

Thomas v 215 E. 68th St., L.P.
2016 NY Slip Op 30769(U)
April 15, 2016
Supreme Court, New York County
Docket Number: 110130/2011
Judge: Doris Ling-Cohan
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IAS PART 36

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Alexander Thomas and
Corinne Thomas,
Plaintiffs,

Index Number:

-against-

110130/2011

215 East 68th Street, L.P.,
and Western Waterproofing Co.,
Inc. d/b/a Brisk Waterproofing
Company,

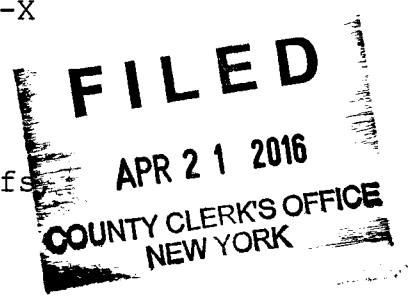
Motion Seq. No.

005 & 006

Defendants.

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215 East 68th Street, L.P.
and Western Waterproofing Co.,
Inc. d/b/a Brisk Waterproofing
Company,
Third-Party Plaintiffs



-against-

Atlantic Housing & Scaffolding,
Inc.,
Third-Party Defendant.

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Doris Ling-Cohan, J.:

Defendants move, pursuant to CPLR 3126, to dismiss plaintiffs' complaint for failure to provide discovery, or, in the alternative, to compel plaintiff and third-party defendant to complete discovery, to vacate the note of issue and for an extension of time to move for summary judgment (Motion Sequence Number 005). Third-party defendant cross-moves, pursuant to CPLR 3126, to dismiss plaintiffs' complaint for failure to provide discovery, or, alternatively, to sever the third-party action. Third-party defendant also moves to reargue the May 21, 2015

order of this court (the May 2015 Order), which denied its prior motion to strike the case from the trial calendar, based upon plaintiffs' failure to provide discovery or, alternatively, to sever the third-party action and for an extension of time to move for summary judgment (Motion Sequence Number 006). The motions and cross motion are consolidated for disposition and decided as indicated below.

Procedural Background

Plaintiff Alexander Thomas (plaintiff) alleges that, while employed by third-party defendant Atlantic Housing & Scaffolding, Inc. (Atlantic), on June 16, 2011, he slipped and fell on a ramp, causing injury to his right knee, impacting his ability to work in the future (Bill of Particulars, Items 3, 5-9, 16). The action was commenced by filing a summons and complaint, which asserted violations of the Labor Law.

On October 9, 2013, in accordance with this court's prior discovery orders, plaintiffs filed their note of issue, certifying that discovery was complete. On October 24, 2013, after the note of issue was filed, defendants served a third-party summons and complaint on Atlantic. Atlantic answered on December 6, 2013 and, on December 23, 2013, the court denied defendants' motion to strike the case from the trial calendar, noting that it was undisputed that only plaintiff's IME's remained outstanding (the December 2013 Order).

On February 10, 2014, the court issued an order (the February 2014 Order) which denied a motion for severance of the third-party action and directed that the parties complete any remaining discovery "expeditiously." On June 17, 2014, at an "early settlement conference", the parties entered into a discovery related stipulation (the June 2014 Stipulation) that set out dates for the completion of depositions (which resulted from the commencement of the third-party action), as well as plaintiff's IME's, all to be completed within approximately four months. On October 14, 2014, also during an "early settlement conference" appearance, the parties entered into another stipulation with respect to the completion of discovery (the October 2014 Stipulation), that again provided dates for the parties' depositions (which had still not been held), and indicated that plaintiff would appear and submit to two additional IME's, all to be completed within three (3) months thereof.¹ In the May 2015 Order noted above (which denied third-party defendants' motion to strike this case from the trial calendar), the court also directed that the parties schedule a telephone conference with each other, to arrange for the completion of any remaining discovery, within 60 days of such telephone call. The May 2015 order provided that "the failure to

¹ Plaintiff had appeared for an orthopedic physical examination on June 14, 2014.

comply with [the] order may result in the issuance of sanctions, including the striking of pleadings". According to the parties, pursuant to such telephone call, a discovery schedule was arranged for the completion of discovery, including the remaining depositions and IME's. Nevertheless, discovery has not been completed, resulting in defendants and Atlantic filing the within motions and cross-motion, in which they argue that plaintiff's conduct in his repeated failure to complete discovery has been deliberate, willful and contumacious, warranting the imposition of sanctions, including dismissal.

In response, plaintiffs provided outstanding discovery and inspection responses and noted that plaintiff has in fact submitted to two of the three requested physical examinations and that the remaining examination (by a vocational rehabilitation expert) has been scheduled. Plaintiff offered no excuse for his failure to appear at previously scheduled IME's or depositions, however, plaintiffs' counsel maintains that the parties were working amicably to arrange for the completion of the remaining depositions, which were necessitated by the commencement of the third-party action. It is not disputed that subsequent to the filing of the within motions/cross-motion, Atlantic supplied the outstanding discovery and inspection responses, sought by defendants.

Discovery

Generally, CPLR 3101 (a) requires "full disclosure of all matter material and necessary in the prosecution or defense of an action, regardless of the burden of proof" (*Matter of Kapon v Koch*, 23 NY3d 32, 38 [2014]). Moreover, "a broad interpretation of the words 'material and necessary' is proper [and they are] to be interpreted liberally to require disclosure . . . of any facts bearing on the controversy" (*Allen v Crowell-Collier Publishing Co.*, 21 NY2d 403, 407, 406 [1968]; see also *Osowski v AMEC Constr. Mgt., Inc.*, 69 AD3d 99, 106 [1st Dept 2009]). This includes not only admissible material, but also "matter that may lead to the disclosure of admissible proof" (*Montalvo v CVS Pharmacy, Inc.*, 81 AD3d 611, 612 [2d Dept 2011]; *Twenty Four Hour Fuel Oil Corp. v Hunter Ambulance*, 226 AD2d 175, 175-176 [1st Dept 1996]). Finally, "[t]he drastic sanction of striking a pleading is inappropriate absent a clear showing that the failure to comply with discovery directives was willful, contumacious or the result of bad faith" (*Banner v New York City Housing Authority*, 73 AD3d 502, 503 [1st Dept 2010]; see also *Delgado v City of New York*, 47 AD3d 550 [1st Dept 2008]).

Severance

Severing a third-party action is a matter of discretion (*Pena v City of New York*, 222 AD2d 233 [1st Dept 1995]; *Freeland v New York Communications Ctr. Assoc.*, 193 AD2d 511, 512 [1st Dept 1993]). Among the factors the court should consider "the

delays that will necessarily attend prosecution of the third-party action, including third-party defendants' own need for disclosure . . . in order to avoid prejudice" (*Garcia v Gesher Realty Corp.*, 280 AD2d 440, 440 [1st Dept 2001]). A party should have to "be substantially prejudiced by a long delay" to warrant severance (*Lombardi v Structure Tone, Inc.*, 118 AD3d 512, 513 [1st Dept 2014]; *Blechman v Peiser's & Sons*, 186 AD2d 50, 51 [1st Dept 1992]). The court should also take into account the factors favoring consolidation "[w]here common questions of law or fact exist . . . [a single trial] 'will avoid unnecessary duplication of trials, save unnecessary costs and expense, and prevent an injustice which would result from divergent decisions based on the same facts'" (*Scotto v Kodsi*, 102 AD3d 947, 948 [2d Dept 2013] [citation omitted]; *Best Price Jewelers.Com, Inc. v Internet Data Stor. & Sys., Inc.*, 51 AD3d 839, 839 [2d Dept 2008]).

Discussion

The portion of defendants' motion that seeks discovery sanctions against Atlantic is denied as it is undisputed that Atlantic has produced the discovery demanded by defendants. Moreover, the portion of Atlantic's motion/cross-motion which seek severance of the third-party action is also denied, as there are common issues of fact between the main action and the third-party action, since they both involve plaintiff's accident. A

single trial “will avoid unnecessary duplication of trials, save unnecessary costs and expense, and prevent an injustice which would result from divergent decisions based on the same facts” (*Scotto*, 102 AD3d at 948). Additionally, the portions of the motions/cross-motion which seek to vacate the note of issue and strike this case from the trial calendar, is denied, as the remaining outstanding discovery shall be completed, as indicated below, while this case remains on the trial calendar.

The portion of the motions/cross-motion which seeks dismissal of plaintiffs’ complaint pursuant to CPLR 3126, for plaintiffs’ willful failure to complete discovery and comply with the prior discovery orders of this court is granted, unless plaintiff timely submits to a deposition, as provided below. Significantly, absolutely no excuse has been proffered for plaintiff’s repeated failure to appear at numerous scheduled depositions, over the course of several years (which were required by this court to be completed expeditiously, while this case remains on the trial calendar). Despite plaintiffs’ counsel’s conclusory assertion that the parties are working together “amicably” to complete discovery (see ¶7, Affirmation in Opposition), the parties’ attempts to complete the outstanding discovery without court intervention were unsuccessful and required the filing of the within motions/cross-motion, in which defendants and Atlantic assert that plaintiff’s conduct in not

completing discovery has been willful, deliberate and contumacious. In support of their motions/cross-motion, counsel for defendants and third-party defendant have detailed numerous failed attempts at arranging for the completion of plaintiff's deposition and IME's, which are undisputed by plaintiffs, as no excuse for the delays and/or nonappearances have been supplied.

The failure to comply with this court's discovery orders, which amount to a period of almost two years of delay, constitute a pattern that established "willful, contumacious or . . . bad faith [conduct]" (*Banner*, 73 AD3d at 503; see also *Hernandez v City of New York*, 100 AD3d 433, 434 [1st Dept 2012]; *Figdor v City of New York*, 33 AD3d 560, 561 [1st Dept 2006][defendant's "cavalier attitude" was "inexcusably lax", and resulted in substantial delay warranting the imposition of discovery sanctions]). As stated by the Appellate Division in *Figdor*, *supra*, "[w]e take this opportunity to encourage IAS courts to employ a more proactive approach in...learning that a party has repeatedly failed to comply with discovery orders[; courts] have an affirmative obligation to take such additional steps as are necessary to ensure future compliance" (33 AD3d at 561). While discovery sanctions including dismissal may arguably be warranted at this time, in this court's discretion, prior to the dismissal of plaintiffs' complaint, one final opportunity for plaintiff to appear for a deposition, is provided, as follows:

On or prior to May 23, 2016, plaintiff shall submit to a deposition, at 10 o'clock a.m., at a location agreed to by the parties, which shall continue day to day until completed.²

Provided that plaintiff appears for deposition as ordered above, on or prior to May 31, 2016 defendants shall appear for deposition and, on or before June 3, 2016, third-party defendant Atlantic shall appear for deposition. All depositions shall begin at 10 o'clock a.m., at a location agreed to by the parties, and shall continue day to day until completed.

If plaintiff fails to appear for a deposition as ordered above, this case will be dismissed, upon the submission of an affidavit/affirmation by counsel, detailing plaintiffs' noncompliance with this order.³

As to the remaining IME, an examination by a vocational rehabilitation expert relates to plaintiff's claim for future lost earnings. As such, the portion of the motions/cross-motion which seek discovery sanctions for plaintiff's failure to appear for a vocational rehabilitation expert is granted to the extent that plaintiff is precluded from producing evidence at the time

² If the parties are unable to agree on a location as to any of the depositions, depositions shall take place at the courthouse, with room to be arranged by plaintiff.

³ Any such affirmation/affidavit shall be sent to this court in an envelope, with a copy of this order attached to the outside of the envelope.

of the trial of this case, as to future lost earnings, unless he appears and submits to an examination by a vocational rehabilitation expert, within 30 days after service of a copy of this order with notice of entry.

This court will not tolerate any further delays in the completion of discovery, as the note of issue was filed over two (2) years ago. "[A] litigant cannot ignore court orders with impunity" (*Kihl v Pfeffer*, 94 NY2d 118, 123 [1999]; see also *Brill v City of New York*, 2 NY3d 648, 653 [2004]["[i]f the credibility of court orders and the integrity of our judicial system are to be maintained, a litigant cannot ignore court orders with impunity"]). Failure to comply with this order will result in the imposition of appropriate discovery related sanctions.

That portion of defendants and Atlantic's motions/cross-motion which seeks an extension of the time to file dispositive motions is granted, as provided below, as it is undisputed that discovery remains outstanding, including depositions, which may be necessary in the preparation of a motion for summary judgment.

Order

Based upon the above, it is

ORDERED that the motion of 215 East 68th Street, L.P. and Western Waterproofing Co., Inc. d/b/a Brisk Waterproofing and

motion/cross-motion of Atlantic Housing & Scaffolding, Inc. are granted only to the following extent, and are otherwise denied: (1) plaintiff Alexander Thomas is precluded from producing any evidence at the trial of this case, as to future lost earnings, unless he appears and submits to an examination by a vocational rehabilitation expert within 30 days after service of a copy of this order with notice of entry; (2) plaintiffs' complaint will be deemed dismissed, unless plaintiff Alexander Thomas appears and submits to an examination before trial on or prior to May 23, 2016, 10 a.m. (which shall continue day to day until complete), at a location to be agreed upon by the parties; and (3) defendants and third-party defendant's time to move for summary judgment is extended to August 3, 2016; and it is further

ORDERED that within 30 days of entry, defendants 215 East 68th Street, L.P. and Western Waterproofing Co., Inc. d/b/a Brisk Waterproofing and third-party defendant Atlantic Housing & Scaffolding, Inc. are directed to serve a copy of this order upon plaintiffs, with notice of entry.

Dated: April 15, 2016



Doris Ling-Cohan, J.S.C.

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⁴ As a courtesy, a copy of this order is also being mailed to the parties by the court.