

Century Ambulance Serv., Inc. v Aquino

2011 NY Slip Op 30323(U)

January 26, 2011

Sup Ct, Nassau County

Docket Number: 013427-08

Judge: Timothy S. Driscoll

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**SUPREME COURT-STATE OF NEW YORK
SHORT FORM ORDER**

Present:

HON. TIMOTHY S. DRISCOLL
Justice Supreme Court

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**CENTURY AMBULANCE SERVICE, INC. and
DOMENICK MARINARO,**

**TRIAL/IAS PART: 20
NASSAU COUNTY**

Plaintiffs,

**Index No: 013427-08
Motion Seq. Nos: 7, 8 and 9
Submission Date: 11/5/10**

- against -

**ROBERT J. AQUINO a/k/a ROBERT J. AQUINO, JR.;
CAS ACQUISITION, LLC; CAS ACQUISITION I, LLC
d/b/a CENTURY AMBULANCE SERVICE; ABRAMS,
FENSTERMAN, FENSTERMAN, EISMAN, GREENBERG,
FORMATO & EINIGER, LLP; MARK ZAFRIN, ESQ.;
BARBARA STEGUN PHAIR, ESQ.; PINNACLE HEALTH
CONSULTANTS, LLC; and ANDREW S. BLATT**

Defendants.

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The following papers have been read on these motions:

- Notice of Motion, Affirmation in Support, Affidavit in Support and Exhibits....X**
- Plaintiffs' Memorandum of Law in Support.....X**
- Notice of Cross Motion, Affirmation in Opposition/Support,
Affidavit in Opposition/Support and Exhibits.....X**
- Reply Affirmation in Support, Reply Affidavit and Exhibits.....X**
- Notice of Second Motion for Imposition of Sanctions,
Affirmation in Support and Exhibits.....X**
- Appendix to Plaintiffs' Second Motion for Sanctions.....X**
- Affirmation in Opposition.....X**
- Affirmation in Reply.....X**

This matter is before the Court for decision on 1) the motion filed by Plaintiffs on July 21, 2010, 2) the cross motion filed by Defendants on August 4, 2010, and 3) the "second

motion for sanctions” filed by Plaintiffs on October 6, 2010, all of which were submitted on November 5, 2010. For the reasons set forth below, the Court 1) denies Plaintiffs’ motion; 2) grants Defendants’ cross motion; and 3) denies Plaintiffs’ second motion for sanctions. The Court directs Defendants to file and serve their Amended Answer with Counterclaim within thirty (30) days of the date of this Order and directs Plaintiffs to file their response within thirty (30) days of receipt. The Court further directs the parties to appear before the Court for a conference on March 22, 2011 at 9:30 a.m. **The parties will not be required to appear at the conference scheduled before the Court on February 8, 2011.**

BACKGROUND

A. Relief Sought

Plaintiffs move for an Order 1) pursuant to CPLR § 3126, striking the Defendants’ Answer and awarding Plaintiffs judgment on the Complaint; 2) awarding Plaintiffs sanctions for Defendants’ allegedly frivolous conduct; and 3) adjudging Defendants in contempt, pursuant to § 753 of the Judiciary Law, for their alleged failure to comply with the Preliminary Conference Stipulation and Order dated December 9, 2009.

Defendants cross move for an Order, pursuant to CPLR § 3215, granting permission to file the counterclaim, attached as Exhibit C to Defendants’ motion.

In their “second motion” for the imposition of sanctions, Plaintiffs move for an Order 1) pursuant to CPLR § 3126, striking the Defendants’ Answer and awarding Plaintiffs judgment on the Complaint; and 2) awarding Plaintiffs sanctions for Defendants’ allegedly frivolous conduct.

B. The Parties’ History

The parties’ history is outlined in detail in prior decisions (“Prior Decisions”) of the Court in which the Court denied the applications of both parties and, accordingly, will not be set forth at length here. Those Prior Decisions include 1) a decision dated November 20, 2009 in which the Court denied the application by Plaintiffs Century Ambulance Service, Inc. (“Century”) and Dominick Marinaro (“Marinaro”) for injunctive relief, which included Plaintiffs’ request for an Order directing the Defendants Robert J. Aquino a/k/a, Jr. (“Aquino”) and CAS Acquisition, LLC and CAS Acquisition I, LLC d/b/a Century Ambulance Service (“CAS”) to cease and desist from: a) exercising dominion and control over the assets of Century

including, but not limited to, Century's ambulance and ambulette operating authority; and b) exercising control over Century's ambulance and ambulette operations, 2) a decision dated June 14, 2010 in which the Court denied both a) Plaintiffs' Order to Show Cause seeking partial summary judgment and certain injunctive relief, and b) Defendants' cross motion seeking an Order disqualifying Plaintiffs' counsel, directing Plaintiff Marinaro to return the ambulance that he had allegedly taken and awarding Defendant damages in the form of a sanction for Plaintiffs' allegedly frivolous conduct, and 3) a decision dated November 17, 2010 in which the Court denied Defendants' application for injunctive relief.

As discussed in the Prior Decisions, Marinaro is the owner of all of the issued and outstanding shares of Century, and has served as its sole director and only officer. Plaintiffs filed an Amended Verified Complaint dated September 26, 2008 that contains thirteen (13) counts. The Complaint relates to Marinaro's transfer of his interest in Century to Aquino and CAS. In connection with that transfer, Marinaro and Century entered into an Asset Purchase Agreement ("Purchase Agreement") with CAS dated July 12, 2007. In addition, Century, Marinaro and CAS entered into a Management Agreement ("Management Agreement") on the same date. After execution of the Purchase and Management Agreements, but prior to Aquino obtaining the necessary agency approvals, Aquino operated Century through CAS, pursuant to the Management Agreement, which Aquino personally guaranteed. Plaintiffs alleged that, while managing the business during this transition phase, Defendants engaged in the wrongful acts and conduct described in the Complaint that, unless enjoined, would cause irreparable harm to Plaintiffs.

C. The Parties' Positions

With respect to their motion and second motion, Plaintiffs allege that Defendants 1) have engaged in a deliberate course of conduct designed to prevent Plaintiffs from preparing their case for trial; 2) have acted frivolously; and 3) have violated the Preliminary Conference Stipulation and Order dated December 9, 2009 (Ex. 2 to Ps' motion) and an Order of the Court dated December 14, 2009.

With respect to their cross motion, Defendants request permission to file the proposed counterclaim alleging breach of contract, fraud, request for injunctive relief, unjust enrichment and a request for rescission of the parties' agreement.

RULING OF THE COURT

A. Discovery Sanctions

Actions should be resolved on the merits wherever possible, and the nature and degree of the penalty to be imposed pursuant to CPLR § 3126 is a matter of discretion with the court. In addition, the drastic remedy of striking an answer is inappropriate absent a clear showing that the failure to comply with discovery demands is willful and contumacious. *1523 Real Estate, Inc. v. East Atlantic Properties, LLC*, 41 A.D.3d 567, 568 (2d Dept. 2007) (internal citations omitted).

B. Contempt

To find a party in civil contempt of court pursuant to Judiciary Law § 753, the applicant must demonstrate by clear and convincing evidence that the alleged contemnor has intentionally engaged in conduct which violated a lawful order of the court clearly expressing an unequivocal and explicit mandate thereby prejudicing the right of a party to the litigation. *Miller v. Miller*, 61 A.D.3d 651 (2d Dept. 2009), citing, *inter alia*, *McCain v. Dinkins*, 84 N.Y.2d 216, 226 (1994); Judiciary Law § 753 (A); *Matter of Department of Environmental Protection of City of New York v. Department of Environmental Conservation of State of New York*, 70 N.Y.2d 233, 240 (1987).

C. Frivolous Conduct

22 NYCRR § 130-1.1(a) authorizes the court, in its discretion, to award to any party or attorney in any civil action or proceeding before the court, except where prohibited by law, costs in the form of reimbursement for actual expenses reasonably incurred and reasonable attorney's fees, resulting from frivolous conduct. Section 130-1.1(c) provides that conduct is frivolous if: (1) it is completely without merit in law and cannot be supported by a reasonable argument for an extension, modification or reversal of existing law; (2) it is undertaken primarily to delay or prolong the resolution of the litigation, or to harass or maliciously injure another; or (3) it asserts material factual statements that are false.

D. Leave to Amend

Leave to amend is to be freely given, absent prejudice or surprise directly resulting from the delay in seeking leave, unless the proposed amendment is palpably insufficient or patently devoid of merit. *Aurora Loan Services, LLC v. Thomas*, 70 A.D.3d 986, 987 (2d Dept. 2010), citing CLR § 3025(b); *Lucido v. Mancuso*, 49 A.D.3d 220, 222 (2d Dept. 2008).

E. Application of these Principles to the Instant Action

The Court denies Plaintiffs' application to strike the Defendants' Answer in light of the factual disputes regarding the extent to which Defendants have provided the requested documents. The Court will address any outstanding discovery disputes at the next compliance conference.

The Court denies Plaintiffs' application to adjudge Defendants in contempt. Preliminarily, the Preliminary Conference Order may not constitute an unequivocal mandate on which a contempt finding could be based. *See, e.g., Ottomanelli v. Ottomanelli*, 17 A.D.3d 647 (2d Dept. 2005) (preliminary conference order stating that husband was to continue present payments did not constitute unequivocal mandate that could give rise to contempt proceeding). Even assuming, *arguendo*, that the Preliminary Conference Order is an unequivocal mandate, the Court concludes that Plaintiffs have not, on the current record and all prior proceedings before the Court, demonstrated Defendants' willful violation of the Court's Orders, or provided sufficient allegations to warrant a hearing on that issue.

The Court denies Plaintiffs' motion for sanctions based on the Court's conclusion that Plaintiffs have not demonstrated that Defendants engaged in frivolous conduct.

The Court grants Defendants' motion to amend its Answer to assert counterclaims. The Court directs Defendants to file and serve their Amended Answer with Counterclaim within thirty (30) days of the date of this Order and directs Plaintiffs to file their response within thirty (30) days of receipt. The Court further directs the parties to appear before the Court for a conference on March 22, 2011 at 9:30 a.m. **The parties will not be required to appear at the conference scheduled before the Court on February 8, 2011.**

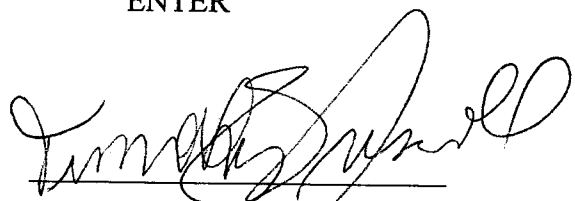
All matters not decided herein are hereby denied.

This constitutes the decision and order of the Court.

The Court reminds counsel of their required appearance before the Court at a conference on March 22, 2011 at 9:30 a.m., as directed herein.

ENTER

DATED: Mineola, NY
January 26, 2011



HON. TIMOTHY S. DRISCOLL
J.S.C.

ENTERED
FEB 01 2011
NASSAU COUNTY
COUNTY CLERK'S OFFICE