

Verizon N.Y. Inc. v Consolidated Edison, Inc.

2018 NY Slip Op 31984(U)

August 2, 2018

Supreme Court, New York County

Docket Number: 150109/2013

Judge: Nancy M. Bannon

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

PRESENT: HON. NANCY M. BANNON **PART** **IAS MOTION 42EFM**

Justice

-----X

VERIZON NEW YORK INC.,

Plaintiff,

- V -

CONSOLIDATED EDISON, INC., and CONSOLIDATED EDISON
COMPANY OF NEW YORK, INC.

Defendant.

INDEX NO. 150109/2013
MOTION DATE 05/21/2018,
06/12/2018
MOTION SEQ. NO. 001 002

DECISION AND ORDER

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 43, 44, 45, 46, 47, 56, 57, 58, 59, 60

were read on this motion to/for EXTEND - TIME

The following e-filed documents, listed by NYSCEF document number (Motion 002) 48, 49, 50, 51, 52, 53, 54, 55, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82

were read on this motion to/for RENEW/REARGUE/RESETTLE/RECONSIDER

In this action seeking to recover for steam damage to certain telecommunications equipment owned by the plaintiff, the plaintiff moves (1) pursuant to CPLR 2004 to extend the note of issue deadline, (2) pursuant to CPLR 3124 to compel the defendants to produce discovery, (3) pursuant to CPLR 3126 to strike the defendants' answer, and (4) for costs and fees associated with the making of their motion (SEQ 001). The defendants oppose the motion. In a separate motion sequence, the defendants purport to move pursuant to CPLR 2221(d) and (e) for leave to reargue or renew the court's order dated April 16, 2018, precluding the defendants from adducing evidence in their defense at trial or in a dispositive motion in support of any defenses pursuant to CPLR 3126, after numerous failures to comply with court orders and discovery demands without a reasonable excuse (SEQ 002). The plaintiff opposes the motion. The plaintiff's motion is granted in part (SEQ 001), and the defendants' motion, denominated as a motion to vacate or modify an order, is denied (SEQ 002).

As described in greater detail in the court's order dated April 16, 2018, little discovery was conducted in this action until the preliminary conference of June 22, 2017, about four and a half years after the commencement of the action. In an order dated November 16, 2017, after several failures to comply with discovery demands and court orders, without explanation, the defendants were directed, among other things, to respond to the plaintiff's Fourth Notice of Discovery and Inspection and letter dated June 16, 2016, to supplement their response to the

plaintiff's Second Notice of Discovery and Inspection, and to produce certain witnesses for deposition on specified dates. The court marked the order "Final- No Extensions." As discussed in the April 16, 2018, order, another discovery conference followed on February 15, 2018, at which it was noted that the defendants had not provided all the court-ordered discovery. When the defendants failed to comply with a further directive issued at the February 15, 2018, conference, the court, by the order dated April 16, 2018, precluded the defendants from adducing evidence in their defense at trial or in a dispositive motion in support of any defenses, pursuant to CPLR 3126. The note of issue deadline remained April 27, 2018, pursuant to the February 15, 2018, order.

In considering a motion seeking to extend the time to file a note of issue, the court "may properly consider factors such as the length of the delay, whether the opposing party has been prejudiced by the delay, the reason given for the delay [and] whether the moving party was in default before seeking the extension." Grant v City of New York, 17 AD3d 215, 217 (1st Dept. 2005), quoting Tewari v Tsoutsouras, 75 NY2d 1, 12 (1989). Nonetheless, CPLR 2004 permits a party to request an extension of such a deadline "whether the application for extension is made before or after the expiration of the time fixed." See Oliver v Town of Hempstead, 68 AD3d 1079, 1080 (2nd Dept. 2009); see generally Cadichon v Facelle, 18 NY3d 230 (2011). Although the five-year delay in this case is not entirely attributable to one party, most of the delays in the year that has followed the preliminary conference have been caused by the defendants. Moreover, the plaintiff has shown that specific and necessary discovery remains outstanding. Accordingly, the court is unpersuaded by the defendants' contention that they will be prejudiced by an extension. Considering the foregoing factors and the circumstances presented here, including the prior court orders and the defendants' failure to comply with numerous discovery directives, the plaintiff's time to file the note of issue is extended to October 1, 2018.

The plaintiff asserts that the defendants have yet to provide a supplemental response to its Fourth Notice of Discovery and Inspection, and a response to the plaintiff's post-EBT demands. The plaintiff avers that the foregoing is required before it can conduct its final further deposition of the defendants' witness, Joseph Russo, which was originally scheduled on March 28, 2018. While the defendants argue that the plaintiff did not specify any alleged deficiencies in the defendants' response to the plaintiff's Fourth Notice of Discovery and Inspection, the plaintiff presents proof that it did in fact do so, by email to defendants' counsel dated March 27, 2018, and by letters dated March 26, 2018, and April 13, 2018. Furthermore, the defendants do not dispute that they have not responded to the plaintiff's post-EBT demands.

The defendants are reminded that CPLR 3126 authorizes the court to sanction a party who "refuses to obey an order for disclosure or wilfully fails to disclose information which the court finds ought to have been disclosed." "[A] failure to comply with discovery, particularly after a court order has been issued, may constitute the "dilatatory and obstructive, and thus contumacious, conduct warranting the striking of [a pleading]." Kutner v Feiden, Dweck & Sladkus, 223 AD2d 488, 489 (1st Dept. 1998); see CDR Creances S.A. v Cohen, 104 AD3d 17 (1st Dept. 2012); Reidel v Ryder TRS, Inc., 13 AD3d 170 (1st Dept. 2004). The parties are further

reminded that CPLR 3101(a) provides that “there shall be full disclosure of all matter material and necessary in the prosecution or defense of an action,” and that this language is “interpreted liberally to require disclosure, upon request, of any facts bearing on the controversy which will assist preparation for trial by sharpening the issues and reducing delay and prolixity.” Osowski v AMEC Constr. Mgt., Inc., 69 AD3d 99, 106 (1st Dept. 2009), quoting Allen v Crowell-Collier Publ. Co., 21 NY2d 403, 406-407 (1968). The outstanding items of discovery requested by plaintiff and referenced herein are material and necessary to the prosecution of the action, as they involve potential evidence relevant to the issues of liability and damages. The defendants are required to produce responses to all outstanding items of discovery. Although the court declines to impose further sanctions upon the defendants at this juncture, given that the items of discovery sought by the plaintiff were previously enumerated in a court order, the court cautions the defendants that their failure to comply with the court’s discovery schedule may result in striking of the answer pursuant to CPLR 3126.

As to the defendants’ motion, a motion pursuant to CPLR 2221(d) or (e) presumes the existence of a decision and order on an underlying motion previously argued by the movant. Conversely, an order of the court that was not the result of a motion made on notice cannot be reargued or renewed. Where an order is rendered by the court without an underlying motion, the proper vehicle through which a movant may seek relief from that order is vacatur pursuant to CPLR 5015. Therefore, pursuant to CPLR 2001, the court deems the defendants’ motion one to vacate or modify the court’s prior order. See Lamot v City of New York, 297 AD2d 527 (1st Dept. 2002).

Although it is well established that a court maintains inherent power to vacate its own orders in the interest of justice (see CPLR 5015[a][5]); Friends of Keuka Lake v DeMay, 206 AD2d 850 [4th Dept. 1994]; Alvarez v Fiat Realty Corp., 157 AD2d 456 [1st Dept. 1990]) the defendants have not made a showing that the order dated April 16, 2018, should be vacated. The reasons given in the defendants’ moving papers for their defaults are insufficient to warrant vacatur of the court’s April 16, 2018, order. As explained in the prior order, their multiple failures to comply with discovery demands and court orders, as described in detail in the subject order, constituted “dilatatory and obstructive, and thus contumacious, conduct warranting the striking of the [answer].” Kutner v Feiden, Dweck & Sladkus, *supra*; see CDR Creances S.A. v Cohen, *supra*; Reidel v Ryder TRS, Inc., *supra*.

Accordingly, it is

ORDERED that the plaintiff’s motion (SEQ 001) is granted to the extent that (1) the note of issue deadline is extended until October 1, 2018, and that date shall not be further extended; (2) the defendants are directed to produce a supplemental response to the plaintiff’s Fourth Notice of Discovery and Inspection, and a response to the plaintiff’s Post-EBT Demands, within 14 days of this order, and the defendants are further directed to produce Joseph Russo, for a further deposition to take place on or before September 7, 2018, at an agreed upon date and time, and location within New York County; and (3) the defendants’ failure to comply with the

foregoing discovery schedule may result in an order striking their answer, and the plaintiff's motion is otherwise denied without prejudice; and it is further,

ORDERED that the defendants' motion (SEQ 002), denominated as a motion to reargue or renew the court's order dated April 16, 2018 pursuant to CPLR 2221, is deemed to be a motion to vacate or modify the order pursuant to CPLR 5015(a)(5), and the motion is denied, and it is further,

ORDERED that the parties are directed to appear for a status conference on September 20, 2018, at 9:30 a.m.

This constitutes the Decision and Order of the court.

8/2/2018

DATE



NANCY M. BANNON, J.S.C.

HON. NANCY M. BANNON

CHECK ONE:

SEQ 001

SEQ 002

APPLICATION:

CHECK IF APPROPRIATE:

CASE DISPOSED

GRANTED

GRANTED

SETTLE ORDER

INCLUDES TRANSFER/REASSIGN

DENIED

DENIED

NON-FINAL DISPOSITION

GRANTED IN PART

GRANTED IN PART

SUBMIT ORDER

FIDUCIARY APPOINTMENT

OTHER

OTHER

REFERENCE