

**Toro v Medina**

2020 NY Slip Op 30908(U)

March 30, 2020

Supreme Court, New York County

Docket Number: 152654/16

Judge: Adam Silvera

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

PRESENT: HON. ADAM SILVERA

PART

IAS MOTION 22

Justice

X

FRANCISCO GUERRERO TORO and MELINA  
HERNANDEZ-RODRIGUEZ,

Plaintiffs,

- v -

CARLOS A. MEDINA and CARERIDE PARATRANSIT LLC

Defendant.

INDEX NO. 152654/16

MOTION DATE 11/22/2019

MOTION SEQ. NO. 002

**DECISION AND ORDER**

X

The following e-filed documents, listed by NYSCEF document number (Motion 002) 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 82

VACATE -

were read on this motion to/for

DECISION/ORDER/JUDGMENT/AWARD

Upon the foregoing documents, it is ordered that plaintiffs' motion to vacate this Court's order dated October 21, 2019 is granted solely to the extent that the preclusion order is vacated and discovery is ordered. Such preclusion order precluded plaintiffs from testifying at trial and offering an affidavit in substantive motion practice. Here, plaintiffs move to vacate such order arguing that the Court's September 20, 2019 and October 21, 2019 orders circumvented the CPLR, that plaintiffs fully complied with all court ordered discovery, and that any failure was not willful, contumacious, or deliberate. Defendants oppose and plaintiff replies.

In order to vacate a default judgment pursuant to CPLR §5015(a)(1), a motion must be made within one year of service of a copy of the judgment with notice of entry and the moving party has the burden of demonstrating both: (1) a reasonable excuse for the default; and (2) a meritorious defense to the action. *See Navarro v A. Trenkman Estate, Inc.*, 279 AD2d 257, 258 (1<sup>st</sup> Dep't 2001); *Cedeno v Wimbledon Building Corp.*, 207 AD2d 297, 297 (1<sup>st</sup> Dep't 1994).

Here, plaintiffs allege that the Court circumvented the CPLR by ordering preclusion for failure to comply with court ordered discovery without a motion. Plaintiffs argue that the proper vehicle for an order of preclusion would be a motion made by defendant, rather than a *sua sponte* order of the Court. Plaintiffs further argue that they complied with all court ordered discovery, appeared for a deposition, appeared for an independent medical examination, as well as responded to all post-deposition demands.

Preliminarily, the Court notes that CPLR §3126 explicitly states that, should any party “refuse[] to obey an order for disclosure...the court may make such orders with regard to the failure or refusal as are just, among them: ...(2) an order prohibiting the disobedient party from supporting or opposing designated claims or defenses, from producing in evidence designated things or items of testimony, or from introducing any evidence of the physical, mental or blood condition sought to be determined, or from using certain witnesses”. CPLR §3126 is clear that the Court may, in its discretion, order preclusion for failing to comply with court orders. Specifically, such statute does not require the making of a motion prior to the court ordering penalties for failing to comply with court orders. Thus, plaintiffs’ argument with regards to the Court allegedly circumventing the CPLR fails.

As to plaintiffs’ argument that they complied with all court orders, the Court notes that on numerous occasions the Court specifically ordered plaintiff to provide defendant with laser color copies of photographs of the subject vehicle, as well as copies of bills and receipts for out of pocket expenses and special damages. In fact, as to special damages, such discovery was specifically ordered by the court as far back as May 22, 2017 by Hon. Paul A. Goetz. Such discovery was again specifically ordered on October 16, 2017 and December 18, 2017 by Justice Goetz. The discovery related to special damages was again specifically ordered on March 30,

2018 by Hon. Adam Silvera, and continued to be specifically ordered by Justice Silvera on July 6, 2018, March 4, 2019, May 13, 2019 and July 19, 2019. On the March 4, 2019 court order, plaintiff was also ordered to provide laser color copies of the subject vehicle. Such discovery was again ordered on May 13, 2019 and July 19, 2019. The Court further notes that in the May 13, 2019 and July 19, 2019 court orders, plaintiff was ordered to either provide the discovery related to special damages and the photographs, or provide affidavits of non-existence. A review of plaintiffs' motion reveals that no affidavits were provided in compliance with the Court's May 13, 2019 and July 19, 2019 court orders.

At the September 20, 2019 discovery conference, which was the parties' 14<sup>th</sup> appearance for a discovery conference, the Court issued an order of conditional preclusion directing plaintiff to comply with the July 19, 2019 court order. The September 20, 2019 court order is exceedingly clear that failure to comply would result in plaintiffs' preclusion. A review of plaintiffs' response to such order reveals that plaintiffs allege that the discovery requested was previously provided in a March 2019 and August 2019 response. However, of note, plaintiffs' response dated March 22, 2019 states that plaintiffs are not in possession of color photos of the subject vehicle while their August 22, 2019 response attaches alleged laser color photos of all damages. Upon review of such photos, it is near impossible to decipher what such photographs depict. Noticeably absent from plaintiffs' discovery responses is any response to the Court's May 13, 2019 court order which ordered either the production of discovery or affidavits of non-existence. Such May 13, 2019 order clearly and explicitly stated that "ORDERED that the above discovery MUST be complied with as previously ordered. π MUST provide the above ordered responses." Aff. in Opp., Exh. K, Order dated May 13, 2019. No response to such order was provided by plaintiff.

Specifically with regards to special damages, plaintiff's March 22, 2019 response directs defendants to plaintiffs' no fault files. However, in plaintiffs' June 22, 2017 letter, plaintiff specifically stated that they are not in possession of any bills or receipts, but reserved their right to supplement their response, and provided authorizations to their no fault files. For approximately a year and a half after plaintiffs stated that they had no bills or receipts with regards to their claim for special damages, plaintiffs directed defendants in a conclusory manner to the no fault files with no specificity as to which documents pertained to such claim. Plaintiffs further failed to provide any clarification after the Court issued 3 additional court orders on May 13, 2019, July 19, 2019, and September 20, 2019. Thus, plaintiffs failed to establish that they provided all discovery responses that was ordered by the Court.

Lastly, plaintiffs argue that any failure to comply was not willful or contumacious. The Court notes that plaintiffs were ordered to provide the photographs on four (4) separate occasions. The Court further notes that plaintiffs were ordered to provide documents related to special damages in nine (9) court orders dating back to May 22, 2017 nearly 2 years ago. Plaintiffs' "failure to produce such documents for more than a year prior to the issuance of the ...[preclusion order dated October 21, 2019] was willful and contumacious". *Santoli v 475 Ninth Ave. Assoc. LLC*, 38 AD3d 411, 415 (1<sup>st</sup> Dep't 2007). The Appellate Division, First Department, has consistently held that courts "providently exercise[] its discretion in dismissing the complaint because of plaintiffs' long continued pattern of noncompliance with court orders and discovery demands..., which gave rise to an inference of willful and contumacious conduct". *Jones v Green*, 34 AD3d 260, 261 (1<sup>st</sup> Dep't 2006). Here, plaintiffs ignored and failed to comply with numerous court orders for over a year.

While the Court justifiably precluded plaintiff, the Court notes that generally, New York courts favor resolution of actions on their merits. *See Picinic v Seatrain Lines, Inc.*, 117 AD2d 504, 508 (1<sup>st</sup> Dep't 1986). In light of this, the Court, in its discretion, will provide plaintiffs one last opportunity to comply with court ordered discovery. Although plaintiff provided copies of photographs, such photographs are of such poor quality as to be indecipherable. Thus, plaintiffs are hereby ordered to provide to defendants either an affidavit stating that they are not in possession of any clear and visible photographs or to provide clear photographs, within 60 days. Plaintiffs are further ordered to provide to defendants the specific bills and receipts, which are allegedly contained in their no fault file, which relate to out of pocket expenses and special damages within 60 days. Failure to fully comply with this court ordered discovery SHALL result in the dismissal of the instant action without any further motion practice.

Accordingly, it is

ORDERED that plaintiffs' motion to vacate the Court's order of preclusion dated October 21, 2019 is granted solely to the extent that such preclusion order is vacated; and it is further

ORDERED that within 120 days plaintiffs are ordered to provide to defendants either an affidavit stating that they are not in possession of any clear and visible photographs or to provide clear photographs; and it is further

ORDERED that within 120 days plaintiffs are ordered to provide to defendants the specific bills and receipts, which are allegedly contained in their no fault file, which relate to out of pocket expenses and special damages; and it is further

ORDERED that failure for plaintiffs to fully comply with the court ordered discovery shall result in the dismissal of this action without further motion practice; and it is further

ORDERED that within 30 days of entry, plaintiffs shall serve a copy of this decision/order upon all parties with notice of entry.

This constitutes the Decision/Order of the Court.

3/30/2020

DATE

ADAM SILVERA, 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