

Dorme v National Convention Servs., Inc.

2017 NY Slip Op 32270(U)

October 26, 2017

Supreme Court, New York County

Docket Number: 154257/2014

Judge: Manuel J. Mendez

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: MANUEL J. MENDEZ
Justice

PART 13

VITO J. DORME,
Plaintiff,

INDEX NO. 154257/2014

- v -

MOTION DATE 10/18/2017

MOTION SEQ. NO. 004

MOTION CAL. NO. _____

NATIONAL CONVENTION SERVICES, INC.,
F.B. INTERNATIONAL, INC. and GLOBAL EXPERIENCE
SPECIALISTS, INC.,
Defendants.

The following papers, numbered 1 to 9 were read on this motion for summary judgment and cross-motion to vacate the Court's Order.

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	<u>1-3; 4 - 6</u>
Answering Affidavits — Exhibits _____	<u>4 - 6</u>
Replying Affidavits _____	<u>7; 8 - 9</u>
Cross-Motion: <input checked="" type="checkbox"/> Yes <input type="checkbox"/> No	

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Upon a reading of the foregoing cited papers, it is Ordered that Defendants F.B. International, Inc. and Global Experience Specialists, Inc.'s (herein "Moving Defendants") motion for summary judgment pursuant to CPLR §3212 to dismiss Plaintiff's Verified Complaint and all cross-claims against them, is granted. Plaintiff's cross-motion to vacate the Court's April 27, 2017 Status Conference Order pursuant to CPLR §5015, is denied.

On April 29, 2014 Plaintiff commenced this action for personal injuries sustained in a construction accident. Plaintiff was employed as a carpenter by non-party Exerv, Inc. to work on a project located at the Jacob Javits Center, 655 W. 34th Street, New York, New York. On May 10, 2011 Plaintiff was working on a scaffold when it allegedly collapsed causing him to fall. Plaintiff was allegedly confined to his bed for one week following the accident due to injuries to his right shoulder, right hand, right knee and lumbar spine (Moving Papers Mot. 004 Ex. F).

The Moving Defendants now move for summary judgment pursuant to CPLR §3212, to dismiss the Verified Complaint and all cross-claims against them. The Moving Defendants contend that since the Court precluded the Plaintiff from presenting evidence on damages at trial, summary judgment is warranted. Plaintiff opposes the motion and cross-moves to vacate the Court's April 27, 2017 Status Conference Order.

To prevail on a motion for summary judgment, the proponent must make a prima facie showing of entitlement to judgment as a matter of law, through admissible evidence, eliminating all material issues of fact (Klein v City of New York, 81 NY2d 833, 652 NYS2d 723 [1996]). Once the moving party has satisfied these standards, the burden shifts to the opponent to rebut that prima facie showing, by producing contrary evidence, in admissible form, sufficient to require a trial of material factual issues (Amatulli v Delhi Constr. Corp., 77 NY2d 525, 569 NYS2d 337 [1999]). In determining the motion, the court must construe the evidence in the light most favorable to the non-moving party (SSBS Realty Corp. v

Public Service Mut. Ins. Co., 253 AD2d 583, 677 NYS2d 136 [1st Dept. 1998]).

Although preclusion of presenting evidence at trial is a drastic remedy, it is warranted with plaintiff's unexplained failure to comply with multiple discovery orders, including conditional preclusion orders (Shaw v Bronfman, 284 AD2d 267, 727 NYS2d 428 [1st Dept. 2001]). The Plaintiff is unable to establish a prima facie case when precluded from presenting evidence at trial, and therefore, dismissal of the complaint is required (1500 Inv. L.P. v Wiener, 299 AD2d 206, 749 NYS2d 138 [1st Dept. 2002]). A conditional order that is self-executing combined with the party's "failure to produce [the requested] items on or before the date certain" renders preclusion absolute (Wilson v Galicia Contracting & Restoration Corp., 10 NY3d 827, 860 NYS2d 417, 890 NE2d 179 [2008]). "If the credibility of court orders and the integrity of our judicial system are to be maintained, a litigant cannot ignore court orders with impunity. Indeed, the Legislature, recognizing the need for courts to be able to command compliance with their disclosure directives, has specifically provided that a court may make such orders ... as are just, including dismissal of an action" (Kihl v Pfeffer, 94 NY2d 118, 700 NYS2d 87, 722 NE2d 55 [1999]).

CPLR §5015(a)(1) allows the court to vacate an order where a party asserts a reasonable excuse for the default (CPLR §5015[a][1]). "Assessment of the sufficiency of the excuse proffered for the delay and the adequacy of the merit of the action are consigned to the sound discretion of the court" (Bengal House Ltd. v 989 3rd Ave., Inc., 118 AD3d 575, 988 NYS2d 586 [1st Dept. 2014]).

While it is in the interest of justice to decide a case on its merits (Myers v City of New York, 110 AD3d 652, 974 NYS2d 243 [1st Dept. 2013]), court orders cannot be ignored with impunity (Kihl, *supra*). Plaintiff's excuse that he is a solo practitioner who thought he complied with most of the Court's Orders is not a reasonable excuse for his repeated failures to comply.

On March 16, 2016, the fifth discovery conference, the Court for the first time ordered that "Plaintiff be precluded from presenting evidence at trial due to repeated failures to provide court ordered documents unless Plaintiff complies with previous court orders as listed above within 30 days" (Moving Papers Mot. 004 Ex. D). On April 20, 2016, the sixth discovery conference, the Court issued its second conditional preclusion language by stating "Plaintiff's complaint is stricken unless Plaintiff within 10 days fully complies with prior orders, provides [Bill of Particulars] as to [Defendants FB International and National Convention Services] and responses to all of Defendants' combined discovery demands" (*Id*). On February 1, 2017, the eighth discovery conference, the Court for the third time conditionally precluded Plaintiff, stating "Plaintiff shall be precluded from presenting evidence at trial of the items ordered to be provided in this order if Plaintiff fails to comply with the terms of this Order" (*Id*). On March 15, 2017, the ninth discovery conference, the Court conditionally precluded Plaintiff for the fourth time stating "Plaintiff to fully comply with 2/1/17 order by 5:00pm Monday 3/20/17. If Plaintiff fails to fully comply, Plaintiff shall be precluded from presenting any evidence on damages at the trial of this action" (*Id*). Finally, on April 26, 2017, the tenth discovery conference, the court precluded the Plaintiff from providing any evidence on damages at trial because "Plaintiff failed to comply with the courts orders after 4 preclusion orders (3/16/16, 4/20/16, 2/1/17, 3/15/17)" (*Id*).

While Defendants have requested extensive discovery, the Plaintiff has repeatedly been willful and contumacious in failing to fully comply with the Court's ten orders (Delaney v Automated Bread Corp., 110 AD2d 677, 487 NYS2d 402 [2nd Dept. 1985]). The Court is sympathetic to the fact that Plaintiff's counsel is a solo practitioner and the Court took this into consideration when it gave the Plaintiff multiple times to fully comply with discovery orders, issuing four (4) conditional preclusion orders before finally precluding the Plaintiff.

With Plaintiff unable to present evidence on damages in a negligence action at trial, the Verified Complaint must be dismissed against Moving Defendants (1500 Inv. L.P., *supra*).

Accordingly, it is Ordered that Defendants F.B. International, Inc. and Global Experience Specialists, Inc.'s motion for summary judgment pursuant to CPLR §3212 to dismiss Plaintiff's Verified Complaint and all cross-claims against them is granted, and it is further,

ORDERED, that the causes of action in the Verified Complaint and all cross-claims asserted against Defendants F.B. International, Inc. and Global Experience Specialists, Inc., are hereby severed and dismissed, and it is further,

ORDERED, that the caption in this action is amended and shall read as follows:

VITO J. DORME,

Plaintiff,

-against-

**NATIONAL CONVENTION SERVICES, INC.,
Defendant.**

, and it is further,

ORDERED, that within twenty (20) days from the date of entry of this Order The Moving Defendants shall serve a copy of this Order with Notice of Entry on all parties appearing, and it is further,

ORDERED, that within twenty (20) days from the date of entry of this Order, The Moving Defendants shall also serve a copy of this Order with Notice of Entry upon the Trial Support Clerk located in the General Clerk's Office (Room 119) and upon the County Clerk (Room 141B), who are directed to amend the caption and the court's records accordingly, and it is further,

ORDERED, that Plaintiff's cross-motion to vacate the Court's April 27, 2017 Status Conference Order pursuant to CPLR §5015, is denied, and it is further,


ORDERED, that the remaining parties are to appear for a Status Conference at IAS Part 13 located at 71 Thomas Street, Room 210, New York, New York on January 17, 2018 at 9:30 A.M., and it is further,

ORDERED, that the Clerk enter judgment accordingly.

ENTER:

MANUEL J. MENDEZ
J.S.C.

Dated: October 26, 2017



Manuel J. Mendez
J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE