

Tchilingarian v Stembi Corp.
2018 NY Slip Op 30897(U)
April 3, 2018
Supreme Court, Queens County
Docket Number: 703575/17
Judge: Timothy J. Dufficy
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ORIGINAL

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

PRESENT: HON. TIMOTHY J. DUFFICY
Justice

PART 35

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ARUSYAK TCHILINGARIAN,

Plaintiff,

Index No.: 703575/17

Mot. Date: 11/1/17

-against-

Mot. Seq. 1

**STEMBI CORPORATION, STEINWAY
MEDICAL GROUP AND EMPIRE STATE
CONTRACTING AND DESIGN, INC,**

Defendants.

-----X

**EMPIRE STATE CONTRACTING AND DESIGN,
INC,**

Third-Party Plaintiff,

-against-

GREEN SIDE UP INDUSTRIES, INC.,

Third-Party Defendants.

-----X

The following numbered papers were read on this motion by defendant Mount Sinai Hospitals Group, Inc. i/s/h/a Steinway Medical Group (Mount Sinai) for an order precluding plaintiff from offering evidence at trial pursuant to CPLR 3042 and for an order striking plaintiff's complaint for failure to comply with discovery pursuant CPLR 3126 or, in the alternative, for an order compelling plaintiff to provide outstanding discovery; and on this cross motion by plaintiff for a default judgment against Steinway Medical Group (Steinway) and to strike the answer interposed by Mount Sinai.

**PAPERS
NUMBERED**

Notice of Motion - Affidavits - Exhibits EF 25 - 31
Notice of Cross Motion - Affidavits - Exhibits EF 41 - 48

Answering Affidavits - Exhibits EF 52 - 55
 EF 64 - 70
 Reply AffidavitsEF 71 - 87

Upon the foregoing papers it is ordered that the motion and cross-motion are determined as follows:

This is an action to recover damages for personal injuries allegedly sustained by plaintiff when he slipped and fell on snow and ice in the parking lot, located at 22-02 Steinway Street in Astoria, New York, on February 3, 2015. On March 16, 2017, the plaintiff commenced the within action against the defendants alleging that they were negligent in the ownership and maintenance of the premises. On June 2, 2017, Mount Sinai served an answer, along with various discovery demands, stating that it was incorrectly sued in this action as Steinway Medical Group. To date, the plaintiff has not responded to Mount Sinai’s discovery demands, including providing a bill of particulars.

Mount Sinai’s motion seeking an order of preclusion and dismissal of plaintiff’s complaint, pursuant to CPLR 3126 and 3042, for failure to serve a bill of particulars and respond to discovery demands served with Mount Sinai’s answer is denied. CPLR 3042(c) provides “if a party fails to respond to a demand in a timely fashion or fails to comply fully with a demand, the party seeking the bill of particulars may move to compel compliance, or, if such failure is willful, for the imposition of penalties pursuant to CPLR 3042(d).” “If a party served with a demand for a bill of particulars willfully fails to provide particulars which the court finds ought to have been provided pursuant to this rule, the court may make such final or conditional order with regard to the failure or refusal as is just, including such relief as is set forth in” CPLR 3126 (CPLR 3042[d]). As a sanction against a party who “refuses to obey an order for disclosure or willfully fails to disclose information which the court finds ought to have been disclosed,” the court, pursuant to CPLR 3126, may issue an order (1) “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,” (2) “prohibiting the disobedient party . . . from producing in evidence designated things or items of testimony,” or (3) “striking out pleadings or parts thereof . . .” The willful and contumacious character of a party’s conduct can be inferred from his or her repeated failures

to comply with court-ordered disclosure and/or discovery demands, coupled with inadequate excuses for these defaults (*see McArthur v New York City Hous. Auth.*, 48 AD3d 431 [2d Dept 2008]; *Bates v Baez*, 299 AD2d 382 [2d Dept 2002]). The nature and degree of the penalty to be imposed under CPLR 3126 lies within the sound discretion of the trial court (*see Workman v Town of Southampton*, 69 AD3d 619 [2d Dept 2010]). In this case, Mount Sinai failed to make a showing that the plaintiff willfully failed to respond to discovery demands or comply with disclosure orders. Rather, this Court finds that the plaintiff must provide responses to Mount Sinai's outstanding discovery demands, including providing a bill of particulars, within 45 days after service of a copy of this Order with Notice of Entry.

When a defendant has failed to appear, plead, or proceed to trial, a plaintiff may seek a default judgment against the defendant (CPLR 3215[a]). On a motion to enter a default judgment against a defendant for the failure to appear or answer the complaint, where as here, a plaintiff must submit proof of service of the summons and complaint, proof by affidavit of the facts constituting the claim, and proof of the defendant's default and the amount due (CPLR 3215[f]). In this case, the plaintiff argues that Steinway has appeared by Mount Sinai, an entity not named in the action, and, thus, is in default by failing to answer the complaint. However, the plaintiff has not submitted any proof that Steinway existed as a legal entity and was the occupant of the premises where the plaintiff's accident occurred on February 3, 2015. The lease agreement between defendant Stembi Corporation (Stembi) and Mount Sinai demonstrates that Mount Sinai was the tenant occupying the subject premises, from September 1, 2011 through August 31, 2016. In addition, New York State Department of Taxation and Finance records indicate that Steinway was listed as a "dormant" entity as of 2013. Moreover, Paul Lombardi, M.D., a partner of Steinway, stated in his affidavit that Steinway had ceased doing business for several years prior to the plaintiff's accident and that, on February 3, 2015, Steinway had no connection, affiliation, business interest, or property interest in the premises where plaintiff's accident occurred. In view of the foregoing, the plaintiff's cross-motion for a default judgment against Steinway for failure to answer the complaint and to strike the answer of Mount Sinai is denied.

Accordingly, it is

ORDERED, that the motion by Mount Sinai for an order of preclusion and dismissal of the complaint pursuant to CPLR 3126 and 3042 for plaintiff's failure to serve a bill of particulars and respond to its discovery demands is denied; and it is further

ORDERED, that the plaintiff is directed to respond to Mount Sinai's outstanding discovery demands, including providing a bill of particulars, within forty-five (45) days after service of a copy of this Order with Notice of Entry; and it is further

ORDERED, that the plaintiff's cross-motion is denied.

The forgoing constitutes the decision and order of this Court.

Dated: April 3, 2018



TIMOTHY J. DUFFICY, J.S.C.

