

Diaz v 214 E 163 LLC
2016 NY Slip Op 31360(U)
June 15, 2016
Supreme Court, Bronx County
Docket Number: 303695/13
Judge: Wilma Guzman
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**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX
IAS PART 7**

Index No. 303695/13
Motion Calendar No.8
Motion Date: 4/11/16

DAMIERYS ENCARNACION DIAZ,
Plaintiff,

-against-

214 E 163 LLC,

Defendant,

DECISION/ ORDER
Present:
Hon. Wilma Guzman

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motion and cross motion for summary judgment:

<u>Papers</u>	<u>Numbered</u>
Notice of Motion, Affirmation in Support, and Exhibits thereto.....	1
Affirmation in Opposition of Motion and Exhibits thereto.....	2
Reply Affirmation	3

Upon the foregoing papers and after due deliberation, and following oral argument, the Decision/Order on this motion is as follows:

Defendant moves pursuant to C.P.L.R. § 3212 for an Order seeking summary judgment on the issue of liability and to dismiss Plaintiff's Complaint and grant cost, fees, disbursements, and further relief as this Court deems just and proper. Plaintiff opposes the motion and defendant submits further reply.

The proponent of a motion for summary judgment must tender sufficient evidence to show the absence of any material issue of fact and the right to judgment as a matter of law. See Alvarez v. Prospect Hospital, 68 N.Y.2d 320, 501 N.E.2d 572, 508 N.Y.S.2d 923 (1986). A party moving for summary judgment is required to establish a prima facie entitlement to that relief regardless of the merits of the opposing papers. See Winegrad v. New York Medical Center, 64 N.Y.2d 851, 476 N.E.2d 642, 487 N.Y.S.2d 316 (1985).

Summary judgment is a drastic remedy that deprives a litigant of his or her day in court. Therefore, the party opposing a motion for summary judgment is entitled to all favorable inferences that can be drawn from the evidence submitted and the papers will be scrutinized carefully in a light most favorable to non-moving party. See Assaf v. Ropog Cab Corp., 153 A.D.2d 520, 544 N.Y.S.2d 834 (1st Dept. 1989). It is well settled that issue finding, not issue determination, is the key to summary judgment. See Rose v. Da Ecib USA, 259 A.D.2d 258, 686 N.Y.S.2d 19 (1st Dept. 1999). Summary judgment will only be granted if there are no material triable issues of fact. See Sillman v. Twentieth Century-Fox Film Corp., 3 N.Y.2d 395, 144 N.E.2d 387, 165 N.Y.S.2d 498 (1957).

Plaintiff commenced this action seeking damages for injuries allegedly sustained as the result of a trip and fall accident that occurred on the premises of the defendant on June 12, 2013.

Plaintiff failed to comply with multiple court orders for discovery. Defendant served plaintiff with a demand for discovery on August 12, 2013. This included a Demand for a Verified Bill of Particulars, a Demand Pursuant to Mandatory Insurer Reporting Law, a Demand Regarding Prior or Subsequent Injury, and Combined Discovery Demands, as well as a September 12, 2013 Demand Regarding a Prior February 2, 2013 Accident. When plaintiff failed to respond to defendant's discovery demands, defendant sent several good faith letters to plaintiff requesting prompt response to its demands. Defendant sent these letters on September 27, 2013; November 13, 2013 (when plaintiff substituted its counsel); and January 2, 2014. Besides providing authorizations and medical records from two medical entities, plaintiff failed to respond to defendant's discovery demands.

This Court issued several court orders directing plaintiff to provide defendant with responses to its outstanding discovery demands. The first, a Preliminary Conference Order, was

issued on February 26, 2014. Again, plaintiff failed to respond and defendant sent two more good faith letters (April 14, 2014 and June 3, 2014). Although plaintiff served defendant with an untimely “response to PC order” on June 10, 2014, it did not include a Bill of Particulars or responses to the other outstanding demands. This Court issued a Compliance Conference Order on September 10, 2014 directing response to the discovery demands and noting that preclusion would follow upon plaintiff’s failure to comply. When plaintiff failed to comply, another Compliance Conference Order was issued on December 18, 2014 and expressly set forth self-executing preclusion language. Again, plaintiff failed to respond.

Upon defendant’s motion to strike plaintiff’s complaint and dismiss with prejudice, a March 11, 2015 Court order was issued. The Order directed plaintiff to produce all outstanding discovery, including a Supplemental Bill of Particulars and defendant’s August 12, 2013 and September 12, 2013 demands. The Order explicitly stated that the outstanding discovery was to be provided within thirty days of the Order. It included explicit and self-executing preclusionary language: “Plaintiff shall be precluded from offering into evidence any of the items detailed above in the event of non-compliance with this order. No further application necessary.” Again, plaintiff completely disregarded the directives of this Court’s Order. On June 4, 2015—almost three months after the March 11, 2015 Order was issued and nearly two months after the deadline—plaintiff attempted to serve the outstanding discovery, which defendant rejected as untimely.

Defendant in moving papers argues that summary judgment is the proper remedy where an order of preclusion prevents a plaintiff from establishing his or her prima facie case and consequently, plaintiff’s complaint should be dismissed.

A conditional order of preclusion becomes “absolute” when the defaulting party fails to comply with its terms. See Wilson v. Garcia Contracting & Restoration Corp., 10 N.Y.3d 827, 890 N.E.2d 179, 860 N.Y.S.2d 417 (2008).

[T]o obtain relief from the dictates of a conditional order that will preclude a party from submitting evidence in support of a claim or defense, the defaulting party must demonstrate (1) a reasonable excuse for the failure to produce the requested items and (2) the existence of a meritorious claim or defense.

Gibbs v. St. Barnabas Hosp., 16 N.Y.3d 74, 80, 942 N.E.2d 277, 280, 917 N.Y.S.2d 68, 71 (2010) (citation omitted). Plaintiffs must satisfy this “two-prong test in cases involving conditional orders that were triggered by failures to submit a bill of particulars by court-imposed deadlines.” Id.

Here, Plaintiff failed to comply with four court orders. Plaintiff provided the discovery demands nearly two years after the initial request was made and two months after the deadline of the self-executing preclusion order—the fourth Order issued by this Court. Plaintiff’s sole argument in opposition to the motion is that the outstanding discovery was provided to defendant, without any reasonable excuse as to why the outstanding discovery was provided after several Court Orders and numerous good faith letters from the defendant. At no time between the initial request of August 12, 2013 and the March 11, 2015 Court Order did the plaintiff request an extension of the numerous deadlines imposed by this Court. The conditional preclusion order in this case became absolute upon the plaintiff’s failure to comply before the court-imposed deadline.

Therefore, plaintiff is precluded from offering any evidence as to the particulars of his alleged accident or claimed damages and as such plaintiff cannot establish his prima facie case against defendant. As plaintiff is barred from introducing evidence to support his complaint, he cannot demonstrate the existence of a meritorious case. See Zapco 1500 Investment L.P. v. Wiener,

299 A.D.2d 206, 749 N.Y.S.2d 138 (1st Dept. 2002); Samuels v. Montefiore Medical Center, 49 A.D.3d 268, 852 N.Y.S.2d 121 (1st Dept. 2008). Thus, plaintiff has failed the two-prong test set out in Gibbs and defendant is entitled to summary judgment.

Accordingly, it is

ORDERED that defendant's motion for summary judgment is hereby granted. It is further

ORDERED that plaintiff's Complaint against defendant is hereby dismissed. It is further

ORDERED that defendant shall serve a copy of this Order with Notice of Entry upon plaintiff within thirty (30) days of entry of this Order.

This constitutes the decision and Order of the Court.

DATE

6/15/16



HON. WILMA GUZMAN, JSC.