

**Galindo v Keller**

2019 NY Slip Op 30020(U)

January 2, 2019

Supreme Court, New York County

Docket Number: 151780/2014

Judge: Robert D. Kalish

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. ROBERT DAVID KALISH PART IAS MOTION 29EFM

Justice

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JOSEPH GALINDO,

Plaintiff,

- v -

MICHAEL KELLER, NATE ROCK, BOOTLEGGERS ON BROADWAY, and JOHN DOES 1-10,

Defendants.

-----X

INDEX NO. 151780/2014

MOTION DATE 12/20/2018

MOTION SEQ. NO. 004

DECISION AND ORDER

NYSCEF Doc Nos. 72-90 and 92-95 were read on this motion to strike a pleading.

Motion by Plaintiff Joseph Galindo pursuant to CPLR 3126 for an order striking the answer of defendant Michael Keller ("Keller") based upon Keller's willful noncompliance with court orders concerning discovery, precluding the use of the unproduced discovery at the time of trial, awarding Plaintiff the costs of this motion, and such other and further relief as the Court deems just and proper is granted to the following extent.

BACKGROUND

Plaintiff commenced the instant action on February 27, 2014, by e-filing a summons and complaint. Plaintiff alleges, among other things, that Keller, a co-owner and bouncer at defendant bar Bootlegger's on Broadway, battered Plaintiff in the early morning of March 2, 2013, knocking Plaintiff unconscious and causing concussions, swelling, and contusions. Plaintiff alleges that he had been at the bar with his two cousins when a bartender accused one or both cousins of marking the bar top with a magic marker. Plaintiff further alleges that Keller told them they could not leave, escorted them by threat of force to a secluded area of the bar away from other patrons and from the view of any surveillance cameras, and then committed the battery. Plaintiff alleges causes of action for: (1) false arrest and imprisonment; (2) negligence; (3) assault and battery; (4) intentional infliction of emotional distress; and (5) negligent retention and supervision.

On May 11, 2015, nearly a year after Plaintiff served Defendants with process, Plaintiff moved pursuant to CPLR 3215 for a default judgment against Defendants for failure to answer or appear in the action. Defendants cross-moved to vacate their default in pleading and to allow service of late answers. In an order dated October 19, 2015, the prior motion court denied Plaintiff's motion and granted the cross-motion to the extent the court allowed Defendants to file late answers. Keller interposed an answer by and through his attorneys O'Connell & Aronowitz, P.C. on November 5, 2015, and defendants Nathan Rock s/h/a Nate Rock ("Rock") and Barley Legal, Inc. d/b/a Bootlegger's on Broadway s/h/a Bootlegger's on Broadway ("Barley Legal") interposed their answer on November 6, 2015. Both answers contained a cross-claim for common-law indemnification and and/or contribution.

On August 22, 2016, the matter was reassigned to this Court, and on November 29, 2016, the Court held a preliminary conference. As is relevant here, on April 25, 2017, Plaintiff requested at Keller's deposition his "TIPS recertification, security license, and email communications, all of which should have been provided in response to Plaintiff's [December 21, 2016] Notice for Discovery and Inspection" [the "Outstanding Discovery"]. (Affirmation of Glavin ¶ 13, exhibit E at 5.)

On October 24, 2017, the Court issued a conference order directing Keller to provide the Outstanding Discovery within 30 days. At the same October 24, 2017 appearance, the Court granted O'Connell and Aronowitz, P.C.'s motion seq. 003 brought by order to show cause to withdraw as counsel for Keller, there being no opposition submitted. The statutory stay as against Keller pursuant to CPLR 321 (b) (2) ended on or about November 27, 2017, pursuant to counsel's filing of proof of compliance with the court's directive that prior counsel was to send the requisite 30-day notice. (NYSCEF Doc No. 68.)

On January 16, 2018, April 24, 2018, August 7, 2018, and November 13, 2018, Keller failed to appear at the scheduled discovery conferences in this matter, and the Court determined that Keller had failed to provide the Outstanding Discovery or respond to counsel's demands.

At the November 13, 2018 conference, the Court granted Plaintiff leave to file a motion regarding the Outstanding Discovery. The same day, Plaintiff filed the instant motion, seq. 004, pursuant to CPLR 3126 for an order striking Keller's answer based upon Keller's willful noncompliance with court orders concerning discovery, precluding the use of the Outstanding Discovery at the time of trial, awarding Plaintiff the costs of the motion, and such other and further relief as the Court deems just and proper. Plaintiff also submitted an affidavit of service indicating that a copy of the motion was mailed to Keller at his last known address. Plaintiff argues, in sum and substance, that the Court should infer that Keller's conduct in failing to provide the Outstanding Discovery has been willful and contumacious based upon his repeated failure to comply with orders of this Court over an extended period without explanation. Plaintiff further argues that striking Keller's answer would not prejudice Rock or Barley Legal. Plaintiff also argues that Keller has only produced a single document in the entire course of discovery.

Defendants Rock and Barley Legal submit an affirmation in partial opposition to the motion. The non-moving defendants do not dispute that Keller has refused to provide the Outstanding Discovery. The non-moving defendants argue, in sum and substance, that the Court's order in this matter should be limited to, in effect, precluding Keller from presenting the Outstanding Discovery at trial or, in the alternative, directing that any proceedings for the entry of a default judgment against Keller occur following the trial or other disposition of the action as against the non-moving Defendants. The non-moving defendants argue that such orders would not prejudice or have an adverse impact on them at the time of trial.

Plaintiff notes in his reply papers that Keller has failed to oppose this motion. Plaintiff then argues that the non-moving defendants' concerns about granting the instant motion to strike "are entirely speculative in nature, unfounded, and contrary to the law." (Reply affirmation of Glavin at 3.) Plaintiff further argues that a mere adverse inference charge would create a windfall for Keller, who has selectively produced only a single document believed to be helpful to him.

## DISCUSSION

CPLR 3126, titled “Penalties for refusal to comply with order or to disclose”, provides, in relevant part, that

“If any party, . . . refuses to obey an order for disclosure or wilfully [sic] fails to disclose information which the court finds ought to have been disclosed pursuant to this article, the court may make such orders with regard to the failure or refusal as are just, among them:

“1. an order 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; or

“2. an order prohibiting the disobedient party from supporting or opposing designated claims or defenses, from producing in evidence designated things or items of testimony, or from introducing any evidence of the physical, mental or blood condition sought to be determined, or from using certain witnesses; or

“3. an order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or any part thereof, or rendering a judgment by default against the disobedient party.”

Referring to a situation such as Plaintiff’s as a “scenario that is all too familiar,” the Court of Appeals has opined that

“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. Indeed, the Legislature, recognizing the need for courts to be able to command compliance with their disclosure directives, has specifically provided that a ‘court may make such orders . . . as are just,’ including dismissal of an action (CPLR 3126). Finally, we underscore that compliance with a disclosure order requires both a timely response and one that evinces a good-faith effort to address the requests meaningfully.”

(*Kihl v Pfeffer*, 94 NY2d 118, 122 [1999].) The Appellate Division, First Department has repeatedly held that a motion court acts within its discretion when striking a defendant’s answer on the ground of a defendant’s willful and contumacious failure to meet multiple court-ordered discovery deadlines. (*See, e.g., Shohat v Suky*, 87 NYS3d 888 [December 13, 2018], citing *McHugh v City of New York*, 150 AD3d 561 [1st Dept 2017]; *Rodriguez v Nevei Bais, Inc.*, 158 AD3d 597 [1st Dept 2018].) Here, the Court finds that Keller has willfully and contumaciously failed to comply with the Court’s October 24, 2017, January 16, 2018, April 24, 2018, August 7, 2018, and November 13, 2018 conference orders. As such, Plaintiff is entitled to the relief requested in the motion, denominated, in the main, as a motion to strike Keller’s answer.

The Court finds further that Plaintiff is entitled at this time to the entry of a default judgment in favor of Plaintiff and against Keller on the complaint as to liability. Contrary to the concerns raised by the non-moving defendants in their papers in partial opposition, “[s]ince plaintiff[s] motion did not seek relief against [Rock and Barley Legal], . . . those defendants cannot be precluded from defending the merits of the claims against them at trial.” (*Henderson-Jones v City of New York*, 120 AD3d 1123, 1124 [1st Dept 2014].) The default judgment that will be entered in favor of Plaintiff and as against Keller “[will] not bind [Rock or Barley Legal] or otherwise affect their substantive rights.” (*Id.*) Furthermore, Keller will be “limited to an inquest on damages. The striking of [Keller’s] answer effectively resolve[s] all of plaintiff[s] claims against [him] . . . even if [Rock and Barley Legal] are found to have no liability.” (*Id.*) Any judgment against Keller as to damages, including the costs of this motion, which the Court hereby awards, shall await the inquest to be held at the time of trial.

**CONCLUSION**

Accordingly, it is

ORDERED that the motion by Plaintiff Joseph Galindo pursuant to CPLR 3126 for an order striking the answer of defendant Michael Keller (“Keller”) based upon Keller’s willful noncompliance with court orders concerning discovery, precluding the use of the unproduced discovery at the time of trial, awarding Plaintiff the costs of this motion, and such other and further relief as the Court deems just and proper is granted to the extent that it is


ORDERED that Keller’s answer and all cross-claims are stricken, and leave for Plaintiff to enter a default judgment against Keller on the complaint in its entirety is granted; and it is further

ORDERED that Plaintiff shall, within 10 days of the date of the decision and order on this motion, serve a copy of this order with notice of entry on all defendants and on the Clerk of the Court (Room 141B), who shall enter judgment in favor of Plaintiff and against defendant Michael Keller on the complaint as to liability, with an inquest on damages to be held at the time of trial; and it is further

ORDERED that the action shall continue as to the non-moving defendants, and all parties shall appear in Part 29 for a status conference on Tuesday, February 19, 2019, at 9:30 a.m.

The foregoing constitutes the decision and order of the Court.

1/2/2019  
DATE

  
HONORABLE ROBERT D. KALISH

CHECK ONE:  CASE DISPOSED  GRANTED  DENIED  NON-FINAL DISPOSITION  GRANTED IN PART  OTHER

APPLICATION:  SETTLE ORDER  SUBMIT ORDER

CHECK IF APPROPRIATE:  INCLUDES TRANSFER/REASSIGN  FIDUCIARY APPOINTMENT  REFERENCE