

Kamhi v East Coast Pain Mgt., P.C.

2016 NY Slip Op 32840(U)

October 14, 2016

Supreme Court, Rockland County

Docket Number: 032565/2015

Judge: Thomas E. Walsh II

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ROCKLAND

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LAWRENCE M. KAMHI, M.D. P.C.,

Plaintiff,

DECISION & ORDER
(Motion # 2)

Index No.: 032565/2015

-against-

EAST COAST PAIN MANAGMENT, P.C. and RICHARD
GEOGHEAN D.C. (in his individual and
Professional capacity),

Defendant.

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Thomas E. Walsh, II, A.J.S.C.

The following papers, numbered 1, were considered in connection with the Notice of Motion filed by Defendant for an Order, pursuant to Civil Practice Law and Rules § 3126, dismissing the action as a result of Plaintiff’s counsel’s failure to participate in court ordered discovery in the action and to appear at a court ordered conference on August 12, 2016, awarding Defendant’s attorney’s fees in connection with this action, and for such other and further relief as this Court deems just and proper:

PAPERS

NUMBERED

NOTICE OF MOTION/AFFIRMATION OF ADAM D. GOODFARB, ESQ.
/EXHIBITS (A-E)

1

Upon a careful and detailed review of the foregoing papers, the Court now rules as follows:

This action arises from a breach of contract claim by Plaintiff for \$16,250. Plaintiff’s commenced the action by filing a Summons and Verified Complaint on June 28, 2012. Issue was joined with the filing and service of an Answer on October 3, 2012 (dated July 25, 2012).

Plaintiff now moves for an Order, pursuant to Civil Practice Law and Rules § 3126, dismissing the action as a result of Plaintiff’s counsel’s failure to participate in court ordered discovery in this action and to appear at a court ordered conference on August 12, 2016.

According to Plaintiff, on August 5, 2015 Defendants served a Notice to Depose the Plaintiff and Plaintiff’s counsel refused to produce the Plaintiff for an examination before trial. Plaintiff’s counsel filed a Motion for Summary Judgment which was denied by Decision

and Order of this Court on April 6, 2016. A conference was held on April 29, 2016 and the undersigned ordered that discovery demands be served by the parties by May 31, 2016. Additionally, Defendant avers that the parties were directed to respond to the demands, set a date for examinations before trial, and ordered that the parties return to Court for a conference on August 12, 2016.

Defendant avers that they served a Notice of Discovery and Inspection on May 27, 2016 and received no response. Further, they assert that Plaintiff has failed to submit any discovery demands. Additionally, Plaintiff's counsel states that he was present in court on August 12, 2016 and the Plaintiff nor counsel for Plaintiff was present on that court date. The Court notes that Defendant's counsel states in his Affirmation that he contacted Stephen Barry, Esq., who had stood for Plaintiff's counsel at the conference in April 2016. According to the Affirmation, Mr. Barry states that he was representing Plaintiff and he had not heard from Plaintiff's counsel, Ian Kaufman, Esq. in months.

Plaintiff sent a letter to the undersigned in July 2016 requesting a conference with the Court so that Ian Kaufman, Esq. could be relieved as counsel. Within the letter Plaintiff states that Mr. Kaufman advised him that he was having a medical procedure in the spring and Mr. Stephen Barry, Esq. would appear on his behalf at the April 2016 court conference. Plaintiff also states that he has attempted to reach Mr. Kaufman through his cellular telephone, emails, text messages and even through his former law firm to no avail. Additionally, Plaintiff asked for this conference "so my rights are protected, since I have not been able to comply with the current discovery scheduling Order." In response, Defendant's counsel sent a letter to the Court stating that there was a conference already scheduled for August 12, 2016 and "I respectfully suggest that the issues pertaining to substitution of counsel, and the related need to adjust discovery deadlines, be addressed at that time." [Def. Exhibit E]. The aforementioned letter was emailed to Plaintiff and sent to Mr. Ian Kaufman, Esq.

A review of the pending Order to Show Cause demonstrates that per the Order of this Court the service was only by e-filing through the NYSCEF system.

Plaintiff does not provide the transcript for any of these conferences, but since there is no opposition and apparently no one representing Plaintiff at the August 2016 conference there is no challenge to the Order to Show Cause.

Civil Practice Law and Rules § 3126 states:

If any party, or a person who at the time a deposition is taken or an examination or inspection is made is an officer, director, member, employee or agent of a party or otherwise under a party's control, refuses to obey an order for disclosure or wilfully fails to disclose information which the court finds ought to have been disclosed pursuant to

this article, the court may make such orders with regard to the failure or refusal as are just, among them:

1. An order that the issues to which the information is relevant shall be deemed resolved for purposes of the action in accordance with the claims of the party obtaining the order; or
2. An order prohibiting the disobedient party from supporting or opposing designated claims or defenses, from producing in evidence designated things or items of testimony, or from introducing any evidence of the physical, mental or blood condition sought to be determined, or from using certain witnesses; or
3. An order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or any part thereof, or rendering a judgment by default against the disobedient party.

The nature and degree of any sanction to be imposed on a Civil Practice Law and Rules § 3126 motion is in the discretion of the Court. [Estaba v. Quow, 101 A.D.3d 940 (2d Dept. 2012); Martin v. City of New York, 46 A.D.3d 635 (2d Dept. 2007); Maiorino v. City of New York, 39 A.D.3d 601 (2d Dept. 2007)]. However, to invoke the drastic and harsh remedy of striking an answer, it must be clearly shown that a defendant's failure to comply with a disclosure order was the result of willful and contumacious conduct. [Carabello v. Luna, 49 A.D.3d 679 (2d Dept. 2008) (defendant had disappeared and made himself unavailable to his own attorney - court properly struck answer and entered a default judgment against that defendant); Martin v. City of New York, 46 A.D.3d 635 (2d Dept. 2007) (defendant's willful and contumacious conduct can be inferred from their repeated failures, over an extended period of time, to comply with court orders directing disclosure and the absence of any reasonable excuse for these failures - court properly struck answer of defendant); Maiorino v. City of New York, 39 A.D.3d 601 (2d Dept. 2007)].

On the record before it, the Court finds that Plaintiff's counsel's conduct was willful or contumacious. However, Plaintiff was clearly never served with the instant Order to Show Cause despite his letter in July 2016 that his counsel had disappeared and he was seeking substitution of counsel and it is unclear from the Court's record whether Plaintiff was informed that he had to appear for a court conference on August 12, 2016. Therefore, the Court is directing that Plaintiff has forty-five (45) days to obtain substitute counsel and comply with the discovery order issued by this Court. If Plaintiff fails to follow the Court's directive the matter will be dismissed without prejudice.

Accordingly, it is hereby

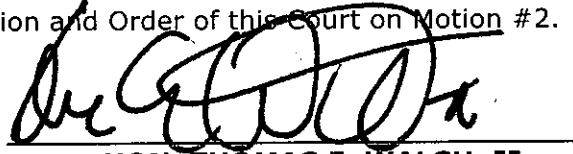
ORDERED that the Notice of Motion filed by Defendant is granted solely in so far

as set forth herein; and it is further

ORDERED that the parties are to appear for a conference on TUESDAY NOVEMBER 22, 2016 at 9:30 a.m.

The foregoing constitutes the Decision and Order of this Court on Motion #2.

Dated: New City, New York
October 14, 2016



HON. THOMAS E. WALSH, II
Acting Justice of the Supreme Court

TO:

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