

Felsen v Stop & Shop Supermarket Co., LLC

2010 NY Slip Op 32291(U)

August 12, 2010

Supreme Court, Nassau County

Docket Number: 1149/09

Judge: Thomas Feinman

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SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK COUNTY OF NASSAU

Present:

Hon. Thomas Feinman
Justice

KERI FELSEN,

Plaintiff,

- against -

THE STOP & SHOP SUPERMARKET COMPANY,
LLC,

Defendant.

TRIAL/IAS PART 15
NASSAU COUNTY

INDEX NO. 1149/09

MOTION SUBMISSION
DATE: 6/16/10

MOTION SEQUENCE
NUMBERS: 1, 2

The following papers read on this motion:

- Notice of Motion and Affidavits X
- Order to Show Cause and Affidavits X
- Affirmations in Opposition..... X
- Reply Affirmations..... X

The plaintiff moves, by way of Notice of Motion, for an order (1) vacating the Court's dismissal of December 16, 2009; (2) restoring this matter to the active calendar;(3)awarding sanctions in favor of the plaintiff and against the defendant; and (4) for such other and further relief as this Court deems just, proper and equitable. The defendant submits opposition. The plaintiff thereafter submits an Order to Show Cause seeking an order (1) vacating the Court's dismissal of December 16, 2009; (2) restoring this matter to the active calendar; (3)awarding sanctions in favor of the plaintiff and against the defendant; and (4) for such other and further relief as this Court deems just proper and equitable.

This Court, by way of order dated December 16, 2009, entered December 18, 2009, dismissed the above referenced matter due to plaintiff's failure to appear for a conference before the undersigned on December 16, 2009 in this matter pursuant to 22 NYCRR Sec.202.27(b). The decision provided that upon application to restore, appropriate sanctions would be considered, and that such application shall be made within ninety (90) days of the date of the order.

The plaintiff, by way of Notice of Motion, moves to vacate this Court's prior order dated December 16, 2009 and restore the matter to the active calendar. However, plaintiff, movant, fails to move by way of Order to Show Cause, fails to move within ninety (90) days of this Court's prior order, and fails to annex, or make any reference to the directives of this Court as contained in this Court's prior order dated December 16, 2009.

Plaintiff's time in which to move to restore this matter expired on or about March 16, 2010. Plaintiff's counsel's affidavit, and plaintiff's per diem attorney's affidavit, are dated March 29, 2010. As per the supporting affidavit of service, plaintiff served the instant Notice of Motion on April 5, 2010, well beyond the requisite ninety day requirement. The defendant, in opposition to the motion, has demonstrated that the defendant served this Court's order dated December 16, 2009, with notice of entry, upon the plaintiff on December 18, 2009.

Plaintiff's instant application lacks any showing of good cause as to why the instant application was not made in a timely manner in accordance with the directives of this Court's prior order dated December 16, 2009.

This matter appeared before the undersigned for a compliance conference on November 4, 2009. Plaintiff's counsel failed to appear. As plaintiff's counsel failed to appear, this Court adjourned the conference for November 18, 2009 and directed counsel for defendant to notify plaintiff's counsel advising that plaintiff's counsel must appear before the undersigned on November 18, 2009 at 9:30 am. Such correspondence was forwarded from defendant's counsel's office to plaintiff's office.

Plaintiff's counsel failed to appear at 9:30 am before the undersigned on November 18, 2009. Plaintiff's counsel appeared at approximately 10:30 am, at which time the undersigned was in the process of dismissing the above matter. Defense counsel advised the undersigned that plaintiff neglected to comply with the Preliminary Conference Order, despite numerous correspondence forwarded by defense counsel advising plaintiff's counsel of such outstanding discovery. As a result, this Court issued an order dated November 18, 2009 directing compliance of this Court's prior Preliminary Conference Order dated July 31, 2009, together with all authorizations, medicals and witnesses by December 2, 2009. The Order further provided that failure to comply with such order would result in the action being dismissed, and further provided that a further conference will be held on December 16, 2009 at 9:30. The Order was signed by counsel appearing for plaintiff and counsel appearing for the defendant, and was so-ordered by the undersigned. Counsel appearing for the plaintiff was further cautioned by the undersigned that this Court takes the bench at 9:30 am and that counsel is expected to appear at 9:30 am.

This matter appeared before the undersigned for a conference on December 16, 2009 and counsel for plaintiff once again failed to appear at 9:30 am.

Plaintiff's per diem counsel avers in her affidavit that she was "here" on December 16, 2009 and since this Court was on trial, there was no real "check-in." Plaintiff's per diem counsel avers that she spoke with defense counsel, learned that this Court's law secretary was conferencing cases outside the courtroom, discussed the matter of outstanding discovery with defense counsel, went to make a call concerning such matter, and advised defense counsel that she was signing in to additional parts as she had other appearances scheduled for that morning. Plaintiff's per diem counsel avers that when she later returned to this Part she learned that the action was dismissed for plaintiff's failure to appear. Plaintiff's per diem counsel avers that while she was not present when the undersigned called the case, she had every intention to represent the interests of the plaintiff, that this matter was erroneously dismissed because "defense counsel knew I was in the courthouse and had spoken to me earlier that morning."

Defense counsel avers that he appeared before this Part at 9:30 am, and the undersigned was on the bench, prior to conducting the trial. Thereafter, the Court advised all counsel to wait outside of the Courtroom while a jury was recalled for a readback. All counsel were advised to wait in the hallway outside the Courtroom and contact chambers when all counsel appeared ready for a conference. Defense counsel avers that at approximately 9:50 am, plaintiff's per diem counsel appeared in the hallway, was advised that discovery was still outstanding, and left presumably to contact plaintiff's counsel. Defense counsel further provides that at approximately 10:10 am, the Courtroom was reopened and all counsel who had conferences pending awaiting to see the undersigned were back in the Courtroom. Defense counsel was the last attorney in the Courtroom at approximately 10:25 am, whereby defense counsel notified this Part that plaintiff's per diem counsel had previously appeared in the hallway and did not yet return. This Court placed a call to plaintiff's counsel, which was not returned, and at approximately 10:45 am, dismissed the instant action for plaintiff's failure to appear. Despite this Court's prior directives, and despite a telephone call placed to plaintiff's counsel, plaintiff failed to appear before the undersigned at 9:30 am. Apparently, plaintiff's per diem counsel, ascertained at sometime after 10:45 that the matter was dismissed.

Plaintiff's counsel, and Plaintiff's per diem counsel, have not demonstrated good cause for plaintiff's continuous failure to appear before this Part, as directed, at 9:30 am promptly. Rather, plaintiff's per diem counsel submits that she had other matters to attend to, and that defense counsel knew she was in the "courthouse," albeit, not in the courtroom, and not present before the undersigned in accordance with the directives of this Court. Such willful disregard of this Court's directives will not be tolerated by this Part. Such contumacious conduct obstructs and defeats the administration of justice.

In response to defendant's opposition, plaintiff's counsel attempts to submit an Order to Show Cause, on or about June 10, 2010, seeking an order vacating this Court's dismissal of December 16, 2009, restoring this matter to the active calendar, and sanctions in favor of the plaintiff and against defense counsel. Plaintiff's counsel and plaintiff's per diem counsel aver, by way of affirmation dated June 1, 2010 that there has been no prior application for the relief requested herein to this Court or any other Court of competent jurisdiction, despite the pendency of plaintiff's prior motion. Such motion was rejected by this Part.

Upon the foregoing, it is hereby

ORDERED that plaintiff's action is hereby restored to this Court's active calendar for a conference on September 29, 2010 at 9:30 am promptly, and it is hereby further

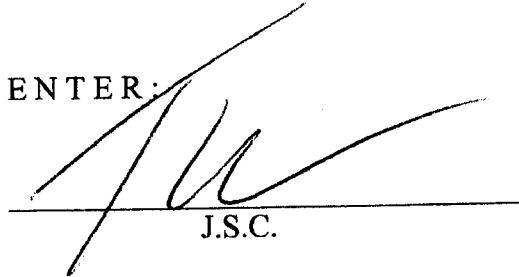
ORDERED that counsel for the plaintiff is hereby directed to pay the sum of Five Hundred and 00/100 Dollars, (\$500.00), as sanctions to the Lawyers' Fund for Client Protection, 119 Washington Avenue, Albany, New York, 12210, within thirty (30) days of service of this order with notice of entry, and it is further

ORDERED that counsel for the plaintiff is hereby further directed to pay the sum of Two Thousand Five Hundred and 00/100 Dollars, (\$2,500.00), as sanctions to counsel for the defendant, made payable to the law firm of Torino & Bernstein, P.C., 200 Old Country Road, Suite 220, Mineola, New York, 11501, within thirty (30) days of service of this order with notice of entry, and it is further

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ORDERED that plaintiff's counsel shall file proof of payment of sanctions with this Part within forty-five (45) days of service of this order with notice of entry.

ENTER:



A handwritten signature in black ink, consisting of a large, stylized 'J' followed by a cursive 'S.C.', is written over a horizontal line.

J.S.C.

Dated: August 12, 2009

cc: Harley S. Fastman, Esq.
Torino & Bernstein, P.C.

ENTERED

AUG 20 2010

NASSAU COUNTY
COUNTY CLERK'S OFFICE