

St. Paul's Sch. of Nursing, Inc. v Papaspiridakos

2014 NY Slip Op 33453(U)

September 23, 2014

Supreme Court, Queens County

Docket Number: 989/12

Judge: Bernice D. Siegal

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This opinion is uncorrected and not selected for official publication.

ORIGINAL

Short Form Order

NEW YORK STATE SUPREME COURT – QUEENS COUNTY
Present: HONORABLE BERNICE D. SIEGAL IAS TERM, PART 19
Justice

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St. Paul's School of Nursing, Inc. doing business
as St. Paul's School of Nursing, individually, and on
behalf of the students, faculty, and administration of
St Paul's School of Nursing,

Index No.: 989/12

Motion Date: 7/8/14

Plaintiff,

Motion Seq. No.: 6

-against-

Nick Papaspiridakos,

FILED
SEP 30 2014
COUNTY CLERK
QUEENS COUNTY

Defendant.

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The following papers numbered 1 to 13 read on this motion to inter alia vacate the order of Justice Bernice D. Siegal dated January 23, 2014 and on Plaintiff's cross-motion for voluntary discontinuance.

	PAPERS NUMBERED
Notice of Motion - Affidavits-Exhibits.....	1 - 6
Notice of Cross-Motion.....	7 - 10
Reply Affirmation and Opposition to Cross-Motion.....	11 - 13

Upon the foregoing papers, it is hereby ordered that the motion is resolved as follows:

Introduction

Defendant, Nick Papaspiridakos (defendant), who is pro-se, moves to dismiss and to vacate this Court's Decision and Order of January 23, 2014. Plaintiff, St. Paul's School of Nursing

(plaintiff) cross-moves to voluntarily discontinue this action. The within motion and cross-motion were referred to this court by Order of Justice Robert L. Nahman dated July 11, 2014. For the following reasons, defendant's motion is denied in its entirety, and plaintiff's motions is granted.

Facts

Plaintiff commenced this action in 2012 to obtain a preliminary injunction barring defendant, a former student of plaintiff's, from entering plaintiff's campus or communicating with plaintiff's employees. This Court's Order of June 20, 2014, held defendant to be in contempt of the January 17, 2012 stipulation. In violation of the January 17, 2012 stipulation, defendant entered plaintiff's leased premises and initiated conversations with plaintiff's employees and students. Pursuant to this Court's Order of June 20, 2014 holding defendant in contempt, defendant was ordered to pay plaintiff \$48,997.75.

Discussion

Defendant's Motion to Dismiss

Defendant's motion to dismiss is denied. Defendant states two grounds in support of his motion to dismiss: that the case does not comply with the court's Standards and Goals and for alleged fraud by the defendant in filing an Emergency Order to Show Cause on December 4, 2012. However, none of these are valid bases, pursuant to CPLR § 3211, for granting a motion to dismiss. (See CPLR § 3211.) Thus, defendant's motion to dismiss is denied.

Even if fraud were a valid basis for granting a motion to dismiss, defendant has not proved fraud. To prove fraud, a party must show "misrepresentation of a material fact, falsity, scienter, and deception." (*Barclay Arms, Inc. v. Barclay Arms Associates*, 74 N.Y.2d 644, 646-647 [1989].)

Defendant has not proved this. Thus, even if fraud were an acceptable basis for a motion to dismiss, defendant's motion would still be denied.

Defendant's Motion to Vacate

Defendant's motion to vacate this Court's Order of January 23, 2014 is also denied. Defendant's basis for seeking to vacate the January 23, 2014 Order is that, the Court signed defendant's undated counter order. Firstly, that is not a valid basis for a motion to vacate. (See CPLR § 5015.) Secondly, this Court signed defendant's proposed undated counter order in error. This Court sua sponte vacated the proposed counter order on June 13, 2014. Thus, defendant's motion to vacate is denied.

Plaintiff's Motion to Discontinue

Plaintiff's motion to discontinue without prejudice is granted. "The determination of a motion for leave to voluntarily discontinue an action pursuant to CPLR 3217(b) rests within the sound discretion of the court." (*Wells Fargo Bank, N.A. v. Chaplin*, 107 A.D.3d 881, 883 [2d Dep't 2013]). "The general rule is that plaintiff should be permitted to discontinue the action without prejudice, unless defendant would be prejudiced thereby." (*Wells Fargo Bank, N.A. v. Fisch*, 103 A.D.3d 622, 622 [2d Dep't 2013] (quoting *Valladares v. Valladares*, 80 A.D.2d 244, 258 [2d Dep't 1981]; see also *New York Mortgage Trust, Inc. v. Dasdemir*, 116 A.D.3d 679, 679 [2d Dep't 2014].) Indeed, "ordinarily, a party cannot be compelled to litigate and, absent special circumstances, discontinuance should be granted." (*Tucker v. Tucker*, 55 N.Y.2d 378, 383 [1982].)

Here, defendant would not be prejudiced. He has no claims against plaintiff in this action, so he has no claims that would be dismissed along with this action. There is no other way that defendant will be prejudiced, nor is there any other reason to deny discontinuance. Thus, plaintiff's

motion to discontinue without prejudice is granted.

Conclusion

Defendant's motions to dismiss and vacate are denied. Plaintiff's motion to discontinue without prejudice is granted.

Dated: *Sept 23, 2014*

Bernice D. Siegal
Bernice D. Siegal, J. S. C.

FILED
SEP 30 2014
COUNTY CLERK
QUEENS COUNTY