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

PRESENT: GISCHE Justice PART 18

INDEX NO. 103271/09

MANOR COPE Z

-v-

M.D.B. DEVELOPMENT CORP

MOTION DATE

MOTION SEQ. NO. 3

MOTION CAL. NO.

The following papers, numbered 1 to _____ were read on this motion to/for VACATE 5/29/09 ORDER, GJS

	PAPERS NUMBERED
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
NOV 17 2009
COUNTY CLERK'S OFFICE
NEW YORK

MOTION IS DECIDED IN ACCORDANCE WITH
THE ACCOMPANYING MEMORANDUM DECISION.

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

Dated: November 9, 2009

J.S.C.

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 10

----------x

Manuel Lopez and Maricell Lopez,

Plaintiff (s),

-against-

M.D.B. Development Corp.,
DC Express, Inc., and "John Doe," a person believed to be employed by DC Express, Inc.,

Defendant (s).

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DECISION/ORDER
Index No.: 103271-07
Seq. No.: 003

PRESENT:
Hon. Judith J. Gische
J.S.C.

Recitation, as required by CPLR 2219 [a], of the papers considered in the review of this (these) motion(s):

Papers	Numbered
Def DCE OSC (CPLR 5015 [a]) w/PJL affirm, exhs	1
Pltf's opp w/RTP affirm, exhs	2
Pltf's opp w/RTP's affidavit of default, exhs	3
Def MDB partial opp w/MKP affirm	4
Def DCE reply	5
Steno Minutes 9/24/09	6

Upon the foregoing papers, the decision and order of the court is as follows:

This is a personal injury action in which plaintiff alleges someone pulled a push cart from under him, causing him to fall and sustain injuries. Defendant M.D.B. Development Corp ("MDB") is in the construction business. It was doing work in the area where plaintiff was injured. Defendant DC Express, Inc. ("DCE") is a courier/ delivery service who allegedly employed "John Doe," the person plaintiff claims pulled the cart out from under him. DCE and MBD have each answered the complaint. DCE has also answered the complaint on behalf of "John Doe."

In connection with a prior motion by plaintiff seeking discovery sanctions against DCE for its failure to comply with the preliminary conference order and subsequent discovery orders, the court issued a conditional order of preclusion dated May 9, 2009 ("conditional preclusion order"). In that conditional preclusion order, "defendant" (DCE) was ordered to appear for its deposition on June 11, 2009. If DCE failed to comply with the court's order, then upon plaintiff filing an affidavit of default, DCE's answer would be stricken without the need for further motion by plaintiff or order of the court.

It is undisputed that DCE produced its Director of Operations, Roy Kratzke ("Kratzke"), as its witness. "John Doe," however, did not appear for his deposition and plaintiff takes the position that DCE's answer should be stricken.

In this motion to vacate the court's conditional preclusion order, DCE presents a number of facts which it contends are newly discovered evidence which would require the court to vacate its prior order or at least reconsider it.

According to DCE "John Doe," who was previously identified as Rakefh Kamrai ("Kamrai") was not an employee of DCE on the day of the incident alleged, but was an independent contractor who had a contractual agreement with DCE to provide delivery services using his own car and under his own insurance policy. The contract, among other things, requires Kamrai to indemnify DCE for "injury to persons" suffered through his negligence. This, according to DCE's attorney, presents a conflict of interest, and the firm seeks to also withdraw its answer on Kamrai's behalf, discussed later in this decision.

The motion is opposed by plaintiff and partially opposed by MDB. Although the motion was served on Kamrai, and there is proof of service, he did not appear for oral

argument, nor file any papers with the court. Neither plaintiff's opposition, nor MDB's partial opposition were served on Kamrai.

Arguments

DCE's argument is that the person who allegedly injured the plaintiff was an independent contractor, not an employee of the corporation. Although DCE answered on behalf of Kamrai, and even provided him with a lawyer, DCE did so under the mistaken impression that Kamrai was a salaried employee of the company. DCE employed some 22 drivers on the date of the accident (October 17, 2006). Some were employees, but others were independent contractors. According to DCE, it entered into an "independent contractor agreement" with Kamrai dated August 7, 2006, a copy of which was produced in response to plaintiff's discovery demands dated June 3, 2009. Although Kamrai appeared for his deposition on June 9, 2009, he was not deposed because DCE's attorney made a statement on the record that there was a conflict of interest. Kamrai did not allow himself to be deposed.

It is undisputed that following the preliminary conference, at the compliance conference held May 29, 2008 compliance, DCE did not object to the complaint and caption being amended to identify "John Doe" by name as Rafkeh Kamrai. The compliance conference order shows that the parties waived a "steno record on possible conflict."

DCE's deposition still had not yet been conducted by the next compliance conference which was held on December 1, 2008. At that time the parties entered into another stipulation, extending discovery. EBTs of all parties were scheduled for December 10, 2008, and another compliance conference scheduled for January 29,

2009.

None of the parties were deposed by the time the conference was held on January 29th, and the deposition were rescheduled to February 27, 2009 by agreement. The court so-ordered the stipulation, however, on condition that there be "no further discovery except for good cause shown." Yet another compliance conference was scheduled for May 7, 2009.

Following the January 29, 2009 conference, plaintiff apparently served two amended bills of particulars alleging new injuries (2/17/09, 2/27/09). Although plaintiff was not deposed, plaintiff brought a motion (March 17, 2009) to strike DCE's answer which resulted in the court's conditional order of preclusion.

Despite the May 29, 2008 order amending the complaint and caption, no amended complaint was ever actually served and DCE's answer on behalf of the company and "John Doe," was never amended. Item 22 of the answer states that: "Defendants DC EXPRESS, INC. and "JOHN DOE" as a person believed to be employed by DC EXPRESS, INC., repeat and reiterate each and every denial heretofore made in this answer . . ."

DCE's attorney acknowledges that there has been a mistake and attributes it primarily to the delay in discovery in this case, but also to the fact that Kratzke did not fully appreciate the nuanced difference between him saying someone "worked for" DCE as an employee as opposed to "working for" DCE as an independent contractor. Thus, in conversations with his client, DCE's attorney was unaware that Kamrai had a contractual relationship with DCE until after the court's conditional order of preclusion when he also learned Kamrai had stopped working for DCE in October 2008.

DCE seeks the following relief from the court. First, to the extent that its answer for "John Doe" is deemed to have been asserted on behalf of Kamrai, DCE seeks to withdraw its answer on behalf of "John Doe"/Kamrai. Next, DCE asks the court to vacate its conditional preclusion order to the extent that it ordered DCE to produce Kamrai for his deposition. DCE argues that there is no employer/employee relationship between the defendants, Kamrai and DCE ended their contractual relationship in October 2008, and DCE's only obligation would have been to provide plaintiff with a last known address for Kamrai, but not produce him for his deposition because DCE has no control over Kamrai.

Plaintiff raises a number of arguments in opposition to DCE's motion. He argues that DCE has always maintained - and has expressly admitted - that Kamrai was employed by DCE on the day of the accident. According to plaintiff these admissions were made in DCE's answer on behalf of "John Doe," the agreement to amend the complaint and caption to reflect "John Doe" is Kamrai, and later in DCE's response to plaintiff's discovery demands dated February 15, 2008. Plaintiff points out that at his deposition, Kratzke repeatedly referred to Kamrai as being "employed" by DCE:

> p. 19, Lines 6-11
> "Q. When DC Express gives a package to a delivery man or person, they are delivering that package for DC Express, are they acting on behalf of DC Express when delivering those packages?
> "A. Yes."
> p. 24, Lines 5-12
> "Q. That day when he [made deliveries] to Baccarat, was he acting on behalf of DC Express? Was he in the course of employment for DC Express?
> *DCE's Attorney: [Objection- you can answer]*
>
> "A. Yes he was making a delivery for us to Baccarat."

Plaintiff argues that DCE's delay in complying with discovery which ultimately resulted in the court's conditional preclusion order, should not be tolerated or excused by allowing DCE to now "create" a conflict of interest at this late date in the case. Plaintiff contends that the newly discovered information could have been discovered two years ago when this case began, had DCE been compliant with plaintiff's discovery demands. He also contends he will be prejudiced because the statute of limitations in this case is near and Kamrai is a New Jersey resident. These two arguments are also raised by MDB in partial opposition to DCE's motion.

Discussion

CPLR § 5015 sets forth five specific grounds upon which a court may relieve a party from a judgment or order; they are (1) excusable default, (2) newly discovered evidence, (3) fraud, misrepresentation, or other misconduct of an adverse party, (4) lack of jurisdiction to render the judgment or order, or (5) reversal, modification or vacatur of a prior judgment or order upon which it is based.

Although DCE's motion is made pursuant to CPLR § 5015 [a], without any specification of the subsection being relied upon, the court's conditional order of preclusion was neither made on default nor after trial. Nor is it alleged by DCE that the order was the product of fraud, misrepresentation, etc., or that any prior order by this court has been reversed, modified or vacated which would affect the conditional order of preclusion. Thus, it would appear that DCE's motion is a hybrid, partly based on CPLR § 5015[a][4] (lack of jurisdiction), CPLR § 2221[d][2] (motion to renew based upon newly discovered facts), and CPLR § 3025[b] (to amend the pleadings).

Regardless of how this motion is styled, the relief sought by DCE must be granted for the reasons that follow.

DCE has established that on the day of the incident alleged Kamrai was not DCE's employee, but that there was a contractual relationship between him and DCE for Kamrai to make deliveries on behalf of the company. DCE has established this by producing a copy of the independent contractor's agreement that Kamrai signed and proof that the vehicle he used to make the deliveries for DCE was registered to Kamrai and insured by Kamrai. Kamrai stopped doing deliveries for DCE in October 2008. Therefore, at the time the court made its order, DCE was required to provide plaintiff (and MDB) with Kamrai's last known address so plaintiff could subpoena him to give testimony. DCE was, however, under no obligation to produce him for a deposition because he was not subject to DCE's control. Since DCE produced a witness (Kratzke), it complied with the court's conditional order of preclusion and there is no basis to strike DCE's answer.

In deciding this motion, the court has not decided (and does not have to decide) the issue of whether Kamrai is or is not an independent contractor because that issue is not properly before the court to decide. Neither side has moved for summary judgment and the determination of whether a person is an independent contractor typically involves questions of fact. Lazo v. Mak's Trading Company, Inc., 199 AD2d 165 [1st Dept 1993]. The court is deciding, however, that DCE did not have an obligation to produce Kamrai, and therefore, DCE's answer should not be stricken because Kamrai was not deposed.

Turning to the second prong of DCE's motion, which is to withdraw its answer on behalf of "John Doe," or Kamrai, that motion must be granted as well. Although plaintiff argues that there is no motion before the court for DCE's attorney to be relieved as Kamrai's attorney, this presumes two things: first, that Kamrai wants to be represented by the same attorneys who represent the company that may asset a cross claim against him for indemnification and, second, that he was properly served in this action.

When he appeared on June 9, 2009, Kamrai stated he was not served with the complaint, he did not know anything about the case, he did not have a lawyer with him and he did not allow himself to be deposed. It is unrefuted that plaintiff never served Kamrai with an amended complaint identifying him by name as the "John Doe," nor did DCE ever serve (assert) an answer on behalf of Kamrai, by name.

The so-ordered agreement of May 28, 2008 cannot subject Kamrai to the jurisdiction of this court. DCE's attorney was not authorized by Kamrai to answer or enter into any agreements on his behalf. Any argument that there is, nevertheless, an attorney/client relationship between Kamrai and DCE's attorney is for Kamrai to make, *not plaintiff*. Kamrai has taken no position on DCE's motion, though there is due proof of service of the motion, if not the opposition papers. In any event, there is also an apparent conflict of interest between DCE and Kamrai that would make it impossible for the attorney to continue to represent Kamrai without violating a disciplinary rule. DR 2-110 (c) (2). Therefore, DCE is permitted to withdraw its answer to the extent it was made on behalf of "John Doe," as its employee.

Plaintiff's (and MDB's) opposition to the motion is largely based on his having

detrimentally relied on DCE's representation that Kamrai was its employee and that he cannot serve Kamrai with service of process before the statute of limitations expires on October 17, 2009 because Kamrai is a New Jersey resident. Actions are successfully commenced all the time against out of state residents. Plaintiff knew about this problem for at least three (3) months in which he could have tried to serve Kamrai but apparently made no attempts to do so. This analysis also applies to MDB who has cross claims against DCE and "John Doe."

Although plaintiff seeks to place the blame for the delay in discovery in this case squarely on the shoulders of DCE, he is also to responsible for the pace this case has taken. There is order after order in this case showing that scheduled depositions - including plaintiff's- were not held, but adjourned. Apparently plaintiff even served an amended bill of particulars on February 27, 2009, the same day the court had ordered depositions be held.

Conclusion

DCE has proved that it complied with the court's conditional order of preclusion by producing the director of operations for his deposition, as the court ordered. Although Kamrai was not deposed, he was not served with the complaint in this case, he no longer works for DCE and DCE was not authorized to enter into an agreement on his behalf to be deposed. Therefor, there is no basis to strike DCE's answer as a discovery sanction.

DCE's motion to withdraw its answer on behalf of "John Doe" who was later identified as Kamrai is granted.

It appears that the Note of Issue was filed by the plaintiff on December 11, 2007, although discovery is incomplete. At the upcoming status conference the court will hear oral argument why the Note of Issue should not be stricken.

Any relief requested that has not been addressed has nonetheless been considered and is hereby expressly denied.

This constitutes the decision and order of the court.

Date: New York, New York
November 9, 2009

So Ordered;

Hon. Judith J. Gische, J.S.C.