

**Valentin v City of New York**

2009 NY Slip Op 31169(U)

May 22, 2009

Supreme Court, New York County

Docket Number: 404142/05

Judge: Eileen A. Rakower

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

PRESENT: \_\_\_\_\_

PART Part 5

*Justice*

Index Number : 404142/2005

**VALENTIN, MICHAEL**

VS.

**CITY OF NEW YORK**

SEQUENCE NUMBER : 001

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

**FILED**

MAY 28 2009  
COUNTY CLERK'S OFFICE  
NEW YORK

**DECIDED IN ACCORDANCE WITH  
ACCOMPANYING DECISION / ORDER**

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

Dated: 5/22/09

**HON. EILEEN A. RAKOWER**

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST

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

-----X  
MICHAEL VALENTIN, AN INFANT BY HIS  
MOTHER AND NATURAL GUARDIAN, LUZ  
VALENTIN,

Plaintiff,

Index No.  
404142/05

- against -

**DECISION and  
ORDER**

THE CITY OF NEW YORK, POLICE OFFICER  
BRIAN CLEMENTS, SHIELD NO. 237 OF THE  
23<sup>RD</sup> PRECINCT,

Mot. Seq. 001

Defendants.

-----X  
HON. EILEEN A. RAKOWER

Plaintiff Michael Valentin (“Plaintiff”) brings this action to recover for injuries sustained on October 5, 2003, when he was struck by an unknown vehicle which jumped up onto the sidewalk. Plaintiff alleges that the accident was prompted by the New York Police Department’s (“NYPD”) pursuit of the automobile in a high speed chase. Presently before the court is a motion by Plaintiff to strike Defendants City of New York (“City”) and Police Officer Brian Clements’ (“Clements”) (collectively “Defendants”) Answer for Defendants’ allegedly willful and systematic violations of so-ordered compliance conference orders calling for Clements’ deposition. In addition, Plaintiff seeks to recover \$465.95 in court reporters’ “bust fees” incurred by as a result of Clements’ failure to appear for deposition.

This action was initially commenced in Supreme Court, Bronx County, but was transferred to Supreme Court, New York County on or around December 8, 2005. On May 11, 2006, the parties appeared for a preliminary conference, wherein it was stipulated that all party depositions were to be conducted on August 8, 2006. Depositions did not occur on that date. Plaintiff alleges that the depositions were adjourned due to Defendants’ “unwillingness or inability to produce a witness,” while

Defendants claim that Clements had in fact appeared for deposition prepared to testify, and it was Plaintiff who was “not prepared at the time.”

The parties subsequently appeared for a compliance conference on September 5, 2006, wherein the parties stipulated that depositions were to be held on November 16, 2006. Clements failed to appear . The deposition was subsequently rescheduled to be held on January 8, 2008, pursuant to a so-ordered stipulation entered into by the parties at an October 2, 2007 compliance conference. Clements again failed to appear for deposition on January 8, 2008. Clements’ deposition was subsequently scheduled to be held on either May 5 or May 13, 2008, pursuant to a so-ordered stipulation entered into by the parties at a January 15, 2008 compliance conference. Plaintiff once again failed to appear for deposition on May 5, 2008.<sup>1</sup> Clements’ deposition was subsequently rescheduled to July 16, 2008, pursuant to a so-ordered stipulation entered into by the parties at a June 17, 2008 compliance conference.

Clements once again did not appear for deposition on July 16, 2008. However, Assistant Corporation Counsel Gordon Miller, attorney for Defendants, explained on the record that Mr. Miller was advised that morning that Clements was engaged in a criminal matter in the Bronx and would thus be unable to give testimony that day. Mr. Miller further stated on the record that Clements was scheduled for vacation shortly, and would not be available for deposition until “from about August 18<sup>th</sup> [2008] onward.” Mr. Miller also stated that Defendants would bear the cost of the court reporter’s “bust fee.” Mr. Miller and Plaintiff’s counsel agreed to reschedule Clements’ deposition for 10:00 a.m. on August 19, 2008.<sup>2</sup> According to Plaintiff’s counsel, this deposition was actually confirmed by Defendants the day before.

On August 19, 2008, Clements failed yet again to appear for his deposition as scheduled. Assistant Corporation Counsel David Depugh made the following statement on the record:

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<sup>1</sup>The record before the court is silent as to whether a Clements’ deposition was attempted on May 13, 2008.

<sup>2</sup>It is worth noting that, after Mr. Miller proposed that the parties reschedule Clements’ deposition, Plaintiff’s counsel said, “No, except if you are in the position to perhaps to agree to a date right now?” To which Mr. Miller replied, “Sure,” and the parties agreed on the record to August 19, 2008.

For the record, the deposition today was scheduled for 2:00 p.m., and the City had confirmed the deposition with the New York Police Department and they asked Police Officer Clements to come in. He has not come in. We tried to investigate, we still have not been able to ascertain why he is not here. At this point we offer our apologies and we will try to determine why he didn't come in and we at this point we have no information.

Clements' deposition was rescheduled to take place on either December 1 or December 2, 2008, pursuant to a so-ordered stipulation entered into by the parties at a September 23, 2008 compliance conference. No deposition took place on either date, due to Defendants' failure to produce Clements. At a compliance conference on January 6, 2009, the parties entered into a so-ordered stipulation, wherein Clements' deposition was rescheduled to take place on either February 12 or February 13, 2009.

Despite Defendants' confirming the day before that they would produce him, Clements failed to appear for deposition on February 12<sup>th</sup>. Plaintiff's counsel noted on the record that, in addition to the numerous cancellations of Clements' deposition over the period of a year and a half, this was the third occasion on which Clements did not appear for deposition, despite Defendants' confirmation. In addition, the parties agreed on the record to adjourn Clements' deposition to February 18, 2009.

Clements' deposition did not take place on February 18, 2009,<sup>3</sup> and to date has not taken place. Defendants state that they remain willing to produce Clements for deposition, but that Plaintiff now refuses to schedule a deposition date, instead making the present motion.

In opposition to Plaintiff's motion, Defendants argue that Clements' failures to appear for deposition on the above-referenced dates were not an attempt to obstruct

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<sup>3</sup>Plaintiff's initial moving papers and Defendants' opposition do not discuss the circumstances surrounding the failure to conduct Clements' deposition on February 18, 2009. Plaintiff alleges in his Reply Affirmation that the February 18<sup>th</sup> deposition did not take place because "the Corporation Counsel's office could not confirm that EBT the day before, saying that it 'was not on their calendar!'" However, since Defendants were not afforded the opportunity to respond to this allegation due to its being raised for the first time in Plaintiff's reply, the court will not consider it.

and delay proceedings, and that he had a legitimate excuse on each date. Annexed to Defendants' Affirmation in Opposition is an Affidavit from Officer Clements ("Clements Affidavit"), which sets forth his purported excuses for his consistent unavailability for giving deposition testimony in this matter. Clements states that he "believe[s] that on August 8, 2006, [he] appeared at Corporation Counsel, ready and willing to be deposed and was sent away as plaintiff was not present." The Clements Affidavit states that he could not appear for deposition on the above dates for the following reasons:

- "January 8, 2008, was my regular day off;"
- "On January 9, 2008, I was in Manhattan Criminal Court;"
- "From May 5, 2008 to May 30, 2008, I was in Sergeant training classes;"
- "On July 16, 2008, I was in Bronx Criminal Court."
- "On August 19, 2008, I was on vacation;"
- "December 1, 2008, was my regular day off;" and
- "On February 11, 2009, I started work at 8:30 p.m. and worked until 5:27 a.m. on February 12, 2009. I made an arrest during that shift and was in Bronx Criminal Court as a result of that arrest and did not finish in court until 12:27 pm."

Defendants' Affirmation and the Clements Affidavit state that an officer's obligation to appear in criminal court when summoned supersedes his or her obligation to appear for a deposition, and that an officer may be summoned to appear in criminal court with less than a day's notice. Further, Clements states in his Affidavit that failure to appear in criminal court when summoned can subject an officer to a command discipline.

As for Clements' failure to appear for deposition on two occasions due to their falling on his "regular day off," Defendants state that "[t]o hold depositions on an officer's regular day off requires approval in advance." In addition, Defendants provide no further explanation as to why Clements was still unavailable because he was "on vacation," despite the parties' having agreed to August 19<sup>th</sup> specifically to accommodate Clements' schedule, which anticipated his availability "from August 18<sup>th</sup> onward;" and despite the City's having "confirmed the deposition with the New York Police Department."

CPLR §3216 provides, in pertinent part:

"If any party... refuses to obey an order for disclosure... 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...

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]). A court may strike a party's answer only when "a clear showing that the failure to comply is willful, contumacious or in bad faith" is made by the moving party. Repeated non-compliance with court orders gives rise to an inference of willful and contumacious conduct. (*Goldstein v. CIBC World Markets Corp.*, 30 A.D.3d 217 [1st Dept. 2006]). The burden then shifts to the non-moving party to provide a reasonable excuse for its non-compliance. (*Reidel v. Ryder TRS, Inc.*, 13 AD3d 170 [1st Dept. 2004]) (where the court issued a conditional order striking the defendant's answer after it found that defendant's failure to appear at three court-ordered depositions was willful and defendant failed to offer a reasonable excuse for its non-compliance). In *Figor v. City of New York*, 33 AD3d 560 [1st Dept. 2006], the Court took the opportunity to

encourage the IAS courts to employ a more proactive approach in such circumstances; upon learning that a party has repeatedly failed to comply with discovery orders, they have an affirmative obligation to take such additional steps as are necessary to ensure further compliance. (*Id.* at 561).

Here, Clements has failed to appear for deposition on six separate occasions. Of these six, the Court finds that Defendants have proffered a reasonable excuse for Clements' failure to appear on three dates: May 5, 2008, July 16, 2008, and February 12, 2009. On these dates, Clements' obligations as a police officer rendered him unavailable to give deposition testimony. However, Clements has failed to proffer reasonable excuses for failing to appear for deposition on January 8, 2008, August 19, 2008, or December 1, 2008. While Defendants assert that appearing on an officer's "regular day off" "requires approval in advance," they have made no showing whatsoever that they even so much as attempted to gain approval in advance to appear

for deposition. This is particularly inexcusable in the case of Clements' failure to appear on December 1, 2008, since by that time Clements had already failed to appear for deposition on numerous occasions.

In addition, Clements' assertion that he missed the August 19, 2008 deposition date because "I was on vacation" is utterly insufficient. The parties agreed to reschedule Clements' deposition to August 19<sup>th</sup> on the record on July 16, 2008, when Clements (justifiably) failed to appear for deposition because he had to appear in the Bronx for a criminal matter. The record is clear that the parties rescheduled the deposition anticipating Clements' vacation, and scheduled it for a time in which Clements would be back from vacation and available. Indeed, on August 19<sup>th</sup> counsel for Defendants stated on the record that the City confirmed with NYPD that Clements would be available for deposition, and that even his attorneys do not know his whereabouts. Under these circumstances, "I was on vacation" falls short.

Accordingly, in failing to appear for deposition on three occasions without a reasonable excuse and thereby prolonging the progression of this litigation for over a year, the court may draw an inference of willful and contumacious behavior on the part of the Defendants (*see Goldstein* at 217), and does so here (*see Reidel* at 171) (disobeying of three successive court orders to appear for deposition "constituted precisely the sort of dilatory and obstructive, and thus contumacious, conduct warranting the striking of their answers") (citations omitted). However, the decision to strike a party's pleading for its failure to appear for depositions rests within the broad discretion of the court (*Reidel* at 171), and there is a "strong preference in our law that matters be decided on their merits" (*Rosen v. Corvalon*, 309 A.D.2d 723 [1st Dept. 2003]).

With these principles in mind, the court will grant Plaintiff's motion for an order striking Defendants' answer *unless* Clements' appears for deposition at a mutually agreed upon time and place within 20 days of receipt of a copy of this order with notice of entry.

In addition, the court finds that Plaintiff's counsel is entitled to reimbursement for the court reporters' "bust fees" incurred as a result of Clements' failure to appear for depositions on the three occasions in which Defendants had previously confirmed that Clements would be produced - amounting to a total of \$465.95.

Wherefore it is hereby

ORDERED that plaintiff's motion to strike is conditionally granted to the extent that Defendants' failure to produce Clements for deposition within 20 days of receipt of a copy of this order with notice of entry will result in this court striking Defendants' answer and directing the Clerk to enter judgment in favor of Plaintiff and against Defendants on the issue of liability; and it is further

ORDERED that Defendants are to reimburse Plaintiff's counsel \$465.95 in court reporters' fees incurred as a result of Clements' failure to appear for deposition within 10 days of receipt of a copy of this order with notice of entry.

This constitutes the decision and order of the court. All other relief requested is denied.

DATED: May 22, 2009

  
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EILEEN A. RAKOWER, J.S.C.

**FILED**  
MAY 28 2009  
COUNTY CLERK'S OFFICE  
NEW YORK