

Lapp v River Place II, LLC
2019 NY Slip Op 31754(U)
June 18, 2019
Supreme Court, New York County
Docket Number: 160894/2014
Judge: Nancy M. Bannon
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTYPRESENT: HON. NANCY M. BANNON

PART

IAS MOTION 42EFM

Justice

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INDEX NO. 160894/2014

ELIZABETH LAPP,

Plaintiff,

MOTION DATE 12/20/2018,
03/05/2019

- v -

MOTION SEQ. NO. 004 005RIVER PLACE II, LLC, THE GYM AT 42ND STREET, LLC, DOING
BUSINESS AS CLUB 7 BY CLAY, TODD DOE, BLACK
MOUNTAIN PRODUCTS INC., BMP FITNESS EQUIPMENT, INC,
JOHN DOE ONE, JOHN DOE TWO

DECISION AND ORDER

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 004) 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148

were read on this motion to/for

STRIKE PLEADINGS

The following e-filed documents, listed by NYSCEF document number (Motion 005) 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162

were read on this motion to/for

VACATE/STRIKE - NOTE OF ISSUE/JURY
DEMAND/FROM TRIAL CALENDAR

In this personal injury action arising from an incident at a fitness class in Manhattan involving a rubber resistance band, the plaintiff moves to strike the answer of the defendants Black Mountain Products, Inc. (Black Mountain), and BMP Fitness Equipment, Inc. (BMP Fitness, and together with Black Mountain, BMP), for their alleged failure to comply with discovery orders (SEQ 004). Black Mountain and BMP oppose the motion. The defendants River Place II, LLC (River Place), and The Gym at 42nd Street, LLC, d/b/a Club 7 by Clay (Clay), move to vacate the Note of Issue filed on December 31, 2018, to compel Black Mountain and BMP to respond to outstanding discovery demands and appear for depositions, and to extend their time to file dispositive motions (SEQ 005). The plaintiff opposes the motion.

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). 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" and that "a failure to comply with discovery,

particularly after a court order has been issued, may constitute the “dilatory and obstructive, and thus contumacious, conduct warranting the striking of the [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 court can infer willfulness from repeated failures to comply with court orders or discovery demands without a reasonable excuse. See LaSalle Talman Bank, F.S.B. v Weisblum & Felice, 99 AD3d 543 (1st Dept. 2012); Perez v City of New York, 95 AD3d 675 (1st Dept. 2012); Figiel v Met Food, 48 AD3d 330 (1st Dept. 2008); Ciao Europa, Inc. v Silver Autumn Hotel Corp., Ltd., 270 AD2d 2 (1st Dept. 2000).

By status conference order dated June 28, 2018, the court directed, among other things, that the parties coordinate inspection of the rubber resistance band that is the subject of this action within 30 days, that BMP respond to the plaintiff’s supplemental discovery demands within 15 days of the inspection, and that BMP appear for a deposition within 45 days of the inspection. The court noted that all other discovery other than potential post-deposition discovery was completed. The parties were directed to appear for a subsequent status conference on September 27, 2018. At that conference, the parties represented that the inspection of the resistance band had not been arranged, and that BMP had not served responses to the plaintiff’s supplemental demands or appeared for a deposition. The court directed that BMP serve responses to the supplemental demands within 30 days and appear for a deposition on or before December 14, 2018. The Note of Issue deadline was set as December 31, 2018, and was marked “Final 3x- No extension of NOI absent motion practice.” The plaintiff subsequently moved for sanctions pursuant to CPLR 3126, representing that BMP had not complied with either of the court’s directives. In opposition, counsel for BMP fails to offer a legitimate excuse for this failure.

In light of the foregoing, the imposition of some form of sanction is warranted. The nature and degree of the sanction to be imposed on a motion pursuant to CPLR 3126 is within the broad discretion of the motion court. See Wolf v Flowers, 122 AD3d 728, 728 (2nd Dept. 2014). Given all of the circumstances presented, including BMP’s prior delays in responding to discovery demands and the plaintiff’s own delays in completing discovery in this action, the plaintiff’s motion is granted to the extent that the defendants Black Mountain and BMP Fitness are directed to complete all outstanding discovery directed in the court’s status conference order dated September 27, 2018, on or before July 17, 2019, or their answer shall be stricken at a subsequent status conference on July 18, 2019, at 9:30 a.m.

As to the motion of River Place and Clay to strike the Note of Issue, the court may vacate a Note of Issue where, as here, it appears that a material fact set forth therein, i.e. the representation that discovery is complete, is incorrect. See 22 NYCRR 202.21(e); Rivers v Birnbaum, 102 AD3d 26 (2nd Dept 2012); Gomes v Valentine Realty LLC, 32 AD3d 699 (1st Dept 2006); Herbert v Sivaco Wire Corp., 1 AD3d 144 (1st Dept 2003). Since the movants have demonstrated that there was discovery outstanding from BMP at the time the Note of Issue was filed, the motion must be granted and the case stricken from the trial calendar. The parties shall complete all outstanding discovery, as described above, before July 17, 2019, and, upon

completion of discovery, the plaintiff may file a new Note of Issue on or before July 24, 2019. Counsel for the plaintiff is reminded that when the court gives a Note of Issue deadline, it means that the Note of Issue may be filed on or before that date *provided that all discovery is complete*. It is not a directive to file a Note of Issue notwithstanding outstanding discovery, as doing so would require counsel to make a misrepresentation in the Certificate of Readiness. Rather, counsel may file a motion to extend the Note of Issue deadline, setting forth the reasons for all delays in the case.

Although the court directed the parties that any summary judgment motion must be made within 60 days after the filing of the Note of Issue (see CPLR 3212[a]), since the Note of Issue is being vacated, and the court is permitting the plaintiff to re-file the Note of Issue, that 60-day period will begin to run anew upon re-filing. See Lance Intl., Inc. v First Natl. City Bank, 86 AD3d 479 (1st Dept. 2011); Williams v Peralta, 37 AD3d 712 (2nd Dept. 2007).

Accordingly, it is

ORDERED that the plaintiff's motion (SEQ 004) to strike the answer of the defendants Black Mountain Products, Inc., and BMP Fitness Equipment, Inc., is granted to the extent that the defendants Black Mountain Products, Inc., and BMP Fitness Equipment, Inc., are directed to complete the discovery enumerated in the court's status conference order dated September 27, 2018, on or before July 17, 2019, or their answer shall be stricken; and it is further,

ORDERED that the motion of the defendants River Place II, LLC, and The Gym at 42nd Street, LLC, d/b/a Club 7 by Clay, to strike the Note of Issue, compel discovery, and extend the deadline for dispositive motions is granted to the extent that the action is stricken from the trial calendar and the defendants Black Mountain Products, Inc., and BMP Fitness Equipment, Inc., are directed to comply with the foregoing discovery directive, and the motion is otherwise denied; and it is further,

ORDERED that River Place II, LLC, and The Gym at 42nd Street, LLC, d/b/a Club 7 by Clay, shall serve a copy of this order on the Trial Support Office within 20 days; and it is further,

ORDERED that the plaintiff may file a new Note of Issue on or before July 24, 2019, upon the completion of all discovery; and it is further,

ORDERED that the parties shall appear for a status conference on July 18, 2019, at 9:30 a.m.; and it is further,

ORDERED that any summary judgment motion may be filed within 60 days after the filing of a new Note of Issue.

This constitutes the Decision and Order of the court.

6/18/2019
DATE

CHECK ONE:

SEQ 004

SEQ 005

APPLICATION:

CHECK IF APPROPRIATE:

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☐
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☐

CASE DISPOSED

GRANTED

GRANTED

SETTLE ORDER

INCLUDES TRANSFER/REASSIGN

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DENIED

DENIED

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NON-FINAL DISPOSITION

GRANTED IN PART

GRANTED IN PART

SUBMIT ORDER

FIDUCIARY APPOINTMENT

☐
☐

OTHER

OTHER

☐

REFERENCE


NANCY M. BANNON, J.S.C.
HON. NANCY M. BANNON