

Rosenthal v Grzegorz Corp.

2020 NY Slip Op 32574(U)

August 5, 2020

Supreme Court, New York County

Docket Number: 162426/2014

Judge: Nancy M. Bannon

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. NANCY M. BANNON

PART IAS MOTION 42EFM

Justice

-----X

NORMA ROSENTHAL,

Plaintiff,

- v -

GRZEGORZ CORP. t/a AMBIANCE IMPROVEMENT
and DGS EXCLUSIVE WOODWORK,
Defendant.

-----X

GRZEGORZ CORP. t/a AMBIANCE IMPROVEMENT

Plaintiff,

-against-

AKAM ASSOCIATES, INC. and AKAM ASSOCIATES

Defendant.

-----X

DGS EXCLUSIVE WOODWORK

Plaintiff,

-against-

AKAM ASSOCIATES, INC. and AKAM ASSOCIATES

Defendant.

-----X

AKAM ASSOCIATES, INC.

Plaintiff,

-against-

KWOK CHAN

Defendant.

-----X

INDEX NO. 162426/2014
MOTION DATE 08/5/2020
MOTION SEQ. NO. 002

DECISION + ORDER ON MOTION

Third-Party
Index No. 595219/2017

Second Third-Party
Index No. 595235/2017

Third Third-Party
Index No. 595112/2018

The following e-filed documents, listed by NYSCEF document number (Motion 002) 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 84, 85, 86, 87, 88, 89, 90

were read on this motion to/for STRIKE COMPLAINT- CPLR 3126

In this personal injury action, the plaintiff alleges that on October 25, 2013, she tripped and fell on a piece of Masonite placed on a hallway floor inside the building at 16 West 16th Street in Manhattan. It is alleged that the defendants, Grzegorz Corp. t/a Ambiance Improvement and DGS Exclusive Woodwork, were performing construction/renovation work inside Kwok Kan Chan's apartment on the 10th floor, where the plaintiff also resides. The defendants answered the complaint, third-party actions were commenced and counterclaims were asserted. Managing agent Akam Associates, Inc was impleaded, and Akam in turn impleaded Kwok Kan Chan.

By this motion, Kwok Kan Chan, as third third-party defendant, moves, pursuant to CPLR 3126 to dismiss the complaint upon the plaintiff's failure to provide discovery or appear for a deposition or physical examination or, in the alternative, to preclude the plaintiff from offering any evidence at trial relating to the discovery not provided, or, in the alternative, to compel the plaintiff to provide all outstanding discovery immediately. The plaintiff does not oppose the motion. The only responsive papers are submitted by Akam Associates, Inc., the third-party defendant/second third-party defendant/third third-party plaintiff, in which it does not oppose the relief sought against the plaintiff but opposes the movant's request to dismiss the complaint as against him alone. In reply, Kwok Kan Chan concedes that he received discovery from Akam Associates.

A preliminary conference order dated April 7, 2016, the plaintiff to provide color copies of photographs previously provided within 30 days, all medical reports and records were to be provided within 30 days, and all other discovery, including depositions and IME, was to be completed on or before October 28, 2016, which was the Note of Issue deadline. A compliance conference order dated September 29, 2016, states that the plaintiff did not respond to a discovery demand of defendant DGS served in August 2016, and the parties were not deposed.

The court ordered the plaintiff to respond within 30 days, and to appear for an IME within 45 days. The Note of Issue deadline was extended to February 10, 2017, and marked Final.

A status conference order dated July 20, 2017, states that the IME had not been conducted and the new third-party actions necessitated further discovery exchanges. The court ordered all parties to respond to all outstanding demands within 45 days, set a deposition schedule extending to November 3, 2017, and directed the plaintiff to appear for an IME within 45 days of completion of the depositions. The court extended the Note of Issue deadline to November 30, 2017, and marked the dated "Final 2x."

A status conference order dated October 19, 2017, states that "discovery from the plaintiff is still outstanding" and "depositions of all parties are outstanding." The plaintiff has not provided authorizations, a Bill of Particulars, or otherwise respond to demands made by the third-party defendant in June 2017. The order states that the plaintiff was "unavailable during summer 2017." The court directed the plaintiff to provide all this discovery in 30 days, and again set a deposition schedule for January 2018, and directed the plaintiff to appear for an IME within 45 days of her deposition. The Note of Issue deadline was set at March 23, 2018, and marked "Final 3X, No Extensions." The plaintiff did not comply.

A final status conference order, dated February 15, 2018, states that the plaintiff did not provide any Bill of Particulars, authorizations or otherwise respond to the outstanding demands or comply with the prior court orders. The court set a new schedule for depositions and IME, all to be completed by March 21, 2018. The court left the Note of Issue deadline as March 23, 2018, in light of the prior orders, and advised the plaintiff that motion practice would be required to extend the Note of Issue deadline. The plaintiff failed to provide the court-ordered discovery and made no motion to extend the Note of Issue deadline. As such, the plaintiff cannot now get onto the trial calendar. Although it appears that she is uninterested in prosecuting the action, she has not discontinued the action.

In December 2018, Akam Associates moved for relief against the plaintiff pursuant to CPLR 3126 for failure to provide discovery. That motion was withdrawn by stipulation dated March 8, 2019. The instant motion was made in February 2020.

CPLR 3126 authorizes the court to sanction a party who “refuses to obey an order for disclosure or wilfully 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 “dilatatory and obstructive, and thus contumacious, conduct warranting the striking of the [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). A plaintiff’s failure to serve a bill of particulars after one has been demanded gives rise to the same sanctions. See CPLR 3042. Furthermore, 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 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).

Here, the plaintiff, who commenced this action in 2014, has wholly failed to comply with numerous discovery demands and court orders without excuse. While seeking to recover damages for an alleged personal injury, she refused to turn over relevant documents, appear for a deposition or submit to a physical examination, and this delay extended over five years,

notwithstanding multiple discovery conferences. The court thus concludes that the plaintiff's dilatory, obstructive, and contumacious conduct warrants a sanction pursuant to CPLR 3126.

An order merely compelling discovery would not be a strong enough sanction under the circumstances, in that the plaintiff already failed to comply with numerous court orders directing discovery. Preclusion would not be appropriate since the matter would likely never be tried. The court also considers that this was the first motion seeking relief under CPLR 3126. Therefore, the motion is granted to the extent that the plaintiff's failure to complete all outstanding discovery on or before October 23, 2020, shall result in the striking of the complaint. This order shall be self-executing, and became absolute upon the plaintiff's failure to comply, without the necessity of further motion practice. See Standard Fire Ins. Co. v Federal Pacific Electric Co., 14 AD3d 213 (1st Dept. 2004); Lopez v City of New York, 2 AD3d 693 (2nd Dept. 2003). The movant may file an affirmation of non-compliance and notify chambers of any such filing.

Accordingly, and upon the foregoing papers, it is

ORDERED that the motion of third third-party defendant Kwok Kan Chan to strike the complaint or for alternative relief pursuant to CPLR 3126, is granted to the extent that the complaint is stricken unless the plaintiff provides all outstanding discovery directed in this court's prior orders on or before October 16, 2020, and it is further

ORDERED that the movant shall serve a copy of this order on the plaintiff or her counsel by overnight mail within 20 days of entry of this order.

This constitutes the Decision and Order of the court.

8/5/2020
DATE


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

CHECK ONE:

<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	<input type="checkbox"/>	OTHER
<input type="checkbox"/>	GRANTED	<input type="checkbox"/>	DENIED	<input checked="" type="checkbox"/>	GRANTED IN PART
<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>	SUBMIT ORDER		

APPLICATION: