

Campbell v United Bldg. Maintenance Assoc., Inc.

2012 NY Slip Op 32488(U)

September 26, 2012

Supreme Court, New York County

Docket Number: 115753/2009

Judge: Louis B. York

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

LOUIS B. YORK

PRESENT: _____ J.S.C. _____
Justice

PART 2

INDEX NO. 115753/09
~~45753~~

MOTION DATE 8/23

MOTION SEQ. NO. 001
file to file summary

Campbell

United Bldg Maint. Assoc.

The following papers, numbered 1 to _____, were read on this motion to/for Verdict Note of Issue 9/21/12

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). _____

Answering Affidavits — Exhibits _____ | No(s). _____

Replying Affidavits _____ | No(s). _____

Upon the foregoing papers, it is ordered that this motion is

**MOTION IS DECIDED IN ACCORDANCE
WITH ACCOMPANYING MEMORANDUM DECISION**

FILED

SEP 28 2012

NEW YORK
COUNTY CLERK'S OFFICE

Dated: 9/26/12

Lery, J.S.C.

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

- 1. CHECK ONE: CASE DISPOSED NON-FINAL DISPOSITION
- 2. CHECK AS APPROPRIATE: MOTION IS: GRANTED DENIED GRANTED IN PART OTHER
- 3. CHECK IF APPROPRIATE: SETTLE ORDER SUBMIT ORDER
- DO NOT POST FIDUCIARY APPOINTMENT REFERENCE

Supreme Court of the State of New York
County of New York

Index No. 115753/2009

Part 2

EWEN CAMPBELL,

Plaintiff,

- against -

UNITED BUILDING MAINTENANCE
ASSOCIATES, INC.,

Defendant.

Decision/Order

Present:
Hon. Louis B. York
Justice, Supreme Court

FILED

SEP 28 2012

NEW YORK
COUNTY CLERK'S OFFICE

Plaintiff commenced this action against defendant in October of 2009.

Defendant answered around January of 2010. Over a year later, on March 30, 2011, the parties appeared in Part 2 for a preliminary discovery conference. In the conference, the court set deposition date of June 30, 2011, a disclosure deadline of October 28, 2011, and a Note of Issue deadline of November 4, 2011.

In the order at paragraph 5, which sets forth the deposition date, it states, "no adjournments without prior court approval." Paragraph 7, which contains the end date for disclosure, states:

Before making any motions, as soon as a disclosure problem arises and before the end date for discovery the affected party must call 646-386-3852. Failure to comply by discovery deadline waives all pending and future discovery absent good cause.

(emphasis supplied). The parties omitted some of the mandatory language -- which

explains that the purpose of the call is to schedule a phone conference. However, the import of the rule remains clear. Moreover, the court requires the parties themselves to write in the quoted language in paragraphs 5 and 7 to make sure that they pay attention to it. Finally, in the preprinted additional directives sheet, the order states:

There are to be no adjournments of any depositions without prior approval of the Court. If Court approval cannot reasonably be obtained before the adjournment, then the Court shall be contacted as soon as reasonably possible. Any violation of this rule will result in sanctions or deeming any further depositions waived or both.

Thus, the Court order explicitly states that if the parties do not comply with the court order – in particular, by getting permission to adjourn depositions and by getting permission to extend the discovery and note of issue deadlines – harsh penalties up to and including sanctions and the waiver of discovery may result.

It appears that the parties completely ignored all of the provisions of the March 30, 2011 order. Indeed, movant's own affirmation concedes that the parties adjourned the June 2011 deposition to October 2011 and does not indicate that they obtained this Court's approval for the adjournment; the record for the case also does not indicate they obtained Court approval. The affirmation also states that neither party has produced a witness for deposition. Counsel does not even suggest that either party made efforts to schedule them after their failure to go forward in October. Moreover, the parties took no steps whatsoever to obtain an extension of the discovery or note of issue deadline.

As a result of this dilatory conduct, the Court scheduled a status conference for April 25, 2012 – nearly five months after the note of issue deadline had passed. Status

conferences are held only in those cases in which the parties have committed the most egregious violations of preliminary and compliance conference orders. At the April 25, 2012 status conference, the parties proffered no justification for these violations or for their failure to contact the Court to obtain extensions. As a result, the Court issued a Status Conference Order which stated that the parties had to file the Note of Issue by May 2, 2012 or the case would be dismissed. The Court's order provided for no further discovery.

Pursuant to this order, and with the penalty of dismissal looming, plaintiff filed the note of issue on May 2. Plaintiff improperly indicated that depositions and other discovery was complete; instead, he should have stated that he filed the note of issue by order of the Court. In a sense, however, he was correct, as the Court in essence had deemed discovery waived if not complete by that date. Against this background, defendant made the current motion to vacate the Note of Issue, contending that discovery is not complete. In particular, it argued, depositions and a physical of plaintiff have not been held.

The court denies the motion. Movant failed to comply with any of the prior Court orders, and also failed to contact the court regarding the discovery delays. Moreover, movant does not explain whether there was good cause for this omission. Thus, under the terms of the preliminary conference order, movant has waived the right to seek further court assistance with the discovery process. In arguing that the note of issue should be vacated based on the failure to hold depositions, movant acknowledges that the Court directed plaintiff to file the note of issue on May 2, 2012 notwithstanding the fact that there had been no EBTs. Apparently movant does not realize that the Court

intended the case to be placed on the trial calendar regardless of this fact, and that this also means it would not grant an application to vacate the note of issue and essentially reverse its April 25, 2012 order.

On top of all these other problems, movant did not submit an affirmation of good faith. Under NYCRR 202.7, an affirmation of good faith must accompany all discovery motions. Moreover, subsection (c) provides that this affirmation must "indicate the time, place and nature of the consultation and the issues discussed and any resolutions, or shall indicate good cause why no such conferral with counsel for opposing parties was held." In the absence of a good faith affirmation, the court must deny the motion. See Fulton v. Allstate Ins. Co., 14 A.D.3d 380, 382, 788 N.Y.S.2d 349, 351 (1st Dept. 2005). An affirmation that does not show the movant attempted to obtain discovery that was previously ordered or scheduled is inadequate. See, e.g., Tine v. Courtview Owners Corp., 40 A.D.3d 966, 967, 838 N.Y.S.2d 92, 93 (2nd Dept. 2007). Failure to submit a good faith affirmation along with a motion to vacate is a proper ground for denial of the motion. See Seda v. Mall Prop., Inc., Index No. 114679/2009 (Sup. Ct. N.Y. Cnty Oct. 28, 2011)(avail at 2011 WL 5137174).

For all of the above reasons, the Court also denies the request to extend the time to move for summary judgment or dismissal. For one thing, this relief is not requested in the notice of motion. For another, the proper time to make this request would have been at the status conference at which the Court directed the parties to file the Note of Issue. Either the parties made this request and the Court rejected it, or they did not make the request and therefore they waived it.

Accordingly, it is

