

Excise Bond Underwriters v Zurich Am. Ins. Co.

2010 NY Slip Op 31690(U)

June 30, 2010

Supreme Court, New York County

Docket Number: 604433/06

Judge: Shirley Werner Kornreich

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

PART 54

Index Number : 604433/2006
EXCISE BOND UNDERWRITERS,
vs
ZURICH AMERICAN
Sequence Number : 001
DISMISS

INDEX NO. 604433/06
MOTION DATE 4/01/10
MOTION SEQ. NO. 001
MOTION CAL. NO. _____

The following papers, numbered 1 to 4 were read on this motion to/for dismiss

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...
Answering Affidavits — Exhibits _____
Replying Affidavits _____

PAPERS NUMBERED

1,2
3
4

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

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

MOTION IS DECIDED IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION AND ORDER.

FILED

JUL 06 2010

NEW YORK COUNTY CLERK'S OFFICE

6/30/10

Dated: _____ JUSTICE SHIRLEY WERNER KORNREICH
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 54

-----X
EXCISE BOND UNDERWRITERS,

Index No. 604433/06

Plaintiff,

DECISION and ORDER

-against-

ZURICH AMERICAN INSURANCE COMPANY,
a/k/a ZURICH NORTH AMERICAN, and FIDELITY
and DEPOSIT COMPANY OF MARYLAND,

Defendants.

-----X
KORNREICH, SHIRLEY WERNER, J.:

In this action, plaintiff Excise Bond Underwriters (EBU), an unincorporated association of companies, seeks to recover from defendant Fidelity and Deposit Company of Maryland (Fidelity), an insurance company and subsidiary of defendant Zurich American Insurance Company a/k/a Zurich North American, amounts claimed when Fidelity withdrew from EBU. Defendants move to dismiss this action pursuant to CPLR 3126 for failure to comply with the court's compliance orders.

I. *Background*

EBU commenced this action by filing its summons and complaint at the end of 2006. On February 5, 2007, defendants served their answer, along with a first set of interrogatories and document requests, by mail. On June 21, 2007, plaintiff's counsel sent a letter acknowledging plaintiff's intention to proceed with the case despite a delay in responding to defendants' requests. On November 27, 2007, plaintiff's counsel responded to defendants' first document request and cited illness as the reason for his delay. On March 11, 2008, plaintiff responded to

the first set of interrogatories, requested judicial intervention and produced additional documents in response to the first document request.

At the preliminary conference held on May 28, 2009, the court issued an order directing both parties to serve discovery demands on or before June 30, 2009, and to respond to those demands on or before July 30, 2009. Plaintiff's counsel did not appear at the next compliance conference on August 20, 2009; instead, he sent an associate unfamiliar with the case. During the conference, defendants' counsel described the plaintiff's disclosures as inadequate. As directed by the court, defendants' counsel outlined the insufficiencies in plaintiff's response in a letter dated August 28, 2009.

As of the October 8, 2009 compliance conference, plaintiff still had not served defendant with a Bill of Particulars or the document demands in accordance with the deadlines set in the court's May 28, 2009 order. Again, plaintiff's counsel was absent. This time he sent a "per diem" attorney who explained that plaintiff's counsel "was experiencing personal difficulties that were keeping him from attending to the prosecution of the case." Defendants' Memo of Law at 6. The court ordered plaintiff to respond to defendant's August 28, 2009 letter and to serve any remaining discovery requests within 30 days. The court scheduled the next status conference for November 12, 2009.

In a November 11, 2009 Affirmation in support of a request for an additional adjournment, plaintiff's counsel cited personal circumstances as an excuse for his delay in responding to discovery, and he affirmed plaintiff's intention not to abandon the suit. He requested "one final adjournment for compliance of no more than 30 days." At the conference the next day, plaintiff's counsel sent a substitute in his place for the third time. The court determined that plaintiff had not complied with the court orders of May 28, 2009 and October 8,

2009, and ordered plaintiff to respond to the August 28, 2009 letter and serve any remaining discovery demands by December 15, 2009. The court's order also warned: "If plaintiff does not comply with the directives of this order, the action shall be dismissed at the 12/17/09 conference for failure to prosecute."

On December 16, 2009, the eve of the scheduled status conference, and one day after the court ordered deadline, defendants' counsel received a package from plaintiff's counsel. The letter accompanying the production was dated December 15, 2009. The next day, plaintiff's counsel appeared for the conference. Although defendants' counsel had not been able to review all of the contents before the conference, defendants' counsel detailed some of the deficiencies in plaintiff's production, disputed some of the responses, and claimed some to be non-responsive. The court concluded that the previous orders had not been complied with, as plaintiff had turned over the purported production on December 16, 2009. The court ordered plaintiff to provide defendants with "all documents and figures in its possession pertaining to how it calculated withdrawal amounts" for parties that withdrew from EBU, and to provide the court with "exchanges plaintiff had regarding its dispute with Chubb which resulted in a Release/Settlement executed in 2007" for *in camera* review, on or before January 15, 2010.

On January 26, 2010, more than one week after the court ordered deadline had passed, plaintiff's counsel sent a letter advising defendants and this court that plaintiff would not be providing the court with the documents ordered for *in camera* review. Some documents, however, were enclosed with the letter. The court reviewed the documents in a conference on January 28, 2010, and concluded that plaintiff had still not complied with court ordered discovery regarding the items delineated in the court's December 17, 2009 order. Accordingly,

the court authorized defendants to move to dismiss for failure to prosecute. Defendants filed this motion to dismiss. Plaintiff opposed.

II. *Discussion*

Where a party “willfully fails to disclose information which the court finds ought to have been disclosed[,]” the court may strike pleadings or parts thereof, dismiss the action or any part thereof or enter a default judgment against the insubordinate party. CPLR 3126 (3). Although actions should be disposed on the merits, the court may strike a pleading against a party who does not comply with court ordered disclosure. *Reidel v Ryder TRS, Inc.*, 13 AD3d 170, 171 (1st Dept 2004). Willful and contumacious conduct can be inferred from a party’s repeated failure to comply with court ordered disclosure coupled with the party’s inadequate excuses offered to justify the default. *Maiorino v City of New York*, 2007 NY Slip Op 3104, 39 AD3d 601 (2d Dept 2007); *Baralan Int’l v Avant Indus., Ltd.*, 242 AD2d 226 (1st Dept 1997); *Johnson v City of New York*, 188 AD2d 302 (1st Dept 1992). Once this showing is made, the burden shifts to the nonmovant to proffer a reasonable excuse. *Reidel*, 13 AD3d at 171.

The Appellate Division gives IAS courts substantial deference to compel compliance with discovery orders and, absent a clear abuse of discretion, any penalty imposed pursuant to CPLR 3126 will not be disturbed. *Arts4All, Ltd., v Hancock*, 54 AD3d 286 (1st Dept 2008); *See Figdor v City of New York*, 2006 NY Slip Op 7809, 33 AD3d 560 (1st Dept 2006) (IAS courts are encouraged “to employ a more proactive approach” in situations where party has repeatedly failed to comply with court ordered discovery). Public policy favoring the disposition of actions on the merits does not permit litigants to impose an undue burden on the discovery process. *Arts4All, Ltd.*, 54 AD3d at 286-87. Indeed, the efficacious disposition of matters is frustrated by litigants who undermine the authority of the court to supervise discovery. *See Id.* at 287. As the

Court of Appeals stated in *Kihl v Pfeffer*, 94 NY2d 118, 123 (1999), "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."

Since the parties dispute whether the court ordered documents have been turned over, the issue is referred to a Special Referee to hear and report as to plaintiff's compliance. The motion to dismiss will be held in abeyance pending final determination of plaintiff's compliance with the court's orders. If it is determined that plaintiff has not so complied, the action will be dismissed. Accordingly, it is


ORDERED that the issue of whether plaintiff has sufficiently complied with court-ordered discovery will be referred to a Special Referee to hear and report with recommendations, except that, in the event of and upon the filing of a stipulation of the parties, the Special Referee shall determine the aforesaid issues; and it is further

ORDERED that a copy of this order shall be served upon the Clerk of the Reference Part (Rm. 119) to arrange a date for the reference to a Special Referee; and it is further

ORDERED that the Clerk shall notify all parties of the date of the hearing.

Date: June 28, 2010
New York, NY

ENTER:



J.S.C.

FILED
JUL 06 2010
NEW YORK
COUNTY CLERK'S OFFICE