

Cepeda v Payano

2019 NY Slip Op 32195(U)

April 17, 2019

Supreme Court, Bronx County

Docket Number: 31518/2017E

Judge: John R. Higgitt

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

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MIGUEL ANGEL CEPEDA,

Plaintiff,

DECISION AND ORDER

- against -

Index No. 31518/2017E

FELIX A. PAYANO and BERROSA AUTO CORP.,

Defendants.

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John R. Higgitt, J.

Upon defendants' March 21, 2019 notice of motion and the affirmation and exhibits submitted in support thereof; there being no opposition to the application; and due deliberation; defendants' motion for leave to reargue the March 1, 2019 decision and order of the undersigned, which granted plaintiff's prior motion to strike defendants' answer to the extent of precluding defendants from offering evidence for their failure to appear for deposition, is granted in part.

Orders of the court dated March 29, 2018, July 31, 2018, September 25, 2018 and January 4, 2019 required defendants to appear for deposition. The March 29, 2018, July 31, 2018 and September 25, 2018 orders warned defendants of the possibility of the imposition of sanctions, including preclusion and waiver, in the event of noncompliance. On the prior motion, plaintiff asserted that defendants' depositions had been adjourned several times at defendants' request. Defendants asserted that they had encountered difficulty in locating defendant Payano, the driver of their vehicle, and that "medical issues" prevented defendant Payano from appearing for the last-scheduled deposition.

"The drastic sanction of striking pleadings is only justified when the moving party shows conclusively that the failure to disclose was wilful, contumacious or in bad faith" (*Christian v City of New York*, 269 AD2d 135, 137 [1st Dept 2000]). Willfulness and contumacy may be established by the violation of multiple court orders without reasonable excuse (*see Watson v*

City of N.Y., 157 AD3d 510 [1st Dept 2018]). The sanction of preclusion may be imposed even where the failure to disclose was neither willful nor contumacious (*see Vandashield Ltd v Isaacson*, 146 AD3d 552 [1st Dept 2017]). To avoid the imposition of a sanction, the non-disclosing party must set forth a reasonable excuse for the failure to disclose (*see Sage Realty Corp. v Proskauer Rose LLP*, 275 AD2d 11 [1st Dept 2000]).

Defendants asserted that they had been unable to locate their witness despite database and online searches. Defendants, however, provided few details of their efforts (*see Periphery Loungewear v Kantron Roofing Corp.*, 214 AD2d 438 [1st Dept 1995]) and did not establish that their efforts were undertaken timely (*see Healy v ARP Cable, Inc.*, 299 AD2d 152 [1st Dept 2002]). Under the circumstances, defendants' agreement to multiple court-ordered deposition dates and repeated adjournment of their depositions undermined their assertion of good faith (*see Williamson v City of N.Y.*, 249 AD2d 248 [1st Dept 1998]). Defendants did not dispute their obligation (*see Hann v Black*, 96 AD3d 1503 [4th Dept 2012]) to produce the witness most relevant to the operation of their vehicle (*see Lloyd v YMCA of N.Y.*, 282 AD2d 269 [1st Dept 2001]; *Levy v Board of Educ.*, 232 AD2d 377 [2d Dept 1996]).

Defendant Payano's failure to cooperate with his attorney did not relieve him of his obligation to appear for a deposition or prevent the imposition of sanctions for his failure to so appear (*see Reidel v Ryder TRS, Inc.*, 13 AD3d 170 [1st Dept 2004]). Counsel's inability to locate defendant Payano was an insufficient basis to avoid the preclusion penalty imposed below (*see Bustamante v Green Door Realty Corp.*, 158 AD3d 444 [1st Dept 2018]). Furthermore, defendants submitted no proof that defendant Payano's physical condition excused his failure to appear for deposition. In any event, there was no prejudice in ordering the deposition of a witness who claimed to be in ill health, where the witness simultaneously claimed to be ready,

willing and able to appear (*see Figueroa v City of N.Y.*, 129 AD3d 596 [1st Dept 2015]).

The court retains broad discretion in supervising discovery (*see Crooke v Bonofacio*, 147 AD3d 510 [1st Dept 2017]), and any CPLR 3126 sanction imposed should be commensurate with and proportionate to the nature and extent of the disobedience (*see Merrill Lynch, Pierce, Fenner & Smith, Inc. v Global Strat Inc.*, 22 NY3d 877 [2013]; *Christian, supra*).

Given the nature and extent of the defendants' disobedience, a penalty was appropriate. Given the overwhelming preference for the resolution of matters on their merits, however, defendants should have been given a final opportunity to appear for deposition (*see 241 Fifth Ave. Hotel, LLC v GSY Corp.*, 110 AD3d 470 [1st Dept 2013]), particularly in light of plaintiff's failure to submit an affirmation of good faith on the prior motion (*see Garcia v City of N.Y.*, 81 AD3d 440 [1st Dept 2011]).

Accordingly, it is

ORDERED, that defendants' motion for leave to reargue the March 1, 2019 decision and order of the undersigned, which granted plaintiff's prior motion to strike defendants' answer to the extent of precluding defendants from offering evidence for their failure to appear for deposition, is granted, without opposition; and it is further

ORDERED, that upon such reargument, plaintiff's motion to strike defendants' answer for failure to produce a witness for deposition is granted solely to the extent that defendants are precluded from offering testimony at trial relating to their liability and affidavits on summary judgment motions relating to their liability unless defendants produce the driver of their vehicle for deposition within 30 days after service upon them of a copy of this order with written notice of its entry; and it is further

ORDERED, that if defendants fail to comply with this conditional order, counsel for

plaintiff shall e-file an affirmation attesting to defendants' noncompliance with this order and shall file such affirmation within ten (10) days after the expiration of the time for defendants to comply; and it is further

ORDERED, that the motion is otherwise denied; and it is further

ORDERED, that the parties shall appear before the undersigned in Part 14, courtroom 407, at 9:30 a.m. on **June 24, 2019** for a pre-trial conference.

This conditional preclusion order is self-executing.

This constitutes the decision and order of the court.

Dated: April 17, 2019



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