

Vernon v Mendes

2018 NY Slip Op 33011(U)

October 15, 2018

Supreme Court, Bronx County

Docket Number: 303487/2016

Judge: John R. Higgitt

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX: I.A.S. PART 14

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NATASHA VERNON,

Plaintiff,

DECISION AND ORDER

- against -

Index No. 303487/2016

RICARDO D. MENDES, OLYMPIC TORCH TAXI,
INC. and MDMOFIDUL H. MIA,

Defendants.

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John R. Higgitt, J.

Upon plaintiff’s July 24, 2018 notice of motion and the affirmation and exhibit submitted in support thereof (Motion Sequence #1); the August 2, 2018 affirmation in opposition of defendants Olympic Torch Taxi, Inc. and Mdmofidul H. Mia (“the Olympic defendants”) and the exhibits submitted therewith; the August 15, 2018 affirmation in opposition of defendant Ricardo D. Mendes and the exhibit submitted therewith; the September 6, 2018 notice of motion of defendant Mendes and the affirmation and exhibits submitted in support thereof (Motion Sequence #2); the September 18, 2018 affirmation in support of defendants Olympic and Mia and the exhibit submitted therewith; plaintiff’s affirmation in opposition and the exhibits submitted therewith; and due deliberation; plaintiff’s motion to strike defendants’ respective answers is denied and defendant Mendes’ motion to strike plaintiff’s complaint is denied.

Plaintiff’s motion to strike defendants’ respective answers and defendants Mendes’ motion to strike plaintiff’s complaint are consolidated for decision herein, as they involve common questions of law and fact.

Plaintiff’s motion is denied. Any motion relating to disclosure must include “an affirmation that counsel has conferred with counsel for the opposing party in a good faith effort to resolve the issues raised by the motion” (22 NYCRR § 202.7[a][2]). The good faith

requirement applies by its terms to any discovery-related application, not just applications to strike pleadings or for particular sanctions for failure to disclose, and the regulation states that the motion cannot be filed without it. Such affirmation must provide a substantive description of the efforts undertaken to confer and avoid motion practice (*see 241 Fifth Ave. Hotel, LLC v GSY Corp.*, 110 AD3d 470 [1st Dept 2013]). Failure to do so is, standing alone, sufficient ground to deny the motion (*see Perez De Sanchez v Trevz Trucking LLC*, 124 AD3d 527 [1st Dept 2015]).

“Good faith” contemplates communication *between* parties (*see Fulton v Allstate Ins. Co.*, 14 AD3d 380 [1st Dept 2005]), not communication *at* a party. Good faith entails “constructive dialogue” (*Nikpour v City of New York*, 179 Misc 2d 928, 930 [Sup Ct, N.Y. County 1999]), and “diligent effort” (*Baez v Sugrue*, 300 AD2d 519, 521 [2d Dept 2002]). The motion discloses no circumstances warranting disregard of this requirement (*cf. Lu Huang v Di Yuan Karaoke*, 28 Misc 3d 920 [Sup Ct, Queens County 2010]). The affirmation submitted here discloses no efforts undertaken by plaintiff to comply with the good faith requirement (*see 241 Fifth Ave. Hotel, LLC, supra*).

The Olympic defendants additionally assert that plaintiff has “unclean hands” because plaintiff has objected to appearing for an examination by their orthopedist because she had already appeared for an orthopedic examination at the request of defendant Mendes. Pursuant to CPLR 3121(a), any party is entitled to serve a notice of examination upon a party who has placed his or her physical condition in controversy. Plaintiff did not timely object to either notice of examination (*see Kattaria v Rosado*, 146 AD3d 457 [1st Dept 2017]), and CPLR 3121 does not limit the number of examinations to which a plaintiff may be subjected (*see Rebollo v Nicholas Cab Corp.*, 125 AD3d 452 [1st Dept 2015]).

The good-faith affirmation submitted in support of the Olympic defendants’ motion is

likewise deficient, at least with respect to their February 8, 2018 discovery demand. Their claimed good-faith efforts all pre-date service of the demand. As the February 8, 2018 demand was duplicative of their May 3, 2017 demand, and plaintiff responded to the February 8, 2018 demand in response to the Olympic defendants' motion, the Olympic defendants' motion appears to be moot (their motion was not premised upon plaintiff's failure to appear for independent medical examination).

Accordingly, it is

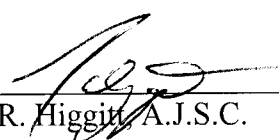
ORDERED, that plaintiff's motion for an order striking defendants' answers for failure to appear for deposition is denied (Motion Sequence #1); and it is further

ORDERED, that the motion of defendants Olympic Torch Taxi, Inc. and Mdmofidul H. Mia for an order dismissing plaintiff's complaint for failure to respond to discovery demands is denied (Motion Sequence #2); and it is further

ORDERED, that the parties shall appear before the undersigned for status conference in Part 14 [14SC], courtroom 709, on **December 21, 2018** at 9:30 a.m.

This constitutes the decision and order of the court.

Dated: October 15, 2018



John R. Higgin, A.J.S.C.