

Betancourt v Port Auth. of N.Y. & N.J.

2020 NY Slip Op 32619(U)

August 11, 2020

Supreme Court, New York County

Docket Number: 154613/2017

Judge: Frank P. Nervo

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK PART IV

-----X
EDDY BETANCOURT

DECISION AND ORDER

Plaintiff,

Index Number

-against-

154613/2017

THE PORT AUTHORITY OF NEW YORK AND NEW
JERSEY, PRICE CARPENTRY, INC. and
TISHMAN CONSTRUCTION CORPORATION,

Defendants.

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FRANK P. NERVO, J.S.C.:

Plaintiff seeks an order, pursuant to CPLR §§ 3124 and 3126, striking defendants' answers for their alleged failure to appear for scheduled depositions, in violation of several Court orders, and their failure to respond to plaintiff's demands. Alternatively, plaintiff seeks to compel discovery and enter judgment on liability in plaintiff's favor should defendants fail to provide the aforementioned discovery. Defendants oppose contending that defendants' deposition was scheduled and confirmed for March 20, 2020, prior to the return date of this motion, evincing their good faith efforts to continue discovery. Defendants further contend that plaintiff has delayed discovery in this matter and misrepresented the completion of discovery. Plaintiff also seeks to extend the note of issue (NOI) deadline, given outstanding discovery. Defendants do not oppose an extension of the NOI.

The instant application was made on February 27, 2020 and was impacted by the effects of COVID-19. Consequently, the application was adjourned to July 10, 2020 to

allow the parties to complete briefing (NYSCEF Doc. No. 56). Notwithstanding, plaintiff has not submitted a reply.

As an initial matter, the NOI deadline of February 28, 2020 has passed and discovery remains outstanding. Plaintiff contends that defendants' failure to provide the aforementioned discovery necessitates extending the NOI. Defendants do not oppose an extension. Given that discovery remains outstanding, the NOI deadline is extended to December 31, 2020. However, this extension is final, absent further order. This matter does not present complex issues; notwithstanding, discovery has progressed sluggishly. The Court has considered the continued impacts of COVID-19 in its determination, and notes that the delays complained of occurred before the pandemic's impact in the State.

CPLR § 3126 governs sanctions for a party's nondisclosure and for persons controlled by a party. Subsection three provides that the Court may strike a pleading, stay proceedings, dismiss an action, or enter a default judgment when it finds, inter alia, that a party has refused to obey an order for disclosure or willfully fails to disclose information that ought to have been disclosed. These remedies are drastic and should only be imposed when the movant has "clearly shown that its opponent's nondisclosure was willful, contumacious or due to bad faith" (*Commerce & Indus. Ins. Co. v. Lib-Com Ltd.*, 266 AD2d 142 [1st Dept 1999]; see also *Siegman v. Rosen*, 270 AD2d 14 [1st Dept 2000]). A pattern of default, lateness and failure to comply with court orders, can give rise to an inference of willful and contumacious conduct (see *Merchants T & F, Inc. v. Kase & Druker*, 19 AD3d 134 [1st Dept 2005]). Willful failure may be established by

repeated failure to comply with court orders directing disclosure, including court orders issued at conferences (*Shah v. Oral Cancer Prevention Intl., Inc.*, 138 AD3d 722 [2d Dept 2016]). The Court has broad discretion to impose sanctions under CPLR § 3126 for bad faith nondisclosure (*Sage Realty Corp. v. Proskauer Rose LLC*, 275 AD2d 11, 17 [1st Dept 2000]; *Bako v. V.T. Trucking Co.*, 143 AD2d 561 [1st Dept 1988]).

Plaintiff contends that defendants violated this Court's conference orders of May 10, 2019, September 13, 2019 and December 13, 2019 which, inter alia, required defendants respond to plaintiff's demands and set forth deposition and medical exam dates. Plaintiff argues that the failure to appear at depositions and rescheduling the same on the eve of examination amounts to dilatory conduct as well as contumacious and willful non-compliance, warranting striking defendants' answers.

Predictably, defendants contend that the depositions were rescheduled in good faith and they provided supplemental responses prior to plaintiff filing the instant application. Defendants do not otherwise offer an explanation for the now nearly one-year delay in scheduling their depositions. However, defendants contend that responsibility for the delay in this matter rests with plaintiff, and defendants highlight plaintiff's various delays in responding to their demands.

It is undisputed that depositions were not completed as ordered by this Court's various conference orders. While the violation of court conference orders supports an inference of willful and contumacious noncompliance, given the discovery delays attributable to both plaintiff and defendants, the Court, in its discretion, will not strike

defendants' pleadings at this time. Notwithstanding, failure to complete discovery, as ordered herein, may result in sanctions, as stated below.

Accordingly, it is

ORDERED that the motion is granted to the extent of directing defendants' depositions occur on or before September 30, 2020, and shall be conducted in person or via electronic means; and it is further

ORDERED that all post-deposition demands shall be served by October 30, 2020, and responses thereto shall be served by November 30, 2020; and it is further

ORDERED that plaintiff shall file the Note of Issue on or before December 31, 2020; and it is further

ORDERED that the failure to complete discovery as directed herein may result in the imposition of sanctions, including, but not limited to, striking pleadings, in the Court's discretion

ORDERED that the motion is otherwise denied; and it is further

ORDERED that further request for conferences be made as a joint letter signed by all counsel outlining the issues expected to be addressed, include a good faith letter attempting to resolve same, and provide proposed dates and times for such conference. A copy of this order must be annexed to the request.

THIS CONSTITUTES THE DECISION AND ORDER OF THE COURT.

Dated August 11, 2020

ENTER:

Hon. Frank P. Nervo J.S.C.