Short Form Order

SUPREME COURT - STATE OF NEW YORK
TRIAL TERM, PART 22 NASSAU COUNTY

PRESENT:
Honorable Karen V. Murphy
Justice of the Supreme Court

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INOCENCIO INFANTE,

Plaintiff(s),

-against-

BRESLIN REALTY DEVELOPMENT CORP. and MODELL'S SPORTING GOODS, INC.,

Defendant(s).

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BRESLIN REALTY DEVELOPMENT CORP.,

Third-Party Plaintiff(s),

-against-

TOYS "R" US d/b/a BABIES "R" US and CENTIMARK CORPORATION,

Third-Party Defendant(s).

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Index No. 12387/06

Motion Submitted: 2/20/08
Motion Sequence: 001, 002, 003

The following papers read on this motion:

Notice of Motion/Order to Show Cause.....XXX
Answering Papers.....XXX
Reply.....XXX
Briefs: Plaintiff's/Petitioner's.....
Defendant's/Respondent's.....

The present action was commenced for personal injuries allegedly sustained by Plaintiff, Inocencio Infante (hereinafter "Infante") in a work related trip and fall accident which occurred on August 5, 2003 at premises owned by Defendant Breslin Realty Development Corp. (hereinafter "Breslin") and rented by Defendant Modell's Sporting Goods, Inc. (hereinafter "Modell's"). Plaintiff alleges that his injuries were sustained by the negligence and violation of Labor Law Sections 200, 240, 240(1), 241 and 241(6) as well as violation of numerous sections of the Industrial Code (12 NYCRR §23). Thereafter, Breslin by third party summons and complaint impleaded third-party defendants Toys "R" Us (hereinafter "Toys") and Centimark Corporation (hereinafter "Centimark").

Defendant Breslin moves this Court, unopposed, for an Order pursuant to CPLR §3126 dismissing the complaint for Plaintiff's failure to comply with the Defendant's demand for discovery dated September 6, 2006 and for Plaintiff's failure to comply with the Preliminary Conference Order dated April 12, 2007.

The demand required Plaintiff to present certain information to the Defendants pursuant to CPLR §3101. This information was to be provided by September 27, 2006. Plaintiff has failed to comply with this demand. Pursuant to the Preliminary Conference Order date April 12, 2007, Plaintiff was directed to provide Defendants with a response to their Demand for Bill of Particulars within 30 days, as well as to provide Defendant with HIPAA Compliant authorizations for Plaintiff's healthcare providers within 30 days.

Plaintiff's Response to their Demand for Bill of Particulars, dated May 16, 2007, was received by the attorney for the defendant on or about May 21, 2007. Counsel for Plaintiff advised that certain information would be provided under separate cover, including the name of plaintiff's employer, plaintiff's job description, as well as the amount of time plaintiff was confined to bed and home after his accident. In response to Bill of Particulars item #26, counsel for the plaintiff indicated that "plaintiff was not treated in a hospital for his injuries he sustained as a result of this accident." In the Plaintiff's supplied records from Jimmy U. Lim, MD, however, the doctor stated that Plaintiff Infante "was seen in the emergency room and was told there was no fracture." Furthermore, Plaintiff has failed to provide the defendant's request for HIPAA Compliant authorizations for Plaintiff's medical records from Jimmy U. Lim, MD, South Shore MRI, Michael Trimba, MD, Plaintiff's workers compensation records from The State Insurance Fund, Plaintiff's hospital records which Dr. Lim indicates plaintiff went to after his accident, and Plaintiff's employment records from his as of yet unidentified employer.

While this Court recognizes the preference for matters to be decided on their merits, when, as is the case herein, there is a clear showing that the failure to comply with discovery demands is willful, contumacious, or in bad faith, a dismissal is appropriate. (***Devito v. J &***

J Towing, Inc., 17 A.D.3d 624, 794 N.Y.S.2d 74 [2d Dept., 2005]). Furthermore, willful and contumacious conduct can be inferred from a party's repeated failures to respond to discovery demands and the court's orders to comply with such demands. (***Id.; Maiorino v. City of New York,*** 39 A.D.3d 601, 834 N.Y.S.2d 272 [2d Dept., 2007]).

It is undisputed that Plaintiff failed to comply with the discovery schedule set by the Preliminary Conference Order of this Court. The Plaintiff has failed to supply all the necessary information requested by the Defendant, including the HIPAA Compliant authorizations for the Plaintiff's medical records. Moreover, the Plaintiff has not responded to the Defendant's motion to dismiss the complaint.

Plaintiff's willful and contumacious conduct can be inferred from its failure to either comply with or object to the defendant's discovery demand (See, ***Ranfort v. Peak Tours***, 250 A.D.2d 747, 672 N.Y.S.2d 918 [2d Dept., 1998]), coupled with its failure to offer any excuse for not responding (See, ***Porreco v. Selway***, 225 A.D.2d 752, 640 N.Y.S.2d 171 [2d Dept., 1996]). Thus, Defendant Breslin has satisfied its initial burden of proving willfulness, and the burden shifted to the plaintiff to offer a reasonable excuse for its failure to comply (See, ***Furniture Fantasy v. Cerrone***, 154 A.D.2d 506, 546 N.Y.S.2d 133 [2d Dept., 1989]). Plaintiff failed to respond to Defendant's motion to dismiss the complaint, and offered no excuse to the Court for its failure to comply with the outstanding discovery demands.

Without opposition, Defendant Breslin's motion is granted.

With respect to motion sequence 002, Third-party defendant Centimark moves this Court for an Order pursuant to CPLR §3212 dismissing the third party action by Breslin and any and all cross claims by defendant Modell's and Third Party defendant Toys and for such other and further relief as the Court deems just and proper.

The third-party action by Breslin against Centimark and Toys should be dismissed as derivative of the main action. Dismissal of the primary cause of action necessitates dismissal of this action. (***Parsley v. Coin Device Corp.***, 5 A.D. 3d 748, 773 N.Y.S.2d 582 [2d Dept., 2004]).

Defendant Modell's moves this Court for an Order granting summary judgment in its favor, in that Plaintiff erroneously named the wrong party in this lawsuit. Plaintiff opposes the requested relief.

Plaintiff alleges that he was injured during the course of employment with third-party defendant Centimark. Plaintiff claims that he fell from a wooden plank he was using during the course of his employment. Plaintiff was engaged in construction work on the roof of a

building located at 5185 Sunrise Highway, Bohemia, New York. Plaintiff alleges further that this construction work was being performed on the roof of a Modell's store.

It is well recognized that summary judgment is a drastic remedy and as such should only be granted in the limited circumstances where there are no triable issues of fact. (***Andre v. Pomeroy,*** 35 N.Y.2d 361, 320 N.E.2d 853, 362 N.Y.S.2d 131 [1974]. Summary judgment should only be granted where the court finds as a matter of law that there is no genuine issue as to any material fact. (***Nassau Diag. Imag & Radiation Oncology Assoc. v. Winthrop-University Hosp.***, 197 A.D.2d 563, 602 N.Y.S.2d 650 [2d Dept., 1993]). The Court's analysis of the evidence must be viewed in the light most favorable to the non-moving party, herein the Plaintiff. (***Majak v. Metropolitan Transportation Authority***, 18 A.D.3d 625, 796 N.Y.S.2d 621 [2d Dept., 2005]).

"On a motion for summary judgment pursuant to CPRL §3212, the proponent must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact." (***Sheppard-Mobley v. King***, 10 A.D.3d 70, 778 N.Y.S.2d 98 (2d Dept., 2004) citing ***Alvarez v. Prospect Hospital,*** 68 N.Y. 2d 320, 501 N.E.2d 572, 508 N.Y.S.2d 923 [1986]). Once the movant's burden is met, the burden shifts to the opposing party to establish the existence of a material issue of fact. (***Zuckerman v. City of New York***, 49 N.Y.2d 557, 404 N.E.2d 718, 427 N.Y.S.2d 595 [1980]).

Defendant Modell's has established its prima facie entitlement to summary judgment on the issue of liability. Plaintiff's alleged injuries took place on August 5, 2003. Defendant Modell's entered into a lease agreement on May 20, 2004. Delivery of the premises to Modell's did not take place until June 11, 2004. It is evident that Modell's was not a tenant at the time of the accident and did not maintain or control the premises at or before the time of the accident.

In response to Defendant's motion, Plaintiff Infante has failed to present evidence sufficient to raise a triable material issue of fact sufficient to defeat the motion. Contrary to Plaintiff's contention, the motion was not premature. Further, Plaintiff has failed to offer a basis to suggest that discovery may lead to relevant evidence (See, ***Ruttura & Sons Constr. Co. v. Petrocelli Constr.***, 257 A.D.2d 614, 684 N.Y.S.2d 286 [2d Dept.,1999]). The mere hope or speculation that evidence sufficient to defeat a motion for summary judgment may be uncovered during the discovery process is insufficient to deny the motion (See, ***Arbizu v. REM Transp.***, Inc., 20 A.D.3d 375, 799 N.Y.S.2d 231 [2d Dept., 2005]; ***Kershis v. City of New York***, 303 A.D.2d 643, 756 N.Y.S.2d 786 [2d Dept., 2003]; ***Associates Commercial Corp. v. Nationwide Mut. Ins. Co.***, 298 A.D.2d 537, 748 N.Y.S.2d 792 [2d Dept., 2002]; ***Drug Guild Distribs. v. 3-9 Drugs***, 277 A.D.2d 197, 715 N.Y.S.2d 442 [2d Dept., 2000];

Weltmann v. RWP Group, 232 A.D.2d 550, 648 N.Y.S.2d 970 [2d Dept., 1996]; ***Mazzaferro v. Barterama Corp.***, 218 A.D.2d 643, 630 N.Y.S.2d 346 [2d Dept., 1995]).

Accordingly, the motion is granted and the complaint against Defendant Modell's is dismissed.

The foregoing constitutes the Order of this Court.

Dated: June 9, 2008
Mineola, N.Y.

Karen V. Murphy
J. S. C.
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ENTERED

JUN 16 2008

NASSAU COUNTY
COUNTY CLERK'S OFFICE