

Moreno v Jimmy G Const. Corp.

2013 NY Slip Op 30334(U)

January 31, 2013

Supreme Court, Queens County

Docket Number: 842/09

Judge: Howard G. Lane

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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE HOWARD G. LANE
Justice

IAS PART 6

DAVID MORENO,

Plaintiff,

-against-

JIMMY G CONSTRUCTION CORP., et al.,
Defendants.

JIMMY G CONSTRUCTION CORP..
Third-Party Plaintiff,

-against-

DIN ISLAM CONTRACTING,
Third-Party Defendant.

JIMMY G. CONSTRUCTION CORP.,
Second Third-Party Plaintiff,

-against-

D&H CONSTRUCTION NY, INC.,
Second Third-Party Defendant.

KINGSTON HEIGHTS APARTMENTS L.P.
and MDG DESIGN AND CONSTRUCTION,
INC.,
Third Third-Party Plaintiff,

-against-

PADMA CONTRACTING CORP.,
Third Third-Party Defendant.

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Motion

Date November 30, 2012

Motion

Cal. No. 95

Motion

Sequence No. 5

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Upon the foregoing papers it is ordered that the branch of the motion by plaintiff, David Moreno for an order pursuant to CPLR 3102(a) for a protective order directing the deposition of plaintiff David Moreno to be conducted by video conference is denied.

Pursuant to *Kirama v. New York Hosp.*, 13 Misc3d 1246A [Sup Ct, NY County 2006]:

CPLR Section 3110 (1) declares that a deposition will ordinarily be held in the county where the action is pending. However, plaintiff argues that when the party to be deposed demonstrates that being deposed in that county would constitute a hardship, the deposition may be held elsewhere.

In *Rogovin v. Rogovin*, 3 AD3d 352 [1st Dept 2004], a deposition was allowed to be held by video conference where the defendant-deponent was established to be the "sole caregiver for her ailing nonagenarian mother and had a special needs 10 year old daughter" (see, *Kirama, supra*).

Via the moving papers, plaintiff submits an attorney's affirmation which merely states that "[i]n early October, 2011, the exact date being unknown to your affirmant, the Plaintiff was deported to his home country of Mexico. He has been unable to return to the United States to date". Additionally, plaintiff includes sworn examination before trial transcript testimony of plaintiff himself wherein he testifies that he was present in this country without a green card, he did not have a social security number, and he had no INS applications pending for citizenship or work permission. Plaintiff has not provided sufficient evidence to establish that a deposition should be held by video conference. The instant case is analogous to the case

of *Rodriguez v. Infinity Ins. Co.*, 283 AD 969 [4th Dept 2001] wherein the court held that "plaintiffs' submissions in support of the motion, i.e., the pleadings and an attorney's affidavit containing only conclusory allegations of hardship, failed to establish that traveling to New York for depositions would result in undue hardship to plaintiffs." Furthermore, the instant case is distinguishable from the recent case of *Gabriel v. Johnston's L.P. Gas Service, Inc.*, 98 AD3d 168 (4th Dept 2012), wherein the court allowed video depositions to be held where the plaintiffs provided a "comprehensive" explanation of hardship. Such factors the Appellate Division, Fourth Department looked at in *Gabriel* which factors are not present here were the submission of a very thorough and detailed attorney's affirmation, an affidavit of an immigration attorney who averred her attempts to obtain visas for the plaintiffs, letters denying visa applications for the plaintiffs, and affidavits of the plaintiffs themselves detailing their unsuccessful efforts to obtain visas.

Accordingly, that branch of the motion by plaintiff, David Moreno for an order pursuant to CPLR 3102(a) for a protective order directing the deposition of plaintiff David Moreno to be conducted by video conference is denied.

That branch of the motion by plaintiff, David Moreno for an order limiting the scope of the third-party defendant's questioning to be limited pursuant to the mandates of *Gibson v. Transact International, Inc.*, is denied.

As third-party defendant, Padma Contracting Corp. was impleaded into the action after plaintiff's deposition had been conducted, the scope of questioning shall not be limited.

That branch of the motion by plaintiff for an order scheduling the deposition of the third-party defendant, Padma Contracting Corp. is hereby granted solely to the extent that third-party defendant, Padma Contracting Corp. is directed to appear for an examination before trial on a date, time, and place mutually agreed upon by the parties, but no later than sixty (60) days from the date of completion of the depositions of plaintiff, defendants, and the other third-party defendants.

That branch of the cross motion by defendants, Kingston Heights Apartments L.P. and MDG Design and Construction, Inc. and that branch of the cross motion by third-party defendant,

Padma Contracting, Corp. for an order pursuant to CPLR 3404 dismissing plaintiff's abandoned complaint for failure to prosecute the matter are hereby denied. It is undisputed that this Court issued an order dated August 10, 2011 vacating the Note of Issue and Certificate of Readiness as disclosure was outstanding. The Appellate Division, Second Department has held that when the Note of Issue is stricken for outstanding discovery matters, the mandates of CPLR 3404 do not apply as the case just returned to "pre-note of issue status" (*Travis v. Cuff*, 28 AD3d 749 [2d Dept 2006]). Additionally, "an action in pre-note of issue status may be dismissed for want of prosecution only if the statutory preconditions for such dismissal are met" (*Id*). In the instant case, such preconditions have not been met as the procedures dictated under CPLR 3216 have not been followed. Accordingly, the plaintiff's Complaint shall not be dismissed pursuant to either 3404 or 3216.

That branch of the cross motion by defendants, Kingston Heights Apartments L.P. and MDG Design and Construction, Inc. for an order pursuant to CPLR 3126 dismissing plaintiff's complaint for plaintiff's wilful and contumacious behavior in refusing to provide discovery and appear for a further deposition or alternatively precluding plaintiff from offering evidence with respect to liability and damages at the time of trial is hereby decided as follows:

On November 2, 2009, a Preliminary Conference Order was entered into between the parties, whereby the plaintiff was to provide discovery. It is undisputed that plaintiff failed to comply with the terms of this order. Thereafter, on March 2, 2010, a Compliance Conference Order was entered into between the parties, whereby the plaintiff was to again provide outstanding discovery. It is undisputed that plaintiff has failed to comply with the terms of this order. The only excuse provided by plaintiff is provided in affirmation of plaintiff's attorney wherein he affirms that plaintiff has been deported to Mexico and due to this deportation, "mails are difficult and often are not delivered" and plaintiff "resides numerous miles away from an embassy for purposes of getting documents notarized and the cost of a notary is prohibitive". The Court finds that plaintiff's Complaint shall be stricken without further order of the Court unless plaintiff provides all outstanding discovery requested by defendants Kingston Heights Apartments L.P. and MDG Design and Construction, Inc. within sixty (60) days after service of a copy of this order with notice of entry. Plaintiff is to appear for an EBT on a date, time, and place mutually agreed upon by the

parties, but no later than sixty (60) days from the date of service of a copy of this order with notice of entry.

That branch of the cross motion by third-party defendant, Padma Contracting Corp. for an order pursuant to CPLR 3126 dismissing plaintiff's complaint for failure to fully comply with third-party defendant's discovery demands (third-party defendant's Combined Demands dated October 25, 2011, third-party defendant's notices for Discovery and Inspection dated December 8, 2011, January 13, 2012, January 31, 2012, July 3, 2012 and July 26, 2012 and defense counsel's correspondence dated October 3, 2012 and plaintiff's failure to appear for a deposition and physical examinations conducted on behalf of third-party defendant) or precluding the plaintiff from offering evidence at the trial of this action with regard to liability and damages and for an order precluding the plaintiff from offering evidence at the trial of this action is hereby granted, solely to the extent that plaintiff is ordered to comply with the outstanding discovery demands of third-party defendant Padma Contracting Corp. within sixty (60) days after service of a copy of this order with notice of entry and plaintiff is to appear for an examination before trial and independent medical examinations on a date, time, and place mutually agreed upon by the parties, but no later than thirty (60) days from the date of service of a copy of this order with notice of entry.

Should plaintiff fail to comply with this order, third-party defendant, Padma Contracting Corp. may move for sanctions pursuant to CPLR 3126.

That branch of the cross motion by third-party defendant, Padma Contracting Corp. for an order pursuant to CPLR 3126, striking defendant, Jimmy G. Construction Corp.'s complaint for defendant's failure to respond to third-party defendant's Combined Demands dated October 25, 2011, for failure to respond to third-party defendant's Notice for Discovery and Inspection dated July 5, 2012, for defendant's failure to respond to defense counsel's correspondence dated June 5, 2012, and October 3, 2012; and for defendant's failure to appear for a deposition is hereby granted (as the record reflects that any responses provided by defendant Jimmy G. Construction Corp. were provided after the making of the instant motion) solely to the extent that defendant, Jimmy G. Construction Corp. is ordered to comply with the outstanding discovery demands of third-party defendant, Padma Contracting Corp. within thirty (30) days after service of a copy of this order with notice of entry and Jimmy G. Construction

Corp. is to appear for an examination before trial and independent medical examinations on a date, time, and place mutually agreed upon by the parties, but no later than sixty (60) days from the date of service of a copy of this order with notice of entry.

Should Jimmy G. Construction Corp. fail to comply with this order, defendant Padma Contracting Corp. may move for sanctions pursuant to CPLR 3126.

This constitutes the decision and order of the court.

Dated: January 31, 2013

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Howard G. Lane, J.S.C.