); *Wiltos*

v. 1230 Park Owners, Inc., 1 A.D.3d 353 (2d Dept. 2003) (dismissed for plaintiff's failure to appear for deposition); *Russell v. B & B Indus., Inc.*, 309 A.D.2d 914, 915 (2d Dept. 2003) (dismissed for plaintiff's failure to appear for an independent examination); *Furniture Fantasy, Inc. v. Cerrone*, 154 A.D.2d 506, 507 (2d Dept. 1989) (dismissed for plaintiff's failure to appear for deposition).

This Court has issued numerous Orders directing Ms. Capogrosso to appear for her deposition. Specifically, the Court directed plaintiff to be deposed by January 28, 2006, then by March 23, 2006, then by April 24, 2006, then by June 27, 2006, and finally, on or before December 15, 2006 (five deposition deadlines were mandated). Indeed, Ms. Capogrosso was explicitly directed on the record to appear for her scheduled deposition and was admonished that failure to appear would result in dismissal of her case. Nonetheless, after numerous conferences and several admonitions, plaintiff has declined to appear for questioning at her deposition.

The Court of Appeals – this state's highest tribunal – has made crystal clear:

“If the credibility of court orders and the integrity of our judicial system are to be maintained, a litigant cannot ignore court orders with impunity.” *Kihl v. Pfeiffer*, 94 N.Y.2d, at 123. “Litigation cannot be conducted efficiently if deadlines are not taken seriously, and * * * disregard of deadlines should not and will not be tolerated.” *Andrea v. Arnone*, 5 N.Y.3d 514, 520 (2005).

Given the Court's warning to plaintiff and the perfectly plain language of the final order directing the deposition to go forward, the Court must infer that Ms. Capogrosso's failure to comply is willful, contumacious and deliberate. Thus, Metropolitan's motion to dismiss the action is granted. *Wiltos v. 1230 Park Owners, Inc.*, 1 A.D.3d, at 353; *Vanalst v. City of New York*, 302 A.D.2d 515 (2d Dept. 2003).

Additionally, despite Dr. Scelso's and Dr. Mitgang's failure to properly move for dismissal, the Court will *sua sponte* dismiss plaintiff's claims against them because, just as is the case with Metropolitan, Ms. Capogrosso has willfully failed to prosecute her case against Dr. Scelso and Dr. Mitgang as well. *Waterman v. County of Westchester*, 274 A.D.2d 513 (2d Dept. 2000) (on successful CPLR 3126 motion to dismiss by some defendants, trial court properly *sua sponte* dismissed complaint as to remaining defendants), *lv. denied*, 95 N.Y.2d 768; *see also, Goldstein v. CIBC World Mkts. Corp.*, 30 A.D.3d 217 (1st Dept. 2006) (affirming *sua sponte* dismissal based on plaintiff's pattern of noncompliance with court orders); *Macias v. New York City Tr. Auth.*, 240 A.D.2d 196 (1st Dept. 1997) (affirming *sua sponte* dismissal for plaintiff's failure to appear for deposition).

Accordingly, it is

ORDERED that Metropolitan's motion to dismiss is granted and the complaint is dismissed as against it; and it is further

ORDERED that Ms. Capogrosso's action against Dr. Scelso and Dr. Mitgang is dismissed *sua sponte*. The Clerk is directed to enter judgment in favor of all defendants.

This constitutes the Decision and Order of the Court.

Dated: New York, New York
February 22, 2007

ENTER



Hon. Eileen Bransten

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