Smith v County of Nassau
2015 NY Slip Op 32561(U)
February 13, 2015
Supreme Court, Nassau County
Docket Number: 7372-12
Judge: James P. McCormack
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SUPREME COURT - STATE OF NEW YORK
TRIAL/IAS TERM, PART 40 NASSAU COUNTY

PRESENT:

Honorable James P. McCormack
Acting Justice of the Supreme Court

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GENE E. SMITH,

Plaintiff(s),

-against-

COUNTY OF NASSAU,

Defendant(s).

---x

Index No.: 7372-12

Motion Seq. No.: 001 &002
Motion Submitted: 1/22/15

The following papers read on this motion:

Notice of Motion/Supporting Exhibits....................................X
Notice of Cross Motion/Supporting Exhibits............................X
Affirmation in Further Support/Opposition..............................X
Reply Affirmation..X

BACKGROUND

Defendant County of Nassau (County) moves this court for an Order pursuant to CPLR § 3216(a) dismissing Plaintiff's complaint. Plaintiff, Gene E Smith, opposes the motion and cross moves for an order pursuant to CPLR 3126, either striking the County's answer or deeming certain issues decided in favor of Plaintiff. The County opposes the

cross motion.

Plaintiff commenced this action by service of a summons and complaint dated May 22, 2012. Issue was joined by service of an answer dated July 3, 2012. Plaintiff claims that on March 14, 2011, he was caused to slip and fall on County property and that as a result of the fall he sustained serious physical injuries. The fall occurred on outdoor, cement steps leading into the rear entrance of a building located at 400 County Seat Drive, Mineola.

The parties certified the case ready for trial, and the court signed a certification order, on July 17, 2014. As Plaintiff was reluctant to certify the case due to some outstanding discovery, the court allowed the parties to certify with a stipulation, which was so ordered by the court. The entire text of the stipulation states: "Defendant County of Nassau to respond to Plaintiff's April 4, 2014 Supplemental Notice for Discovery & Inspection within 30 days."

The outstanding discovery in question involved Customer Request Summary Report #1473, located in the County's AIM system. The AIM system appears to be an internal notification system in which, *inter alia*, complaints about County facilities are logged for the purpose of tracking them and ensuring they are addressed. Customer Request 1473 indicated complaints were made that the back steps of 400 County Seat Drive were in disrepair and employees had to traverse the broken steps in the dark when they left for the evening due to malfunctioning lighting. Plaintiff uncovered this

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document in his own investigation. It *was not* turned over in discovery. The report is dated approximately 3 months prior to Plaintiff's accident.

In the April 4, 2014 demand, Plaintiff sought the last known address of a former county employee, "All AIM records related to 400 County Seat Drive on file through the AIM system" and AIM records related to Customer Request #1473, including any remedial actions taken. In response to the demand, the County provided the last known address for the employee, objected to the demand for "All AIM records related to 400 County Seat Drive" as overly broad and not reasonably calculated to lead to relevant evidence, and provided a Work Order Assignment Report in response to Customer Request #3677.

Plaintiff then served the County with a Notice to Admit that the County "took no remedial action" in response to Customer Request #1473. The County's response, in its entirety, was: "Defendant County of Nassau can neither admit nor deny paragraph numbered 1 of the Notice to Admit." Plaintiff's counsel then wrote to Defendant's counsel that the response was improper, pursuant to CPLR §3123 in that the response was not sworn to, nor did it provide an explanation for its refusal to either admit or deny the allegation. By use of an Amended Response to Notice to Admit the County alleged "Defendant County of Nassau can neither admit or deny paragraph numbered 1 of the Notice to Admit in the manner in which it is phased [sic]".

By this time, the close of Plaintiff's 90 day window in which he was to file a note

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of issue was approaching. Plaintiff therefore filed a note of issue and a certificate of readiness, but indicated that discovery was still outstanding. The County's motion ensued.

DEFENDANT'S MOTION TO DISMISS

The County argues that, by indicating discovery is not complete, Plaintiff's note of issue and certificate of readiness are a nullity.

CPLR §3216(a) states:

> Where a party unreasonably neglects to proceed generally in an action or otherwise delays in the prosecution thereof against any party who may be liable to a separate judgment, or unreasonably fails to serve and file a note of issue, the court, on its own initiative or upon motion, with notice to the parties, may dismiss the party's pleading on terms. Unless the order specifies otherwise, the dismissal is not on the merits

In relying on *Furrukh v. Forest Hills Hosp.*, 107 A.D.3d 668 (2nd Dept. 2013), the County argues that, as the note of issue is a nullity, it should be vacated and the complaint dismissed. In opposition, Plaintiff expresses outrage that the County would willfully refuse to comply with the so-ordered stipulation, and then use that obfuscation as the basis for their motion to dismiss. While the court finds Plaintiff's sentiments valid and shares its disbelief in the manner in which the County has handled this matter, the proper procedure would have been for Plaintiff to move either to vacate the 90 day demand or seek to extend it. *Id.*

Even assuming the note of issue is a nullity herein, the court will not dismiss the

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complaint. CPLR §3216 authorizes, but does not require, dismissal of a complaint, (*Atterberry v. Serlin & Serlin*, 85 A.D.3d 949 [2nd Dept. 2011]) and is invoked when a plaintiff "unreasonably" fails to file a proper note of issue. Nothing about Plaintiff's actions herein were unreasonable. To the contrary, Plaintiff took a number of steps to attempt to resolve the discovery issue prior to the date the note of issue was due. But for the County's untimely objection to a discovery demand, an incorrect response to another demand and two improper responses to the Notice to Admit, a proper note of issue could have been timely filed.

Further, dismissal is inappropriate where, as here, Plaintiff has a justifiable excuse and can show the existence of a meritorious action. *Id.* Plaintiff's justification, as already discussed, was Defendant's recalcitrance and refusal to properly respond to discovery and a notice to admit. As for an affidavit of merit, Plaintiff's complaint, annexed to the cross motion and verified by Plaintiff, suffices. (*Salch v. Paratore*, 60 N.Y.2d 851 [1983]). As such, the County's motion to dismiss is denied.

PLAINTIFF'S CROSS MOTION PURSUANT TO CPLR §3126

Plaintiff cross moves pursuant to CPLR §3126 to either strike the County's answer or for a ruling that the County failed to take remedial action in response to Customer Request #1473.

CPLR § 3124 provides that the court has the discretion to compel discovery or to strike a pleading for failure to abide with discovery and disclosure orders. At the

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discretion of the court, a party's failure to comply with such requests may result in sanctions, pursuant to CPLR § 3126. "The striking of a pleading may be appropriate where there is a clear showing that the failure to comply with discovery demands is willful or contumacious" *Silberstein v. Maimonides Medical Center*, 109 A.D.3d 812 (2nd Dept. 2013), *quoting Montemurro v. Memorial Sloan–Kettering Cancer Ctr.*, 94 A.D.3d 1066 (2nd Dept. 2012),; see *Commisso v. Orshan*, 85 A.D.3d 845 (2nd Dept. 2011); *Byam v. City of New York*, 68 A.D.3d 798 (2nd Dept. 2009). The determination of whether to strike the a pleading is addressed to the sound discretion of the trial court (*see Raville v. Elnomany*, 76 AD3d 520 [2d Dept 2010]; *Pirro Group, LLC v. One Point St., Inc.*, 71 AD3d 654, 655 [2d Dept 2010]; *Workman v. Town of Southampton*, 69 AD3d 619, 620 [2d Dept 2010]). The court may also preclude a party from testifying or offering evidence at trial where the failure to comply with discovery was willful or contumacious. (*Pepsico, Inc. v. Winterthur Inern. America Ins. Co.*, 24 A.D.3d 42 [2nd Dept. 2005]).

Plaintiff's April 4, 2014 Supplemental Notice for Discovery and Inspection made three demands. Demand number 2 sought "All AIM records related to 400 County Seat Drive on file through the AIM system." The County's response was boilerplate, and claimed the demand was overly broad and not reasonably calculated to lead to relevant admissible evidence. This response is dated July 21, 2014. Pursuant to CPLR §3122(a), a party has 20 days from service of a demand to object, in detail, to the demand. The County's objection is therefore untimely. The County argues that the so-ordered

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stipulation dated July 17, 2014, extending their time to respond to the demand also extended their time to object to it. The court disagrees. Nothing in the wording of the stipulation indicates the 20 day time limit imposed by CPLR §3122(a) had been extended. (*Saratoga Harness Racing Inc v. Roemer*, 274 A.D.2d 887 [3rd Dept 2000]).

Even if the objection was timely, the court finds the objection to be improper. In a letter to Plaintiff's counsel, annexed to the motion papers as an exhibit, the County's counsel argues that the use of the word "All" in the demand renders the demand improper. While the use of words such as "all" and "any and all" do tend to suggest a lack a specificity and are to be avoided, they do not automatically render a demand improper. (*Mendelowitz x. Xerox Corp.*, 169 A.D.2d 300 [1st Dept. 1991]). Where using such phrases relates to specific subject matter, the demand is allowable. *(Id.*; *Palmieri v. Kilcourse*, 91 A.D.2d 657 [2nd Dept. 1982]. Herein, Plaintiff's demand was specific in that it sought records related to a particular building, and the time frame is proper as the records sought are contained in the AIM system which has been in existence for a relatively short period of time.

Confounding matters further, in response to the request for records relating to Customer Request #1473, the County provided a work order that was responding to Customer Request #3677. It is clear the document provided in no way relates to the demand, yet the County makes no attempt to explain or rectify the error.

In an attempt to narrow the issue, Plaintiff served a Notice to Admit, dated October

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14, 2014, that the County took "no remedial action" in response to Customer Request #1473. The County's first response, neither admitting not denying the allegation, was invalid as it was not sworn. The County's second response is invalid because it neither admits nor denies the allegation, yet does not set forth in detail why the matter cannot be admitted or denied. CPLR §3123(a). The County simply states they can neither admit nor deny the demand as "phased", which the court presumes was supposed to read "phrased". The court finds nothing confusing, ambivalent or unclear about the single request in the Notice to Admit. The County's refusal to explain why it can neither admit nor deny is unacceptable and, the court fears, appears intended to delay these proceedings and improperly obstruct Plaintiff from proving its case. Finally, it is never explained why the County served responses to discovery indicating there was no record or prior complaints at the location of the accident, yet Customer Request #1473 existed.

In light of all the foregoing, the court finds the County's conduct willful, deliberate and contumacious in refusing to comply with discovery. *(Pepsico, Inc. V. Winterthur Inern. America Ins. Co., supra)*.

Accordingly, it is hereby

ORDERED, that County's motion to dismiss the complaint is DENIED in its entirety; and it is further

ORDERED, that the note of issue and certificate of readiness filed by Plaintiff on October 15, 2014 is VACATED; and it is further

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ORDERED, that Plaintiff shall file a new note of issue and certificate of readiness no later than April 10, 2015; and it is further.

ORDERED, that Plaintiff's motion pursuant to CPLR 3126(1) is GRANTED to the extent that the County is deemed to have received prior written notice of the defective condition, to wit: that the subject steps were broken and in disrepair and that there was a lack of lighting at the subject steps on the date of the accident. The County is precluded from challenging these facts at trial; and it is further

ORDERED, that the County's response to Plaintiff's Notice to Admit was improper and violative of CPLR §3123. Therefore, the allegation: "That the County of Nassau took no remedial action in response to the conditions reported in Customer Request #1473, referenced as Plaintiff's Exhibit 1 at the deposition of the County conducted on March 28, 2014" is deemed admitted by the County. The County is precluded from denying this fact at trial; and it is further

ORDERED, that Plaintiff's motion to strike the County's answer is DENIED.

All other requests for relief not specifically granted are denied.

This constitutes the Decision and Order of the Court.

Dated: February 23, 2015
Mineola, N.Y.

Hon. James P. McCormack, A. J. S. C.

ENTERED
FEB 24 2015
NASSAU COUNTY
COUNTY CLERK'S OFFICE