

Rivera v Second Ave. Tooth Doctor, PC
2018 NY Slip Op 31885(U)
August 6, 2018
Supreme Court, New York County
Docket Number: 805252/2014
Judge: Eileen A. Rakower
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 6

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Irma Rivera and Nelson Viruet,
Plaintiffs,

Index No.
805252/2014

**DECISION and
ORDER**

- against -

Mot. Seq. 4

Second Avenue Tooth Doctor, PC,
The Perfect Smile Dental Service
Corporation, Andrew Maron, DDS,
Michael Taylor, DDS, Valerie
Schwab, DDS, and Care Credit,
Defendants.

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HON. EILEEN A. RAKOWER, J.S.C.

This is an action for damages for personal injuries sustained by plaintiff Irma Rivera due to defendants' alleged negligence and for the loss of services by plaintiff Nelson Viruet, Irma's husband. Presently before the court is plaintiffs' motion to strike the Answer of Second Avenue Tooth Doctor, PC ("Tooth Doctor") and Andrew Maron, DDS ("Maron") and for entry of a default judgment and inquest on damages. Defendants Tooth Doctor and Maron do not oppose.

Factual Background

Plaintiffs commenced this action by filing a Summons and Complaint on July 29, 2014. On March 22, 2016, plaintiffs filed a motion for default judgment against all defendants which was granted by decision dated May 17, 2016. On December 9, 2016, defendants Tooth Doctor, Maron, and Valerie Schwab, DDS ("Schwab"), filed an Order to Show Cause ("OTSC") to vacate the default judgment. On December 9, 2016, plaintiffs and defendants Tooth Doctor, Maron, and Schwab entered into a Stipulation which resolved the OTSC, granted defendants time to file their respective Answers, vacated the default judgment and amended the caption. Defendants filed their Answer. On January 26, 2017, Miller

Law Offices, P.C., filed a motion to be relieved as counsel for defendants Tooth Doctor and Maron. On May 2, 2017, Miller Law Offices, P.C.'s motion to be relieved as counsel for defendants Tooth Doctor and Maron was granted.

On June 29, 2017, a Preliminary Conference Order was entered between plaintiffs and defendant Schwab. Defendants Tooth Doctor and Maron failed to appear at the Preliminary Conference. On November 14, 2017, a Compliance Conference Order was entered between plaintiffs and defendant Schwab. Defendants Tooth Doctor and Maron failed to appear at the Compliance Conference. On January 16, 2018, a Compliance Conference Order was entered between plaintiffs and defendant Schwab. Tooth Doctor and Maron failed to appear at the Compliance Conference. On February 27, 2018, a Compliance Conference Order was entered between plaintiffs and defendant Schwab. Defendants Tooth Doctor and Maron failed to appear at the Compliance Conference.

Legal Standard

"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." *Fish & Richardson, P.C. v. Schindler*, 75 AD3d 219, 220 (1st Dept 2010). "Although actions should be resolved on the merits whenever possible, the efficient disposition of cases is not advanced by hindering the ability of the trial court to supervise the parties who appear before it and to ensure they comply with the court's directives." (*id.*) Accordingly, CPLR § 3126 provides,

"If any party . . . refuses to obey an order for disclosure or willfully fails to disclose information which the court finds ought to have been disclosed . . . the court may make such orders with regards to the failure or refusal as are just, among them: . . .

2. an order prohibiting the disobedient party from supporting or opposing designated claims or defenses, from producing in evidence designated things or items of territory . . . or from using certain witnesses: or

3. an order striking out pleadings or parts thereof . . .

or dismissing the action or any part thereof, or rendering a judgment by default against the disobedient party.”

“CPLR 3126 provides various sanctions for violations of discovery orders, the most serious of which are striking a party’s pleadings or outright dismissal of the action.” *Corner Realty 30/7, Inc. v Bernstein Management Corp.*, 249 AD2d 191, 193 (1st Dept 1998). “However . . . the extreme sanction of dismissal is warranted only where a clear showing has been made that the noncompliance with a discovery order was willful, contumacious or due to bad faith.” (*id.*) A “plaintiff’s pattern of noncompliance with discovery demands and a court-ordered stipulation supports an inference of willful and contumacious conduct . . .” *Jackson v OpenCommunications Omnimedia, LLC*, 147 AD3d 709, 709 (1st Dept 2017). Although Plaintiff may “tender a reasonable excuse to overcome defendants’ showing of willfulness” (*Menkes v Delikat*, 50 NYS3d 318, 319 (1st Dept 2017), “failure to offer a reasonable excuse for . . . noncompliance with discovery requests gives rise to an inference of willful and contumacious conduct that warrant[s] the striking of the answer.” *Turk Eximbank-Export Credit Bank of Turkey v Bicakcioglu*, 81 AD3d 494, 494 (1st Dept 2011).

Section 22 NYCRR § 202.27 states:

“At any scheduled call of a calendar or at any conference, if all parties do not appear and proceed or announce their readiness to proceed immediately or subject to the engagement of counsel, the judge may note the default on the record and enter an order as follows:

- (a) If the plaintiff appears but the defendant does not, the judge may grant judgment by default or order an inquest.
- (b) If the defendant appears but the plaintiff does not, the judge may dismiss the action and may order a severance of counterclaims or cross-claims.
- (c) If no party appears, the judge may make such order as appears just.”

Discussion

To date, defendants Tooth Doctor and Maron have failed to provide any discovery to plaintiffs as demanded in the Preliminary Conference Order dated June 29, 2017, and Compliance Conference Orders dated November 14, 2017, January 16, 2018, and February 27, 2018. Defendants Tooth Doctor and Maron have failed to appear for depositions as scheduled in these four court orders. Furthermore, they have failed to appear at the Preliminary Conference and the last three Compliance Conferences. In their motion, plaintiffs have provided proof of service of each of the court orders to Tooth Doctor and Maron, a request to the provide discovery and schedule depositions, and notification that they intended to file a motion to strike and enter default judgment if the discovery was not provided. (See letters dated November 18, 2017, December 21, 2017, and January 16, 2018). Defendants Tooth Doctor and Maron do not oppose, and therefore provide no explanation for the repeated failures to comply with court orders and appear at court conferences. Defendants Tooth Doctor and Maron's Answer is stricken due to their willful, contumacious, and bad faith refusal to comply with four orders and their lack of any excuse for their continued failure to comply.

Wherefore, it is hereby

ORDERED that plaintiffs' motion to strike defendants Second Avenue Tooth Doctor, PC and Andrew Maron, DDS' Answer is granted without opposition; and it is further

ORDERED that the Answer of defendants Second Avenue Tooth Doctor, PC and Andrew Maron, DDS is hereby stricken; and it is further

ORDERED that an assessment of damages as against defendants Second Avenue Tooth Doctor, PC and Andrew Maron, DDS, will be held at the time of trial.

This constitutes the Decision and Order of the Court. All other relief requested is denied.

Dated: AUGUST 6 2018


Eileen A. Rakower, J.S.C.