

DeFelice v Seakco Constr. Co., LLC
2014 NY Slip Op 33882(U)
February 25, 2014
Supreme Court, Westchester County
Docket Number: 50715/12
Judge: Joan B. Lefkowitz
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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
RICHARD DeFELICE, JR.,

Plaintiff,

-against-

SEAKCO CONSTRUCTION COMPANY, LLC, SEAKCO
NEW YORK, LLC, MICHAEL O'HALLORAN and JUDITH
McHALE,

Defendants.

-----X
SEAKCO NEW YORK, LLC, d/b/a SEAKCO
CONSTRUCTION,

Third-Party Plaintiff,

-against-

AUGUSTINE ELECTRIC, INC.,

Third-Party Defendant.

-----X
MICHAEL O'HALLORAN and JUDITH McHALE,

Second Third-Party Plaintiffs,

-against-

GLAMOROUS GARDENS, LTD.,

Second Third-Party Defendant.

-----X
LEFKOWITZ, J.

DECISION & ORDER

Index No. 50715/12
Motion Date: Feb. 10, 2014

Seq. Nos. 1-4

The following papers were read on these motions by defendants for an order (1) pursuant to CPLR 3126, striking plaintiff's complaint for his repeated, willful and contumacious behavior in failing to appear for his deposition and his counsel's failure to comply with this court's discovery

orders and failure to respond to defendants' discovery demands; (2) pursuant to CPLR 3126, imposing sanctions and costs upon plaintiff for the expenses incurred as a result of plaintiff's failure to appear for scheduled depositions and comply with court orders to appear for a deposition without adequate excuse; (3) pursuant to CPLR 3042, precluding plaintiff from offering testimony or evidence at trial as to matters which discovery has been sought but not provided; and (4) pursuant to CPLR 3101, 3124 and 3126, compelling plaintiff to supply all outstanding discovery within a certain time and precluding plaintiff from proving those elements of his case at trial for which discovery has not been provided.

Order to Show Cause - Affirmation in Support of Melanie J. Estrada, Esq.

- Exhibits A-K

Order to Show Cause - Affirmation in Support of Sara R. David, Esq.

- Exhibits A-P

Order to Show Cause - Affirmation in Support of Tony Semidey, Esq.

- Exhibit A

Order to Show Cause - Affirmation in Support of Corey M. Reichardt, Esq.

- Exhibits A-B

Affirmations in Opposition of John T. Brennan, Esq.

Affidavits in Opposition of Richard DeFlice -Exhibits A-B

Upon the foregoing papers and upon the proceedings held on February 10, 2014, the motion is determined as follows:

Factual and Procedural Background

Plaintiff allegedly sustained back injuries when he slipped and fell on snow and ice at a residence under construction. Plaintiff commenced the present action alleging negligence and Labor Law claims by filing an amended summons and amended verified complaint on January 19, 2012. In his verified bill of particulars dated February 13, 2013, plaintiff alleged, inter alia, that his personal injuries are permanent, he was unable to work for 169 weeks from March 25, 2009 to June 25, 2012, underwent back surgeries, and was confined to his bed and home intermittently because of his injuries.

Defendant Seakco New York LLC d/b/a Seakco Construction, s/h/a Seakco Construction Company, LLC and Seakco New York, LLC (hereinafter "Seakco defendants"), interposed an answer on or about February 27, 2012. Defendants Michael O'Halloran and Judith McHale interposed an answer on or about March 15, 2012. The Seakco defendants commenced a third-party action against Augustine Electric, Inc. by filing a third-party summons and complaint on September 18, 2012. Third-party defendant Augustine Electric interposed an answer with cross claims against all defendants. By answer dated and filed November 19, 2012, defendants O'Halloran and McHale asserted cross claims against third-party defendant Augustine Electric. Defendants O'Halloran and McHale commenced a second third-party action against Glamorous Gardens, LTD. by filing a summons and complaint on April 8, 2013. Glamorous Gardens interposed an answer on or about May 2, 2013.

On August 22, 2012, plaintiff and defendants executed a Preliminary Conference Stipulation, which was "so ordered" by this court. Therein, plaintiff was to appear for a deposition on November 1, 2012, and defendants were to appear for depositions on November 2, 2012.

Third-party Augustine Electric served a Combined Discovery Demand on or about October 26, 2012, seeking, inter alia, authorizations for employment records, Workers' Compensation records, tax returns from 2005, Social Security Administration records, and for medical treatment rendered to plaintiff for the injuries claimed in this action.

On or about February 12, 2013, plaintiff responded to Seakco defendants' Combined Demands,¹ including a Response to Seakco defendants' Notice to Produce with authorizations for various medical records.

By Compliance Conference Order dated March 14, 2013, this court directed, inter alia, plaintiff to provide authorizations for tax returns for three years prior to the date of the incident and the last known address or employer information for "Danny Todd". In the order, the court also directed party depositions be completed on or before May 10, 2013.

By Compliance Conference Order dated April 10, 2013, this court directed plaintiff to provide, inter alia, an authorization for plaintiff's gym and tax returns for three years prior to the date of the incident on or before April 24, 2013.

By Compliance Conference Order dated June 13, 2013, this court directed, inter alia, plaintiff to respond to Seakco defendants' Notice to Produce on or before June 28, 2013.

By Compliance Conference Order dated July 2, 2013, this court directed, inter alia: (1) all outstanding authorizations be provided on or before July 16, 2013; (2) plaintiff's responses to Seakco defendants' Notice to Produce be served on or before July 16, 2013; and plaintiff's responses to Glamorous Gardens' demands shall be served on or before July 16, 2013.

By Compliance Conference Order dated July 25, 2013, this court directed, inter alia: (1) all outstanding authorizations be provided on or before August 9, 2013; (2) plaintiff's responses to Glamorous Gardens' demands shall be served on or before August 9, 2013; (3) plaintiff's deposition be completed on or before September 12, 2013; and (4) defendants' depositions be completed on or before September 18, 2013.

By letter dated August 21, 2013, counsel for Augustine Electric requested a new unrestricted authorization for tax records as the Internal Revenue Service was unable to process the authorization provided.

¹ Defendant Seakco's Combined Demand was not annexed to the motion papers.

By letter dated September 16, 2013, counsel for Augustine Electric advised plaintiff's counsel that the authorization provided for Centers for Medicare & Medicaid Services could not be processed since they were missing information. Counsel for Augustine Electric also requested plaintiff's counsel provide a new authorization with no restrictions and attached guidelines for access to the medical records.

By Compliance Conference Order dated September 23, 2013, this court directed, inter alia, plaintiff's deposition be completed on or before October 3, 2013 and defendants' depositions be held on certain dates in October, 2013, following plaintiff's deposition.

By email sent on October 2, 2013, plaintiff's counsel confirmed plaintiff's deposition for October 3, 2013. Although counsel for all parties appeared for the deposition on October 3, 2013, plaintiff did not appear. The parties rescheduled the deposition for October 10, 2013.

On October 10, 2013, plaintiff appeared for his deposition and the deposition commenced at 10:22 A.M. The deposition was ended at 12:15 P.M., after plaintiff's counsel objected to questions about plaintiff's cocaine use and plaintiff indicated to his counsel that he could not sit any longer, was uncomfortable and could not focus on the questions. Plaintiff's counsel agreed on the record to produce plaintiff on another date.

Plaintiff's deposition was continued on October 16, 2013 at 9:48 A.M. and ended at 11:47 A.M. after plaintiff complained that his back was "killing" him and he was experiencing "stabbing pain," and responded that he could not continue the deposition that day. At the deposition, plaintiff testified about motor vehicle accidents he was involved in subsequent to the subject slip and fall, as well as work related accidents which occurred subsequent to the subject slip and fall.

Third-party defendant Augustine Electric served a Notice to Produce on or about October 18, 2013, seeking, inter alia, authorizations for the Workers' Compensation Board file related to plaintiff's work related accident on January 2, 2013, plaintiff's gym records, and plaintiff's medical records from multiple physicians, including Pain Management Center of Norwalk Hospital/Dr. Dmitry Mironov and Dr. Mark Waynik. On or about October 22, 2013, Augustine Electric served another Notice to Produce seeking additional authorizations for medical records.

Also, by letter dated October 18, 2013, Augustine Electric advised plaintiff's counsel that the following demanded items of discovery were still outstanding: (1) authorizations for employment records from 2005 to present; (2) authorization for Workers' Compensation Board records; (3) information and documents related to plaintiff's prior and subsequent accidents as requested in the November 15, 2012 Notice for Discovery and Inspection; (4) the last known address or employer for "Danny Todd" as directed by court order on March 14, 2013; (5) authorization for Drs. Alma Garcia, Dmitry Mironov and "Cyril Waynik", as well as Paradigm Management Services which demand was served on or about June 28, 2013²; (6) new unrestricted

² Augustine Electric did not annex a demand dated June 28, 2013 as an exhibit to its motion papers.

authorization for tax records demanded August 21, 2013; (7) new corrected authorization for CMS, New York Regional Office (Centers for Medicare & Medicaid Services) demanded September 16, 2013; and (8) authorization for Dr. Allan M. Lans associated with Hospital for Special Surgery since authorization provided was for Dr. David M. Lans.

By Compliance Conference Order dated October 24, 2013, this court directed (1) plaintiff's deposition be completed on or before November 15, 2013; (2) plaintiff to provide authorization for Workers' Compensation Board for the State of Connecticut on or before November 8, 2013; and (3) physical examinations be completed within 30 days of completion of plaintiff's deposition.

On or about October 28, 2013, Augustine Electric served a Demand for Authorizations of the same date seeking authorizations for Workers' Compensation records, alcohol/substance abuse records from Silver Hill and South Central Rehabilitation Center in New Haven. By letter of the same date, as requested by the court, Augustine Electric advised plaintiff of the basis for requests for demands in the Notice to Produce dated October 18, 2013 and October 22, 2013. Those demands included: (1) authorizations for records regarding plaintiff's work related accident on January 2, 2013, about which plaintiff testified; and (2) authorization for records of Dr. Dmitry Mironov, who was listed on the operative report of plaintiff's November 12, 2009 L5 nerve root block procedure.

By email sent on November 1, 2013, plaintiff's counsel advised remaining counsel that plaintiff could not appear for a deposition on November 5, 2013, but was available on November 8th, 11th or 13th.

Plaintiff's deposition was rescheduled for November 11, 2013. The morning of the deposition, plaintiff left a message with his counsel advising him that he had been up all night with back pain, was going to the doctor and would not attend the deposition. Plaintiff's counsel emailed all remaining counsel that morning.

Defendants' Motions and Contentions

Defendants and third-party defendants now move for an order dismissing the complaint or precluding plaintiff from testifying or introducing evidence at trial and compelling plaintiff to provide all outstanding discovery, and for costs and sanctions. Third-party defendant Augustine Electric contends that the dismissal is warranted since plaintiff has only appeared for a deposition for a total of four hours despite the fact that five dates for his deposition were scheduled and confirmed. Moreover, Augustine Electric contends that plaintiff has ignored discovery demands and court orders directing discovery without a reasonable excuse. Augustine Electric asserts that by letters dated October 18, 2013 and October 28, 2013, it demanded outstanding authorizations and discovery. Augustine Electric contends that plaintiff has not provided authorizations for the physicians who prescribed narcotic pain medication to plaintiff before and after the subject accident, despite the fact that plaintiff's counsel was advised by the Court Attorney Referee at a compliance conference that defendants were entitled to the authorizations. Augustine Electric also

asserts that plaintiff's medical records and mental health records demonstrate a prior and ongoing history of cocaine and narcotic pain medication abuse, as well as prior and ongoing anxiety and depression disorders. Augustine Electric further contends that plaintiff has failed to provide the following demanded discovery: (1) authorizations for employment records, Workers' Compensation records and Social Service Administration records; (2) information regarding prior and subsequent accidents; (3) the last known address or employer for "Danny Todd"; (4) unrestricted authorizations for plaintiff's records from certain medical providers, including Drs. Alma Garcia, Dmitry Mironov and Cyril Waynik and Paradigm Management Services; (5) new authorization for Department of Treasury/Internal Revenue Service without restriction; (6) new and corrected authorization for CMS, New York Regional Office to obtain plaintiff's Medicaid/Medicare records; and (7) corrected authorization to obtain plaintiff's medical records from Dr. Allan M. Lans. In the event dismissal is not granted, Augustine Electric contends that preclusion is the proper remedy since plaintiff has been given numerous opportunities to appear for his deposition and has willfully ignored at least six discovery demands and court orders directing plaintiff provide outstanding discovery. Augustine Electric notes that plaintiff has not sought an extension of time to produce the outstanding discovery nor objected to the discovery demands. Finally, Augustine contends that an award of costs and sanctions is appropriate in light of plaintiff's willful failure to comply with court orders and produce discovery.

Defendants O'Halloran and McHale contend that the relief of dismissal or preclusion is warranted since plaintiff failed to appear on two scheduled deposition dates, cancelled one date the night before, and has only appeared for a total of four hours over two days of depositions. These defendants contend that plaintiff has willfully failed to comply with court orders and caused inordinate delay of this case. Further, these defendants contend that, in view of plaintiff's obvious disregard for the court orders directing his appearance for a deposition, sanctions, reasonable attorney's fees and costs against plaintiff or plaintiff's counsel are appropriate.

Seakco defendants and second third-party Glamorous Gardens also seek the foregoing relief and incorporate the facts and arguments of Augustine Electric and defendants O'Halloran and McHale.

At oral argument, all movants argued that the authorizations provided by plaintiff after the present motions were filed were deficient since they were not unrestricted and did not allow movants to obtain records with respect to plaintiff's mental health and substance abuse. Movants argued that they were entitled to unrestricted authorizations insofar as plaintiff's medical records referred to plaintiff's substance abuse. Movants further asserted that plaintiff only provided the authorizations on the party who requested the authorizations. Movants further indicated that other demanded discovery remained outstanding, including the last known address or employer for "Danny Todd."

Plaintiff opposes the motions. In opposition to the motions, plaintiff filed his affidavit wherein he avers that he never intentionally failed to appear for his deposition. As to the first deposition date, on which he did not appear, he avers that he was confused as to the date of the deposition. He further avers that he appeared on two subsequent dates for his deposition and answered questions for two hours on each date, but had to adjourn the deposition due to his back pain. Additionally, he avers that he was unable to appear on November 5, 2013 due to a family

obligation and had asked his counsel for adjournment. As to the deposition scheduled for November 11, 2013, he avers that he experienced severe back pain the night before, was up all night, needed to see a doctor that day and left a message with his counsel at 5:00 A.M. advising counsel that he could not attend the deposition.

In the affirmation in opposition, plaintiff's counsel asserts that all outstanding medical authorizations were served. Plaintiff's counsel submits, inter alia, the follow discovery responses as exhibits: (1) Responses to Notice to Produce dated January 6, 2014, responding to Augustine Electric's October 18, 2013 and October 22, 2013 Notices to Produce, with eight authorizations for medical records attached; (2) Response to Demand for Authorizations dated January 6, 2014, responding to Glamorous Gardens' Demand for Authorizations dated October 18, 2013 seeking medical, Workers' Compensation and disability records, with authorizations dated January 6, 2014; (3) Response to Demands for Authorizations dated January 6, 2014, responding to Augustine Electric's demand, with authorizations dated January 6, 2014; (4) Response to Demands for Authorizations dated January 6, 2014, responding to defendant Seakco's demand, with authorizations dated January 6, 2014; (5) Response to Notice to Produce of Glamorous Gardens dated January 6, 2013, with authorizations. Those authorizations served on Glamorous Gardens include authorizations for: Camsan Electric (employment records); Montanaro Electric (employment records); Super K Electric (employment records); Workers' Compensation Commission for the State of Connecticut (entire file for February 19, 2009 accident and January 2, 2013 accident); Social Security Administration; Dr. Alma Garcia; Dr. Dmitry Mironov; Dr. Cyril Waynik; Internal Revenue Service (tax records for 2007-2012); CMS-New York Regional Office (entire medical record); Dr. Allen M. Lans; Silver Hill Hospital; and South Central Rehabilitation Center. As to Augustine Electric, the following authorizations were served: Workers' Compensation Commission of the State of Connecticut (entire file for January 2, 2013 accident); Dr. Kessel; Silver Hill Hospital; and South Central Rehabilitation Center. The authorizations served on Seakco, Glamorous Gardens and Augustine Electric in response to the Notices to Produce include authorizations for The Edge Fitness Center and for plaintiff's Workers' Compensation records for February 19, 2009 and January 2, 2013 accidents. Augustine Electric was also served with authorizations for Dr. Dmitry Mironov, Dr. Mark Waynik and many other physicians and health providers, but not Dr. Alma Garcia or Paradigm Management Services. However, none of the authorizations provided were unrestricted and did not permit movants to obtain plaintiff's mental health and substance abuse records.

Plaintiff's counsel contends that, in view of all the authorizations which were provided, all outstanding discovery demands have been complied with. Plaintiff's counsel further contends that plaintiff did not willfully fail to provide these authorizations previously. Plaintiff's counsel asserts that she explained to the Court Attorney Referee during the October 24, 2013 conference that plaintiff believed that all relevant authorizations had been provided and it was agreed that counsel for all parties would discuss the relevance of the authorizations demanded at the next conference. Plaintiff's counsel relies upon the fact that there is no mention of outstanding medical authorizations in the courts' order dated October 24, 2013. Plaintiff's counsel further notes that plaintiff has provided over 40 authorizations to obtain plaintiff's medical records prior to this motion.

At oral argument, plaintiff's counsel argued that authorizations relating to treatment of plaintiff's body parts, other than his back, would not provide relevant information. Plaintiff's counsel, did not contradict movants' assertions that the authorizations provided were restricted or that plaintiff's medical records contained references to plaintiff's substance abuse. Plaintiff's counsel also argued that one authorization demanded was for a physician who treated plaintiff's father.

As to the applications for costs and sanctions, plaintiff's counsel contends that costs should not be awarded based upon plaintiff's failure to complete his deposition since he sustained a severe back injury from the subject accident, has undergone multiple back surgeries, remains out of work, and is unable to sit for long periods of time requiring the adjournment of the deposition. Accordingly, plaintiff's counsel contends that plaintiff's failure to complete his deposition has not been willful and contumacious and does not warrant the imposition of costs or sanctions.

Analysis

CPLR 3126 provides that if any party "willfully fails to disclose information which the court finds ought to have been disclosed," the court may, inter alia, issue an order of preclusion or an order striking the pleadings, dismissing the action, or rendering judgment by default against the disobedient party. "The nature and degree of the penalty to be imposed on a motion pursuant to CPLR 3126 is a matter generally left to the discretion of the Supreme Court" (*Carbajal v Bobo Robo*, 38 AD3d 820 [2d Dept 2007]). To invoke the drastic remedy of striking a pleading, or preclusion, a court must determine that the party's failure to disclose is willful and contumacious (*Arpino*, 102 AD3d at 210; *Greene v Mullen*, 70 AD3d 996 [2d Dept 2010]; *Maiorino v City of New York*, 39 AD3d 601 [2d Dept 2007]). "Willful and contumacious conduct can be inferred from repeated noncompliance with court orders ... coupled with no excuses or inadequate excuses" (*Russo v Tolchin*, 35 AD3d 431, 434 [2d Dept 2006]; see also *Commisso v Orshan*, 85 AD3d 845, 845 [2d Dept 2011]; *Prappas v Papadatos*, 38 AD3d 871, 872 [2d Dept 2007]).

Movants correctly contend that the authorizations provided by plaintiff are deficient insofar as they are not unrestricted and do not permit movants to obtain plaintiff's mental health and substance abuse records. Insofar as plaintiff has alleged that the back injuries he sustained as a result of the subject accident prevented him from working for 169 weeks and have confined him to bed and home intermittently, movants are entitled to discovery as to any other conditions which may have contributed to his inability to work and to his confinement. Notably, plaintiff testified at his deposition as to his involvement in multiple motor vehicle accidents and a work related accident subsequent to the subject accident. Additionally, plaintiff has not contested movant's assertions that plaintiff's medical records contain references to his substance abuse and depression. Plaintiff also has not served certain authorizations on all the movants.

Accordingly, on this record, although plaintiff has now provided certain parties with authorizations for employment records, Workers' Compensation records, Social Service Administration records, and tax records for 2007-2012, it is clear that certain demanded discovery, including numerous unrestricted authorizations, remains outstanding despite multiple court orders directing the discovery. It is also clear from the record that plaintiff has not provided all the

demanded authorizations to all the parties. Additionally, plaintiff's counsel's affirmation and the motion record demonstrate that plaintiff's counsel has taken it upon herself during the pendency of this action to determine that certain demanded discovery is not relevant to the issues in this action and unduly delayed production of discovery for over a year. Notably, plaintiff's counsel failed to seek a protective order as to the discovery or formally object to the demanded discovery. Plaintiff, therefore, shall provide all outstanding discovery, including unrestricted authorizations with the mental health information and alcohol/drug treatment boxes of the authorizations initialed. Said authorizations shall be served upon all parties even if not demanded by all parties.

Although plaintiff failed to appear for the first scheduled deposition, appeared for only a total of four hours on two deposition dates and cancelled a deposition date the morning of the deposition, in view of his claims that he was confused as to the first date and his severe back pain has prevented him from appearing for more than two hours at a time, it cannot be said that plaintiff's conduct was willful and contumacious warranting dismissal of the complaint at this time. Defendants, however, are entitled to plaintiff's continued deposition and completion of his deposition by a date certain insofar as plaintiff has failed to submit any medical proof that he is unable to appear for a deposition. Notably, plaintiff could be deposed while alternating between sitting, standing, laying down or pacing in order to relieve any back pain he may experience. In the event that plaintiff fails to appear for a deposition as directed in this order, movants shall submit an affidavit of noncompliance and proposed order of dismissal. Movants, however, are each entitled to an award of costs in the sum of \$100 payable by plaintiff for the costs associated with the first scheduled deposition which plaintiff failed to cancel in advance or appear.

Moreover, since plaintiff's counsel's lack of diligence in providing demanded discovery for over a year, including unrestricted authorizations, necessitated the present motion, movants are each entitled to motion costs in the sum of \$150 payable by plaintiff's counsel.

Accordingly, it is

ORDERED that the motions are granted to the extent that plaintiff shall produce on or before February 21, 2014, as directed by this court at oral argument on February 10, 2014, outstanding authorizations and discovery to all movants, including unrestricted authorizations for medical records which will allow movants to obtain plaintiff's substance abuse and mental health records, as well as the last known address or employer of "Danny Todd"; and it is further

ORDERED that the motions are granted to the extent that plaintiff shall appear for a full day of deposition on February 27, 2014, as directed by this court at oral argument on February 10, 2014, and plaintiff's deposition shall be continued until completed, but shall be completed no later than March 28, 2014. To accommodate plaintiff's back condition and insure that plaintiff's deposition continues for a full day, plaintiff may sit, stand, laydown or pace as necessary during the deposition; and it is further

ORDERED that, in the event that plaintiff fails to appear for his deposition on February 27, 2014, or fails to complete his deposition on or before March 28, 2014, movants shall file, on or before April 11, 2014, an affidavit of non-compliance with a proposed order precluding plaintiff from testifying at trial; and it is further

ORDERED that plaintiff's counsel shall pay each movant motion costs in the sum of \$150 on or before March 5, 2014, and file proof of payment on the NYSCEF website on or before March 7, 2014; and it is further

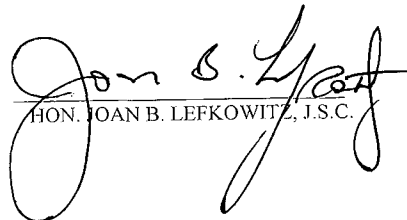
ORDERED that plaintiff shall pay, on or before March 28, 2014, each movant \$100 for the costs associated with the first scheduled deposition for which he failed to appear or cancel in advance, and filed proof of payment on the NYSCEF website on or before March 31, 2014 ; and it is further

ORDERED that counsel shall appear for a conference in the Compliance Part, Courtroom 800, on April 4, 2014 at 9:30 A.M.

ORDERED that third- party defendant Augustine Electric shall serve a copy of this order with notice of entry on plaintiff within 10 days of entry.

This constitutes the decision and order of this court.

Dated: White Plains, New York
February 15, 2014



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

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