

Prophete v City of New York

2008 NY Slip Op 32290(U)

August 13, 2008

Supreme Court, New York County

Docket Number: 0104360/2003

Judge: Martin Shulman

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

MARTIN SHULMAN

PRESENT: J.S.C.

PART 1

Index Number : 104360/2003
PROPHETE, LAUSE
 vs.
CITY OF NEW YORK
 SEQUENCE NUMBER : 004
 VACATE STAY/ORDER/JUDGMENT

INDEX NO. 104360/03
 MOTION DATE _____
 MOTION SEQ. NO. _____
 MOTION CAL. NO. _____

this motion to/for _____

Notice of Motion/ ~~Order to Show Cause~~ — Affidavits — Exhibits A-I
 Answering Affidavits — Exhibits A-P
 Replying Affidavits _____

PAPERS NUMBERED	
1	_____
2	_____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the attached decision and order.

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

FILED
 AUG 18 2008
 COUNTY CLERK'S OFFICE
 NEW YORK

Dated: August 13th, 2008

[Signature]

MARTIN SHULMAN 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 1

-----X
LAUSE PROPHETE,

Plaintiff,

Index No: 104360/03

-against-

Decision and Order

THE CITY OF NEW YORK and NEW 24 WEST
40TH STREET LLC "DUSHEY",

Defendants.

-----X
NEW 24 WEST 40TH STREET LLC "DUSHEY",

Third-Party Plaintiffs,

-against-

ENTERTAINMENT OUTLET ON 40TH INC.
d/b/a ENTERTAINMENT OUTLET,

Third-Party Defendant.

Third-Party
Index No. 590840/07
FILED
AUG 18 2008
COUNTY CLERK
NEW YORK

Hon. Martin Shulman, J.S.C.:

Pursuant to CPLR §5105(a)(1), plaintiff, Lause Prophete ("plaintiff"), moves for an order vacating this court's May 7, 2008 Decision and Order which granted a motion of defendant/third-party plaintiff, New 24 West 40th Street LLC "Dushey" ("defendant" or "New 24"), dismissing plaintiff's complaint on default (Exhibits G and H to Motion)("Dismissal Order"). New 24 has filed opposition thereto.

Protracted Procedural History

In 2003, plaintiff commenced this personal injury action against the City of New York (the "City") and New 24 for damages as a result of her "trip and fall" accident

which occurred at or about 24 West 40th Street, New York, New York on January 31, 2002 (see Summons and Complaint as Exhibit A to Motion). Plaintiff's Bill of Particulars alleges misplaced ropes on the sidewalk (from construction activity) as the trip hazard and recites a litany of her purported soft tissue injuries (see ¶¶ 3 and 8 as Exhibit B to Motion).

After languishing for about three and a half years, plaintiff moved to extend her time to file the Note of Issue ("NOI"). The City of New York then cross-moved for summary judgment dismissing plaintiff's claims and New 24's cross-claims as against the City. On February 21, 2007, the court (Feinman, J.) issued a Decision and Order granting the City summary judgment of dismissal, deeming plaintiff's motion moot by virtue of the parties' stipulation which agreed to the withdrawal of the NOI and severed and continued the action against New 24 with a directive to have same reassigned from the City Part to a general IAS Part.

On March 27, 2007, after this matter was reassigned to this court, plaintiff and defendant entered into a stipulation after a status conference to resolve outstanding discovery requests which included furnishing defendant with plaintiff authorizations for certain medical records, taking plaintiff's deposition on May 2, 2007 and arranging her "independent" medical examination some time thereafter (Exhibit F to Klauber Opp. Aff.). The NOI filing date was extended to July 31, 2007. At a July 10, 2007 compliance conference, this court issued another order (Exhibit G to Klauber Opp. Aff.) directing plaintiff and defendant to complete all outstanding depositions before October 3, 2007 and extended the NOI filing date to October 31, 2007.

In the interim and about eight months later, on September 20, 2007, New 24 filed

its third-party complaint against Entertainment Outlet on 40th Inc. d/b/a Entertainment Outlet ("Outlet")(Exhibit E to Klauber Opp. Aff.). On October 2, 2007, plaintiff's counsel contacted New 24's counsel to advise that plaintiff would not be available for the court-ordered deposition and requested it be rescheduled (Exhibit H to Klauber Opp. Aff.). A scheduled status conference in October 2007 had to be adjourned to December 4, 2007 because Outlet had not yet interposed its answer to the third-party complaint.

Exhibiting continued patience with the snail-paced progress of this pedestrian litigation, this court so-ordered another discovery stipulation on December 7, 2007 (Exhibit K to Klauber Opp. Aff.) which *inter alia* required plaintiff to supply updated HIPAA compliant authorizations and responses to a supplemental notice for discovery and inspection, required plaintiff's deposition to be completed by January 22, 2008 and defendant's deposition to be completed January 23, 2008 as well as required plaintiff to file the NOI by March 7, 2008.¹

On February 5, 2008, New 24 moved to strike plaintiff's complaint pursuant to CPLR §3126 for her failure to appear for her repeatedly rescheduled deposition and comply with various ordered discovery requests. Defendant also sought alternative relief for plaintiff's alleged dilatory conduct. The motion was initially made returnable on February 26, 2008 in Room 130 at the Motion Submissions Part. Counsel for plaintiff, New 24 and Outlet eventually appeared in this court's Part on March 25, 2008 and proceeded to draft a proposed stipulation to resolve the motion which this court adopted

¹ The latter was in fact filed with the Trial Support Office on March 7, 2008, however, at Item 8 on the second page of the Note of Issue, plaintiff noted that "[t]here are not outstanding requests for discovery (Plaintiff's 50-H held & EBT [sic] are outstanding)."

as its order disposing of New 24's CPLR §3126 motion ("March Order")(Exhibit O to Klauber Opp. Aff.).

The March Order stated the following:

Defendant's motion to dismiss plaintiff's complaint is hereby granted as follows:

Plaintiff shall supply to all defendants the following authorizations and documents by April 14[;]

- (1) Authorization for plaintiff's psych[.] treatment records related to incident[;]
- (2) Copies of all outstanding invoices and bills related to plaintiff's alleged special damages and out of pocket expenses[;]
- (3) Authorization for plaintiff's employment records for Lex Reproductions;
- (4) Authorization for all of plaintiff's no-fault records and all medical, MRI, PT, diagnostic tests[;]
- (5) Plaintiff shall appear for Examination before Trial on or before May 21, 2008; plaintiff shall appear for an IME 30 days after plaintiff's EBT;

Plaintiff's failure to comply with any of the above shall result in dismissal of her complaint with prejudice. This order is self-executing.

* All authorizations to be HIPAA compliant

On April 14, 2008, plaintiff's counsel furnished defendant's counsel with an affidavit from plaintiff essentially attesting to the fact that she did "not possess any outstanding invoices and bills relating to plaintiff's alleged special damages and out of pocket expenses."²

Because the March Order was self-executing, it was unnecessary to make a formal motion. Thus, on April 24, 2008, this court received a transmittal cover letter

² As will be noted, *infra*, apparently deeming this unresponsive, defendant sought to hold plaintiff in default of the March Order.

from defendant's counsel enclosing a Notice of Settlement with the proposed form of order for signature and entry with the Clerk's office accompanied by an attorney's affirmation of plaintiff's non-compliance or default ("April 18th Aff." as Exhibit P to Klauber Opp. Aff.) and relevant exhibits together with an affidavit of service of same on plaintiff's counsel. Plaintiff's counsel filed no opposition. After waiting the prescribed statutory period, this court issued the Dismissal Order *inter alia* dismissing the complaint with prejudice and directed the Clerk to enter a judgment accordingly (Exhibits G and H to Motion).

Plaintiff's Motion

Plaintiff's motion to vacate the Dismissal Order which was filed on July 1, 2008 with a return date of July 23, 2008, advances a claim for excusable default in that defendant's "motion" for the Dismissal Order was never calendared for May 7, 2008 and without notice of same, counsel's non-appearance is excusable. Plaintiff's counsel directs the court's attention to the Bill of Particulars and plaintiff's treating physician reports (Exhibit I to Motion) describing the nature of her injuries (e.g., meniscal tear of left knee, etc.) to establish a meritorious cause of action (Linder Aff. in support of Motion at p. 7).

The bulk of counsel's supporting affirmation was devoted to arguing that the Dismissal Order was grounded on defendant's counsel's misrepresentations contained in her April 18th Aff. In a seriatim fashion, plaintiff's counsel attests that on October 24, 2006, his office served authorizations for "no fault" records, for records from S.G. Medical P.C., All Care Medical Services of N.R., P.C., All County Open MRI & Diagnostic Radiology, Boulevard Surgical Center, St. Vincent Hospital and respective

medical reports, from some of these health care providers as well as an authorization for employment records from Lex Reproductions (Exhibit C to Motion); that consistent with 2007 court-ordered requests and defendant's Supplemental Demands for Discovery and Inspection, on February 25, 2008, his office furnished an additional authorization for plaintiff's health care insurance provider, Fidelis Care, a HIPAA compliant authorization for records including any psychological treatment reports from HTR Chiropractic Associates and copies of medical records and/or outstanding bills/invoices from St Vincent Hospital, AP Orthopedic & Rehabilitation P.C., S.G. Medical, P.C., All County Open MRI & Diagnostic Radiology and All Care Medical Services of N.R., P.C. (Exhibit D to Motion); and that on March 18, 2008, his office furnished HIPAA compliant authorizations for records from New York City Medicaid and ongoing treatment records from AP Orthopedic and Rehabilitation, P.C. (Exhibit E to Motion).³

Obviously on notice that New 24 was seeking to have the Dismissal Order entered as a judgment, but without communicating with the court, plaintiff's counsel wrote defendant's counsel a letter dated April 29, 2008 (Exhibit F to Motion) countering New 24's misrepresentation of plaintiff's non-compliance with the varied discovery requests in the March Order. Counsel further noted that a "no-fault" file does not exist as this was not a motor vehicle accident and that plaintiff never received any

³ With each ensuing transmittal cover letter, plaintiff would definitively advise what was or was not available to be turned over (i.e., no accident reports, no prescription drug use [authorization unnecessary], no photographs, no receipts for \$500.00 cash purchase of non-prescription pain analgesics, etc.).

psychological treatment as a result of this accident, thus, there is no basis for defendant's demand for same. Finally, counsel advised that plaintiff was ready to have her deposition taken on May 21, 2008 as scheduled in the March Order but defendant obviously refused to proceed with same because of the Dismissal Order. Based on the foregoing, plaintiff urges the court to reinstate the complaint and restore defendant's February 26, 2008 motion to the calendar to address the merits of defendant obtaining any CPLR §3126 relief.

New 24's Opposition

In painstaking detail, defendant's attorney's affirmation in opposition walks the court through what New 24 perceives to be plaintiff's and her counsel's delays/defaults in complying with discovery demands since the inception of this 2003 action. Relevant to the motion before the court, counsel argues against vacating the Dismissal Order and refers the court to the then unchallenged April 18th Aff., wherein New 24's counsel, at ¶¶ 4-5 (Exhibit P to Klauber Opp. Aff.), avers that plaintiff failed to furnish authorizations by the April 14, 2008 deadline for: (1) psychological treatment records; (2) employment records; and (3) no-fault records including MRI and diagnostic tests. Counsel further claims plaintiff failed to furnish copies of outstanding invoices or bills related to plaintiff's special damages.

Discussion

Preliminarily, this court's March Order disposed of defendant's February 26, 2008 motion which sought to strike plaintiff's complaint (CPLR §3126) and without plaintiff filing any opposition thereto. Moreover, Plaintiff also provides no information as

to whether an appeal has been taken from the March Order. Therefore, the discovery demands enumerated therein are not subject to challenge.

Plaintiff's counsel also mistakenly advances an excuse for his non-appearance on May 7, 2008. However, this round of motion practice will not be addressing a default grounded on non-appearance of counsel on a non-existent motion return date. Rather, what must be decided is the issue of plaintiff's alleged non-compliance with the March Order and the resultant Dismissal Order.

In *Brewster v. FTM Servo, Corp.*, 44 A.D.3d 351, 352, 844 N.Y.S.2d 5, 6 (1st Dept., 2007), the First Department, relying on established Court of Appeals precedent, made it clear that violations of discovery orders must be taken seriously:

CPLR 3126 authorizes sanctions against a party who "refuses to obey an order for disclosure or wilfully fails to disclose information which the court finds ought to have been disclosed." "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. Pfeffer*, 94 N.Y.2d 118, 123, 772 N.E.2d 55, 700 N.Y.S.2d 87 [1999])

Against this backdrop, it is well established that "[w]hen [a] plaintiff fail[s] to respond to the discovery demands within the [time] limit set in the conditional preclusion order, the order be[comes] absolute . . ." (bracketed matter added), see *VSP Associates, P.C. v. 46 Estates Corp.*, 342 A.D.2d 373, 664 N.Y.S.2d 556 (1st Dept., 1997); see also, *DiPetro v. Duhl*, 227 A.D.2d 515, 643 N.Y.S.2d 166 (2nd Dept., 1996). Further, "it is settled that such failure [to provide discovery material within the time period in the self-executing preclusion order] warrants the drastic relief of dismissal in the absence of a reasonable excuse for the failure to comply and an affidavit of merit . . ." (bracketed matter added) (*Tejeda v. 750 Gerard Properties Corp.*, 272 A.D.2d

124, 707 N.Y.S.2d 174, 175 (1st Dept., 2000).

This belated, albeit needless, round of motion practice was engendered by plaintiff's counsel's apparent indifference to defendant's efforts to enforce the March Order, a self-executing preclusion order based upon plaintiff's purported failure to supply requested authorizations and documentary proof of special damages. Had counsel been responsive *vis-a-vis* the settlement of a preclusion order dismissing the complaint or even furnished the court with a copy of counsel's April 29, 2008 letter to defendant's counsel (Exhibit F to Motion), the Dismissal Order might not have been issued.

Benefitting from a more full record, this court concludes that the requisite authorizations were furnished well in advance of the April 14, 2008 date set in the March Order. Not only were some of these authorizations given to New 24's counsel two years earlier on October 24, 2006 but they were also given same a second time on February 25, 2008.

To be fair, both plaintiff and defendant have been dilatory and the latter's legal right to engage in third-party practice more than four years after this action started did not help to expedite matters. Notably, much of plaintiff's discovery responses inure to defendant's benefit (e.g., no claim for damages under the no-fault law, no claim for psychological damages, no documentary proof of special damages⁴) which strongly suggests plaintiff's alleged damages are limited to pain and suffering and past lost

⁴ Plaintiff's Bill of Particulars and authorizations suggest a possible existence of a Medicaid lien for \$5,500.00 in expenses for certain hospital and related medical expenses. However, this alleged damages item is also presently unproven at this juncture.

earnings of approximately \$1750.00 (see Item 14b. of Bill of Particulars as Exhibit B to Motion). Moreover, defendant's document-laden opposition does not convincingly counter plaintiff's proof of compliance with discovery demands.

Thus, this court concludes that plaintiff, regardless of her historic foot-dragging, did not fail to comply with the March Order. Further, the Bill of Particulars and other supporting papers (Exhibit I to Motion) support plaintiff's meritorious claim.

Accordingly, plaintiff's motion to vacate the Dismissal Order and reinstate her complaint is granted and the action shall be restored to the trial calendar.

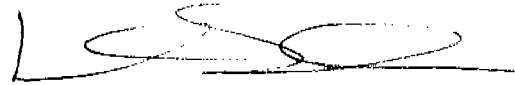
Plaintiff, defendant and Outlet are directed to appear on October 20, 2008 at 9:30 a.m. at 111 Centre Street, New York, New York and report to the 3rd Floor Jury Room for jury selection and the ensuing trial forthwith. This is a **final** marking against all parties for all purposes.⁵

In the interim, plaintiff and defendant are directed to pick mutually convenient dates for respective depositions as previously ordered in the March Order. If plaintiff again fails to appear on the agreed date for her deposition, then this action shall be dismissed in its entirety **with prejudice**. There will be no further need for motion practice as this decretal provision is self-executing.

⁵ This court has set the trial date factoring in sufficient time for all parties to prepare, serve and file (where appropriate), expert witness disclosure notices, trial subpoenas and arrange for the scheduling of witnesses.

This constitutes this court's Decision and Order. Courtesy copies of same have been provided to counsel for all parties.

DATED: New York, New York
August 13, 2008



HON. MARTIN SHULMAN, J.S.C.

FILED
AUG 18 2008
COUNTY CLERK'S OFFICE
NEW YORK