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| Board of Mgrs. of the S. Star v Grishanova |
| 2014 NY Slip Op 31157(U) |
| April 30, 2014 |
| Supreme Court, New York County |
| Docket Number: 159101/2012 |
| Judge: Carol R. Edmead |
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 35

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THE BOARD OF MANAGERS OF THE SOUTH STAR,

Plaintiff,

Index No. 159101/2012

-against-

Motion #015

SOPHIE GRISHANOVA,

Defendant.

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SOPHIE GRISHANOVA,

Plaintiff,

Index No. 3426/2013

-against

KEVIN OSOWIECKI, PATRICK KENNELL, VINCENT
PIAZZA, and TERRY PRITIKIN, each individually and as
members of THE BOARD OF MANAGERS OF THE SOUTH
STAR, THE BOARD OF MANAGERS OF THE SOUTH
STAR, WOLF HALDENSTEIN ADLER FREEMAN &
HERZ LLP, and JOHN DOE(s) 1-5*,

Defendants.

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HON. CAROL R. EDMEAD, J.S.C.

MEMORANDUM DECISION

Defendant in Action 1, Sophie Grishanova (“Grishanova”), moves by order to show cause pursuant to CPLR 5015 and 3404 to vacate this Court’s Order dated October 15, 2013 (the “October 2013 Order”) and to restore this action to the calendar. In response, The Board of Managers of the South Star (“The Board”) and defendants in Action 2, Kevin Osowiecki, Patrick Kennel, Vincent Piazza and Terry Pritikin each individually and as members of The Board (the “defendants in the second action”) cross move to dismiss the complaint and counter-claims of Grishanova for failure to comply with court-ordered discovery, and for costs and expenses incurred in connection with their cross-motion.

Factual Background

The October 2013 Order granted the motion of The Board and defendants in Action 2, Kevin Osowiecki, Patrick Kennel, Vincent Piazza and Terry Pritikin each individually and as members of The Board (the “defendants in the second action”) to preclude Grishanova and strike her complaint and counterclaim for failure to comply with discovery demanded in such, and held that the dismissal of her complaint was “without prejudice, and may be restored pursuant to the CPLR 3404 upon a showing no later than December 31, 2013, on notice to all parties, of full compliance with outstanding discovery; the failure to make such a showing by December 31, 2013 shall result in the dismissal of Sophie Grishanova's complaints in the above actions with prejudice.”

In support of her motion, Grishanova contends that she served a notice on December 23, 2013 advising of her availability for a psychological and physical examination, and furnished a copy of her HIPPA authorization. She also served defendants a verified bill of particulars. Therefore, Grishanova argues, she is in compliance with all notices for discovery as of December 23, 2013, and this action should be restored.

The Board and defendants in the second action oppose Grishanova’s motion on the grounds that she has still failed to fully comply with outstanding discovery in this matter, and that plaintiff’s failure to fully respond to all outstanding discovery is part of a continuing pattern of willful and obstructive behavior on the part of Sophie Grishanova and her prior counsel. The Board and defendants in the second action also cross move to dismiss with prejudice all claims and counter-claims against them herein, and to enter judgment in the above-entitled action, on grounds that plaintiff has willfully failed and refused to supply all discovery as ordered by the

Court's October 2013 Order. They contend that Grishanova failed to appear for a deposition, failed to submit to a medical examination, and has asserted objections to document production, without appropriate application to the Court. And, her bill of particulars fails to supply information to numerous items. Thus, The Board and defendants in the second action request that the Court restore the action to the calendar for the costs, disbursements and reasonable attorneys' fees incurred in making this cross-motion.

In opposition to the cross-motion, Grishanova contends that defendants never requested a deposition of her. The only request for a deposition was one made by the office of Wolf Haldenstein Adler Freeman & Hertz LLP ("WHAFH") in the Action 1, which was later adjourned to an unspecified later date at WHAFH's request. Plaintiff also responded to defendant's demand for physical and psychiatric examination with letters advising of her availability for a psychiatric examination and objecting to the demand of physical examination as being irrelevant. Defendants have, to date, failed to designate a doctor to conduct such examinations. As to the bill of particulars, the current address of a non-party is palpably irrelevant to this proceeding, and the demand that Grishanova search for a non-party (Zakharova) address is unduly burdensome. Defendants were aware of the transaction with Zakharova because they executed the Waiver of the Right of First Refusal in connection with the transaction. Second, prior ownership of the unit by Grishanova and Zakharova is reflected in public records. Thus, the request that Grishanova obtain, assemble and supply records that are (1) publicly available and (2) are already in defendants' possession are likewise unduly burdensome and cannot possibly lead to the discovery of any admissible evidence. Grishanova agreed to provide her interactions with members of the financial world and the number of

employment applications she made and the names and addresses of such employers, subject to a Confidentiality Agreement, which is required to preserve the integrity of this proceeding given defendants' actions of harassment of plaintiff, including with the use of media, which gave rise to this action in the first place. And, Grishanova contends that she answered the remaining questions to the best of her knowledge. The cross-movants have not stated that they were in any way prejudiced by the discovery produced to date.

Discussion

Vacatur of this Court's October 2013 Order is unwarranted pursuant to CPLR 5015 and 3404.

It is well settled that in order to vacate a judgment default pursuant to CPLR 5015 the defaulting party must demonstrate both a reasonable excuse for the default and a meritorious defense (*see AWL Indus., Inc. v. QBE Ins. Corp.*, 65 A.D.3d 904, 905, 885 N.Y.S.2d 71 [2009]; *Goldman v. Cotter*, 10 A.D.3d 289, 291, 781 N.Y.S.2d 28 [2004]). What constitutes a reasonable excuse for a default generally lies within the sound discretion of the motion court (*see Grutman v. Southgate At Bar Harbor Home Owners' Assn.*, 207 A.D.2d 526, 527, 616 N.Y.S.2d 68 [1994]). The determination whether a reasonable excuse has been offered is *sui generis* and should be based on all relevant factors, among which are the length of the delay chargeable to the movant, whether the opposing party has been prejudiced, whether the default was willful, and the strong public policy favoring the resolution of cases on the merits (*Chevalier v. 368 E. 148th Street Associates, LLC*, 80 A.D.3d 411, 914 N.Y.S.2d 130 [1st Dept 2011] *citing Harcztark v. Drive Variety, Inc.*, 21 A.D.3d 876, 876-877, 800 N.Y.S.2d 613 [2005]).

CPLR 3404, entitled Dismissal of abandoned cases, provides:

A case in the supreme court . . . marked “off” or struck from the calendar or unanswered on a clerk’s calendar call, and not restored within one year thereafter, shall be deemed abandoned and shall be dismissed without costs for neglect to prosecute. The clerk shall make an appropriate entry without the necessity of an order.

Although CPLR 3404 dismissals are accomplished automatically upon the passage of one year after being stricken, by operation of law, and Grishanova has moved within one year to have her action restored, this alone is insufficient to warrant restoration. A “motion to vacate the dismissal of an action pursuant to CPLR 3404 and restore the action to the calendar is addressed to the sound discretion of the trial court” (*Threatt v. Seton Health System Inc.*, 277 A.D.2d 796, 715 N.Y.S.2d 791 [3d Dept 2000]; citing *Greco v. Aetna Life Ins. Co.*, 180 A.D.2d 664, 580 N.Y.S.2d 878 and *O’Boye v. Consolidated Edison*, 168 A.D.2d 219, 562 N.Y.S.2d 106). Further, “[a] party seeking to have a case restored to the trial calendar must demonstrate a meritorious cause of action, a reasonable excuse for the delay, a lack of intent to abandon the action and the absence of prejudice to the opposing party” (*Padded Wagon, Inc. v. Associates Commercial Corp.*, 92 A.D.3d 430, 937 N.Y.S.2d 592 [1st Dept 2012] (affirming denial of motion to restore pursuant to CPLR 3404 where plaintiff’s excuse for the delay was unsubstantiated). “Furthermore “[a]ll four conditions must be satisfied” (*Padded Wagon, Inc.*, *supra* citing *Campbell v. Crystal Realty Assoc. Ltd. Partnership*, 276 A.D.2d 328, 328, 716 N.Y.S.2d 288 [2000]).

Here, Grishanova failed to establish that she fully complied with the Court’s October 2013 Order and failed to establish a reasonable excuse for such failure. No excuse was offered and prejudice to the cross-movants exists by virtue of the fact that discovery has still not been provided.

Notwithstanding her claim that defendants did not formally request a deposition in writing, it is clear that Grishanova was required to submit to such an examination, and there is no showing that she attempted to schedule her deposition in order to comply with the Court's Order. Grishanova's letter of December 23, 2013, more than two months after the Court's October Order, and only one week before the expiration of deadline for her compliance, of her mere availability for a psychological examination is plainly insufficient to show any good faith attempt to complete discovery before the deadline.

And, as pointed out by the cross movants, in her bill of particulars, Grishanova failed to provide the following: (1) the current address of non-party Zakharova (#3);¹ (2) her interactions with a member of the financial world which she claims to have been affected by her dispute with defendants which forms the basis of the subject action (42(c)); (3) particulars as to their alleged conduct which was "continuous, intentional, malicious" and intended to injure the plaintiff and interfere with her life (#51); (4) the basis for the allegation that board members published an article in the New York Post for the purpose of "injuring the plaintiff and their [sic] reputation in coercing the plaintiff", the identity of the board members and/or employees which published such article (#62); and (5) state the number of employment applications she made, the names and addresses of each employer to whom plaintiff has made applications, to support her claim that she was unable to obtain employment by virtue of the alleged publications (#67). Plaintiff offered no legal or factual support that her interactions with a member of the financial world or employment applications and identities of the employers to which she applied should be

¹ The documents Grishanova provided to the Court fail to indicate Zakharova's current address, and Grishanova's response that this information is irrelevant lacks merit.

protected by a confidentiality agreement. Further, Grishanova's response to the demand for a psychiatric examination that she consents to same to held on March 28, 2014 is three months subsequent to the deadline by which such examination was to be completed. And, her consent to such examination was conditioned upon a signed confidentiality agreement, which is unwarranted in light of her allegations in the complaint. Essentially, Grishanova failed to establish her complete compliance with discovery demands, and her reasons for the delay and non-production are unwarranted.

The dismissal based on the failure by a plaintiff to complete discovery after a conditional order is warranted, and no finding that the failure was "wilful" is required to enforce the conditional order (*see Keller v. Merchant Capital Portfolios, LLC*, 103 A.D.3d 532, 962 N.Y.S.2d 948 [1st Dept 2013]; *Ensley v. Snapper, Inc.*, 62 A.D.3d 403, 879 N.Y.S.2d 71 [1st Dept 2009]).

Therefore, the branch of the cross-motion to dismiss the complaint and counter-claims for failure to comply with court-ordered discovery is supported by the record. However, costs, disbursements and reasonable attorneys' fees incurred in making this cross-motion is unwarranted, given that under the Court's October 2013 self-executing order, Grishanova's failure to make the required showing by December 31, 2013 resulted in the dismissal of Sophie Grishanova's claims with prejudice. Therefore, dismissal of the complaint was already in effect prior to the cross-motion.

As such, Grishanova's motion is denied, and the cross-motion is granted.

Conclusion

Based on the foregoing, it is hereby

ORDERED that the motion by defendant in Action 1, Sophie Grishanova, pursuant to CPLR 5015 and 3404 to vacate this Court's Order dated October 15, 2013 and to restore this action to the calendar is denied; and it is further

ORDERED that the cross-motion by The Board of Managers of the South Star and defendants in Action 2, Kevin Osowiecki, Patrick Kennel, Vincent Piazza and Terry Pritikin each individually and as members of The Board to dismiss the complaint and counter-claims of Grishanova for failure to comply with court-ordered discovery, and for costs and expenses incurred in connection with their cross-motion, is granted solely to the extent that the complaint and counter-claims of Sophie Grishanova are dismissed with prejudice; and it is further

ORDERED that The Board of Managers of the South Star shall serve a copy of this order with notice of entry upon all parties within 20 days of entry.

This constitutes the decision and order of the Court.

Dated: April 30, 2014

A handwritten signature in black ink, appearing to read 'Carol Robinson Edmead', written over a horizontal line.

Hon. Carol Robinson Edmead, J.S.C.

HON. CAROL EDMEAD