Janicki v Beaux Arts II LLC
2016 NY Slip Op 30614(U)
April 11, 2016
Supreme Court, New York County
Docket Number: 156299/2013
Judge: Arthur F. Engoron

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 37

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LUKASZ JANICKI,

Plaintiff,

-against-

BEAUX ARTS II LLC, THE BRODSKY ORGANIZATION, LLC., URBAN ASSOCIATES, LLC., STEVEN FARKAS AND SILVERCUP SCAFFOLDING 1 LLC,

Defendants.

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Index Number: 156299/2013

Sequence Number: 003

Decision and Order

Arthur F. Engoron, Justice

In compliance with CPLR 2219(a), this Court states that the following papers were used on defendants' motion, pursuant to CPLR 3126 and 3124, to strike and/or compel, and, pursuant to 22 NYCRR § 130-1.1(a), for sanctions:

Papers Numbered:

Notice of Motion - Affirmation - Exhibits 1
Affirmation in Opposition of Motion 2
Reply Affirmation - Exhibits 3

Facts

On August 1, 2012, plaintiff, Lukasz Janicki, allegedly sustained personal injuries to his hand, neck, and back as a result of falling off a scaffold while performing construction work at a building owned and operated by defendant Beaux Arts II LLC ("Beaux Arts") and located at 307 East 44th Street, New York, NY 10017 ("Building"). Defendants The Brodsky Organization LLC. ("Brodsky"), Urban Associates, LLC. ("Urban"), and Silvercup Scaffolding 1 LLC ("Silvercup") supervised the construction work at the Building. Plaintiff's injuries occurred during the course of his employment with Veneer Construction, a subcontractor doing work at the Building.

Procedural History

On July 11, 2013, plaintiff commenced this action initially against defendant Beaux Arts only, to recover for the personal injuries he allegedly sustained while working at the construction project. The complaint alleges violations of Labor Law §§ 200, 240(1), and 241(6).

Following receipt of Beaux Arts' answer, plaintiff moved, pursuant to CPLR 3025, for leave to serve a Supplemental Summons and Amended Complaint on Brodsky, Urban, Steven Farkas, and Silvercup, adding them as direct defendants. This Court granted the motion on May 14, 2014; on May 15, 2014, plaintiff e-filed a Supplemental Summons and Amended Complaint. Per stipulation, dated June 26, 2014, plaintiff voluntarily discontinued the instant action against Silvercup. By order dated March 23, 2016, this Court dismissed the complaint as against Steven Farkas. The remaining defendants are Beaux Arts, Brodsky, and Urban.

In plaintiff's Bill of Particulars, dated October 3, 2013, plaintiff alleges lost earnings of $77,000, and continuing, as a result of the injuries he allegedly sustained in the August 1, 2012 incident. During plaintiff's deposition, held on January 22, 2015, he stated that he had not worked since the day of the accident, and that his treating doctors told him that he could not work.

Pursuant to a February 4, 2015 compliance conference order, on February 23, 2015, defendants designated Gary Young to conduct a vocational IME of plaintiff on March 6, 2015 and hired a polish interpreter. When defendants called to confirm the vocational IME, plaintiff's counsel advised that plaintiff would not be produced without motion practice. Following further letter exchange, defendants moved, on March 13, 2015, to compel plaintiff to appear for the vocational IME.

By so-order stipulation, dated March 18, 2015, the Court granted defendants' motion to compel and directed plaintiff to appear for three IMEs: (1) an orthopedic exam by Dr. Gregory Montalbano on March 25, 2015; (2) an orthopedic hand exam by Dr. Joel Grad on March 30, 2015; and (3) a neurological exam by a Dr. Bonomo on May 18, 2015.

Defendants rescheduled the March 25, 2015 IME with Dr. Montalbano to April 6, 2015. Plaintiff claims that defendants unilaterally picked the April 6, 2015 date; defendants claim that plaintiff's counsel confirmed his availability before defendants served an Amended Notice of Expert Designation. Once again, defendants hired a Polish interpreter from Star Interpreting, Inc. ("Star Interpreting") for the IME. Once again, plaintiff failed to show for the IME without providing any prior notice to defendants or the doctor's office. Defendants then served another Amended Notice of Expert Designation, rescheduling the IME for April 27, 2015, along with an April 14, 2015 letter requesting reimbursement of no-show fees. Plaintiff ultimately appeared for an IME with Dr. Montalbano, but not before defendants were charged no-show fees: $800 for Dr. Montalbano's time, and $300 for Star Interpreting's services, totaling $1,100 in no-show fees for plaintiff's failure to attend Dr. Montalbano's April 6, 2015 IME.

Defendants claim that they confirmed plaintiff's appearance at the March 30, 2015 IME with Dr. Grad for which they ordered a Polish interpreter. Plaintiff, however, failed to appear. As a result, Dr. Grad charged defendants' counsel no-show fees in the sum of $350, and Star Interpreting charged no-show fees in the sum of $300.

On or about April 8, 2015, defendants sent a letter to plaintiff's counsel with a copy of the no-show fees, together with a First Amended Notice of Expert Designation, rescheduling Dr. Grad's vocational IME for May 11, 2015. Once again, defendants' counsel hired a Polish interpreter. Once again, plaintiff failed to

appear without explanation. On May 20, 2015, this Court ordered plaintiff to attend his IME with Dr. Grad on June 1, 2015. On June 1, 2015, plaintiff failed to appear for a third time. Dr. Grad again charged defendants a $350 no-show fee, and Star Interpreting charged $300. Defendants then served a Second Amended Notice of Expert Designation, rescheduling the IME for July 13, 2015. Due to a conflict, Dr. Grad rescheduled the examination for July 27, 2015. Defendants then served a Third Amended Notice of Expert Designation, along with correspondence explaining that Dr. Grad had to postpone the IME. Plaintiff ultimately appeared for the IME with Dr. Grad on July 27, 2015.

Dr. Bonomo examined plaintiff as scheduled on May 18, 2015, and Gary Young examined plaintiff on June 30, 2015.

Plaintiff concedes that he failed to attend the March 30, 2015 IME scheduled with Dr. Grad because this date was miscalendared by his counsel's office. Plaintiff argues he failed to attend the subsequent IMEs with Dr. Grad and Dr. Montalbano because defendants improperly addressed the related notices, and plaintiff's counsel never received them. Specifically, plaintiff's counsel claims it never received: (1) the Amended Notices of Expert Designation for Dr. Grad, dated April 8, 2015, June 18, 2015, and July 10, 2015; and (2) the Amended Notice of Expert Designation for Dr. Montalbano's April 6, 2015 IME, dated March 20, 2015. Defendants sent all notices to 1430 Broadway, Suite 1802, New York, New York 10118; plaintiff's counsel alleges that these notices were not received because it moved offices over three years ago.

Defendants demonstrated that its insurance carrier, York Risk Services Group ("York"), paid Dr. Grad, Dr. Montalbano, and Star Interpreting for the three missed IMEs, totaling $2,600 in no-show fees.

Defendants wrote to plaintiff on several occasions requesting reimbursement of the no-show fees incurred due to plaintiff's failure to attend multiple scheduled IMEs. Defendants never received a response. Defendants addressed this issue during the July 1, 2015 discovery conference, and the Court directed plaintiff to advise of his position on reimbursement by July 10, 2015; otherwise, defendants reserved their right to make a motion to recoup the same, and to seek costs and sanctions for having to make the motion. Unfortunately, the motion proved necessary as plaintiff, once again, failed to respond, even in light of this Court's direction.

The Instant Motion

Defendants now move (1) pursuant to CPLR 3126, to strike plaintiff's complaint based on his willful and contumacious failure to provide outstanding discovery; or, alternatively, (2) pursuant to CPLR 3126, to preclude plaintiff from testifying at the time of trial as to damages, unless plaintiff reimburses defendants for the aforesaid fees and costs; and/or, alternatively, (3) pursuant to CPLR 3124, to compel plaintiff to reimburse defendants for the no-show fees; and (4) pursuant to 22 NYCRR § 130-1.1(a), for the costs incurred in making the within motion.

Discussion

I. Defendants are not Entitled to An Order Striking Plaintiff's Complaint

Pursuant to CPLR 3126, this Court can, in its discretion, sanction plaintiff for his failure to comply with discovery. However, in order to be entitled to the drastic relief of striking plaintiff's complaint, defendants must conclusively demonstrate that plaintiff's failure to attend the scheduled IMEs and to respond to defendants' reimbursement request for no-show fees was willful, contumacious, or due to bad faith. The burden then shifts to plaintiff to demonstrate a reasonable excuse for the noncompliance. See Reidel v Ryder TRS, Inc., 13 AD3d 170, 171 (1st Dept 2004) ("A court may strike a [pleading] only when the moving party establishes a clear showing that the failure to comply is willful, contumacious or in bad faith. The burden then shifts to the nonmoving party to demonstrate a reasonable excuse") (internal quotations omitted). Although the Court has the discretion to determine the nature and degree of the penalty to impose for failure to comply with discovery orders, it is well-settled that penalizing a noncompliant party by striking its pleading is extreme, and should only be levied where (1) failure has been willful and contumacious; and (2) that such behavior can be fairly attributed to plaintiff, rather than plaintiff's counsel. See Lowitt v Burton I. Korelitz, M.D., P.C., 152 AD2d 506, 507 (1st Dept 1989) ("Striking a plaintiff's pleading is a drastic remedy and is inappropriate when the contumacious conduct or noncompliance is attributable to [plaintiff's] counsel rather than to the [plaintiff]"); see also Stathoudakes v Kelmar Contracting Corp., 147 AD2d 690 (2d Dept 1989) (noncompliant party's counsel "should be afforded another chance to provide the requested documentary information or, if they cannot, to supply a satisfactory explanation of their efforts to obtain that information").

Here, there is insufficient evidence to demonstrate that (1) plaintiff's conduct was "willful and contumacious," or (2) that the failure to comply can fairly be attributed to plaintiff, rather than plaintiff's counsel. The Court did not find on defendants' March 2015 motion to strike and/or compel that plaintiff's conduct rose to the level of "willful and contumacious," even though, at that time, plaintiff had missed multiple IMEs, and defendants had already incurred no-show fees. Rather, upon defendants' counsel's consent that plaintiff be afforded another chance to attend the IMEs, plaintiff did in fact submit to all requested IMEs. Moreover, this Court has not yet directed plaintiff or its counsel to reimburse defendants for no-show fees, so plaintiff's alleged failure to do so is not–and cannot be–willful or contumacious.

Accordingly, defendants are not entitled to an order, pursuant to CPLR 3126, striking plaintiff's complaint based on his failure to reimburse defendants for incurred no-show fees.

II. Defendants are Entitled to Reimbursement of All Incurred No-Show Fees, and a Conditional Order of Preclusion

Defendants are entitled to a full reimbursement for all no-show fees defendants' counsel incurred for plaintiff's failure to attend scheduled IMEs. The Affidavits of Service indicate that all Notices of Expert Designation, including Amended Notices of Expert Designation, were actually mailed to plaintiff's counsel, Bader Yakaitis & Nonnemacher, LLP, at its address, 1430 Broadway, Suite 1802, New York, NY 10018, giving rise to a presumption of receipt. See American Tr. Ins. Co. v Solorzano, 108 AD3d 449 (1st Dept 2013) (court found there was a proper mailing because plaintiff submitted "competent evidence of the mailing of the notices scheduling the injured [party's] independent medical examination and of [plaintiff's] failure to appear"); American Tr. Ins. Co. v Lucas, 111 AD3d 423, 424 (1st Dept 2013) ("A properly executed affidavit of service raises a presumption that a proper mailing occurred, and a mere denial of receipt is not enough to rebut this presumption").

Plaintiff failed to rebut the presumption of receipt of the IME notices. See Badio v Liberty Mut. Fire Ins. Co., supra at 231. Mere denial of receipt is insufficient. Plaintiff's claim that defendants sent the IME notices to the wrong address is unavailing. If, indeed, plaintiff's counsel changed addresses in the midst of this litigation, plaintiff should have notified defendants of the address change. Not only did plaintiff not do so, but according to the litigation back of plaintiff's opposition papers, its counsel's office is located at "1430 Broadway, Suite 1802, New York, NY 10018," the exact address to which defendants' counsel had sent all notices. Consequently, plaintiff has failed to show as a reasonable excuse for his no-show at the IMEs, and, subsequently, why he should not be responsible for no-show fees that defendants incurred.

Defendants' counsel demonstrated that it incurred the following no-show fees for the three IMEs plaintiff failed to attend: (1) Dr. Grad charged $350, and Star Interpreting charged $300, for plaintiff's failure to attend the March 30, 2015 IME; (2) Dr. Grad charged $350, and Star Interpreting charged $300, for plaintiff's failure to attend the June 1, 2015 IME; and (3) Dr. Montalbano charged $800, and Star Interpreting charged $300, for plaintiff's failure to attend the April 6, 2015 IME. In opposition, plaintiff argues that $2,600 in cumulative no-show fees is excessive, arbitrary, and inflated. However, plaintiff has cited no convincing legal authority as to why these fees are not reasonable on this record. See Adams v Deloreto, 272 AD2d 875 (4th Dept 2000) ("Supreme Court did not abuse its discretion in assessing costs of $1,000 upon plaintiff); Renford v Lizardo, 104 AD2d 717, 718 (4th Dept 1984) (where plaintiff failed to keep appointments for two medical examinations, defendant's counsel was billed $350 for physician's lost time; court awarded full reimbursement); see also Wolford v Cerrone, 184 AD2d 833, 834 (3d Dept 1992) ("Supreme Court's direction that plaintiffs pay for the cost of the two missed physical exams was [not] beyond the court's authority to impose"); Flynn v Debonis, 246 AD2d 852 (3d Dept 1998) ("In light of plaintiff's conduct during discovery and [his] failure to submit to two IMEs, we find no abuse of discretion in Supreme Court's order that plaintiff appear for a physical examination and reimburse defense counsel for charges assessed by defendants' physician"). Plaintiff's argument that these doctors may have had other appointments on the aforementioned IME dates, and, therefore, plaintiff should not be charged fees, is unavailing.

In view of the foregoing, defendants' request for reimbursement of incurred no-show fees is neither excessive nor arbitrary, and is, therefore, granted. Plaintiff's counsel is directed to reimburse defendants' counsel $2,600 for the no-show fees it incurred, as a result of plaintiff's failure to attend the scheduled IMEs, within 30 days of the date of this order. Plaintiff's failure to reimburse defendants' counsel as required herein may result in plaintiff being precluded from testifying at the time of trial as to damages. See CPLR 3126(2).

Pursuant to 22 NYCRR § 130-1.1(a), the Court, in its discretion, may (1) award, to any party or attorney, costs in the form of reimbursement for actual expenses reasonably incurred, and reasonable attorneys' fees, resulting from frivolous conduct; or alternatively (2) impose financial sanctions upon any party or attorney who engages in frivolous conduct. See generally Freidman v Fayenson, 41 Misc3d 1236(A), *14 (Sup Ct, New York County 2013) ("In determining whether to award sanctions, the First Department has considered whether there is a 'continuous pattern of conduct'"). Conduct is "frivolous" if: (a) it is completely without merit in law, and cannot be supported by a reasonable argument for an extension, modification or reversal of existing law; (b) it is undertaken primarily to delay or prolong the resolution of the litigation, or to harass or maliciously injure another; or (c) it asserts material factual statements that are false. See 22 NYCRR § 130-1.1(a). In determining whether conduct is "frivolous," courts shall consider

(i) circumstances under which the conduct took place, including the time available for investigating the legal or factual basis of the conduct; and (ii) whether or not the conduct was continued when its lack of legal or factual basis was apparent, should have been apparent, or was brought to the attention of counsel or the party. Id.

Defendants are not entitled to sanction in the form of reimbursement of costs and attorneys' fees on this motion. As noted above, plaintiff's failure to appear at IMEs was occasioned by his counsel's law office failure and not by plaintiff's own refusal to voluntarily cooperate in this litigation. Indeed, the Court notes that plaintiff appeared for his deposition and has since appeared for all IMEs. Moreover, plaintiff's counsel's argument that the no-show fees are excessive is not frivolous, nor meant to harass or delay resolution of this action. To the contrary, IMEs having been conducted and defendants not having been prejudiced, there appears, on this record, to be no reason why discovery cannot be expeditiously completed.

Conclusion

Defendants' motion is hereby denied in part and granted in part. Defendants' motion to strike the complaint and for sanctions is denied; defendants' motion to compel plaintiff to pay no-show fees is granted. Plaintiff is hereby directed to pay defendants' counsel the sum of $2,600 within 30 days of the date of this order, or be precluded from testifying as to damages at the time of trial.

Dated: April 11, 2016

Arthur F. Engoron, J.S.C.