

Rabinowitz v Robert C. Gottlieb, PC
2017 NY Slip Op 31771(U)
August 18, 2017
Supreme Court, New York County
Docket Number: 650929/2017
Judge: David B. Cohen
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. DAVID BENJAMIN COHEN
Justice

PART 58

JEROME RABINOWITZ
Plaintiff,

INDEX NO. 650929/2017

MOTION DATE 4/3/2017

- v -

MOTION SEQ. NO. 001

ROBERT C. GOTTLIEB, PC,
Defendant.

DECISION AND ORDER

The following e-filed documents, listed by NYSCEF document number 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31

were read on this application to/for Dismiss

Upon the foregoing documents, it is

Decided that the motion to dismiss the Complaint is denied. On September 2, 2011 plaintiff Jerome Rabinowitz filed a Complaint (under Index #110113/2011) against defendant Robert C. Gottlieb, alleging breach of contract claims because of defendant's excessive billing of attorney's fees (the "First Complaint"). Upon plaintiff's repeated failure to appear for a deposition, the Court issued multiple orders on October 10, 2012; November 28, 2012; and, May 15, 2013 ordering deadlines for both parties to complete depositions. Plaintiff failed to meet all of the deadlines.

Following plaintiff's continued noncompliance with the discovery orders, on August 13, 2013, defendant moved to dismiss the First Complaint or in the alternative for an order of

preclusion pursuant to CPLR § 3126. The Court adjourned defendant's motion and instead ordered that plaintiff, who then resided in prison, be made available by the warden for depositions. Plaintiff failed to appear for the deposition in connection with said order. This pattern repeated itself several times with the Court adjourning the motion to dismiss and working to have plaintiff deposed through videoconference. By June 12, 2014, plaintiff's counsel successfully coordinated with the Federal Bureau of Prisons to conduct the depositions through videoconferences, and Judge Wright ordered that it be executed no later than six weeks from that point. Despite failing to appear yet again, on October 9, 2014, Judge Wright gave plaintiff a final opportunity to appear by November 20, 2014, the failure of which would result in granting defendant's motion, specifically to preclude plaintiff from testifying. Plaintiff again failed to appear.

On December 14, 2015 defendant served plaintiff with a 90-day demand letter pursuant to CPLR 3216. Plaintiff failed to take any additional actions and on July 26, 2016, defendant moved to dismiss the First Complaint pursuant to CPLR § 3216. Around the same time, plaintiff filed a motion to restore. On August 26, 2016 Judge Wright granted defendant's motion to dismiss. The order states: "Upon the foregoing papers, it is ordered that this motion by the Defendant to dismiss the complaint for failing to go forward after service of a ninety (90) day notice, and for multiple failures to appear for video deposition without explanation is granted without opposition." On September 29, 2016, the Court denied plaintiff's motion to restore. In that order, Judge Wright stated "this motion by the Plaintiff to restore this to the calendar is denied. By order of mine dated October 9, 2014, I ruled that the Plaintiff would be precluded from testifying if he did not appear for a video deposition by November 20, 2014. In August of this year, I granted the defense's motion to dismiss the complaint for the failure of the Plaintiff to

go forward within ninety (90) days of the service of a demand pursuant to CPLR 3216. As this case has been (1) dismissed and (2) the Plaintiff precluded from testifying, the motion to restore the case must be denied. The Plaintiff has not submitted an affidavit of merit with this motion.”

On December 15, 2016, plaintiff filed this action against defendant (the “Second Action”), the allegations of which are virtually identical to the First Complaint, seeking the same amount of monetary relief, with a slight addendum noting that the Second Complaint was brought within the requisite statutory period. Defendant moved seeking dismissal of the Second Action and argues that because plaintiff’s testimony was precluded and the case was eventually dismissed, it should be treated as a dismissal “on the merits,” and hence be barred by the doctrine of *res judicata*, pursuant to CPLR § 3211(a)(5). Additionally, defendant seeks sanctions, including attorney’s fees pursuant to 22 NYCRR § 130-1.1, claiming that the lawsuit was filed frivolously.

“On a motion to dismiss pursuant to CPLR § 3211(a), the court accepts as true the facts as alleged in the complaint and affidavits in opposition to the motion, accords the plaintiff the benefit of every possible favorable inference, and determines only whether the facts as alleged manifest any cognizable legal theory” (*Elmaliach v Bank of China Ltd.*, 110 AD3d 192, 199 [1st Dept 2013], quoting *Sokoloff v Harriman Estates Dev. Corp.*, 96 NY2d 409, 414 [2001]). If, however, the allegations and facts are “inherently incredible” or refuted by documentary evidence, the court may then reject the above assumption (*Biondi v Beekman Hill House Apt., Corp.*, 257 AD2d 76, 80 [1st Dept 1999]).

In *Landau, P.C. v LaRossa, Mitchell & Ross* (11 NY3d 8, 12 [2008], quoting *Parker v Blauvelt Volunteer Fire Co.* 93 NY2d 343 [1999]), the Court of Appeals defined *res judicata* and its effect on subsequent cases:

Under *res judicata*, or claim preclusion, a valid final judgment bars future actions between the same parties on the same cause of action. As a general rule, once a claim is brought to a final conclusion, all other claims arising out of the same transaction or series of transactions are barred, even if based upon different theories or if seeking a different remedy (*id.*).

A valid final judgment within the meaning of *res judicata* is rendered only if the action was determined “on the merits” of the case (*Landau* at 13). Once such action is considered “on the merits,” the decision’s binding nature issues a preclusive effect on causes that arise out of the same transaction (*see id.*). But such an effect is not applicable here.

In October 2014, Judge Wright ordered the preclusion of plaintiff’s testimony (as opposed to an outright dismissal). In August 2016, although noting the repeated failures to appear for the ordered depositions, Judge Wright dismissed the First Complaint on default pursuant to CPLR § 3216, for plaintiff’s want of prosecution for failing to file a Note of Issue. Judge Wright also stated in the September 2016 order, that he had precluded plaintiff from testifying.

The statute is clear: “[W]here a party . . . unreasonably fails to serve and file a note of issue, the court, on its own initiative or upon motion, with notice to the parties, may dismiss the party’s pleading on terms. Unless the order specifies otherwise, the dismissal is not on the merits” (CPLR § 3216(a)); Here, plaintiff’s First Complaint was not dismissed on the merits, nor was he precluded from offering all evidence, just his own testimony. It is clear that pursuant to Judge Wright’s orders and the relevant law on this issue, the dismissal of the First Complaint was not on the merits.

Similar to a dismissal under CPLR 3216, a dismissal based upon a party’s noncompliance with discovery orders pursuant to CPLR 3126 is not necessarily on the merits (*see Daluise v Sottile*, 40 AD3d 801 [2d Dept 2007], quoting *Maitland v Trojan Elec. & Mach. Co.*, 65 NY2d

614, 615-616 [1985] “[W]here a plaintiff’s noncompliance with a disclosure order does not result in a dismissal with prejudice, or an order of preclusion or summary judgment in favor of defendant so as to effectively close plaintiff’s proof, dismissal resulting from the noncompliance is not a merits determination so as to bar commencement of a second action”). However, defendant cites certain cases in support of its argument that this action should be dismissed. Defendant argues that *Barrett v Kasco Const. Co., Inc.* (56 NY2d 830 [1982]) stands for the proposition that if a case is dismissed following the issuance of a preclusive order it must be given a *res judicata* effect in order to prevent a circumvention of that order. However, the Court in *Barrett* precluded the plaintiff from offering any and all evidence, not just personal testimony. The preclusive order here, forbidding plaintiff from testifying, is narrow in scope; and did not preclude plaintiff from offering other evidence in contrast to *Barrett*. *Palmer v. Fox* (22 NY2d 667 [1968]) also cited by defendant involves the same broad and inapplicable preclusive order as *Barrett*. Similarly, *Strange v Montefiore Hosp. and Med. Ctr.* (91 AD2d 507 [1st Dept 1982], *aff’d*, 59 NY2d 737 [1983]), is also distinguishable. There, the Court granted *summary judgment* based upon plaintiff failure to serve a bill of particulars, which was not appealed. The *Strange* Court then found the granting of summary judgment to have *res judicata* effect. Dismissing the Second Complaint based upon solely on an order precluding testimony would afford defendants more relief than they are legally entitled (*Aguilar v Jacoby*, 34 AD3d 706, 707 [2d Dept 2006] [“[T]he dismissal of the prior action on the ground of noncompliance with discovery requests and certain court orders was not a determination on the merits so as to bar commencement of the instant action as the prior dismissal was not preceded by an order of preclusion and there was no indication that the dismissal was with prejudice”). Further, an order of preclusion of certain evidence does not preclude the offering of other evidence (*Lee v Barnett*, 134 AD3d 908 [2d

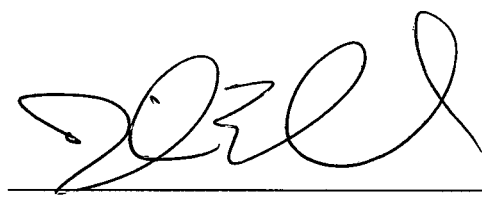
Dept 2015] [due to noncompliance plaintiff was precluded from testifying at trial, however this did not stop plaintiff from offering other evidence in support of its claim)].¹

Accordingly, it is therefore

ORDERED, that defendant's motion to dismiss is denied; and it is further

ORDERED, that defendant shall file an Answer on or before September 8, 2017.

This constitutes the decision and order of the Court.



DAVID BENJAMIN COHEN, J.S.C.

8/18/2017

DATE

CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	DENIED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	<input type="checkbox"/>	OTHER
APPLICATION:	<input type="checkbox"/>	GRANTED	<input type="checkbox"/>		<input type="checkbox"/>	GRANTED IN PART	<input type="checkbox"/>	
CHECK IF APPROPRIATE:	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>		<input type="checkbox"/>	SUBMIT ORDER	<input type="checkbox"/>	REFERENCE
	<input type="checkbox"/>	DO NOT POST	<input type="checkbox"/>		<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/>	

¹ In this pre-answer motion, defendant sought only dismissal. Defendant did not alternatively seek preclusion of plaintiff from testifying at trial in this action, and this issue is not yet before the Court.