

Grant v Mendez

2013 NY Slip Op 33750(U)

May 22, 2013

Supreme Court, Westchester County

Docket Number: 60257/2011

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
GEORGE GRANT,

Plaintiff,

DECISION & ORDER

-against-

Index No. 60257/2011
Motion Date: May 20, 2013

JOEL MENDEZ and F and P CONTRACTING,

Seq No. 2

Defendants.

-----X
LEFKOWITZ, J.

The following papers were read on this motion by the Law Offices of Andrew Hirschhorn to be relieved as counsel for plaintiff and staying the action for a period of 60 days so that plaintiff may find new counsel.

Order to Show Cause - Affirmation in Support - Exhibits A-D
Affirmation in Opposition - Exhibits A-B
Filed Papers: Affirmation in Support of Motion to Dismiss filed February 26, 2013
with Exhibits

Upon the foregoing papers and upon the proceedings held on May 20, 2013, this motion is determined as follows:

Plaintiff commenced the present action to recover damages for personal injuries allegedly sustained by plaintiff as result of a motor vehicle accident. Defendants filed an answer on or about January 25, 2012.

Pursuant to the preliminary conference stipulation and order dated June 13, 2012, this court directed plaintiff to appear for a deposition on or about September 6, 2012. According to defendants, the deposition was adjourned to September 27, 2012 at the plaintiff's written request. By letter dated September 6, 2012, plaintiff requested a second adjournment of the deposition.

On October 23, 2012, a compliance conference was held. Pursuant to the compliance conference order issued on or about that date, plaintiff was directed to appear for a deposition on or before November 30, 2012. By letter dated November 18, 2012, defense counsel advised plaintiff's counsel that the deposition had not yet been scheduled. By letter to the court dated November 28, 2012, defendants requested permission to make a motion to dismiss based upon plaintiff's failure to appear for a deposition.

In response to the letter, a court conference was held on December 10, 2012, and counsel for all the parties appeared at the conference. Pursuant to a compliance conference order dated December 11, 2012, plaintiff was directed to appear for a deposition on or before January 7, 2013. By letter dated December 13, 2012, defense counsel requested that plaintiff's counsel schedule the deposition.

On or about January 9, 2013, the parties appeared for a compliance conference. At that conference, plaintiff's counsel advised the court of his intent to file a motion to be relieved as counsel and the court issued a briefing schedule whereby plaintiff's counsel was directed to file the motion to be relieved on or before January 23, 2013. Plaintiff's counsel did not file such motion at that time.

A conference was held on February 19, 2013, and the court issued a briefing schedule to defendants for a motion to dismiss the complaint based upon plaintiff's failure to appear for a deposition.

On April 5, 2013, movant filed a proposed Order to Show Cause seeking to be relieved as counsel for plaintiff on the ground that movant had lost contact with plaintiff. In the Affirmation in Support of the Order to Show Cause, Andrew Hirschhorn, Esq. asserted that he had lost contact with plaintiff since June 30, 2012. Mr. Hirschhorn further asserted that correspondence had been sent to plaintiff's last known address and telephone calls placed to plaintiff's last known telephone number, but that all available telephone numbers had been disconnected and no response had been received from plaintiff. Mr. Hirschhorn contends that plaintiff's case cannot be prosecuted and will ultimately be dismissed, which exposes counsel to both ethical and/or professional liability.

In support of the motion, movant annexed the pleadings, defendants' demand for a bill of particulars and discovery demands dated January 24, 2012, and a letter from Mr. Hirschhorn to plaintiff dated June 30, 2012. In the letter, Mr. Hirschhorn advised plaintiff as follows: "This letter is an official notice to you and all parties concerned that we have determined to close your file and chose not to represent you for your personal injury dated August 29, 2011. Enclosed please find a full copy of your file."

On April 8, 2013, oral argument was heard on defendants' motion to dismiss the complaint. Although plaintiff did not submit written opposition to the motion, plaintiff's counsel appeared at oral argument and made vague assertions that he had been unable to contact plaintiff. By order dated April 11, 2013, this court denied defendants' motion to dismiss the complaint and gave plaintiff one last opportunity to appear for a deposition. Therein, this court also directed that, in the event plaintiff failed to appear for the deposition on or before April 22, 2013, defendants were to file an affidavit of noncompliance and proposed order precluding plaintiff from testifying at trial or otherwise.

By Order to Show Cause dated April 12, 2013, this court directed movant to, inter alia, serve plaintiff with the Order to Show Cause by personal delivery or certified mail/return receipt

requested on or before April 22, 2013, to undertake an investigation to ascertain plaintiff's current address, and to seek an amended Order to Show Cause directing alternate service if movant was unable to locate plaintiff. The Order to Show Cause also adjourned plaintiff's deposition pending determination of the present motion.

Movant failed to file either an affidavit regarding the search undertaken to locate plaintiff or proof of service of the Order to Show Cause on plaintiff. Additionally, movant failed to seek an amended Order to Show Cause directing alternate service of the Order to Show Cause upon plaintiff. At oral argument, movant asserted that he recently learned that plaintiff is currently incarcerated at Rikers Island.¹

Defendants oppose the motion on the ground that they have been prejudiced by movant's late motion to be relieved as counsel as they have lost the benefits of the court's preclusion order. Defendants object to plaintiff's counsel moving to be relieved as counsel on the eve of their motion to dismiss and the failure of plaintiff's counsel to make the motion by January 23, 2013, as directed in the court's briefing schedule. Moreover, defendants oppose the motion since movant failed to comply with the directives in the Order to Show Cause regarding an affidavit verifying the efforts undertaken by movant to locate plaintiff and to verify proof of service. In the event the court grants movant's motion to be relieved, defendants seek a provision that if plaintiff fails to retain new counsel by a date certain, then the complaint will be dismissed.

Insofar as movant has failed to file proof of service of the Order to Show Cause on plaintiff and has failed to file an affidavit setting forth the search undertaken to locate plaintiff, as directed in the Order to Show Cause, the motion is denied. Although in support of the present motion movant professes to be concerned about his ethical and/or professional liability in continuing his representation of plaintiff since he has lost contact with plaintiff, he notes that he lost contact with plaintiff almost a year ago and has failed to advise the court as to why he apparently failed to search for plaintiff until recently. Moreover, movant did not have any concerns about his ethical and/or professional obligation or liability when he sent plaintiff the letter dated June 30, 2012, wherein he advised plaintiff that his file was being closed and movant no longer chooses to represent plaintiff. As movant should be well aware, an attorney must seek leave of the court to be relieved as counsel for a client based upon good cause, unless a consent to change attorneys signed by the client has been filed (CPLR 321[b][2]; Rules of Professional Conduct [22 NYCRR 1200.0] rule 1.16[d]). Here, movant improperly advised plaintiff that he was withdrawing from representing him without obtaining plaintiff's signed consent or seeking a court order relieving him as counsel. In view of the foregoing circumstances, it is not surprising that plaintiff did not provide movant with his current contact information. Movant has an obligation to contact plaintiff, continue representing plaintiff and prosecute the present action until such time as movant obtains a court order relieving him as counsel.

¹ The New York City Department of Correction website indicates that a George Grant is currently incarcerated on Rikers Island at the Otis Bantum Correctional Center under Book & Case Number 1411206740.

Accordingly, it is

ORDERED that the motion is denied insofar as movant has failed to file an affidavit of service demonstrating service of the Order to Show Cause upon plaintiff and has failed to file an affidavit setting forth the efforts undertaken to locate plaintiff as directed in the Order to Show Cause; and it is further

ORDERED that the parties arrange for the appearance of plaintiff at a deposition to be held on or before June 17, 2013 at Rikers Island, where he is currently incarcerated, including seeking a court order, if necessary; and it is further

ORDERED that counsel for all parties shall appear for a conference in the Compliance Part, Courtroom 800, on June 19, 2013 at 9:30 A.M.

ORDERED that movant shall serve a copy of this order with notice of entry on all parties within 10 days of entry.

Dated: White Plains, New York
May 22, 2013


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

TO:

Law Office of Andrew Hirschhorn Esq.
By Andrew Hirschhorn, Esq.
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Rosedale, New York 11422
Via NYSCEF

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East Elmhurst, NY 11370

Dodge & Monroy, P.C.
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Via NYSCEF

cc: Compliance Part Clerk