

Feliciano v 5th Ave Gateway Land, LLC
2020 NY Slip Op 31180(U)
April 22, 2020
Supreme Court, New York County
Docket Number: 157453/2018
Judge: Robert David Kalish
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. ROBERT D. KALISH PART IAS MOTION 29EFM

Justice

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ANTHONY FELICIANO,

Plaintiff,

- v -

5TH AVE GATEWAY LAND, LLC, 5TH AVE GATEWAY
DEVELOPER, LLC and ALBA SERVICES INC.,

Defendants.

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INDEX NO. 157453/2018
MOTION DATE N/A
MOTION SEQ. NO. 001

**DECISION + ORDER ON
MOTION**

This Court declines to sign the instant order to show cause by Schuman & Hill PLLC, seeking leave to withdraw as attorneys of record for Plaintiff Anthony Feliciano (“Plaintiff”), as the instant action is hereby dismissed, *sua sponte*, without prejudice.

BACKGROUND

In the instant action, Plaintiff Anthony Feliciano (“Plaintiff”) alleges that he was injured while performing construction work on May 30, 2018 due to the common law negligence and statutory violations of Labor Law §§ 200, 240 (1) and 241 (6) by Defendants 5th Ave Gateway Land, LLC, 5th Ave Gateway Developer, LLC and Alba Services Inc. (collectively, “Defendants”). Defendant 5th Ave Gateway Land, LLC (“5th Ave Land”) served its answer on November 8, 2018; and Defendant Alba Services Inc. (“Alba”) served its answer on January 4, 2019.

The Court now has before it a proposed order show cause by Plaintiff’s counsel seeking leave to withdraw from representation of Plaintiff (Seq. 001). In sum and substance, Plaintiff’s counsel seeks leave to withdraw because Plaintiff has been unwilling and unable to effectively communicate with his attorneys.

Roughly a day after Plaintiff’s counsel electronically filed the instant motion seeking to withdraw, 5th Avenue Land filed a motion (Seq. 002) seeking to dismiss the complaint, pursuant to CPLR 3126, for failure to provide discovery pursuant to the orders of this Court – namely for Plaintiff’s repeated failures to appear for his deposition and to provide the aforesaid medical authorizations. Thereafter, Alba filed a cross-motion in response to 5th Ave Land’s motion also seeking to dismiss the complaint for Plaintiff’s aforesaid discovery violations.

Plaintiff’s counsel did not physically appear before this Court to present the proposed order to show cause for signing (Seq. 001), as required by this Court’s rules, prior to the closure

of this Court's physical courtroom due to the COVID-19 pandemic.¹ As such, the order to show cause was never signed and no service was made upon Plaintiff.²

In addition, because of restrictions put in place on the litigation of non-essential matters during the current COVID-19 pandemic, the parties were unable to fully brief and formally submit the motion and cross-motion to dismiss (Seq. 002). (*See generally* Executive Order [A. Cuomo] 202.8; Administrative Orders of the Chief Administrative Judge of the Courts, dated March 20 and 22, 2020 [AO/71/20; AO/78/20].)³

Given the above circumstances and following the directives of the Chief Administrative Judge (*see* AO/85/20), this Court conducted a telephonic conference with counsel for the parties on April 9, 2020 at 11 AM regarding the two pending motions ("the teleconference").

Based on the papers submitted on the two motions (Seq. 001-002) and the teleconference, there appear to be no dispute about the following facts.

On October 2, 2019, the Court held a preliminary conference wherein the parties were directed to appear for depositions, with Plaintiff's deposition scheduled for December 6, 2019. The Court also ordered that Plaintiff was to furnish various medical authorizations to Defendants.

On December 6, 2019, counsel for all of the parties – including Plaintiff's counsel – appeared for Plaintiff's deposition, but the deposition was "busted" because Plaintiff failed to appear. Counsel memorialized Plaintiff's failure to appear on the record. Plaintiff's counsel also stated on the record that he had spoken with his client on the previous evening and confirmed that he would appear, but, nonetheless Plaintiff had not appeared, and counsel's attempts to contact Plaintiff that morning had been unsuccessful. Notwithstanding this Court's rules requiring parties to seek leave of Court before adjourning any depositions, there was no attempt to contact the Court.

Thereafter, the parties appeared before the Court for a compliance conference on December 17, 2019. Notwithstanding Plaintiff's unexcused failure to appear for his deposition, this Court gave Plaintiff a second opportunity to appear for his deposition, with said deposition scheduled for February 25, 2020.

On the afternoon of February 24, 2020 – the day before Plaintiff's rescheduled deposition – Plaintiff's counsel emailed Defendants' counsel, stating that Plaintiff's deposition would not be "going forward tomorrow as [Plaintiff] is unavailable." (NYSCEF Document No. 28.) No

¹ *See Rules of the Justices, Supreme Court – Civil Branch* at 39, available at <http://ww2.nycourts.gov/courts/1jd/supctmanh/justices.shtml>.

² Defendants and the Court are in receipt of said papers because of the NYSCEF filing.

³ The return date for Defendants' motion and cross-motion (Seq. 002) was March 24, 2020, roughly two days after the suspension of the filing papers in non-essential matters, pursuant to AO/78/20.

explanation was provided as to why Plaintiff was unavailable.⁴ And again, in violation of this Court's rules, no attempt was made to seek leave to adjourn this deposition.

Further, there is no dispute that Plaintiff still has not furnished various medical authorizations to Defendants, as required by the aforesaid Preliminary and Compliance Conference Orders in this action. (*See* NYSCEF Document Nos. 13-14.)

At the same time as the above events, Plaintiff's counsel had been making numerous attempts to get in contact with Plaintiff, including by telephone, letter and sending individuals to Plaintiff's last know address. (*See* NYSCEF Document No. 18.)

In sum and substance, the issue before this Court is what to do about Plaintiff's repeated failures to communicate with his counsel and participate in the instant action. As will be explained further, this Court finds that, based on the circumstances, it is appropriate to dismiss the action, *sua sponte*, without prejudice.

DISCUSSION

CPLR 3126 states as follows:

"If any party, or a person who at the time a deposition is taken or an examination or inspection is made is an officer, director, member, employee or agent of a party or otherwise under a party's control, refuses to obey an order for disclosure or wilfully fails to disclose information which the court finds ought to have been disclosed pursuant to this article, the court may make such orders with regard to the failure or refusal as are just, among them:

1. an order that the issues to which the information is relevant shall be deemed resolved for purposes of the action in accordance with the claims of the party obtaining the order; or
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; or
3. an order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or any part thereof, or rendering a judgment by default against the disobedient party."

As Chief Judge Kaye has explained, CPLR 3126 was designed to give the Supreme Court the tools to combat discovery abuse:

⁴ During the teleconference, Plaintiff's counsel informed the Court that the deposition did not go forward because he was unable to get in contact with his client.

“If the credibility of court orders and the integrity of our judicial system are to be maintained, a litigant cannot ignore court orders with impunity. Indeed, the Legislature, recognizing the need for courts to be able to command compliance with their disclosure directives, has specifically provided that a ‘court may make such orders ... as are just,’ including dismissal of an action.”

(*Kihl v Pfeffer*, 94 NY2d 118, 123 [1999], quoting CPLR 3126.)

“The nature and degree of the penalty to be imposed pursuant to CPLR 3126 lies within the sound discretion of the Supreme Court.” (*Schiller v Sunharbor Acquisition I, LLC*, 152 AD3d 812, 813 [2d Dept 2017].) “The striking of a pleading may be appropriate where there is a clear showing that the failure to comply with discovery demands or court-ordered discovery is willful and contumacious.” (*Brandenburg v County of Rockland Sewer Dist. #1*, 127 AD3d 680, 681 [2d Dept 2015].) The courts however are encouraged to provide litigants with reasonable latitude before imposing the “ultimate sanction” of striking a pleading. (See *CDR Creances S.A.S. v Cohen*, 62 AD3d 576, 577 [1st Dept 2009].) Moreover, there is a strong preference in this state that, wherever possible, actions be decided on their merits and a discovery sanction lesser than striking a pleading be imposed. (See *Ayala v Lincoln Med. & Mental Health Ctr.*, 92 AD3d 542 [1st Dept 2012].)

Here, the Court finds that Plaintiff’s failures to provide discovery – namely, his repeated failures to appear for so-ordered depositions – are willful and contumacious and warrant dismissing the instant action without prejudice. (*Flynn v City of New York*, 101 AD3d 803, 805 [2d Dept 2012] [“The willful or contumacious character of a party’s conduct can be inferred from the party’s repeated failure to respond to demands or to comply with discovery orders.”].) In sum and substance, there is no dispute that Plaintiff has absented himself from this litigation and stopped communicating with his counsel. While these facts would also merit relieving Plaintiff’s counsel from its representation, this Court has conferenced the matter with counsel for all parties and it appears to the Court that the most appropriate course is that the action be dismissed, *sua sponte*, without prejudice.

This Court is mindful that there may well be some reasonable explanation for why Plaintiff has failed to participate in this action.⁵ This Court is also mindful that neither the motion to withdraw (Seq. 001) nor the motion and cross-motion for discovery sanctions (Seq. 002) have been fully briefed.

However, by all appearances Plaintiff has absented himself from participating in this litigation, and the Court sees no reason to expend further resources (by the Court or the parties) in managing this action. This is especially so given that such resources will likely become all the more scarce once the flood of litigation pours in following the lifting of the current administrative stays.

⁵ Although the Court notes that Plaintiff’s pattern of discovery misconduct long predates the onset of the COVID-19 pandemic in this region.

For all these reasons, this Court finds that it is appropriate to dismiss the instant action, *sua sponte*, without prejudice. As such, the Court declines to sign the order to show cause seeking leave to withdraw (Seq. 001), and the Court deems the motion and cross-motion for discovery sanctions (Seq. 002) to be academic. By dismissing the action without prejudice, the Court is essentially doing what it would do in the more-than-likely event that Plaintiff failed to appear for a scheduled compliance conference after granting Plaintiff's counsel's motion to withdraw. (*See Farrell Forwarding Co., Inc. v Alison Transp. Inc.*, 119 AD3d 891, 892 [2d Dept 2014] [stating that the trial court "should have dismissed the complaint without prejudice, since dismissal of an action for a default pursuant to 22 NYCRR 202.27 does not constitute a determination on the merits"].)

Lastly, given the circumstances—including the *sua sponte* dismissal—this Court finds that an award of costs, pursuant to CPLR 8101, is not appropriate.

CONCLUSION

Accordingly, it is hereby

ORDERED that the Court declines to sign instant order to show cause (Seq. 001) by Schuman & Hill PLLC, seeking leave to withdraw as attorneys of record for Plaintiff Anthony Feliciano ("Plaintiff"), as the instant action is hereby dismissed, sua sponte, without prejudice; and it is further

ORDERED that the clerk is directed to mark this action disposed, having been dismissed without prejudice; and it is further

ORDERED that the motion and cross-motion (Seq. 002) for discovery sanctions, pursuant to CPLR 3126, are deemed academic; and it is further

ORDERED that the counsel for Defendant 5th Ave Gateway Land, LLC ("5th Ave Land") shall serve, via NYSCEF, a copy of the instant decision and order with notice of entry within ten (10) days after Governor Cuomo's Executive Order 202.8 or any order modifying it is lifted; and it is further

ORDERED that compliance with this order is subject to the Administrative Orders of the Chief Administrative Judge of the Courts, dated March 20 and 22, 2020 (AO/71/20; AO/78/20) or any future orders relating to the litigation of non-essential matters during the current COVID-19 pandemic.

The foregoing constitutes the decision and order of this Court.

4/22/2020
DATE

Robert David Kalish
ROBERT DAVID KALISH, J.S.C.

CHECK ONE:

Form with checkboxes for CASE DISPOSED, GRANTED, DENIED, SETTLE ORDER

Form with checkboxes for NON-FINAL DISPOSITION, GRANTED IN PART, OTHER

APPLICATION:

CHECK IF APPROPRIATE:

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