

Crooke v Bonofacio

2015 NY Slip Op 31218(U)

July 15, 2015

Supreme Court, New York County

Docket Number: 155008/2012

Judge: Ellen M. Coin

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SUPREME COURT OF THE STATE OF NEW YORK – NEW YORK COUNTY

PRESENT: HON. ELLEN M. COIN
A.J.S.C.

PART 63

Dale Crooke,

Plaintiff,

-v-

**Michael Bonofacio, Continuum
Health Partners, Inc., and
St. Luke’s-Roosevelt Hospital Center,**

Defendants.

INDEX NO.
MOTION DATE
MOTION SEQ. NO.
E-FILED

155008/2012
March 11, 2015
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The following papers, numbered 1 to 5 were read on this motion.

Papers

Notice of Motion/Order to Show Cause – Affidavits – Exhibits
Notice of Cross-Motion to Dismiss and in Opposition
Affirmation in Reply and Opposition
Affirmation in Sur-Reply
Supplemental Affirmation

Papers Numbered

1
2
3
4
5

Cross-Motion: Yes No

Plaintiff Dale Crooke (Crooke) moves pursuant to CPLR § 3126 to strike the answer of defendants Michael Bonofacio, Continuum Health Partners, Inc. and St. Luke’s-Roosevelt Hospital Center, or to preclude Michael Bonofacio (Bonofacio) from testifying in this case at deposition and trial; or, in the alternative, pursuant to CPLR 3124 to compel defendants to produce Bonofacio for a Court-ordered examination. Defendants cross-move pursuant to CPLR 3211 and 3212 to dismiss Crooke’s claim for negligent hiring, retention, and supervision.

The underlying complaint alleges that on May 29, 2012, while plaintiff Crooke was leaving the emergency room at Roosevelt Hospital, she was attacked by Bonofacio, then employed by Roosevelt Hospital as a security guard, and as a result Crooke suffered serious

injury. The remainder of the factual background of this motion consists of only the Court's repeated and ultimately futile attempts to compel defendants to comply with discovery orders.

In the preliminary conference order dated March 28, 2013, the Court ordered the depositions of defendants to be held on or before June 18, 2013. Defendants failed to comply with that order. At the compliance conference on August 7, 2013, the Court directed the deposition of defendants to be held on or before October 11, 2013. After that deadline passed without result, at the November 20, 2013 and January 29, 2014 status conferences, the Court yet again ordered the depositions of defendants, generally, and Bonofacio, specifically, by April 25, 2014. When Bonofacio had still not been deposed at the time of that fourth deadline, in a fifth and final status conference order dated May 21, 2014, the Court ordered the deposition of Bonofacio to be held on or before July 9, 2014. Unbeknownst to the Court, however, on June 17, 2014, Bonofacio emailed defendants' counsel and unequivocally stated that he would not participate in depositions on this matter. Without informing the Court of that development, and in violation of the Court's fifth order, defendants failed to produce Bonofacio, and the action stalled for five months until service of the instant motion, filed on November 20, 2014.

In opposition, defendants argue that their prolonged inability to produce Bonofacio was not willful and that they were attempting to locate him. As evidence, defendants submitted three certified letters "strongly recommending" that Bonofacio appear for deposition, mailed to Bonofacio on June 23, 2014; July 16, 2014; and November 7, 2014 (defendants' exhibit C), all three of which were sent after Bonofacio had expressly informed defendants' counsel that he would not comply. While defendants did eventually produce an alleged witness for deposition¹,

¹ The deposition of Angela Wright was held and completed on October 7, 2014.

the most pertinent and crucial testimony of Bonofacio went unheard. Then, in impermissible sur-reply dated December 3, 2014, defendants baldly claimed that Roosevelt Hospital had terminated Bonofacio's employment. At the subsequent motion conference on March 4, 2015, the Court ordered defendants to produce evidence of Bonofacio's termination. In response, defendants submitted an eight-page regurgitation of their previous arguments, but failed to include the single component that the Court actually requested. Additionally, defendant St. Luke's liability carrier, which provides joint coverage to defendants St. Luke's and Bonofacio, did not take any steps to withdraw coverage for Bonofacio as a result of his failure to cooperate in the defense of this action. Finally, on March 6, 2015, almost two years after the preliminary conference in which defendants' depositions were first ordered, defendants claimed, without affidavit proof, that Bonofacio's employment was terminated as of May 30, 2014. Further, they alleged, "Mr. Bonifacio² appears to now understand the ramifications of not cooperating and has advised your affirmant that he agrees to be produced for his deposition within thirty (30) days" (supplemental affirmation of defendants' counsel at 8). Defendants, however, did not submit an affidavit by Bonofacio either explaining his intransigence or committing to a deposition.

Analysis

"If the credibility of court orders and the integrity of our judicial system are to be maintained, a litigant cannot ignore court orders with impunity... [C]ompliance with a disclosure order requires both a timely response and one that evinces a good-faith effort to address the requests meaningfully" (*Kihl v Pfeffer*, 94 NY2d 118, 123 [1999]). Accordingly, courts may strike pleadings, stay proceedings, dismiss any or all of the action, or render default

² Defendants' various submissions record defendant Bonofacio's name as "Bonofacio," "Bonifacio," and "Bonafacio."

judgment if any party “refuses to obey an order for disclosure or wilfully fails to disclose information which the court finds ought to have been disclosed pursuant to this article” (CPLR § 3126[3]). “While trial courts are accorded wide discretion in fashioning appropriate sanctions, striking the pleading should be restricted to occasions when the failure to comply or disclose is found to be wilful, contumacious or in bad faith. Such may be illustrated by, but is not limited to, instances when a party deliberately destroys evidence, or repeatedly fails to appear for scheduled depositions while also failing to provide responsive answers upon appearing or when the failures to appear or comply are repetitive” (*Cespedes v Mike & Jac Trucking Corp.*, 305 AD2d 222, 222 [1st Dept 2003] [citations omitted]; *see also Henderson-Jones v City of New York*, 87 AD3d 498, 504 [1st Dept 2011] [“Willful and contumacious behavior can be inferred by a failure to comply with court orders, in the absence of adequate excuses”]; *Rodriguez v United Bronx Parents, Inc.*, 70 AD3d 492, 492 [1st Dept 2010] [“‘[R]epeated and persistent’ failure to comply with successive disclosure orders without providing adequate explanation establishes willfulness and contumaciousness”]).

Failure of a defendant to comply with successive deposition orders warrants the striking of an answer when accompanied only by defendants’ counsel’s bald assertions of good faith (*Reidel v Ryder TRS, Inc.*, 13 AD3d 170, 171 [1st Dept 2004] [defendants’ counsel claimed to have even hired an investigator, but did not buttress that claim with sufficient details and evidence]). Where defendants offer to produce a witness for deposition after an unreasonable delay, plaintiff’s motion to strike may still be granted on the grounds that defendant’s compliance is inexcusably late (*see Perez v City of NY*, 15 Misc 3d 1136[A] [Sup Ct, Bronx County 2007] [recognizing that “justice delayed is justice denied” and that repeated noncompliance with court orders cannot be tolerated, irrespective of eventual compliance]).

In the instant case, defendants consistently ignored the Court's orders to depose Bonofacio while he was employed by co-defendant St. Luke's. After Bonofacio informed defendants' counsel that he would not appear for depositions, defendants failed to inform the Court and apparently did nothing to locate him other than mail three short letters. As an excuse for repeatedly failing to comply with the Court's orders, defendants offered only the bald assertion of good faith. That defense counsel now professes, without affidavit support, Bonofacio's readiness to appear for deposition is unavailing as defendants have already failed to comply with numerous court orders, and Bonofacio's deposition at this point would still be woefully untimely. Such unjustified delays cannot be tolerated because they serve only to frustrate proceedings and ensure that witnesses' memories fade. Although Bonofacio's failure to appear for deposition can be solely attributed to him as a party defendant, the Court cannot overlook the fact that all defendants have joint insurance coverage, enjoy the same representation, and share in common litigation strategy. In such circumstances, St. Luke's should not derive the benefit of asserting the defense of justification for Bonofacio's alleged conduct without affording plaintiff an opportunity to question Bonofacio and obtain testimony detrimental to St. Luke's position. Therefore, the Court finds that by repeatedly and persistently failing to comply with the Court's orders without providing an adequate explanation, defendants acted willfully and contumaciously and are subject to sanctions under CPLR § 3126.

As to the cross-motion, where an employee is acting within the scope of his or her employment, exposing the employer to vicarious liability for any damages caused by the employee's negligence under a theory of *respondeat superior*, no claim may proceed against the employer for negligent hiring or retention. (*Karoon v NY City Tr. Auth.*, 241 AD2d 323, 324 [1st Dept 1997]. "This is because if the employee was not negligent, there is no basis for imposing

liability on the employer, and if the employee was negligent, the employer must pay the judgment regardless of the reasonableness of the hiring or retention or the adequacy of the training” (*id.*). Here, defendants concede that Bonofacio was acting within the scope of his employment as a hospital security guard at the time of the alleged incident (affirmation of defendants’ counsel at 2). Predicated expressly upon this concession, defendants’ motion to dismiss the claim for negligent hiring, retention, and supervision is granted.

Accordingly, it is hereby

ORDERED that the motion of plaintiff Dale Crooke pursuant to CPLR § 3126 is granted to the extent of striking the answer of defendant Michael Bonofacio and precluding him from testifying at trial; and it is further

ORDERED that defendants Continuum Health Partners, Inc., and St. Luke’s-Roosevelt Hospital Center are precluded from raising the defense of justification at trial, and the sixteenth affirmative defense is hereby stricken; and it is further

ORDERED that an inquest is to be held at, or shortly thereafter, the trial (with scheduling to be determined at the discretion of the trial judge) assessing damages against defendant Michael Bonofacio, and entering judgment in accordance therewith and awarding costs and disbursements; and it is further

ORDERED that plaintiff’s motion is otherwise denied; and it is further

ORDERED that defendants' cross-motion to dismiss plaintiff's cause of action sounding in negligent hiring, retention, and supervision is granted.

This constitutes the decision and order of the Court.

Dated: 7/15/15

EM
Ellen M. Coin, A.J.S.C.

Check One: CASE DISPOSED NON-FINAL DISPOSITION
Check as appropriate: GRANTED DENIED GRANTED IN PART OTHER