Mesiti v Weiss
2019 NY Slip Op 33984(U)
January 31, 2019
Supreme Court, Sullivan County
Docket Number: 1179-2015
Judge: Mark M. Meddaugh

At a term of the Supreme Court of the State of New York, held in and for the County of Sullivan, at Monticello, New York, on January 18, 2019

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF SULLIVAN

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ANNAMARIA MESITI,

Plaintiff,

-against-

EVELYN WEISS AND LINDA KRAUS,

Defendants.

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DECISION/ORDER

Index #1179-2015
RJI # 52-37966-2016

Present: Hon. Mark M. Meddaugh,
Acting Justice, Supreme Court

Appearances:

Basch & Keegan, LLP
By: Derek J. Spada, Esq.
Attorneys for the Plaintiff
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Kingston, New York 12402

Law Office of Bryan M. Kulak, Esq.
By: Bryan M. Kulak, Esq.
Attorney for the Defendants
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Middletown, New York 10941

MEDDAUGH, J.:

By Notice of Motion dated December 28, 2018, the Plaintiff has moved for an Order, pursuant to CPLR 2221, to reargue the Decision and Order of this Court dated October 31, 2018, which granted the Defendants' motion to strike the Plaintiff's complaint. The Order was entered on November 13, 2018, and a copy of the Order, with Notice of Entry, was served on the Plaintiff on November 26, 2018.

Plaintiff argues that the motion should have been denied, because defense counsel failed to submit an affirmation of good faith pursuant to 22 NYCRR §202(a)(2)(c). He indicates that in May

of 2018, while an earlier motion to strike the Plaintiff's complaint was pending, he sent two letters seeking clarification of the discovery, which the Defendants believed to be outstanding, and Defendants' counsel failed to respond. The Plaintiff's counsel also indicates that he did not take the Defendants' second motion to strike seriously, because he believed that the motion was procedurally defective and that defense counsel was not acting in good faith.

The other argument raised by the Plaintiff's counsel is that it has not been demonstrated that either the Plaintiff, or her counsel, engaged in any willful, evasive, misleading or contumacious behavior.

In response, the Defendants' counsel argues that the Plaintiff has failed to demonstrate that the Court overlooked or misapprehended the facts, or the law. He alleges that, in addition to sending two good faith letters requesting the outstanding discovery, the issue of the Plaintiff's failure to respond to the three Notices to Produce was discussed at multiple Court conferences, and deadlines were set for responses to the outstanding discovery in four conference orders.

In addition, in April of 2018, the Defendants made a motion to strike the complaint and, in its Decision and Order dated June 12, 2018, the Court found at page 3 thereof, that "the plaintiff had failed to adequately respond to the three notices to produce." The Court provided the Plaintiff with an additional thirty days from the date of the Decision/Order to provide responses to the outstanding demands, but the Plaintiff failed to provide any further discovery.

Defense counsel also advised that his office contacted Plaintiff's counsel on May 16, 2018 and May 17, 2018, to advise as to the missing discovery, as well as on October 4, 2018, and October 8, 2018.

CONCLUSIONS OF LAW

A motion for leave to reargue shall "be based upon matters of fact or law allegedly overlooked or misapprehended by the court in determining the prior motion, but shall not include any matters of fact not offered on the prior motion" (CPLR 2221[d][2]).

The Court had previously found that:

> The Court also finds that, although the Affirmation submitted by the Defendant's counsel lists only two letters requesting compliance with the first Notice to Produce, the Court finds that Defendants' counsel repeated requests that the Plaintiff respond to the Notice to Produce at Court conferences over a period of two years, together with the motion to compel in which the Defendant outlined the missing discovery that was missing, are sufficient to satisfy the requirements of 22 NYCRR 202.7(c) (*Loeb v. Assara New York I L.P.*, 118 A.D.3d 457, 987 N.Y.S.2d 365 [1 Dept.,2014]; *see, also, Rodriguez v. Nevei Bais, Inc.*, 158 A.D.3d 597, 73 N.Y.S.3d 135 [1 Dept., 2018]). In addition, even if plaintiff's motion papers were technically noncompliant with 22 NYCRR 202.7(c), the Court finds that any further attempt to resolve the dispute with the necessity of motion practice would have been futile" *(Northern Leasing Sys., Inc. v. Estate of Turner*, 82 A.D.3d 490 918 N.Y.S.2d 413 [1st Dept.2011];*Carrasquillo ex rel. Rivera v. Netsloh Realty Corp.*, 279 A.D.2d 334, 719 N.Y.S.2d 57 [1 Dept.,2001]).

In the motion currently before the Court, the Plaintiff has failed to address the Court's findings set forth above, that the affirmation of the Defendants' counsel was sufficient to satisfy the requirements of 22 NYCRR 202.27(c), nor the finding that any further attempt to resolve the dispute with the necessity of motion practice would have been futile. The Plaintiff instead relies on a string of generic cases that indicate an affirmation of good faith is required on a motion to compel discovery, but he failed to demonstrate that any of these cases had facts which were analogous to those in the case before this Court.

The Plaintiff also argues that the defense counsel did not act in good faith when he failed to respond to inquiries about what discovery remained outstanding, which claim is disputed by the defense counsel in his affirmation in opposition to the instant motion. The Court also notes that the defense counsel repeatedly advised Plaintiff's attorney at Court conferences that he had not received

responses to the three Notices to Produce, and this failure to adequately respond was also the subject of an earlier motion to strike the complaint.

Despite having ample notice that the responses to the Notice to Produce were inadequate, counsel failed to undertake the relatively simple task of comparing a list of the requested authorizations to the list of authorizations provided, and to address the missing authorizations. Under these circumstances, the Court finds the claim of Plaintiff's counsel that he believed that he had complied with all missing discovery to be disingenuous.

The Court also finds that the Plaintiff has failed to demonstrate that his conduct and that of the Plaintiff was not willful, evasive, misleading or contumacious. The Court had previously found on page 11 of the prior Decision and Order that:

> [T]he Court finds the Plaintiff's history of untimely, unresponsive and lax approach to complying with the court's previous orders warrants the striking of the complaint (*Elias v. City of New York*, 87 A.D.3d 513, 517, 928 N.Y.S.2d 543 [1st Dept. 2011]; *see also*, *Goldstein v. CIBC World Mkts. Corp.*, 30 A.D.3d 217, 817 N.Y.S.2d 19 [1st Dept. 2006]; *Figdor v. City of New York*, 33 A.D.3d 560, 823 N.Y.S.2d 385 [1 Dept.,2006]). In *BDS Copy Inks, Inc. v. International Paper*, 123 A.D.3d 1255, 999 N.Y.S.2d 234 [3d Dept., 2014), the Third Department affirmed an Order striking the complaint, where the Court met with counsel for the parties on at least six occasions during a period of twenty-one months, and issued at least two orders extending plaintiffs' time to comply with their disclosure obligations. The Court found that it was insufficient for the Plaintiff to maintain that their discovery response was adequate after being told that it was not adequate. Finally the *BDS* court found that, even though the Plaintiff did provide some documents in response to the Defendants' disclosure demands, the Third Department ruled that "[t]his limited cooperation does not necessarily preclude a finding of willful and contumacious behavior" (*Id.* at 1256).

This Court also found in the prior Decision/Order that the Plaintiff had failed to comply with multiple court orders, which resulted in two motions to compel, and that willful and contumacious behavior can be inferred by a failure to comply with court orders, in the absence of adequate excuses (*Henderson–Jones v. City of New York*, 87 A.D.3d 498, 504, 928 N.Y.S.2d 536 [1 Dept., 2011]).

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Under the circumstances presented in this case, the Court finds no basis to conclude that it overlooked, or misapprehended matters of fact or law in determining the prior motion. Therefore, the Court shall deny the Plaintiff's motion to reargue the prior motion.

WHEREFORE, based on the foregoing, it is hereby

ORDERED that the Plaintiff's motion for leave to reargue the Decision/Order of this Court, pursuant to CPLR 2221, is denied.

This memorandum shall constitute the Decision and Order of this Court. The original Decision and Order, together with the motion papers have been forwarded to the Clerk's office for filing. The filing of this Order does not relieve counsel from the obligation to serve a copy of this order, together with notice of entry, pursuant to CPLR § 5513(a).

ORIGINAL

Dated: January 31, 2019
Monticello, New York

ENTER: Mark M. Meddaugh
HON. MARK M. MEDDAUGH
Acting Supreme Court Justice

Papers Considered:

1. Notice of Motion, dated December 28, 2018
2. Affirmation in Support of Derek J. Spada, Esq., dated December 28, 2018
3. Affirmation in Opposition of Bryan M. Kulak, Esq., dated January 4, 2019