

Agaj v Kone, Inc.

2014 NY Slip Op 32103(U)

July 30, 2014

Sup Ct, Bronx County

Docket Number: 310362/2008

Judge: Laura G. Douglas

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX, PART 11

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MEHMET AGAJ and VJOSA AGAJ

Index No. 310362/2008

Plaintiffs,
- against -

DECISION/ORDER

Present:

KONE, INC., 11 MADISON AVENUE LLC,
BOCA GROUP INTERNATIONAL, INC., and
BOCA GROUP EAST, LLC

**HON. LAURA G. DOUGLAS
J.S.C.**

Defendants.

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Defendant Kone Inc. (hereinafter "Kone"), has filed two separate motions seeking various forms of relief. In the first motion dated May 20, 2013 (Kone #1), Kone has moved for an order (1) pursuant to CPLR §3126, dismissing plaintiffs' Complaint for failure to appear for their court ordered examinations before trial, and for plaintiffs' counsel egregious misconduct and deliberate acts to obstruct plaintiff Mehmet Agaj's initial and continued examinations before trial; (2) pursuant to 22 NYCRR 130-1.1(a), imposing sanctions against plaintiffs' counsel for his misconduct and deliberate acts to obstruct plaintiff Mehmet Agaj's initial and continued examinations before trial, in violation of the Uniform Rules for the Conduct of Depositions, 22 NYCRR 221; (3) pursuant to 22 NYCRR 130-1.1 (a) awarding costs to defendant Kone for expenses and attorney's fees incurred as a result of counsel's egregious misconduct during the initial and continued examination before trial of plaintiff Mehmet Agaj.

In the second motion dated June 13, 2013 (Kone #2), Kone moves for an order (1) vacating plaintiffs' Note of Issue; (2) compelling plaintiff to provide discovery by a date certain; and (3) precluding plaintiffs from offering evidence at trial any evidence relating to the information requested in Kone's Demand for a Bill of Particulars dated

February 25, 2009 as to Items 6 - 9, 11-16 and 20-21.

Defendant 11 Madison LLC., (hereinafter "Madison"), cross-moves for an order (1) vacating the plaintiff's Note of Issue on the grounds that pre-trial discovery has not been completed; (2) striking plaintiffs' pleadings pursuant to CPLR 3126, for failure to produce witnesses for continued depositions and independent medical examinations, (3) compelling plaintiff to appear for continued depositions and independent medical examinations by a date certain pursuant to CPLR 3124, and (4) for all costs, expenses and sanctions in 11 Madison's filing and prosecution of the instant cross-motion, pursuant to, *inter alia*, 22 NYCRR 130-1.1.

Defendant Boca Group International, Inc., (hereinafter "Boca"), cross-moves for an order (1) vacating plaintiffs' Note of Issue (2) compelling plaintiffs to comply with discovery pursuant to CPLR 3124; and (3) dismissing plaintiffs' Complaint for failure to appear for their examinations pursuant to CPLR 3126. Plaintiff has submitted Affirmations in Opposition. The motion and cross-motions are consolidated for purposes of decision.

In this action, plaintiff Mehmet Agaj seeks monetary damages for injuries allegedly sustained on July 25, 2007 when he was caused to trip and fall at a mis-leveled elevator owned, operated, or serviced by the defendants.

This case has a long history of delay and animosity between the attorneys. The instant motions were brought as a result of non-compliance with the March 19, 2013 order of this Court (Kone #1, Exhibit E) which directed, among other things, that plaintiff Mehmet Agaj's continued deposition take place on April 17, 2013 and be completed by April 19, 2013. In the order, the Court further directed that absolutely no adjournments

be made without Court approval.

Plaintiff Mehmet Agaj's continued deposition was commenced but not completed on April 17, 2013. On April 17th, the deposition was adjourned until April 19th upon the consent of the parties. On April 19th, the attorney conducting the deposition for Kone, Michael Morris, Esq., of Costello, Shea & Gaffney, became engaged in jury selection in another matter. The Court, (through Court Attorney Deirdre O'Connor, Esq.) was contacted by telephone, advised of the situation and adjourned plaintiff's deposition until April 26, 2013. This adjournment was memorialized in a letter to Ms. O'Connor dated April 18, 2013. (Kone #1, Exhibit F). Ms. O'Connor directed Mr. Morris to submit, and serve, an Affidavit of Engagement on all parties, which he did. (Kone #2, Exhibit U). Plaintiff Mehmet Agaj did not appear for a continued deposition on April 26, 2013. Plaintiffs filed a Note of Issue on May 24, 2013 (Kone #2, Exhibit BB).

In opposition, to the motions and cross-motions, plaintiffs assert that defendants waived any further deposition of Mehmet Agaj by placing a stipulation on the record at plaintiff's continued deposition on April 17, 2013 that if the deposition was not completed by April 19, 2013, it would be deemed waived. (Kone #2, Exhibit CC, pp. 100 - 103).

The motions and cross-motions are decided as follows:

That branch of Kone #2 and the cross-motions seeking an order vacating the Note of Issue is granted as discovery is clearly not complete in this matter. The case is stricken from the trial calendar.

That branch of Kone #1 seeking dismissal of the complaint for the failure of Mehmet Agaj to appear for a continued deposition is granted to the extent that Mehmet

Agaj is directed to appear for a continued deposition within 45 days from the date of service of this order with notice of entry thereon at a date and time agreed upon by the parties. The failure of plaintiff to appear for this continued deposition will result in preclusion of his testimony at trial. In light of the nature and history of this case, the Court directs that the continued deposition be held at the Courthouse. Once a continued deposition date is selected, no adjournments will be granted without prior Court approval. Contrary to plaintiffs' counsels assertions, counsel for Kone did not engage in any improper questioning at the April 17, 2013 continued deposition of Mehmet Agaj. Any action on the part of plaintiffs' counsel to impede the completion of the continued deposition will not be tolerated.

Within 30 days following Mehmet Agaj's completed deposition, defendants are to designate physician(s) for Independent Medical Examinations. Such examinations shall be conducted within 45 days of designation.

Plaintiff is to provide any outstanding discovery in 30 days.

The Court reserves decision on that branch of the motions and cross-motions for attorneys' fees and sanctions until following the completion Mehmet Agaj's deposition.

The parties are directed to appear for a Status Conference on September 30, 2014, at 9:30 a.m., Part 11 Room 711 of this Courthouse.

This constitutes the decision and order of the Court.

Dated: 7-30-14
Bronx, New York



LAURA G. DOUGLAS, J.S.C.