

Miller v Barry Martin 546 Corp.
2020 NY Slip Op 30492(U)
February 19, 2020
Supreme Court, New York County
Docket Number: 652056/2017
Judge: Robert R. Reed
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. ROBERT R. REED PART 43

Justice

DONALD MILLER, MARIA MILLER, Plaintiff,

- v -

BARRY MARTIN 546 CORP., NATHAN FISHMAN, CHAD FEINSTEIN, ROBERT CEDANO Defendant.

INDEX NO. 652056/2017
MOTION DATE N/A
MOTION SEQ. NO. 006, 007

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 006) 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 178, 179, 180, 181

were read on this motion to STRIKE PLEADINGS

Motion sequence numbers 006 and 007 are consolidated for disposition and are discussed below.

In motion sequence 006, plaintiffs move, pursuant to CPLR 3126, to strike defendants' counterclaims for their alleged failure to properly respond to plaintiffs' discovery demands, or, in the alternative, to preclude defendants from presenting evidence in support of their counterclaims at the trial of this action. In opposition, defendants argue that plaintiffs' motion is procedurally defective, due to plaintiffs' submission of an affirmation supporting the motion and not an affidavit. Defendants also argue that plaintiffs' motion is deficient on the merits and that plaintiffs failed to actually mail or email their good faith letters -- attached as exhibits to plaintiffs' moving papers -- and that plaintiffs seek disclosure to which they are not entitled.

In motion sequence 007, defendants move, pursuant to CPLR 3124 and CPLR 3126, to impose sanctions for plaintiffs' alleged willful failure to appear for their respective depositions scheduled for December 11, 2019, including awarding defendants legal fees and the costs of the

deposition, and mandating that plaintiffs appear on a date certain for their depositions. In opposition, plaintiffs argue that a notice of rejection was served on defendants and an email was sent notifying defendants that plaintiffs would not be appearing for the scheduled deposition.

On or around June 19, 2019, plaintiffs served combined demands upon the defendants. Plaintiffs acknowledge that on or about July 9, 2019 defendants responded to plaintiffs' documents demands. Plaintiffs allege that on or about August 1, 2019 a deficiency letter was mailed to defendants. Plaintiffs allege that on October 25, 2019 a second deficiency letter was mailed to defendants. Defendants deny ever receiving either of plaintiffs' deficiency letters in the mail. Plaintiffs argue that, as of the date of the instant motion, defendants had failed to amend their original responses. On or about October 24, 2019, both parties attended a status conference at Part 43 at 60 Centre Street, New York, New York. The parties discussed and agreed on a date certain for plaintiffs' depositions. On or about October 31, 2019, defendants served a notice of deposition upon plaintiffs. On or about December 8, 2019, plaintiff served upon defendant a notice of rejection of the notice to take deposition. On or about December 10, 2019, plaintiffs' notice of rejection was in turn rejected by defendants. On December 11, 2019, defendants traveled to take the depositions of plaintiffs. Plaintiffs failed to appear at the scheduled deposition.

MOTION SEQUENCE 006

CPLR 3101 requires full disclosure of all matter material and necessary in the prosecution or defense of an action. The phrase "material and necessary" is "to be 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. The test is one of usefulness and reason" (*Allen v. Crowell-Collier Publishing Co.*, 21 NY2d 403).

CPLR 2106 (a), which allows attorneys, physicians, osteopaths, and dentists to submit an affirmation with the same force of as an affidavit, is limited to professionals licensed in the State of New York and must be complied with literally. CPLR 2106 (a) is a provision of convenience with narrow applicability – meant to permit certain licensed professionals to offer written “testimony” without the necessity of securing a notary public. It is not a device meant to make litigation easier for the self-represented. Plaintiffs’ motion, then, is indeed procedurally defective.

In any event, however, plaintiffs are not entitled to the discovery that serves as the basis for this motion. Plaintiffs’ motion seeks relief for discovery primarily relating to their complaint; yet, that complaint has been stricken by this court. To the extent plaintiffs’ document demands do not relate to plaintiffs’ complaint, moreover, the demands are insufficiently specific, overbroad and unduly burdensome, or seek to procure materials that relate to defendants’ trial strategy in the instant action. Thus, for reasons both procedural and substantive, plaintiffs’ motion must be denied.

MOTION SEQUENCE 007

In motion sequence 007, defendants move to impose sanctions upon plaintiffs for their failure to appear at a scheduled deposition. Costs upon a motion may be awarded to any party in the discretion of the court (*see* CPLR 8106). To invoke sanctions under CPLR 3126, this court must determine whether any failure to comply with a discovery order was willful, deliberate and contumacious.

At the status conference at Part 43 on October 24, 2019, both parties agreed to a date certain for plaintiffs’ depositions. Plaintiffs rejected defendants’ notice for a deposition on December 8, 2019, just three days before the deposition was to take place – and over a month

after the notice of deposition had been served . On the date of the deposition, plaintiffs emailed defendants and stated that they would not appear for the deposition. In said email -- and upon the record before the court -- plaintiffs failed to proffer a reasonable excuse to support their absence from the previously scheduled deposition. Plaintiffs' conduct, it appears to this court, was "undertaken primarily to delay or prolong the resolution of this litigation, or to harass or maliciously injure another" (22 NYCRR 130-1.1[c] [2]). Thus, the court will exercise its discretion and sanction plaintiffs to the extent that plaintiffs are required to remit payment to defendants for the cancellation fee charged by the court reporter for the cancelled deposition. The court declines to award attorney's fees under the particular circumstances outlined in defendants' motion.

Accordingly, it is

ORDERED that motion sequence 006 to strike defendants' counterclaims or preclude defendants from offering evidence at the trial of this action is denied in its entirety; and it is further

ORDERED that motion sequence 007, seeking to impose sanctions upon plaintiffs for failure to appear at a deposition is granted in part, and that defendants shall be entitled to recover cancellation fees in the amount of \$143.00, for the fee charged by the court reporter for the cancelled deposition; and it is further

ORDERED that plaintiffs are directed to appear for a deposition on March 13, 2020, at 10:00 a.m. at the offices of Bee Reporting Agency, Inc., located at 450 7th Avenue, Suite 1408, New York, NY 10123, or such other date, time and location as the parties may agree to by written stipulation, but such date shall not be later than March 13, 2020; and it is further

ORDERED that both parties are directed to appear for a compliance conference on March 26, 2020 at Part 43, Room 412 at 60 Centre Street, New York, New York at 11:00 a.m.

This constitutes the Decision and Order of the court.

2/19/2020

DATE



ROBERT R. REED, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE