

Ortiz v Watspm-Brown
2016 NY Slip Op 30108(U)
January 20, 2016
Supreme Court, New York County
Docket Number: 160199/2013
Judge: Michael D. Stallman
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**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 21**

-----X
EDWIN ORTIZ,

Plaintiff,

- against -

Index No. 160199/2013

LISA WATSON-BROWN, TONYA M. HORTON,
NEW YORK CITY TRANSIT AUTHORITY,
METROPOLITAN TRANSPORTATION
AUTHORITY and MANHATTAN AND BRONX
SURFACE TRANSIT OPERATING AUTHORITY,

Decision and Order

Defendants.

-----X

HON. MICHAEL D. STALLMAN, J.:

Pursuant CPLR 3126, plaintiff and defendant Horton each separately move for an order to preclude or to strike in connection with the continued deposition of defendant Lisa Watson-Brown (Motion Seq. Nos. 004 and 005). New York City Transit Authority, Metropolitan Transportation Authority, Manhattan and Bronx Surface Transit Operating Authority and Watson-Brown (the Transit defendants) oppose the motions. This decision addresses both motions.

The background allegations of Watson-Brown's repeated failures to appear at a deposition are fully set forth in the prior decision and order of

plaintiff's first motion to compel (Motion Seq. No. 002), and are not repeated here.

DISCUSSION

"CPLR 3126 provides that if a party 'refuses to obey an order for disclosure or wilfully fails to disclose information which the court finds ought to have been disclosed ..., the court may make such orders ... as are just.'" (*Fish & Richardson, P.C. v Schindler*, 75 AD3d 219, 220 [1st Dept 2010].) A pattern of noncompliance with court orders and discovery demands and failure to offer a reasonable excuse for the noncompliance may give rise to an inference of wilfull and contumacious conduct. (See e.g. *Henderson v Manhattan and Bronx Surface Tr. Operating Auth.*, 74 AD3d 654 [1st Dept 2010].) If a discovery sanction is warranted, it should be "appropriately tailored to achieve a fair result." (*Krin v Lenox Hill Hosp.*, 88 AD3d 597 [1st Dept 2011][citation and quotation marks omitted].)

The basis of the motions for preclusion against the Transit defendants is Watson-Brown's repeated failures to attend her continued deposition. Plaintiff also cites to the Transit defendants' delay in responding to post-EBT demands, which is the subject of a separate motion for discovery sanctions (Motion Seq. No. 003), which has been adjourned to February 25, 2016 for additional briefing.

Here, plaintiff has demonstrated that the Transit defendants wilfully failed to comply with at least two so-ordered conference stipulations and has demonstrated an overall pattern of delay in connection with Lisa Watson-Brown's deposition.

By conference order and stipulation dated March 26, 2015, the Court ordered that Lisa Watson-Brown's deposition be continued on June 9, 2015. She failed to appear on that date. The Transit defendants offer no excuse for that failure. By conference order and stipulation dated June 25, 2015, the Court ordered that Lisa Watson-Brown's deposition be held on September 21, 2015. She failed to appear on that date.

While Transit defendants maintain that yet another work-related injury prevented Watson-Brown's appearance on September 21, 2015 (Berkowitz Opp. Affirm. ¶ 9), Watson-Brown herself submitted no affidavit or evidence substantiating why her injury prevented her from attending the deposition. The Transit defendants attach an Employee Claim C-3 Form indicating that Lisa Watson-Brown was injured on September 10, 2015 while mopping. (Berkowitz Opp. Affirm., Ex C.) The C-3 Claim reflects that she "felt pain from neck down to back" which affected her "back, neck, right shoulder."

However, the Transit defendants have not substantiated that this injury prevented Lisa Watson-Brown from appearing for her deposition. (*Metflex*

Corp. v Klafter, 123 AD2d 845, 846 [2d Dept 1986] [Despite his claims of ill health, defendant never substantiated his assertion that he was unable to submit to the oral deposition]; see also *Brady v Zambrana*, 221 AD2d 171 [1st Dept 1995] [an unsubstantiated health emergency is not a valid reason for not complying with a court order].) Moreover, the Transit defendants offered no excuse whatsoever for Watson-Brown's failure to appear on June 9, 2015, which was prior to her September 10, 2015 Claim.¹ Watson-Brown's failure to cooperate with counsel does not prevent a court from imposing a conditional order. (See *Besson v Beirne*, 188 AD2d 330 [1st Dept 1992]; see *Robinson v Rollins Leasing Corp.*, 288 AD2d 367, 367 [2d Dept 2001] ["The fact that a defendant has disappeared or made herself unavailable provides no basis for denying a motion to strike her answer for failure to appear at a deposition"].)

The unexplained (and insufficiently explained) pattern of Watson-Brown's failure to appear for her continued deposition gives rise to an inference of the Transit defendants' willful non-compliance. Therefore, the motions are granted only to the extent of granting a conditional order

¹ Neither had the Transit defendants submitted the additional briefing to answer specific questions as to the nature and extent of Watson-Brown's prior work injury, as directed by the Court's interim order dated December 18, 2014.

precluding the Transit defendants from calling Watson-Brown as their witness at trial, if Watson-Brown fails to appear for her continued deposition, within 90 days of the date of this order, unless she is hospitalized or medically disabled and unable to be deposed based on medical evidence. The extreme sanction of striking the answer of the Transit defendants is not warranted. Striking a party's pleading "would be too drastic a remedy where [the opposing party is] not entirely bereft of evidence tending to establish [its] position." (*Cohen Bros. Realty v Rosenberg Elec. Contrs.*, 265 AD2d 242, 244 [1st Dept 1999].)

CONCLUSION

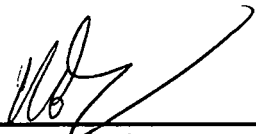
According, it is ORDERED that plaintiff's motion and defendant Horton's motion (Motion Seq Nos. 4 and 5) are granted in part; and it is further

ORDERED that if defendant Lisa Watson-Brown does not appear for a deposition within 90 days of the date of this order, unless she is hospitalized or medically disabled and unable to be deposed based on medical evidence, then the Transit defendants shall be precluded from

calling Watson-Brown as their witness at trial.


Dated: January 14, 2016
New York, New York

ENTER:



J.S.C.

MICHAEL D. STALLMAN
J.S.C.