

McGrath v Eaves

2013 NY Slip Op 32697(U)

August 12, 2013

Supreme Court, Westchester County

Docket Number: 54851/11

Judge: Joan B. Lefkowitz

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This opinion is uncorrected and not selected for official publication.

To commence the statutory time period for appeals as of right [CPLR 5513(a)], you are advised to serve a copy of this order, with notice of entry upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER - COMPLIANCE PART

-----X
MARK MCGRATH,

Plaintiff,

-against-

CORY A. EAVES and ANGELA D. EAVES,

Defendants.

-----X
CORY A. EAVES and ANGELA D. EAVES,

Third-Party Plaintiffs,

-against-

CAD DEVELOPMENT CORP.,

Third-Party Defendant.

-----X
MARK MCGRATH,

Plaintiff,

-against-

CORY A. EAVES, ANGELA D. EAVES and NEIL
ROBERTSON,

Defendants.

-----X
LEFKOWITZ, J.

DECISION & ORDER

Action #1

Index No. 54851/11

Motion Date: Aug. 12, 2013

Seq. No. 2, 3

Action #2

Index No. 62302/12

The following papers were read on this motion by defendants/third-party plaintiffs Cory Eaves and Angela Eaves for an order pursuant to CPLR 3126 dismissing plaintiff's complaints in both action #1 and action #2, or precluding plaintiff from offering testimony in this matter, and

awarding costs and fees related to court appearances and the instant motion. Third-party defendant CAD Development Corp. moves for an order dismissing plaintiff's complaint in action #1, including all third party complaints and all cross claims, or precluding plaintiff from offering any testimony in this matter and awarding costs and fees related to court appearances and the instant motion.

Order to Show Cause - Affirmation in Support by Karen Lager - Exhibits

Order to Show Cause - Affirmation in Support by Jeannine Davanzo - Exhibit

Affirmation in Opposition - Exhibits

Upon the foregoing papers and the proceedings held on August 12, 2013, this motion is determined as follows:

Plaintiff allegedly sustained injuries on September 16, 2009 while working as a carpenter at defendants/third-party plaintiffs' Cory and Angela Eaves' home. Plaintiff alleges he sustained injuries when he struck his head on the header of a low door frame. Plaintiff was employed by third-party defendant CAD Development Corp. Cory Eaves and Angela Eaves commenced a third-party action against CAD Development Corp., alleging negligence and breach of contract and seeking indemnification and contribution.

Defendants/third-party plaintiffs Cory Eaves and Angela Eaves (hereinafter the Eaves defendants) argue plaintiff has repeatedly failed to comply with Court orders directing him to appear for a deposition. Pursuant to the December 19, 2012 compliance conference order, the deposition of the plaintiff was to be completed on or before February 15, 2013 (Affirmation of Karen Lager, Exhibit J). Counsel for the Eaves defendants sent a February 14, 2013 letter memorializing plaintiff's counsel's representation that plaintiff could not appear for a deposition because he recently underwent surgery (Affirmation of Karen Lager, Exhibit K).

The February 28, 2013 compliance conference order provided plaintiff's deposition was to be completed on or before May 7, 2013 (Affirmation of Karen Lager, Exhibit L). In a May 2, 2013 letter, counsel for the Eaves defendants stated he intended on conducting plaintiff's deposition on May 7, 2013. He requested plaintiff's counsel contact him if plaintiff was not physically able to attend his deposition to make accommodations to conduct the deposition at his current address. In a May 3, 2013 letter, counsel for the Eaves defendants memorialized plaintiff's counsel's representation that plaintiff was in the hospital and his deposition needed to be adjourned. In a May 6, 2013 letter, counsel for the Eaves defendants requested that plaintiff's counsel provide him with the earliest possible date for plaintiff's deposition (Affirmation of Karen Lager, Exhibit M).

Pursuant to a May 14, 2013 compliance conference order, plaintiff was directed to provide the operative report for the 2013 surgery and authorizations for all 2013 medical treatment on or before May 23, 2013. Plaintiff was to provide a firm date for his deposition at

the May 30, 2013 conference (Affirmation of Karen Lager, Exhibit N). In a May 29, 2013 letter, counsel for the Eaves defendants noted plaintiff's failure to comply with the May 14, 2013 compliance conference order (Affirmation of Karen Lager, Exhibit O).

Pursuant to a May 30, 2013 compliance conference order, plaintiff was directed to provide authorizations on or before June 7, 2013 and provide copies of medical records from 2013 in his possession on or before June 10, 2013. The order provides plaintiff was to be produced for a deposition on or before June 25, 2013 (Affirmation of Karen Lager, Exhibit P). By letter dated June 17, 2013, counsel for the Eaves defendants advised they did not receive authorizations or medical records as directed in the May 30, 2013 compliance conference order. Counsel requested that his office be notified if plaintiff was unable to be deposed on June 25, 2013. In a June 24, 2013 letter, plaintiff's counsel stated plaintiff was physically incapable of attending the deposition, as he underwent a lumbar fusion on March 5, 2013, was bed bound, and was in pain. Plaintiff's counsel stated plaintiff would make every effort to make himself available to be deposed before the July 25, 2013 compliance conference date, pending his surgeon's approval (Affirmation of Karen Lager, Exhibit Q). In plaintiff's response to the May 14, 2013 Court order dated June 21, 2013, plaintiff provided authorizations and states medical records were provided (Affirmation of Karen Lager, Exhibit Q). In a June 28, 2013 letter, plaintiff's counsel advised that plaintiff was unable to be deposed for at least twelve weeks. Plaintiff attaches a June 26, 2013 letter by plaintiff's treating surgeon, Dr. Seth Neubardt, stating plaintiff is four months post lumbar fusion L4-L5 and L5-S1 and a CT scan showed plaintiff has bilateral L4 fractures, and is experiencing severe pain. The surgeon states that due to plaintiff's continued pain he is unable to attend any hearings or depositions for at least three months (Affirmation of Karen Lager, Exhibit R).

The Eaves defendants argue plaintiff has failed to comply with Court orders and failed to notify the parties of plaintiff's inability to appear for a Court ordered deposition. The movants argue at multiple Court conferences plaintiff's counsel represented plaintiff could be produced for a deposition and entered into orders plaintiff had no intent on complying with. The Eaves defendants argue plaintiff's repeated adjournment of his client's deposition and failure to contact the Court to advise that he was unavailable to be deposed constitutes willful and contumacious conduct.

CAD Development argues plaintiff has not appeared for a deposition despite numerous good faith requests for compliance. CAD argues the parties were not notified of the status of plaintiff's medical condition until June 2013. Plaintiff has repeatedly failed to appear for a deposition, failed to timely advise the parties as to plaintiff's medical condition, failed to adjourn conferences, and failed to abide by Court orders.

Plaintiff submits opposition arguing plaintiff's injuries have rendered him physically unable to travel and appear for a deposition. Plaintiff submits an affidavit stating he has undergone four spinal surgeries in two and a half years. Since the most recent surgery on March 5, 2013, plaintiff has been in constant and debilitating pain. He is unable to walk, sit or stand except for brief periods of time and he is on several medications which make it difficult to focus

and answer questions. He has been confined to his home and bed for a four month period (Plaintiff's Exhibit D). Plaintiff argues he has stated a reasonable excuse for his failure to appear for a deposition.

“The nature and degree of the penalty to be imposed on a motion pursuant to CPLR 3126 is a matter generally left to the discretion of the Supreme Court” (*Carbajal v Bobo Robo, Inc.*, 38 AD3d 820 [2d Dept 2007]). To invoke the drastic remedy of striking a pleading or of preclusion a court must determine that the party's failure to disclose is willful and contumacious (*Greene v Mullen*, 70 AD3d 996 [2d Dept 2010]; *Kingsley v Kantor*, 265 AD2d 529 [2d Dept 1999]). Willful and contumacious conduct can be inferred from repeated noncompliance with court orders or a failure to comply with court ordered discovery over an extended period of time, coupled with the lack of an adequate excuse for the failure (*Mei Yan Zhang v Santana*, 52 AD3d 484 [2d Dept 2008]; *Carbajal v Bobo Robo, Inc.*, 38 AD3d 820 [2d Dept 2007]; *Prappas v Papadatos*, 38 AD3d 871 [2d Dept 2007]). Plaintiff failed to appear for a deposition in violation of three Court orders. The compliance conference orders provide that any failure to comply strictly with the terms of the order shall be grounds for the striking of pleadings or other relief pursuant to CPLR 3126. However, the Court notes plaintiff underwent spinal surgery in March 2013. Counsel for the Eaves defendants submits a June 26, 2013 letter from plaintiff's treating surgeon indicating plaintiff had postoperative complications and is in severe pain. The letter states plaintiff is unable to attend a deposition for at least three months. Plaintiff submits an affidavit stating he is unable to walk, sit or stand except for brief periods of time and he is on several medications which make it difficult to focus and answer questions. Insofar as plaintiff is in violation of three Court orders directing that he appear for a deposition and defense counsel has diligently followed up to obtain the deposition, the movants are entitled to a conditional order of preclusion.

In view of the foregoing, it is

ORDERED that the motions by defendants/third-party plaintiffs Cory Eaves and Angela Eaves and third-party defendant CAD Development Corp. are granted to the extent that plaintiff shall be produced for a deposition on or before October 4, 2013. The deposition may be conducted at a location designated by the plaintiff; and it is further

ORDERED that if plaintiff does not appear for a deposition as directed, plaintiff is precluded from testifying at trial; and it is further

ORDERED that plaintiff shall provide on or before August 26, 2013 copies of all medical records from 2013 in plaintiff's possession; and it is further

ORDERED that the branches of the motions seeking an award of costs and fees related to court appearances and the instant motion are denied; and it is further

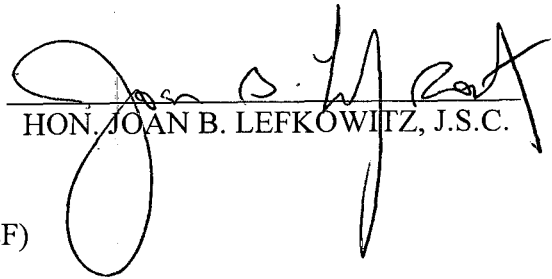
ORDERED that counsel for defendants/third-party plaintiffs Cory Eaves and Angela

Eaves shall serve a copy of this order with notice of entry on the parties within ten days of entry; and it is further

ORDERED that all parties are directed to appear for a conference in the Compliance Part, Courtroom 800, on October 10, 2013 at 9:30 a.m.

The foregoing constitutes the decision and order of this Court.

Dated: White Plains, New York
August 12, 2013


HON. JOAN B. LEFKOWITZ, J.S.C.

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