

Preister v City of New York
2020 NY Slip Op 32112(U)
May 18, 2020
Supreme Court, New York County
Docket Number: 155396/2017
Judge: Dakota D. Ramseur
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. DAKOTA D. RAMSEUR PART IAS MOTION 5

Justice

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DAVID PREISTER, INDEX NO. 155396/2017
Plaintiff, MOTION DATE 3/17/20
- v - MOTION SEQ. NO. 002

THE CITY OF NEW YORK, NEW YORK CITY POLICE
DEPARTMENT, POLICE OFFICER MICHAEL MORRIN,
SHIELD NO. 17028, POLICE OFFICER JOSEPH CUERVO,
SHIELD NO. 27083,
Defendant.

**DECISION + ORDER ON
MOTION**

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The following e-filed documents, listed by NYSCEF document number (Motion 002) 34, 35, 36, 37, 38,
39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 57, 58, 65, 66, 68, 69, 70, 71, 73
were read on this motion to/for DISMISSAL

Plaintiff commenced this tort action to recover for damages sustained on December 26, 2015 at East 12th and Washington Street in New York, New York, alleging that he was assaulted by the Defendant Police Officers, members of the New York City Police Department (collectively the “City”). The City moves, pursuant to CPLR 3126 and 3211(a)(7) and 22 NYCRR 202.27, to dismiss for Plaintiff’s failure to appear for a 50-h hearing, failure to provide an unsealing authorization, and failure to appear at multiple scheduled conferences. For the reasons below, the motion is granted, and the Complaint is dismissed.

BACKGROUND FACTS AND PROCEDURAL HISTORY

After filing a notice of claim, despite numerous requests, Plaintiff failed to appear for a scheduled 50-h hearing on June 16, 2016, August 28, 2017, and October 2, 2017 (*NYSCEF 37*; *NYSCEF 35 [City Affirm]* ¶¶ 3-5). Plaintiff also failed to provide a CPL § 160.50 unsealing authorization for criminal records despite numerous written requests (*City Affirm* ¶¶ 4-6).

On October 10, 2017, the parties appeared for a preliminary conference, where they agreed to adjourn the conference to November 21, 2017 to provide another opportunity for Plaintiff to appear for a 50-h hearing by November 14, 2017 (*NYSCEF 41*). After Plaintiff did not appear for the 50-h hearing, the parties entered into another stipulation on November 21, 2017 providing that Plaintiff would appear by January 10, 2018 for the hearing (*NYSCEF 43*). On November 22, 2017, the City mailed a letter to Plaintiff scheduling the 50-h hearing for December 27, 2017 and again requesting an unsealing authorization (*NYSCEF 44*). Plaintiff neither appeared nor provided the authorization (*City Affirm* ¶ 10).

In February 2018, Plaintiff’s counsel at the time, Getz & Braverman, P.C. (“Getz”) notified the City that Yalkut & Israel (“Yalkut”) would now represent Plaintiff; as discussed

further below, no substitution of counsel was ever filed (*City Affirm* ¶ 11). On February 27, 2018, the City sent Yalkut a letter demanding Plaintiff's appearance for a 50-h hearing on March 27, 2018 and an unsealing authorization (*NYSCEF* 45). Again, Plaintiff complied with neither (*City Affirm* ¶ 12). On March 8, 2018, Yalkut notified the City that Plaintiff was incarcerated in Florida, and that blank unsealing authorizations had been sent to Plaintiff and would be forwarded to the City upon execution (*NYSCEF* 46).

On July 5, 2018, the City wrote to both Getz and Yalkut to demand Plaintiff's appearance at a 50-h hearing on July 26, 2018 and an unsealing authorization (*NYSCEF* 47). Again, Plaintiff complied with neither. On July 12, 2018, Yalkut wrote to the City, asserting—without explanation or authority—that City had “waived the 50-h hearing by not scheduling same in the appropriate time,” but also offering to “conduct the deposition via your TV hookup” (*NYSCEF* 48).

On August 8, 2018, the City moved, pursuant to CPLR 3211 and 3126 to dismiss for Plaintiff's failure to appear for a 50-h hearing or provide an unsealing authorization (sequence 001, *NYSCEF* 10-26). On September 21, 2018, Plaintiff again sent Plaintiff a letter demanding a firm 50-h hearing date and an unsealing authorization (*NYSCEF* 49). On December 17, 2018, the Court (Saunders, J.) granted the City's motion and ordered: (1) that Plaintiff to serve a respond to outstanding discovery demands; (2) that Plaintiff appear at the next scheduled 50-h hearing; (3) that the City could move for dismissal for Plaintiff's failure to comply; and (4) that the parties appear for a preliminary conference on January 22, 2019 (*NYSCEF* 50). Plaintiff failed to appear for the preliminary conference, and to date has failed to appear for a 50-hearing or provide an unsealing authorization.

On April 17, 2019, the City filed this motion to dismiss. On May 14, 2019, the parties agreed to adjourn the pending compliance conference and the City's motion to allow Plaintiff to find new counsel (*NYSCEF* 55). In the interim, Plaintiff had apparently been corresponding with another law firm, Rossi Law PLLC (“Rossi”). On June 11, 2019, the Court (Saunders, J.) adjourned the motion and compliance conference again, but also ordered Rossi to detail apparent correspondence with Plaintiff (*NYSCEF* 56).

On July 9, 2019, Rossi filed an affirmation informing the Court that both named Yalkut partners had died, and that Rossi had sent a letter to all firm clients notifying them to obtain new counsel (*NYSCEF* 57 ¶¶ 3-4).¹ Rossi had received a representation request from Plaintiff, but declined (*NYSCEF* 57 ¶¶ 5-6). In reviewing the file, Rossi also realized that Getz had returned the file to Yalkut after filing the Summons and Complaint, but never prepared, executed, or filed a substitution of counsel (*NYSCEF* 57 ¶ 9). Rossi had also received two June 2019 letters from Plaintiff indicating his attempts to retain new counsel (*NYSCEF* 57 ¶ 10). Rossi responded on July 3, 2019, informing Plaintiff once again that “IT IS IMPERATIVE THAT YOU OBTAIN AN ATTORNEY TO HANDLE YOUR CASE AGAINST THE CITY OF NEW YORK. ... THE JUDGE WILL DISMISS YOUR CASE IF YOU DO NOT OBTAIN AN ATTORNEY SOON” (*NYSCEF* 58 [emphasis in original]). As memorialized in a July 24, 2019 letter, the Court (Saunders, J.) instructed Rossi to advise Plaintiff that Plaintiff was only to communicate

¹ It appears that Rossi served as counsel to Mrs. Yalkut, the surviving spouse and executor of one of the Yalkut partners.

with Getz, Plaintiff's counsel of record (*NYSCEF 60*). On or about July 23, 2019, Plaintiff asked Rossi to move, on Plaintiff's behalf, to proceed pro se.

On August 21, 2019, while this motion was pending, Getz moved by order to show cause to withdraw as counsel (*NYSCEF 62*, sequence 003). On October 29, 2019, the Court (Saunders, J.) deemed the motion abandoned (*NYSCEF 64*). Thus, at that point and as of this motion, Getz remained counsel of record for Plaintiff.

On January 9, 2020, the Court (Saunders, J.), addressing the unusual circumstances and procedural history of this action and the pending motion, issued an interim order directing service upon Plaintiff at his last known address at the Liberty Correctional Facility in Florida, directing opposition by February 14, 2020, and the parties to appear for a conference on February 25, 2020 (*NYSCEF 65* p 2).²

In the interim, the undersigned assumed Justice Saunders' inventory. On February 25, 2020, counsel for the City appeared, calling the Court's attention to his February 19, 2020 supplemental affirmation (*NYSCEF 68*). The affirmation noted, correctly: (1) that the motion had been marked decided but had not actually decided the substantive issue (dismissal); (2) that the City had, as directed, served a copy of the motion on Plaintiff himself at the Florida Correctional Facility; and (3) that Plaintiff had still failed, several years after the City's initial request and numerous follow-up letters, to appear for a 50-h hearing or even provide an unsealing authorization. The Court issued a further directive providing Plaintiff with a final opportunity to oppose the motion by March 13, 2020. The City served the directive upon Plaintiff and Getz on February 28, 2020 (*NYSCEF 73*). Despite the additional opportunity, Plaintiff has still failed to oppose.³

DISCUSSION

As the City correctly argues, until a potential plaintiff has complied with General Municipal Law § 50-h (1), which requires appearance at a 50-h hearing, that plaintiff is precluded from commencing an action against a municipality (*La Vigna v County of Westchester*, 160 AD2d 564, 564-565 [1st Dept 1990]). Where a 50-h examination has been demanded and repeatedly re-scheduled or adjourned at the plaintiff's request or due to the plaintiff's failure to appear without informing the municipality of a reasonable excuse, failure to comply merits dismissal (*Best v New York*, 97 AD2d 389, 389 [1st Dept 1983] [dismissing after five missed appearances]). Here, the City has demanded Plaintiff's appearance at least seven times, and has been given numerous opportunities and directives by the Court which have been ignored, including nearly a year since the last communications regarding both of Plaintiff's former attorneys.

Additionally, CPLR 3126 provides that "[i]f any party...refuses to obey an order for disclosure or willfully fails to disclose information which the court finds ought to have been disclosed pursuant to this article, the court may make...an order striking out pleadings or parts

² The motion was incorrectly marked disposed, likely because the order was not clearly designated as an interim order. The Court also notes that the order incorrectly states that Yalkut, not Getz, remained counsel of record. Because Getz filed the Summons and Complaint, Getz remains counsel of record.

³ The deadline for opposition preceded AO/78/20, which restricted filings due to the Covid-19 pandemic.

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.” Here, Plaintiff has failed to comply with numerous requests, despite multiple opportunities to do so, and most recently a December 17, 2018 order to do so by Justice Saunders (*Ensley v Snapper, Inc.*, 62 AD3d 403, 403 [1st Dept 2009] [affirming dismissal where plaintiff failed to comply in a timely fashion with three discovery orders, and failed to offer a reasonable excuse]; *see also Wolfson v Nassau County Med. Ctr.*, 141 AD2d 815, 815 [2d Dept 1988] [“the extensive nature of the plaintiffs’ delay in responding to the defendant’s interrogatories permits an inference that the delay was willful,” notwithstanding plaintiff’s attorneys’ explanation that “they were not substituted for the plaintiffs’ former attorneys until after, or shortly before, the defendant made the motion pursuant to CPLR 3126.”]). Accordingly, dismissal is appropriate.

CONCLUSION/ORDER

For the above reasons, it is

ORDERED that the City’s motion (002) is GRANTED, and the Clerk of Court shall enter judgment dismissing the Complaint; and it is further

ORDERED that the City shall, within 30 days of receipt, e-file and serve a copy of this order with notice of entry upon Plaintiff individually at all known addresses, including but not limited to the Florida Correctional Facility previously served, and to Plaintiff’s counsel of record.

This constitutes the decision and order of the Court.



5/18/2020
DATE

DAKOTA D. RAMSEUR, J.S.C.

CHECK ONE:	<input checked="" type="checkbox"/> CASE DISPOSED	<input type="checkbox"/> DENIED	<input type="checkbox"/> NON-FINAL DISPOSITION	<input type="checkbox"/> OTHER
APPLICATION:	<input checked="" type="checkbox"/> GRANTED		<input type="checkbox"/> GRANTED IN PART	
CHECK IF APPROPRIATE:	<input type="checkbox"/> SETTLE ORDER		<input type="checkbox"/> SUBMIT ORDER	
	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN		<input type="checkbox"/> FIDUCIARY APPOINTMENT	<input type="checkbox"/> REFERENCE