

Rodriguez v Department of Pub. Works

2017 NY Slip Op 33239(U)

November 13, 2017

Supreme Court, Westchester County

Docket Number: 66971/2016

Judge: Joan B. Lefkowitz

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This opinion is uncorrected and not selected for official publication.

To commence the statutory time period for appeals as of right [CPLR 5513(a)], you are advised to serve a copy of this order, with notice of entry upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER - COMPLIANCE PART

-----X
BIANCA RODRIGUEZ,

Plaintiff,

-against-

DECISION AND ORDER

Index No.: 66971/2016
Order Date: Nov. 13, 2017
Motion Seq.: 1

DEPARTMENT OF PUBLIC WORKS, THE CITY OF
YONKERS and THOMAS DELPRETE,

Defendants.

-----X
LEFKOWITZ, J.

The following papers were read on this motion by defendant Department of Public Works, The City of Yonkers (hereinafter "City") for an order pursuant to CPLR 3126(3) dismissing plaintiff's action and an award of costs for alleged discovery violations:

- Order to Show Cause, Aff. in Support, Exhs. A-G
- Affirmation in Opposition, Exh. 1

Upon the foregoing papers and proceedings held on November 13, 2017, the motion is determined as follows:

Plaintiff commenced this action by Summons and Complaint on or about November 11, 2016, alleging personal injuries arising from a motor vehicle accident on December 21, 2015, in Yonkers, New York. The complaint alleges that a City sanitation truck driven by defendant Thomas DelPrete struck a building that plaintiff occupied, causing damages. According to the City, the evidence is that DelPrete suffered a "sudden and unforeseen seizure immediately before" the accident. Defendants joined issue and all parties concluded a Preliminary Conference Stipulation so-ordered by this Court and entered April 10, 2017 (NYSCEF Doc. 12), pursuant to which plaintiff was to serve a Bill of Particulars, medical authorizations and photographs by May 5, 2017.

The parties appeared for a Compliance Conference on September 13, 2017, by which time plaintiff had failed to tender a Bill of Particulars and authorizations. Accordingly, this Court entered a Compliance Conference Order directing that plaintiff must tender a Bill of Particulars and medical authorizations by September 27, 2017, and that "no further extension" would be granted. The parties next appeared for a Compliance Conference on October 4, 2017, by which date plaintiff still had failed to tender the Bill of Particulars, authorizations and photographs that plaintiff stipulated to provide by May 5, 2017. Accordingly, this Court issued a

briefing schedule, pursuant to which defendants now move pursuant to CPLR 3126 to dismiss plaintiff's complaint and award costs based on plaintiff's failure to comply with the Preliminary Conference Order and the Compliance Conference Order of September 13, 2017.

In support hereof, defendants plead and prove the foregoing. Based on the five month delay, and plaintiff's lack of excuse proffered, defendants assert that plaintiff's failure to comply can only be deemed willful and contumacious, thus justifying dismissal.

In opposition, plaintiff asserts that plaintiff fully responded to all discovery demands (*see* Pl's Mem in Opposition, at para. 2), and attaches what plaintiff characterizes to be a full response (*see* Pl's Exh. 1). Plaintiff's papers offered no other explanation or context for this Court's consideration, and plaintiff did not appear at oral argument on this motion.

It is axiomatic that under CPLR 3101(a)(1), there must be full disclosure of all matters "material and necessary" in the prosecution or defense of an action. The phrase "material and necessary" is interpreted liberally to require disclosure, on request, of any facts bearing on the controversy that will assist preparation for trial by sharpening the issues and reducing delay and prolixity (*see Matter of Kapon*, 23 NY3d 32 [2014], *quoting Allen v Crowell-Collier Publ. Co.*, 21 NY2d 403, 406 [1968]). Trial courts have broad discretion to supervise discovery and enter appropriate remedies to ensure the fair and efficient conduct of discovery (*see Auerbach v Klein*, 30 AD3d 451 [2d Dept 2006]; *Feeley v Midas Properties, Inc.*, 168 AD2d 416 [2d Dept 1990]).

On a CPLR 3126 motion to strike papers as a consequence of a party's failure to proceed with discovery, "the nature and degree of the penalty ... is a matter generally left to the discretion of the Supreme Court" (*Carbajal v Bobo Robo, Inc.*, 38 AD3d 820 [2d Dept 2007]). To invoke the drastic remedy of striking a pleading or of preclusion a court must determine that the party's failure to disclose is willful and contumacious (*see Greene v Mullen*, 70 AD3d 996 [2d Dept 2010]; *Kingsley v Kantor*, 265 AD2d 529 [2d Dept 1999]). Willful and contumacious conduct can be inferred from repeated noncompliance with court orders or a failure to comply with court ordered discovery over an extended period of time, coupled with the lack of an adequate excuse for the failure (*see Mei Yan Zhang v Santana*, 52 AD3d 484 [2d Dept 2008]; *Carbajal*, 38 AD3d at 820; *Prappas v Papadatos*, 38 AD3d 871 [2d Dept 2007]).

Here, it is undisputed that plaintiff failed to comply with multiple court orders directing her timely to tender a Bill of Particulars, photographs and medical authorizations. The exhibit to which plaintiff refers shows that plaintiff provided a Bill of Particulars and photographs only on October 20, 2017 – after defendants brought the instant motion, and nearly six months after plaintiff's Preliminary Conference compliance deadline. Plaintiff's papers offer no excuse and don't even acknowledge plaintiff's tardiness. Moreover, there is no evidence that plaintiff provided any response to defendants' demand for authorizations, without which defendants are substantially prejudiced in the defense of this action.

Accordingly, this Court is left with no record basis to dispute defendants' contention that plaintiff willfully and contumaciously violated multiple discovery orders of this Court. Thus, defendants are entitled to a CPLR 3126 remedy.

Based on the facts and circumstances of this case, a conditional order of dismissal would best serve the interest of justice. Accordingly, so as to be received by November 30, 2017, plaintiff shall tender to defendants full and complete responses to defendants' demands for authorizations. Moreover, as to plaintiff's late-tendered Bill of Particulars, if defendants allege the same to be deficient, defendants may tender to plaintiff, so as to be received by November 20, 2017, a good faith letter explicating any such alleged deficiencies, and plaintiff shall serve a sufficient response thereto not later than November 30, 2017. Also by November 30, 2017, plaintiff shall make a monetary payment in the amount of \$100 for motion costs. If plaintiff fails to comply with any provision hereof, defendants may upload to NYSCEF by December 7, 2017, a proposed Order with Notice of Settlement dismissing plaintiff's complaint pursuant to CPLR 3126. If plaintiff timely complies, depositions shall be completed by January 19, 2018, and the Court Attorney Referee shall fix dates certain at the next conference.

Plaintiff is admonished strictly to comply with this Order, and that further unexcused delays in plaintiff's compliance with discovery obligations will not be tolerated.

This Court notes that plaintiff's Exhibit 1 includes Combined Demands for Discovery and Inspection, also dated October 20, 2017. The Preliminary Conference Order provided for party depositions to be complete by September 5, 2017. The Compliance Conference Order of September 13, 2017, made no reference to plaintiff's demands and, pursuant thereto, "disclosure demands not raised at this Conference are deemed waived." As these demands are not properly before the Court on this motion, this Court takes no position herein as to their timeliness or substantive merit.

Accordingly it is hereby

ORDERED that defendants' motion is granted to the extent that plaintiff shall tender to defendants, so as to be received by November 30, 2017: (1) full and complete responses to defendants' demands for authorizations; (2) a response to any good faith letter that defendants may serve by November 20, 2017, concerning plaintiff's Bill of Particulars; and (3) a monetary payment in the amount of \$100 for costs associated with the making of this motion; and it is further

ORDERED that if plaintiff fails to comply, defendants may upload to NYSCEF by December 7, 2017, a proposed Order with Notice of Settlement dismissing plaintiff's complaint pursuant to CPLR 3126, upon which plaintiff's action is subject to dismissal; and it is further

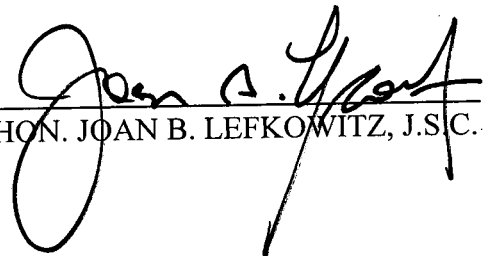
ORDERED that if plaintiff timely complies, depositions shall be completed by January 19, 2018, and the Court Attorney Referee shall fix dates certain at the next conference; and it is further

ORDERED that defendants shall serve this Decision and Order, with Notice of Entry, on plaintiff within five days hereof; and it is further

ORDERED that counsel for all parties shall appear in the Compliance Part, Room 800 of this Courthouse, at 9:30 a.m., on December 11, 2017.

The foregoing constitutes the Decision and Order of this Court.

Dated: White Plains, New York
November 13, 2017


HON. JOAN B. LEFKOWITZ, J.S.C.

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