

Gonzalez v Jaafar

2019 NY Slip Op 30022(U)

January 4, 2019

Supreme Court, New York County

Docket Number: 155280/2016

Judge: Kathryn E. Freed

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This opinion is uncorrected and not selected for official publication.

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

PRESENT: HON. KATHRYN E. FREED PART IAS MOTION 2

Justice

-----X INDEX NO. 155280/2016

CARLOS GONZALEZ,

Plaintiff,

MOTION SEQ. NO. 002

- v -

MOHAMAD JAAFAR and ZAHAR JAAFAR,

Defendants.

DECISION AND ORDER

-----X

The following e-filed documents, listed by NYSCEF document number (Motion 002) 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44

were read on this motion to/for DISMISSAL/SUMMARY JUDGMENT

Upon the foregoing documents, it is ordered that the motion is decided as follows.

In this personal injury action commenced by plaintiff Carlos Gonzalez, defendants Mohamad Jaafar and Zahar Jaafar move: 1) pursuant to CPLR 3124 and 3126 to dismiss the complaint due to plaintiff's failure to provide discovery; or, in the alternative, 2) pursuant to CPLR 3212, for summary judgment dismissing the complaint; 3) for costs and sanctions, including attorneys' fees, resulting from plaintiff's frivolous conduct; and 4) for such other relief as this Court deems just and proper. After a review of the motion papers, as well as a review of the relevant statutes and case law, the motion, which is unopposed, is decided as follows.

FACTUAL AND PROCEDURAL BACKGROUND:

This action was commenced by the filing of a summons and complaint on June 22, 2016. Doc. 1. Defendants joined issue by service of their answer filed August 10, 2016. Doc. 5. Concomitantly with their answer, defendants served combined discovery demands, including a demand for a bill of particulars and a notice to take plaintiff's deposition. Doc. 31.

On November 21, 2016, defense counsel wrote to plaintiff's attorney in a good faith attempt to obtain all outstanding discovery. Doc. 32.

A preliminary conference was scheduled for May 2, 2017. Doc. 33. However, the conference did not proceed because plaintiff was no longer represented by counsel. Doc. 29, at par. 8; Doc. 34.

On July 24, 2016, defense counsel moved (motion sequence 001) to dismiss the complaint pursuant to CPLR 3124 and 3126 due to plaintiff's failure to provide discovery. Doc. 14. The motion was returnable on July 21, 2017 but, when plaintiff failed to appear at that time, it was adjourned until September 7, 2017. Doc. 29, at par. 11; Doc. 36.

Sometime after July 21, 2017, plaintiff retained the firm of Harmon, Linder & Rogowski (HLR) as counsel. Doc. 29, at par. 12. On September 5, 2017, HLR served an affirmation in opposition to the motion to dismiss which annexed a bill of particulars and responses to defendants' discovery demands, including several authorizations. Doc. 29, at par. 13; Doc. 23.

By correspondence dated September 28, 2017, defendants' attorney wrote to HLR to request that numerous deficiencies in the bill of particulars be rectified. Doc. 38. These

deficiencies included the fact that defendant was referred to as “Clark Wilson, Inc.” and the alleged date of the accident set forth in the bill of particulars, January 28, 2015, differed from that in the complaint, which was January 20, 2015. Doc. 1, Doc. 23, Doc. 29, at par. 14, and Doc. 38. Defendants’ attorney also asked HLR to identify the photographer who took photographs of the location of the alleged accident, as well as the date the photographs were taken. Doc. 38. Further, defense counsel requested that plaintiff personally verify the bill of particulars and that HLR provide responses to outstanding discovery demands. Doc. 38.

A preliminary conference was conducted on October 31, 2017. Doc. 24. At the preliminary conference, plaintiff was directed, *inter alia*, to: supplement the bill of particulars in accordance with plaintiff’s counsel’s September 28, 2017 letter by December 29, 2017; serve non-date restricted authorizations within 45 days; appear for a deposition on March 15, 2018; serve an employment record authorization by December 29, 2017; and serve complete responses to defendants’ discovery demands within 60 days. Given the terms of the preliminary conference order, defense counsel agreed to withdraw its motion to dismiss. Docs. 24 and 25.

The parties appeared for a compliance conference on April 17, 2018. Doc. 26. The compliance conference order issued that day reflects that plaintiff’s attorney had not yet served “any meaningful discovery” and directed plaintiff to comply with the preliminary conference order within 30 days. Doc. 26.

Despite the fact that HLR had until May 17, 2018 to provide all outstanding discovery, it still had not done so by the time the parties appeared for a status conference on June 5, 2018. Doc. 27. The status conference order of June 5, 2018 directed plaintiff to “comply with prior orders [within] 30 days or otherwise may be precluded from serving the same, as no meaningful discovery

has been served to date.” Doc. 27. The order further indicated that, in the event plaintiff failed to comply, “defendant has permission from the court to move for preclusion [and] sanctions related to [plaintiff’s] failure to comply with discovery demands.” Doc. 27.

On August 16, 2018, more than 30 days after the June 5 order, defense counsel filed the instant motion due to plaintiff’s failure to comply with the foregoing discovery orders. Doc. 28.

LEGAL CONCLUSIONS:

Pursuant to CPLR 3126(3), a court may strike a party’s pleading if it fails to obey a discovery order or willfully fails to provide discovery. The party moving to strike a pleading must establish that the other party’s failure to comply with a discovery order was willful, contumacious, or in bad faith. *See Rodriguez v United Bronx Parents, Inc.*, 70 AD3d 492 (1st Dept 2010). “[W]illfulness can be inferred when a party repeatedly fails to respond to discovery demands and/or to comply with discovery orders, coupled with inadequate excuses for those defaults.” *Oversea Chinese Mission v Well-Come Holdings, Inc.*, 145 AD3d 634, 635 (1st Dept 2016), quoting *Siegman v Rosen*, 270 AD2d 14, 15 (1st Dept 2000), citing CPLR 3126. This Court has broad discretion to determine the nature of the sanction to be imposed pursuant to CPLR 3126. *See Kihl v Pfeffer*, 94 NY2d 118, 122 (1999).

This Court finds that plaintiffs’ failure to comply with three court orders, including the June 5, 2018 order warning plaintiff’s counsel that its failure to comply with the terms thereof would enable defendants to move for preclusion or other discovery sanctions, constitutes a pattern

of willful and contumacious conduct warranting dismissal of the complaint. *See LaSalle Talman Bank, F.S.B. v Weisblum & Felice*, 99 AD3d 543 (1st Dept 2012) (willful and contumacious conduct inferred from plaintiff's failure to comply with two court orders, the second of which clearly warned plaintiff that noncompliance would result in dismissal); *Northern Leasing Sys., Inc. v Estate of Turner*, 82 AD3d 490 (1st Dept. 2011) (imposition of sanctions affirmed where willful and contumacious refusal to comply with demands was inferred from failure to comply with three court orders).

Further, since HLR did not oppose the motion, plaintiff failed to offer any explanation for failing to comply with the orders.

The remaining contentions of the parties need not be addressed since they are without merit or rendered academic by the foregoing result.

Therefore, in light of the foregoing, it is hereby:

ORDERED that the branch of the motion by defendants Mohamad Jaafar and Zahar Jaafar seeking dismissal of the complaint pursuant to CPLR 3124 and 3126 is granted, and the complaint is dismissed in its entirety, with costs and disbursements to said defendants as taxed by the Clerk of the Court upon the submission of an appropriate bill of costs; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly; and it is further

ORDERED that this constitutes the decision and order of the court.

1/4/2019

DATE


KATHRYN E. FREED, J.S.C.

CHECK ONE:

<input checked="" type="checkbox"/>	CASE DISPOSED	<input type="checkbox"/>	DENIED
<input type="checkbox"/>	GRANTED		
<input type="checkbox"/>	SETTLE ORDER		
<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN		

APPLICATION:

CHECK IF APPROPRIATE:

<input type="checkbox"/>	NON-FINAL DISPOSITION	<input type="checkbox"/>	OTHER
<input checked="" type="checkbox"/>	GRANTED IN PART		
<input type="checkbox"/>	SUBMIT ORDER		
<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/>	REFERENCE