

Siemers v Pizzarelli
2018 NY Slip Op 33505(U)
June 6, 2018
Supreme Court, Orange County
Docket Number: 6139/2016
Judge: Catherine M. Bartlett
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ORIGINAL

SUPREME COURT-STATE OF NEW YORK
IAS PART-ORANGE COUNTY

Present: HON. CATHERINE M. BARTLETT, A.J.S.C.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ORANGE

-----x

JOHN SIEMERS and BARBARA SCHATZ,

Plaintiffs,

-against-

JOSEPH D. PIZZARELLI and ANTHONY COCCI,

Defendants.

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.

Index No. 6139 / 2016
Motion Date: April 24, 2018

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The following papers numbered 1 to 4 were read on Defendants' motion for an order vacating (1) a prior order striking Defendants' Answer, and (2) the Note of Issue:

Notice of Motion - Affirmation / Exhibits - Affirmation of Good Faith	1-3
Affirmation in Opposition / Exhibits	4
Reply Affirmation / Exhibits - Affidavits (2) / Exhibits	5-7

Upon the foregoing papers ORDERED that the motion is disposed of as follows:

This is an action pursuant to RPAPL §861. The Preliminary Conference Order ("PCO"), dated May 23, 2017, directed that the depositions of all parties be completed by August 23, 2017. At a compliance conference on September 14, 2017, the parties advised that party depositions had yet to occur. The Court directed that party depositions be held by November 22, 2017. At a compliance conference on December 14, 2017, the parties again advised that party depositions had yet to occur. The Court directed that party depositions be held by February 14, 2018 or they

[* 2]

would be waived. By facsimile dated February 12, 2018, two days before the Court-ordered deadline, Plaintiffs' counsel advised the Court as follows:

At the conference held before Your Honor on December 14, 2017, it was ordered that depositions of all parties were to be completed on or before February 14, 2018, or they would be waived. Since that same date, my office has tried repeatedly to schedule the depositions, and through no fault of plaintiffs, or my office, they have yet to be held.

Following six (6) phone calls to defense counsel's office, depositions of the plaintiffs were scheduled to be held today, February 12, 2018. The defendants were scheduled to be deposed on February 14, 2018.

On February 7, 2018, defense counsel's office informed our office that the attorney handling the case had a CLE on February 12th and requested that the plaintiffs be produced on February 13th instead. We agreed. We were thereafter contacted by defense counsel's office and informed that they would not be producing their clients on February 14th because the defendants were unavailable.

Today, defense counsel's office called and cancelled the depositions of plaintiffs which were scheduled to commence tomorrow. The reason provided is that their office schedule "is stretched too tight right now."

In response, the Court scheduled a conference on February 28, 2018. At the conference, the Court ruled that Defendants had waived their right to Plaintiffs' deposition, struck Defendants' Answer and directed Plaintiffs to file a Note of Issue.

Defendants now move for an order vacating both the order striking Defendants' Answer and the Note of Issue. Defendants' counsel confirms that a CLE obligation prevented him from proceeding with Plaintiffs' deposition on February 12th, but denies that he agreed to proceed with Plaintiffs' deposition on February 13th or to proceed with Defendants' deposition on February 14th. He claims that Plaintiffs' counsel had agreed to adjourn the Plaintiffs' deposition to March 5, 2018. However, the PCO provides that adjournments of the Court's directives with respect to the time of discovery shall not be had without the permission of the Court.

Assuming *arguendo* that Defendants had a reasonable excuse for not proceeding with Plaintiffs' deposition on February 12, 2018, they (1) made no effort to comply with the Court's deadline by proceeding on February 13th or 14th, (2) failed to present themselves for deposition by February 14th in accordance with the Court's directive, and (3) did not contact the Court to seek an adjournment of the Court's deadline for party depositions. Defendants were duly warned on December 14, 2017 – after two prior extensions of the Court-ordered deadline for party depositions – that their failure to depose Plaintiffs by February 14, 2018 would result in a waiver of their right to Plaintiffs' deposition. The Court's February 28, 2018 ruling that Defendants had waived Plaintiffs' deposition was thus fully justified, and will not be disturbed.

However, Defendants' motion to vacate the order striking their Answer, and to vacate the Note of Issue herein, is conditionally granted, provided that (1) Defendants' counsel pay Plaintiffs' counsel the sum of \$500.00 to compensate for Plaintiffs' efforts to secure Defendants' compliance with this Court's discovery order, and further provided that (2) Defendants present themselves for deposition on or before August 1, 2018.

It is therefore

ORDERED, that Defendants' motion is conditionally granted to the extent that this Court's prior order of February 28, 2018 striking Defendants' Answer, as well as the Note of Issue dated March 16, 2018, are hereby vacated provided that Defendants' counsel pay Plaintiffs' counsel the sum of \$500.00 on or before June 30, 2018, and further provided that Defendants present themselves for deposition on or before August 1, 2018, and it is further

ORDERED, that Defendants' motion is otherwise denied, and it is further

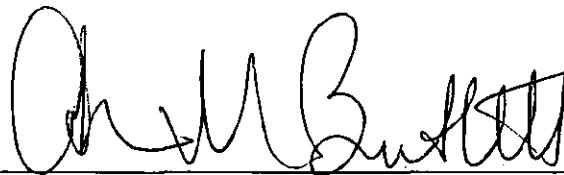
ORDERED, that a status conference in this matter is hereby scheduled for

August 14, 2018 at 9:00 a.m.

The foregoing constitutes the decision and order of this Court.

Dated: June 6, 2018
Goshen, New York

ENTER



HON. CATHERINE M. BARTLETT, A.J.S.C.

**JUDGE NY STATE COURT OF CLAIMS
ACTING SUPREME COURT JUSTICE**