

Gomez v City of New York

2014 NY Slip Op 30324(U)

February 3, 2014

Supreme Court, New York County

Docket Number: 115866/06

Judge: Barbara Jaffe

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.

This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

PRESENT: JAFFE
Justice

PART 12

Index Number : 115866/2006
GOMEZ, RAIDY J.
vs.
CITY OF NEW YORK
SEQUENCE NUMBER : 001
VACATE STAY/ORDER/JUDGMENT

INDEX NO. 115866/2006
MOTION DATE _____
MOTION SEQ. NO. 001

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

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____	No(s). <u>1</u>
Answering Affidavits — Exhibits _____	No(s). <u>2</u>
Replying Affidavits _____	No(s). <u>3</u>

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

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

DECIDED IN ACCORDANCE WITH
ACCOMPANYING DECISION / ORDER

FILED
FEB 05 2014
NEW YORK
COUNTY CLERK'S OFFICE

Dated: 2/3/14
[Signature]

[Signature], J.S.C.

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 : IAS PART 12

-----X
RAIDY J. GOMEZ, an infant by his Mother and Natural
Guardian, MARIA RODRIGUEZ, and MARIA RODRIGUEZ,
individually,
Plaintiffs,

Index No. 115866/06
Mot. seq. no. 001

DECISION AND ORDER

-against-

THE CITY OF NEW YORK, *et al.*,
Defendants.

-----X
BARBARA JAFFE, J.S.C.:

For plaintiffs:
Mark S. Gray, Esq.
Law Offices of Mark S. Gray
251 W.93rd St.
New York, NY 10025
212-537-7000

FILED
FEB 05 2014
NEW YORK
COUNTY CLERKS OFFICE

For defendants:
Binyomin Travis, ACC
Michael A. Cardozo
Corporation Counsel
100 Church St., 4-139
New York, NY 10007
212-356-3197

By notice of motion, plaintiffs move pursuant to CPLR 5015(a)(1) for an order vacating my order dated July 20, 2012 dismissing the action, and restoring the action to the active calendar. Defendants oppose.

In my July 20, 2012 order, I dismissed the action based on plaintiffs' failure to appear for scheduled depositions on May 24, 2012, pursuant to my order dated March 27, 2012, in which I provided that:

as plaintiff and plaintiff's mother failed to appear for depositions as ordered on 1/10/12 and 10/4/11, the plaintiff and his mother are directed to appear for depositions on May 24, 2012 or the action will be dismissed. This is a self-executing order.

By affirmation dated July 13, 2012, defendants' attorney states that plaintiffs did not appear for their depositions on May 24, 2012.

Plaintiffs previously failed to appear for depositions as directed in the following court

orders:

- (1) a preliminary conference order dated December 23, 2008;
- (2) a compliance conference order dated June 2, 2009;
- (3) a compliance conference order dated January 12, 2010;
- (4) a compliance conference order dated July 27, 2010; in that order, deposition dates were marked final, and it was noted that “failure to appear will be deemed willful and contumacious conduct which may result in sanctions, including the striking of pleadings or preclusion;”
- (5) a compliance conference order dated January 11, 2011, which provided that “as these [examinations before trial] were previously marked final, failure to appear will result in sanctions.” While Rodriguez appeared for her deposition, it could not be completed that day, and plaintiff Gomez did not appear for his deposition;
- (6) a compliance conference order dated June 7, 2011, in which Rodriguez was directed to finish her deposition and Gomez was directed to appear for his deposition; neither appeared;
- (7) a compliance conference order dated October 4, 2011, in which the depositions were again marked final;
- (8) a compliance conference order dated January 10, 2012, in which it was stated that plaintiffs’ failure to appear for their depositions would result in sanctions; and
- (9) the last compliance conference order dated March 27, 2012, as set forth above.

It is well-settled that a self-executing conditional order becomes absolute upon a party’s failure to comply with it. (*Wilson v Galicia Contr. & Restoration Corp.*, 10 NY3d 827 [2008]; *Casas v Consol. Edison Co. of New York, Inc.*, 105 AD3d 471 [1st Dept 2013]; *Okumus v Living Room Steak House, Inc.*, 112 AD3d 799 [2d Dept 2013]; *AWL Indus., Inc. v QBE Ins. Corp.*, 65 AD3d 904 [1st Dept 2009]; *Rampersad v New York City Dept. of Educ.*, 30 AD3d 218 [1st Dept 2006]). However, a failure to comply may be relieved upon a showing of a reasonable excuse for the failure and the existence of a meritorious claim or defense. (*Gibbs v St. Barnabas Hosp.*, 16 NY3d 74 [2010]; *Tejada v 750 Gerard Properties, Inc.*, 272 AD2d 124 [1st Dept 2000]).

Plaintiffs contend that Gomez was unable to appear for his deposition due to his serious heart condition and disabilities, and that Rodriguez failed to appear on May 24, 2012 because she traveled to the Dominican Republic to care for her ill mother. (Affirmation of Mark S. Gray,

Esq., dated Aug. 22, 2013 [Gray Aff.]. Exhs. A, H). They also allege that they have a meritorious claim that defendants failed to supervise Gomez, who as a result of his heart condition, was required to use the elevator instead of the stairs at school. As the paraprofessional assigned to supervise him allegedly left him alone between classes, Gomez proceeded to a stairway where he fainted and suffered a heart attack. (*Id.*, Exhs. C, F, G).

Plaintiffs failed nine times to appear for depositions, and discovery proceedings have pending for over four years. On one date, Rodriguez began her deposition but did not finish it and failed to return to complete it despite numerous court orders warning plaintiffs of the consequences of doing so. Gomez's condition, absent any specifics or supporting documentation, does not justify his failure to appear, and counsel's contention that he "may not be competent to testify" is of no probative value, especially as Gomez testified at the 50-h hearing. While Rodriguez understandably missed one of the dates in order to care for her mother, she offers no explanation for her other failures to appear.

Given these circumstances, counsel's characterization of his clients' repeated failures to appear as "merely technical" reflects a disregard for the court's processes. (*See Williams v Shiva Ambulette Svce. Inc.*, 102 AD3d 598 [1st Dept 2013] [plaintiff's unexplained pattern of disobeying four successive court orders and failing to provide timely discovery demonstrated that noncompliance willful, contumacious, and in bad faith; court thus properly struck complaint and dismissed action; her excuse that noncompliance result of surgery does not explain pre-surgery violation of numerous court orders]; *Sadoyan v Castro*, 102 AD3d 666 [2d Dept 2013] [defendant's answer properly stricken for failure to appear for court-ordered depositions three times over nine months]; *Legarreta v Neal*, 108 AD3d 1067 [4th Dept 2013] [party's willfulness

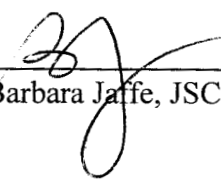
or contemptuousness inferred from repeated failure to comply with demands or discovery orders and warranted striking of pleading]; *see also Keller v Merchant Cap. Portfolios, LLC*, 103 AD3d 532 [1st Dept 2013] [conditional order properly enforced without need for finding that defendant's conduct willful; failure to comply timely with three court orders, including conditional order striking answer warranted inference of willfulness]). And even if plaintiffs' failures to appear are not appropriately characterized as wilful or contemptuous, their year-long delay in moving to vacate the dismissal reflects a lack of interest in prosecuting the action. (*See eg Pichardo-Garcia v Josephine's Spa Corp.*, 91 AD3d 413 [1st Dept 2012] [plaintiff made no attempt to vacate dismissal of complaint based on failure to appear at conference until almost year after being served with notice of entry of order]; *Glanville v Lets Care Again Daycare, Inc.*, 40 AD3d 580 [2d Dept 2007] [plaintiffs' failure to respond to discovery, timely comply with discovery order, and further one-year delay in moving to vacate dismissal order constituted pattern of willful default and neglect that cannot be excused]; *Pan v Metro Apple Exp., Inc.*, 188 AD2d 282 [1st Dept 1992] [motion to vacate order dismissing action properly denied as plaintiff's pattern of delay over years showed laxity and disregard for court rules]).

However, in the exercise of my discretion, I afford plaintiffs one last opportunity to appear for their depositions. Plaintiffs and defendants are directed to confer and agree on a date for the depositions, which must be held within two months of the date of this decision. If plaintiffs appear and complete their depositions, the action will be restored to the Part 5 compliance calendar. If plaintiffs fail to appear and complete their depositions, the action will be dismissed, upon submission of an affirmation of non-compliance. Accordingly, it is hereby

ORDERED, that plaintiffs' motion for an order vacating the dismissal of this action is

granted to the extent indicated above.

ENTER:



Barbara Jaffe, JSC

DATED: February 3, 2014
New York, New York

FILED
FEB 05 2014
NEW YORK
COUNTY CLERK'S OFFICE