

Santiago v Duane Reade, Inc.

2011 NY Slip Op 32319(U)

August 19, 2011

Supreme Court, New York County

Docket Number: 110290/07

Judge: Louis B. York

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

PRESENT: LOUIS B. YORK
Judge

PART ✓

Santiago
- v -
Duane Rende

INDEX NO. 110290/07
MOTION DATE 6/8/11
MOTION SEQ. NO. 06
MOTION CAL. NO. _____

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

	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 *is decided in accordance with the accompanying decision.*

FILED

AUG 24 2011

NEW YORK
COUNTY CLERK'S OFFICE

Dated: 8/19/11

Luy
LOUIS B. YORK

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: IAS PART 2

-----x
 BENJAMIN SANTIAGO,

Plaintiff,

Index No. 110290/07

-against-

DUANE READE, INC., DARIO DE LA CRUZ and
 ANGEL GOMEZ,

Defendant.

FILED

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 COUNTY CLERK'S OFFICE

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 LOUIS B. YORK, J.:

Plaintiff commenced this action to recover damages resulting from an assault defendants allegedly committed against plaintiff. On July 16, 2009, plaintiff's attorney filed a note of issue and certificate of readiness, indicating discovery was complete. In mediation on May 20, 2010, defendants extended a settlement offer of \$10,000 to plaintiff. Plaintiff rejected the offer and filed a complaint regarding his counsel with the disciplinary committee. On November 3, 2010, this Court granted plaintiff's attorney's motion to be relieved as counsel.

On February 15, 2011, plaintiff, now *pro se*, moved to proceed as a poor person, to be assigned counsel and to be furnished a copy of the stenographic transcript of the pre-trial conference. Subsequently plaintiff made another motion in which he sought again to proceed as a poor person and to be assigned counsel and in addition sought to compel opposing counsel to respond to discovery requests and to compel former counsel to turn over a certified copy of the file regarding this matter. Both these motions, sequence numbers 005 and 006, are currently before the Court. The Court consolidates motion sequences 005 and 006 for disposition and for the reasons below partially denies and partially grants plaintiff's motions.

Plaintiff seeks to proceed as a poor person under CPLR § 1101(a). This provision requires that the moving party submit an affidavit setting forth the nature of the action, the amount and source of his income, and a list of his property and its value. CPLR § 1101(a). The party must also state in his affidavit that he or she is unable to pay the costs necessary to prosecute the action and must provide “sufficient facts so that the merit of the contentions can be ascertained.” *Id.* When an affidavit contains no factual basis upon which the merits of the contentions can be considered, the movant has not met the statutory requirements and his motion must be denied. *See McNear v. New York*, 38 A.D.3d 1093, 1094, 831 N.Y.S.2d 591, 592 (3d Dept. 2007). Here, plaintiff merely states he receives zero income, owns no property and has no other assets. As defendant correctly notes in opposition to this motion, this does not satisfy the requirements of CPLR § 1101(a) since plaintiff failed to set forth required information, including the nature of the action and sufficient facts about the merits so the Court can properly evaluate his application. Accordingly, the Court denies this part of plaintiff’s motion.

Plaintiff also seeks to be assigned counsel under CPLR § 1102(a). Pursuant to this section, a court that permits a party to proceed as a poor person “may assign an attorney.” CPLR § 1102(a). Because this Court denies plaintiff’s request to proceed as a poor person, the Court denies his application to be assigned counsel. Even if the Court had granted plaintiff’s application under CPLR § 1101(a), the Court would have denied plaintiff’s request to be assigned counsel. An individual is entitled to the provision of counsel where the State proceeds against him “with risk of loss of liberty or grievous forfeiture.” *Id.* at 437, 369 N.Y.S.2d at 90. However, “[n]o similar constitutional or statutory provision applies to private litigation.” *Id.* at 438, 369 N.Y.S.2d at 90. When a *pro se* plaintiff’s complaint does not implicate a liberty interest, he is not assigned to counsel. *See Planck v. County of Schenectady*, 51 A.D.3d 1283,

1283-84, 858 N.Y.S.2d 824, 825 (3d Dept. 2008). Here, plaintiff seeks damages for an assault defendants allegedly committed against him. Thus, his action fails to implicate any liberty interest. Accordingly, plaintiff is not entitled to be assigned counsel under CPLR § 1102(a) and the Court denies this portion of his motion.

Plaintiff also seeks additional discovery from defendant. However, as defendant notes in opposition to plaintiff's request, when a plaintiff files a note of issue and certificate of readiness stating disclosure is complete, he waives his right to further disclosure. *See Melcher v. City of New York*, 38 A.D.3d 376, 377, 832 N.Y.S.2d 186, 187 (1st Dept. 2007). On July 16, 2009, plaintiff's attorney filed a note of issue and certificate of readiness. Because plaintiff is *pro se*, and his attorney filed the note of issue before relieving himself as counsel, if plaintiff had moved promptly for additional discovery following his attorney's discharge, the Court may have accommodated his request. However, plaintiff delayed over five months before moving to request further material and in the interim has brought other motions. Accordingly, plaintiff's request for additional discovery is denied.

The Court reaches a different conclusion with respect to plaintiff's request for a copy of his former attorney's file. Upon the termination of an attorney-client relationship, a client has the right of full access, with a few exceptions, to the documents in his attorney's file, including work product material. *Sage Realty Corp. v. Proskauer Rose Goetz & Mendelsohn*, 91 N.Y.2d 30, 37-38, 666 N.Y.S.2d 985, 989 (1997). Documents falling within the exception include those which might "violate a duty of nondisclosure owed to a third party," or those that are "intended for office review and use." *Id.* In opposition to plaintiff's motion to compel his former counsel to disclose the file, former counsel avers that he previously sent plaintiff all relevant portions of the file and that the remaining undisclosed documents constitute work product materials to which

which plaintiff is not entitled. However, this objection is merely a broad invocation of the attorney-client privilege, which does not apply to a former client, and is not particular enough to show that any of the undisclosed documents fall under the exception. *See id.* Accordingly, plaintiff is entitled to a certified copy of his file and his former counsel must resend plaintiff the file within thirty days from the date of entry of this Order. In the event his former attorney withholds any portion of the file, he must serve plaintiff with a privilege log explaining how the undisclosed documents qualify as protected documents to which plaintiff is not entitled.

Plaintiff also seeks a copy of the stenographic transcript of the pre-trial conference. The Court does not typically record such conferences and there is no evidence that a transcript of this particular conference exists. Therefore, the Court denies plaintiff's request.

Finally, plaintiff seeks to compel defendants to respond to discovery demands. Defendants annexed their response to the preliminary conference order to their opposition to plaintiff's motion dated May 25, 2011. Defendants claim that any other documents in their counsel's file are protected by attorney-client privilege pursuant to CPLR § 3101(c). Accordingly, plaintiff is not entitled to these documents and his request for their disclosure is denied.

Based on the above, therefore it is

ORDERED that plaintiff's motion 005 is denied; and it is further

ORDERED that plaintiff's motion 006 is granted to the extent that it seeks to compel his former counsel to turn over a certified copy of the file regarding this matter and is otherwise denied; and it is further

ORDERED that plaintiff is to serve a copy of this order upon defendants; and it is further

ORDERED that counsel shall produce the file to plaintiff within thirty days of the date of service of this order.

Dated: 8/19/11

ENTER:

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LOUIS B. YORK, J.S.C.

LOUIS B. YORK
J.S.C.

FILED

AUG 24 2011

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