

Galindo v Cavendish Realty LLC
2020 NY Slip Op 31481(U)
May 12, 2020
Supreme Court, New York County
Docket Number: 159448/2015
Judge: Nancy M. Bannon
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.
This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 42

-----X
JOSE AGUIRRE GALINDO,

Index No.: 159448/2015

Plaintiff,

-against-

MOT SEQ

003, 004, 005

CAVENDISH REALTY LLC, HARLINGTON
REALTY CO., LLC, and DOLMEN
CONTRACTING CORP.,

DECISION and ORDER

Defendants.

-----X

I. INTRODUCTION

In this personal injury action alleging violations of Labor Law §§ 200, 240(1) and 241(6) defendants Cavendish Realty, LLC (Cavendish) and Harlington Realty Co., LLC (Harlington) move (i) pursuant to CPLR 3025(b) to amend their answer to assert the affirmative defense of collateral estoppel, *nunc pro tunc*, (ii) for summary judgment dismissing the plaintiff's complaint on the theory of collateral estoppel, (iii) to dismiss the plaintiff's complaint pursuant to CPLR 3126(3), or in the alternative (iv) to extend the Note of Issue deadline (SEQ 003).

The plaintiff opposes that motion, and moves by separate motion sequence (SEQ 004) for an order (i) extending his time to file his Note of Issue, (ii) scheduling further dates for all outstanding depositions, (iii) staying the portion of Cavendish and Harlington's motion for summary judgment based upon its

theory of collateral estoppel until depositions have been completed, and (iv) striking the defendants' answers pursuant to CPLR 3126(3). Cavendish and Harlington oppose the plaintiff's motion, and cross-move for sanctions pursuant to 22 NYCRR 130-1.1.

Defendant Dolmen Contracting Corp. (Dolmen) also moves for summary judgment dismissing the complaint (i) on the same theory of collateral estoppel alleged by Cavendish and Harlington, and (ii) pursuant to CPLR 3126(3). Dolmen also moves to dismiss all cross-claims asserted by Cavendish and Harlington and pursuant to CPLR 8303(a) and 22 NYCRR 130-1.1 for sanctions against the plaintiff (SEQ 005). The plaintiff opposes and cross-moves (i) to strike Dolmen's answer pursuant to CPLR 3126(3), (ii) for sanctions against Dolmen, and (iii) to vacate this court's order, dated November 2, 2018, inasmuch as it directed the plaintiff to pay costs and attorneys' fees to Dolmen based upon his delay in producing the workers compensation records.

II. BACKGROUND

The plaintiff, Jose Aguirre Galindo, a 40-year-old laborer, alleges that on May 24, 2015 he fell from a ladder while carrying bricks and performing other construction work at 456 Sheridan Boulevard, in the Inwood section of Manhattan. He claims to have suffered injury to his left shoulder, left arm,

chest and spine and to have undergone a disc fusion procedure as a result of the accident. He commenced this action by summons and complaint filed on September 14, 2015, alleging, *inter alia*, causes of action for violations of Labor Law §§ 200, 240(1) and 241(6). The defendants answered separately.

This case has a protracted and contentious discovery history. On August 31, 2016, a preliminary conference was held, which resulted in an order directing the plaintiff to appear for a deposition on or before November 2, 2016. The plaintiff did not appear for his deposition.

On April 20, 2017, a compliance conference was held. Pursuant to the order issued at that conference, the plaintiff was to appear for a deposition on or before July 19, 2017. The plaintiff again failed to appear. On October 5, 2017, a second compliance conference was held. Pursuant to the order issued at that conference, the plaintiff was to appear for a deposition on or before January 10, 2018. For a third time, the plaintiff failed to appear for a deposition.

On January 18, 2018, a third compliance conference was held. In the order issued at this conference, the plaintiff was directed to appear for a deposition on or before March 14, 2018. The plaintiff once again did not appear for that deposition.

On April 26, 2018 a fourth compliance conference was held. Pursuant to the order issued at that conference, the plaintiff

was to appear for a deposition on or before August 9, 2018. The plaintiff did not appear for that deposition. That was the fifth missed deposition date.

On August 23, 2018 a fifth compliance conference was held. Pursuant to the order issued at this conference, the plaintiff was to appear for a deposition on October 25, 2018, and appear for all outstanding independent medical examinations, and the Note of Issue was to be filed by January 31, 2019, and that date marked "Final 3x". The defendant did not appear.

In a related action, Galindo v Harlington, Index No. 156041/2016, subsequently consolidated with this action, the court, by an order dated November 2, 2018, granted the motions of Dolmen, Cavendish, and Harlington's to, *inter alia*, compel him to provide authorizations for workers' compensation records or strike his complaint for failing to do so, and "to pay costs of motion practice including filing fee, drafting, and appearances within 30 days of receipt of invoice," and denied the remainder of the motions without prejudice.

On November 15, 2018, a sixth compliance conference was held. At that conference the parties agreed that the plaintiff would be deposed on January 8, 2019 at 10:30 a.m. The plaintiff appeared on that date but did not testify, his counsel conceding on the record that his client was simply not ready to testify.

After the plaintiff finally complied with the court's order to provide a workers' compensation authorization, the defendants discovered a determination by the workers' compensation board that he applied for but was found to be not entitled to workers' compensation benefits based upon his alleged fall at 456 Sheridan Boulevard on May 24, 2015. The determination was rendered on October 11, 2017, after evidentiary hearings were held on December 14, 2015, May 16, 2016, July 18, 2016, September 26, 2016, June 19, 2017, and July 10, 2017. The workers compensation board found that "Based on the available, most persuasive evidence and testimony [the workers' compensation board is] *unable to find that the claimant did sustain any accident at Sheridan project on or about May 24, 2015. The claim is disallowed.*" (emphasis added).

The workers' compensation board's determination was based upon, *inter alia*, testimony from the plaintiff's employer, Jose Santamaria of JVS Restoration. Santamaria testified that although the plaintiff had worked for him, it was at a project located in Brooklyn, and that all brickwork at the Sheridan project had already been completed prior to May 24, 2015, the date of the alleged accident. Additional testimony from JVS Restoration employees Aristeo Alvarado and Tobias Flores corroborated Santamaria's testimony, averring that there were no accidents involving anybody falling off of a ladder at the

Sheridan project, and that they knew the plaintiff from a project in Brooklyn, but had never even seen him at the Sheridan project.

The plaintiff appealed the workers' compensation board's determination, and the appeal was denied by a Board Panel decision dated April 5, 2018. The plaintiff then applied for a Full Board Review which was likewise denied on June 20, 2018.

Following defendants' discovery of the determination of the workers' compensation board, the instant motions between the parties for, *inter alia*, summary judgment on the theory of collateral estoppel and sanctions were filed.

III. DISCUSSION

A. Motion Sequence 003

1. Leave to Amend

Defendants Harlington and Cavendish move to amend their answer to assert a defense of collateral estoppel, *nunc pro tunc*. Leave to amend a pleading should be freely granted absent evidence of substantial prejudice or surprise, or unless the proposed amendment is palpably insufficient or patently devoid of merit. See CPLR 3025(b); JPMorgan Chase Bank, N.A. v Low Cost Bearings NY, Inc., 107 AD3d 643 (1st Dept. 2013). The burden is on the party opposing the motion to establish substantial prejudice or surprise if leave to amend is granted. See Forty

Cent. Park S., Inc. v Anza, 130 AD3d 491 (1st Dept. 2015). The moving defendants' motion to amend is granted.

In light of the workers' compensation board's 2017 determination that the plaintiff did not establish that any accident occurred, which was upheld on administrative appeal, it cannot reasonably be argued that the proposed defense is palpably insufficient or devoid of merit. Indeed, the plaintiff does not address this motion in his responding papers. Although a worker's compensation board determination is not necessarily dispositive of a civil action (see Jeffreys v Griffin, 1 NY3d 34 [2003]), it is, at minimum, a sufficient basis to assert a defense of collateral estoppel *nunc pro tunc*. See Ficorp, Ltd. v Gourian, 263 AD2d 392 (1999). By failing to oppose the motion to amend, the plaintiff fails to meet his burden of establishing that the proposed amendment would cause substantial prejudice or surprise. Nor can such argument be made since the plaintiff was aware of the worker's compensation proceedings and determination well before the defendants were provided with the information.

2. Summary Judgment on the Ground of Collateral Estoppel

It is well settled that the movant on a summary judgment motion "must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case."

See Winegrad v New York Univ. Med. Ctr., 64 NY2d 851, 853 (1985). The motion must be supported by evidence in admissible form (see Zuckerman v City of New York, 49 NY2d 557 (1980), and the pleadings and other proof such as affidavits, depositions, and written admissions. See CPLR 3212. The “facts must be viewed in the light most favorable to the non-moving party.” Vega v Restani Constr. Corp., 18 NY3d 499, 503 (2012) (internal quotation marks and citation omitted). Once the movant meets its burden, it is incumbent upon the non-moving party to establish the existence of material issues of fact. See id., *citing Alvarez v Prospect Hosp.*, 68 NY2d 320 (1986).

“The quasi-judicial determinations of administrative agencies are entitled to collateral estoppel effect where the issue a party seeks to preclude in a civil action is identical to a material issue that was necessarily decided previously by an administrative tribunal and where there was a full and fair opportunity to litigate that issue before that tribunal (Jeffreys v Griffin, 1 NY3d 34, 39 [2003]).” Auqui v Seven Thirty One Ltd. P'ship, 22 NY3d 246,255 (2013); see Ryan v New York Tel. Co., 62 NY2d 494 (1984).

Determinations by the workers' compensation board may be entitled to such a preclusive effect. See Ryan v New York Tel. Co., *supra*; Sheppard v Blitman/Atlas Bldg. Corp., 288 AD2d 33 (1st Dept. 2001); Lee v Jones, 230 AD2d 435 (3rd Dept. 1997), *lv*

denied 91 NY2d 802 (1997). Whether collateral estoppel should be applied in a particular case is the burden of the party seeking to establish the identity of issue. See Jeffreys v Griffin, supra; Kim v Goldberg, Weprin, Finkel, Goldstein, LLP, 120 AD3d 18 (1st Dept. 2014). The application of collateral estoppel turns on “‘general notions of fairness involving a practical inquiry into the realities of the litigation.’” Id. at 41, quoting Matter of Halyalkar v Board of Regents of State of N.Y., 72 NY2d 261 (1988). To that end, “among the factors bearing on whether an administrative decision is ‘quasi-judicial’ are ‘whether the procedures used in the administrative proceeding ... were sufficient both quantitatively and qualitatively, so as to permit confidence that the facts asserted were adequately tested, and that the issue was fully aired.’” Id. at 40-41, quoting Allied Chem., an Operating Unit of Allied Corp. v. Niagara Mohawk Power Corp., 72 NY2d 271, 277 (1988). Stated otherwise, if the quasi-judicial determination was rendered by an agency “employing procedures substantially similar to those used in a court of law”, the doctrines of res judicata and collateral estoppel maybe applied. Ryan v New York Tel. Co., supra at 499.

Here, Cavendish and Harlington have established *prima facie* that one of the issues, indeed the singular and discrete threshold issue, presented in the instant civil action is

identical to the issue determined in the workers' compensation board determination *i.e.*, whether the plaintiff was working at 456 Sheridan Boulevard, Inwood, New York at the time he sustained his alleged injuries on May 24, 2015. See Lee v Jones, supra [Worker's Compensation Board determination that plaintiff had no employment relationship has preclusive effect in subsequent Labor Law action]; Compare Melendez v McCrowell, 139 AD3d 1018 (2nd Dept. 2016)[civil action concerned a type of brain injury which was not an issue raised before the Workers' Compensation Board].

Moreover, the workers' compensation board's determination is the type of quasi-judicial determination that is sufficient both "quantitatively and qualitatively, so as to permit confidence that the facts asserted were adequately tested, and that the issue was fully aired." Jeffreys v Griffin, supra. The determination was based upon a series of six hearings in front of the workers' compensation board, wherein testimony was elicited from the plaintiff, his employer, and the additional employees who worked at the Sheridan project, all of whom stated that there had been no ladder-related accidents at the Sheridan site and that the plaintiff had never worked at the Sheridan site, but rather worked at a different site in Brooklyn. The 'realities of the prior litigation' here are that it was a sufficiently extensive and fully adversarial hearing presided

over by an administrative law judge, that the hearing was initiated by the plaintiff himself to demonstrate entitlement to workers' compensation benefits, and that he appeared with legal counsel who advocated on his behalf in the proceeding. Ryan v New York Tel. Co., supra at 501. The submissions show that the hearing was fair and the plaintiff was afforded a full opportunity to litigate the issue of how and where he sustained his alleged injuries, such that the underlying facts were adequately tested. See Ryan v New York Tel. Co., supra; see also Matter of Halyalkar v Board of Regents of State of N.Y., supra. Notably, and as set forth more fully in the decision, the plaintiff has failed to appear for a deposition in this action. As such, he has offered no proof to dispute the determination that he was not injured in an accident as claimed.

In opposition, the plaintiff argues that Auqui v Seven Thirty One Ltd. P'ship, supra, supports his position that because the standard in a negligence action is broader in scope than a workers' compensation action, collateral estoppel is not proper as "based on the scope and focus of each type of action, it cannot be said that the issues are identical." Id. However, that reliance is misplaced, as set forth above. As correctly argued by the movants in response, the Court of Appeals decision in Auqui is based upon two separate meanings of the term 'disability' in which disability is narrowly defined as an

inability to work when applied to workers compensation claims, and a broader interpretation of the term disability is used in negligence actions, such that a determination by the workers' compensation board that a party was not disabled was not preclusive on future negligence actions. Unlike Auqui, in this case no definitional discrepancy is presented by the issue of whether the accident occurred on the movants property as claimed. As previously stated, this is the discrete singular threshold issue in both the workers' compensation proceeding and this civil action. If there was no accident, there can be no recovery in any tribunal. Therefore, Cavendish and Harlington's motion for summary judgment dismissing the plaintiff's complaint on the ground of collateral estoppel is granted.

3. Striking Plaintiff's Complaint Pursuant to CPLR 3126

In light of the dismissal of the complaint on the ground of collateral, the court need not reach the portion of the motion of Cavendish and Harlington seeking to strike the plaintiff's complaint pursuant to CPLR 3126(3).

In any event, the movant's correctly argue that the plaintiff's repeated failure to provide court-ordered discovery and appear for a deposition provides an additional ground for dismissal of the complaint.

CPLR 3101(a) provides that "there shall be full disclosure of all matter material and necessary in the prosecution or defense of an action" and that this language is "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." Osowski v AMEC Constr. Mgt., Inc., 69 AD3d 99, 106 (1st Dept 2009) quoting Allen v Crowell-Collier Publ. Co., 21 NY2d 403, 406-407 (1968). CPLR 3126 authorizes the court to sanction a party who "refuses to obey an order for disclosure or willfully fails to disclose information which the court finds ought to have been disclosed" and that "a failure to comply with discovery, particularly after a court order has been issued, may constitute the "dilatory and obstructive, and thus contumacious, conduct warranting the striking of the [a pleading]." Kutner v Feiden, Dweck & Sladkus, 223 AD2d 488, 489 (1st Dept. 1998); see CDR Creances S.A. v Cohen, 104 AD3d 17 (1st Dept. 2012); Reidel v Ryder TRS, Inc., 13 AD3d 170 (1st Dept. 2004). The court can infer willfulness from repeated failures to comply with court orders or discovery demands without a reasonable excuse. See LaSalle Talman Bank, F.S.B. v Weisblum & Felice, 99 AD3d 543 (1st Dept. 2012); Perez v City of New York, 95 AD3d 675 (1st Dept. 2012); Figiel v Met Food, 48 AD3d 330 (1st Dept. 2008); Ciao

Europa, Inc. v Silver Autumn Hotel Corp., Ltd., 270 AD2d 2 (1st Dept. 2000).

The plaintiff maintains that the failure to schedule the plaintiff's deposition was attributable to the defendants' unwillingness to conduct the plaintiff's deposition prior to their receipt of his workers' compensation authorization. The plaintiff submits an affidavit from plaintiff's counsel's calendar clerk averring that on at least two dates for the plaintiff's deposition, defendant's counsel refused to conduct the deposition due to the outstanding authorizations.

However, in a separate affidavit the plaintiff's counsel's paralegal, Maureen Whyte-Sterling, avers that on May 3, 2017, the plaintiff was forwarded five blank workers compensation board authorization forms, that on October 17, 2017 the authorization forms were still outstanding, and that on January 18, 2018 Ms. Whyte-Sterling met with the plaintiff and he stated, incorrectly, that he had not applied for any workers' compensation coverage. The affidavit also avers that as of January 29, 2018 the plaintiff had not provided the authorization forms, and that following demands by the defendants for 'fresh' authorizations the plaintiff came to his counsel's office June 21, 2018 to execute new workers compensation authorizations. This was three years after he commenced the action.

The plaintiff attempts to deflect blame for the delay of over a year in providing authorizations to the defendants. However, the record reflects that the authorizations first provided to the defendants were improperly scanned, and it was not until the defendants successfully moved to compel that the plaintiff executed and sent proper authorization forms. This resulted in a delay of approximately 18 months from the time the forms were requested by the defendants.

Moreover, even after the authorizations were properly sent, at the sixth compliance conference in this case, held November 15, 2018, the parties agreed that the plaintiff was to appear for his deposition on January 8, 2019 at 10:30 a.m. Upon the plaintiff appearing for the deposition, over an hour late, the plaintiff's counsel admitted on the record that the plaintiff was not ready to testify. He did not testify on that or any day thereafter.

Due to the plaintiff's repeated failure to comply with discovery, particularly after numerous court orders had been issued, the plaintiff's conduct constitutes the type of "dilatory and obstructive, and thus contumacious, conduct warranting the striking of the [a pleading]." Kutner v Feiden, Dweck & Sladkus, 223 AD2d 488, 489 (1st Dept. 1998).

4. Extending Note of Issue Deadline

As the complaint has been dismissed, the branch of Cavendish and Harlington's motion seeking, in the alternative, the extension of the Note of Issue deadline is denied as moot.

B. Motion Sequence 004

The first three branches of the plaintiff's motion, seeking to extend his time to file his Note of Issue, scheduling further dates for outstanding depositions, and staying the portion of Cavendish and Harlington's motion for summary judgment until depositions have been completed are likewise denied as moot upon this court's dismissal of the complaint. Additionally, inasmuch as the fourth branch of the plaintiff's motion seeks to strike Cavendish and Harlington's answers pursuant to CPLR 3126(3), such a determination would be academic in light of the court's dismissal of the complaint.

However, even were the court to address that branch of the plaintiff's motion, the court notes that the plaintiff failed to submit an affirmation of good faith pursuant to 22 NYCRR 202.7(a)(2), which mandates its denial. It is well settled that "a party moving to strike a pleading pursuant to CPLR 3126 is required to submit an affirmation that counsel for the moving party has made a good faith effort to resolve the issues raised by the motion with opposing party's counsel," and that a failure

to do so requires denial of a motion to strike. Fifth Ave.

Hotel, LLC v GSY Corp, 110 AD3d 470, 470 (1st Dept. 2013).

Indeed, in light of the plaintiff's own recalcitrance, a good faith affirmation would be difficult to draft.

In support of their cross-motion for sanctions pursuant to 22 NYCRR 130-1.1, Cavendish and Harlington's argue the plaintiff (i) fraudulently commenced this lawsuit despite a previous determination of the workers' compensation board, and (ii) continued to litigate the action despite their knowledge that this action was barred by the previous determination of the workers' compensation board.

22 NYCRR 130-1.1(a) provides, in relevant part, that the court, "in its discretion, may award to any party or attorney in any civil action ... costs in the form of reimbursement for actual expenses reasonably incurred and reasonable attorney's fees, resulting from frivolous conduct ... In addition to or in lieu of awarding costs, the court, in its discretion may impose financial sanctions upon any party or attorney in a civil action or proceeding who engages in frivolous conduct." 22 NYCRR 130-1.1(b) provides that the court, as appropriate, "may make such award of costs or impose such financial sanctions against ... a party to the litigation." Frivolous conduct includes conduct that is completely without merit in law and cannot be supported by a reasonable argument for an extension, modification, or

reversal of existing law, is undertaken primarily to harass or maliciously injure another, or asserts material factual statements that are false. See 22 NYCRR 130-1.1(c).

"In determining whether the conduct undertaken was frivolous, the court shall consider, among other issues the circumstances under which the conduct took place, including the time available for investigating the legal or factual basis of the conduct, and whether or not the conduct was continued when its lack of legal or factual basis was apparent, or should have been apparent, or was brought to the attention of ... the party." Id.

In light of the worker's compensation board's determination that the plaintiff was not involved in any accident on May 24, 2015, it appears that plaintiff had no factual basis for commencing this action in the first instance. However, the court also considers that the action was commenced on September 14, 2015, two years prior to the issuance of the administrative determination, which was rendered October 11, 2017, and which was followed by appeals. The defendants' argument that the plaintiff should not have pursued the action after October 11, 2017, is alone insufficient to impose sanctions. The plaintiff's position that the worker's compensation board determination was not dispositive in this civil action, while rejected herein, was not wholly without legal basis so as to warrant sanctions.

Moreover, the defendants had not yet sought to assert a res judicata or collateral estoppel defense.

C. Motion Sequence 005

Defendant Dolmen Contracting Corp. (Dolmen) also moves for summary judgment dismissing the complaint (i) on the same ground of collateral estoppel alleged by Cavendish and Harlington, and (ii) pursuant to CPLR 3126(3). Dolmen also moves to dismiss all cross-claims asserted by Cavendish and Harlington and pursuant to CPLR 8303(a) and 22 NYCRR 130-1.1 for sanctions against the plaintiff (SEQ 005). The plaintiff opposes and cross-moves (i) to strike Dolmen's answer pursuant to CPLR 3126(3), (ii) for sanctions against Dolmen pursuant to CPLR 8303(a) and 22 NYCRR 130-1.1, and (iii) to vacate this court's order, dated November 2, 2018, inasmuch as it ordered the plaintiff to pay costs and attorneys' fees to Dolmen based upon its delay in producing the plaintiff's workers compensation records.

Dolmen's motion for summary judgment dismissing the complaint on the grounds of collateral estoppel is granted for the reasons previously discussed herein with respect to Cavendish and Harlington's motion seeking the same relief. Dolmen's motion seeking to strike the plaintiff's complaint pursuant to CPLR 3126(3) is denied as moot based upon this court's dismissal of the plaintiff's complaint. Dolmen's motion

for sanctions pursuant to CPLR 8303(a) and 22 NYCRR 130-1.1 is denied for the reasons previously discussed herein. Inasmuch as the complaint is dismissed, the portion of Dolmen's motion to dismiss all cross-claims as asserted against it is also denied as moot.

The branch of the plaintiff's cross-motion seeking to strike Dolmen's answer pursuant to CPLR 3126(3) is denied as academic in light of the court's dismissal of the complaint. However, even were the court to address that branch of the plaintiff's motion, the court would deny that application for the reasons set forth above.

The branch of the plaintiff's cross-motion for sanctions against Dolman is also denied. The plaintiff argues that Dolmen's refusal to conduct the plaintiff's deposition without first receiving the plaintiff's outstanding workers' compensation authorizations, and its subsequent motion for summary judgment on the grounds of collateral estoppel, unnecessarily duplicated the claims raised in Cavendish and Harlington's motion seeking the same relief and constitutes frivolous conduct. The plaintiff further argues that Dolmen's allegations that he purposefully delayed providing the defendants with the authorizations was made with Dolman's knowledge that the allegations were false. The plaintiff's argument are without merit and do not establish entitlement to

relief under 22 NYCRR 130-1.1(c). The plaintiff fails to establish how Dolmen's refusal to proceed with a deposition prior to the plaintiff's own compliance with discovery demands, or Dolmen's submission of its own dispositive motion seeking to dismiss the complaint on the theory of collateral estoppel are frivolous.

The plaintiff's cross-motion to vacate this court's order, dated November 2, 2018, which directed the plaintiff to pay costs and attorneys' fees to Dolmen based upon its delay in producing the workers compensation records is, in essence, an untimely motion to reargue as it was made more than 30 days after the order. Nor does the plaintiff demonstrate that the court misapprehended or overlooked any facts or law in deciding those motions. See CPLR 2221[d][2]; William P. Pahl Equip. Corp. v Kassis, 182 AD2d 22 (1st Dept 1992). Notably, the plaintiff appealed from the November 2, 2018, order but later withdrew the appeal. The plaintiff demonstrates no basis to vacate that order.

IV. CONCLUSION

Accordingly, it is hereby,

ORDERED that the motion of defendants Cavendish Realty, LLC and Harlington Realty Co., LLC seeking (i) leave to amend their

answer to assert the affirmative defense of collateral estoppel, nunc pro tunc, (ii) summary judgment pursuant to CPLR 3212 dismissing the plaintiff's complaint, (iii) dismissing the plaintiff's complaint pursuant to CPLR 3126(3), or in the alternative (iv) to extend the Note of Issue deadline is granted to the extent that the branches of the motion seeking leave to amend, *nunc pro tunc*, and for summary judgment pursuant to CPLR 3212 on that ground are granted, and the motion is otherwise denied as moot (**MOT SEQ 003**); and it is further,

ORDERED that the plaintiff's motion seeking to (i) extend his time to file his Note of Issue, (ii) schedule further dates for all outstanding depositions, (iii) stay the portion of Cavendish and Harlington's motion for summary judgment until depositions have been completed, and (iv) strike the defendants' answers pursuant to CPLR 3126(3) is denied in its entirety (**MOT SEQ 004**); and it is further,

ORDERED that the cross-motion of defendants Cavendish Realty, LLC and Harlington Realty Co., LLC seeking sanctions against the plaintiff pursuant to 22 NYCRR 130-1.1 is denied (**MOT SEQ 004**); and it is further,

ORDERED that defendant Dolmen Contracting Corp.'s motion (i) for summary judgment dismissing the complaint pursuant to CPLR 3212, (ii) seeking to strike the plaintiff's complaint pursuant to CPLR 3126(3), (iii) seeking to dismiss all cross-claims asserted against it, and (iv) pursuant to CPLR 8303(a) and 22 NYCRR 130-1.1 for sanctions against the plaintiff is granted to the extent that the branch of the motion seeking summary judgment dismissing the complaint is granted and the motion is otherwise denied (**MOT SEQ 005**); and it is further,

ORDERED that the plaintiff's cross-motion (i) to strike defendant Dolmen Contracting Corp.'s answer pursuant to CPLR 3126(3), (ii) for sanctions against Dolmen pursuant to CPLR 8303(a) and 22 NYCRR 130-1.1, and (iii) to vacate this court's order, dated November 2, 2018, is denied in its entirety (**MOT SEQ 005**); and it is further,

ORDERED that the Clerk shall enter judgment accordingly.

This constitutes the Decision and Order and Judgment of the court.

Dated: May 12, 2020


NANCY M. BANNON, J.S.C.
HON. NANCY M. BANNON