

**Dinan v City of New York**

2010 NY Slip Op 33611(U)

December 29, 2010

Supreme Court, New York County

Docket Number: 107965/2007

Judge: Barbara Jaffe

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

PRESENT: JAFFE BARBARA JAFFE  
J.S.C.

PART 5

Index Number : 107965/2007

DINAN, ROBERT S.

INDEX NO. \_\_\_\_\_

vs

CITY OF NEW YORK

MOTION DATE \_\_\_\_\_

Sequence Number : 002

MOTION SEQ. NO. \_\_\_\_\_

VACATE

MOTION CAL. NO. \_\_\_\_\_

CAL # 28

The following papers, numbered 1 to \_\_\_\_\_ were read on 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

**FILED**

Upon the foregoing papers, it is ordered that this motion

JAN 05 2011

NEW YORK  
COUNTY CLERK'S OFFICE

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

Dated: 12/29/10  
DEC 29 2010

[Signature]  
J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST  REFERENCE

SUBMIT ORDER/ JUDG.

SETTLE ORDER/ JUDG.

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

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

-----X  
ROBERT S. DINAN,

Plaintiff,

-against-

Index No. 107965/07

Motion Date: 11/9/10  
Motion Seq. No.: 002  
Calendar Nos: 28

DECISION AND ORDER

**FILED**

**JAN 05 2011**

THE CITY OF NEW YORK,

Defendant.

-----X  
BARBARA JAFFE, JSC:

NEW YORK  
COUNTY CLERK'S OFFICE

**For plaintiff:**  
Natalia Derin, Esq.  
Queller, Fisher, Dienst *et al.*  
233 Broadway, 18<sup>th</sup> Fl.  
New York, NY 10279  
212-406-1700

**For defendant:**  
Peter C. Lucas, ACC  
Michael A. Cardozo  
Corporation Counsel  
100 Church St., 4<sup>th</sup> Fl.  
New York, NY 10007  
212-442-6851

By notice of motion dated August 2, 2010, defendant moves for an order partially vacating or amending court orders dated December 8, 2009 and March 23, 2010, and pursuant to CPLR 3124, compelling plaintiff to appear for an independent medical examination (IME) and vocational rehabilitation examination (VRE). Plaintiff opposes the motion.

By orders dated June 23, 2009 and September 8, 2009, defendant was directed to notice plaintiff's IME within 45 days and conduct it within 45 days thereafter. (Affirmation of Peter C. Lucas, ACC, dated Aug. 2, 2010, Exh. A). By order dated December 8, 2009, another justice of this court required that the IME be held within 60 days or be waived. (*Id.*, Exh. B). On or about March 4, 2010, defendant attempted to notice plaintiff's IME, and on March 5, 2010, plaintiff rejected it. (*Id.*, Exh. C). By order dated March 23, 2010, plaintiff's IME was deemed waived. (*Id.*, Exh. D).

Defendant argues that plaintiff's IME is material and necessary to its case, that plaintiff has not yet filed a note of issue and discovery is ongoing, and that it has complied with all other discovery requests. It explains its untimely notice of the IME as resulting from the delay in obtaining plaintiff's medical records and the delay of the entity with which it contracted to schedule the IME. Without an IME, defendant maintains, it will be prejudiced by its inability to retain an expert to address plaintiff's alleged injuries, whereas plaintiff is not prejudiced by undergoing an IME now. Thus, defendant asserts, the waiver provided for in the self-executing order must be vacated. It also seeks plaintiff's examination by a vocational rehabilitation expert, made necessary by plaintiff's allegation that he cannot work as a result of his injuries. (*Id.*).

Plaintiff observes that defendant willfully ignored, without reasonable excuse, successive court orders, including the December 2009 self-executing order, and denies that defendant complied timely with all of the other discovery requests, alleging too that the self-executing order became absolute upon defendant's failure to comply and claiming that defendant had two years to obtain his medical records and never advised that any records were missing. In light of defendant's disobedience of numerous court orders, plaintiff maintains that the absence of prejudice to him is irrelevant and that, in any event, he is prejudiced by defendant's delays as he has not yet been able to file a note of issue. Moreover, plaintiff argues, defendant implicitly waived its right to conduct a VRE by failing to request it earlier, that it is neither material nor necessary, and that defendant's request for it constitutes a disingenuous attempt to avoid the waiver of its right to an IME. (Affirmation of Natalia Derin, Esq., dated Sept. 22, 2010).

In reply, defendant reiterates that it is entitled to the IME, that its failure to notice it was not its fault, and that although the notice was late, plaintiff has shown no prejudice. As discovery

is ongoing, moreover, it asserts that its delay has not prevented plaintiff from filing a note of issue and that the VRE is material and necessary as it pertains to plaintiff's claimed damages. (Reply Affirmation, dated Oct. 6, 2010).

It is well-settled that a self-executing conditional order becomes absolute upon a party's failure to comply with it. (*Wilson v Galicia Contr. & Restoration Corp.*, 10 NY3d 827 [2008]; *AWL Indus., Inc. v QBE Ins. Corp.*, 65 AD3d 904 [1<sup>st</sup> Dept 2009]). However, a party may be relieved of the consequences of failing to comply upon a showing of a reasonable excuse and an affidavit of merit of the claim or defense. (*Tejada v 750 Gerard Properties, Inc.*, 272 AD2d 124 [1<sup>st</sup> Dept 2000]).

The final and binding nature of a self-executing order was recently addressed by the Court of Appeals in *Gibbs v St. Barnabas Hosp.*, \_\_\_ NY3d \_\_\_, 2010 NY Slip Op 09198 (2010). There, the plaintiff failed to serve a bill of particulars within a court-imposed time limit. As pertinent here, the Court reiterated what it had articulated in *Kihl v Pfeffer*, 94 NY3d 118, 223 (1999), observing now as follows:

[O]ur court system is dependent on all parties engaged in litigation abiding by the rules of proper practice. The failure to comply with deadlines not only impairs the efficient functioning of the courts and the adjudication of claims, but it places jurists unnecessarily in the position of having to order enforcement remedies to respond to the delinquent conduct of members of the bar, often to the detriment of the litigants they represent. Chronic noncompliance with deadlines breeds disrespect for the dictates of the Civil Practice Law and Rules and a culture in which cases can linger for years without resolution. Furthermore, those lawyers who engage their best efforts to comply with practice rules are also effectively penalized because they must somehow explain to their clients why they cannot secure timely responses from recalcitrant adversaries, which leads to the erosion of their attorney-client relationships as well. For these reasons, it is important to adhere to the position we declared a decade ago that “[i]f the credibility of court orders and the integrity of our judicial system are to be maintained, a litigant cannot ignore court orders with impunity.”

Here, defendant's claim that its contractor caused the delay is supported only by counsel's hearsay allegation and it offers no evidence that it had contacted the entity to schedule the IME within 60 days of the December 2009 order or that its defense has merit.

Accordingly, as defendant has failed to demonstrate its entitlement to an order vacating the December 2009 order, the order became final and absolute upon its failure to comply. (*See Kirkland v Fayne*, 78 AD3d 660 [2d Dept 2010] [as so-ordered conditional stipulation became binding upon defendant's failure to comply, court should not have vacated it absent reasonable excuse for default and existence of potentially meritorious defense]; *Ensley v Snapper*, 62 AD3d 403 [1<sup>st</sup> Dept 2009] [plaintiff failed to comply timely with three prior discovery orders and failed to set forth reasonable excuse or merit of claim when moving to vacate final, conditional order]; *see also Pannone v Silberstein*, 40 AD3d 327 [1<sup>st</sup> Dept 2007] [physical examination waived as order provided for automatic waiver and defendant failed to comply with schedule set forth in order]; *Quintanna v Rogers*, 306 AD2d 167 [1<sup>st</sup> Dept 2003] [same]). The opinions cited by defendant for the proposition that it is properly relieved of its waiver of the IME do not address self-executing conditional orders.

However, although defendant did not previously request a VRE, discovery is ongoing and the VRE is material and necessary to its defense. (*See Kavanagh v Ogden Allied Maintenance Corp.*, 92 NY2d 952 [1998] [as plaintiff claimed damages related to inability to work, vocational rehabilitation assessment material and necessary for defendant to rebut claim]). Thus, defendant is entitled to have plaintiff undergo a VRE. (*See Wilkerson v Korbl*, 75 AD3d 470 [1<sup>st</sup> Dept 2010] [as plaintiff claimed future lost wages, vocational examination appropriate]; *Diaz v Elrac, Inc.*, 40 AD3d 515 [1<sup>st</sup> Dept 2007] [court should not have denied motion to compel plaintiff to


undergo vocational examination as it would not have delayed trial]).

Accordingly, it is hereby

ORDERED, that defendant City of New York's motion is granted only to the extent of directing plaintiff to appear for a vocational rehabilitation examination within 45 days after it is noticed by City; and it is further

ORDERED, that City shall notice the vocational rehabilitation examination within 45 days of the date of this order or it will be deemed waived.

ENTER:



\_\_\_\_\_  
Barbara Jaffe, JSC

**BARBARA JAFFE**  
**J.S.C.**

DATED: December 29, 2010  
New York, New York  
**DEC 29 2010**

**FILED**

**JAN 05 2011**

NEW YORK  
COUNTY CLERK'S OFFICE