

Gerasimowicz v Aslanis
2020 NY Slip Op 33626(U)
October 29, 2020
Supreme Court, New York County
Docket Number: 654322/2013
Judge: Andrea Masley
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SUPREME COURT OF THE STATE OF NEW YORK
 COUNTY OF NEW YORK: COMMERCIAL DIVISION PART IAS MOTION 48EFM

-----X
 WALTER GERASIMOWICZ,

Plaintiff,

- v -

PANTELIS ASLANIS, GEORGIA ASLANIS, PANAYIOTTA
 DOUMAZIOS, RITA GIAMPILIS, SPIRO KITOVAS,
 ANDREAS SAVVIDES, GEORGE NIKOLOS, GEORGE
 DELIS, GEORGE RODAS, CONSTANTINE MEGARIS, AB
 CAPITAL CORP., ASTORIA FEDERAL SAVINGS BANK,
 DA CONTRACTING, TRIDENT CONSTRUCTION CORP.,
 TPG CONTRACTING CORP., TPG ELECTRIC CORP.,
 FIRST CENTRAL ELECTRIC CO. INC., THE SITRIX
 FUND, RODEL ELECTRICAL CONTRACTORS, INC.,
 BARE CONTRACTING, INC., MEGARIS ELECTRICAL
 CONTRACTING CORP.,

Defendants.
 -----X

INDEX NO. 654322/2013

MOTION DATE _____

MOTION SEQ. NO. 005

**DECISION + ORDER ON
 MOTION**

HON. ANDREA MASLEY:

The following e-filed documents, listed by NYSCEF document number (Motion 005) 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144 were read on this motion to/for DISMISS

In motion sequence number 005, defendants George Delis, George Rodas, Rodel Electrical Contractors, Inc. and Bare Contracting, Inc. (collectively, Moving Defendants) move to dismiss the Verified Complaint of plaintiff Walter V. Gerasimowicz with costs and disbursements pursuant to 22 NYCRR 202.27.

Background

On December 16, 2013, plaintiff initiated this action against defendants Pantelis Aslanis, Panayiotta Doumazios, Rita Giampilis, Spiro Kitovas, Georgia Panou Aslanis, Andreas Savvides, George Nikolos, George Delis, George Rodas, Constantine Megaris, AB Capital Corp., Astoria Federal Savings Bank, DA Contracting, Trident Construction

Corp., f/k/a Delta Equity Recovery Services, Inc., TPG Contracting Corp., TPG Electric
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Corp., First Central Electric Co. Inc., The Sitrix Fund, Rodel Contracting, Bare Contracting, Inc. f/k/a/ Rodell Electric Corp., and Megaris Electrical Contracting Corp. alleging (1) fraud, (2) unjust enrichment, (3) breach of fiduciary duty, and (5) an accounting. (NYSCEF Doc. No. [NYSCEF] 122, Verified Complaint.) The Moving Defendants filed their Verified Answer on July 31, 2014. (NYSECF 123, Verified Answer.) After initial motion practice in the summer of 2014, resulting in the dismissal of the complaint against Astoria Federal Savings Bank on default, there was no activity in this matter until May 29, 2018, when Simos Dimas, Esq. moved to withdrawal as plaintiff's counsel. (NYSCEF 53, Notice of Entry; NYSECF 54, Proposed Order to Show Cause.)

Plaintiff was represented by Dimas until July 11, 2018 when this court granted Dimas' motion and stayed this action for 30 days to allow plaintiff to retain new counsel if he so choosed. (NYSCEF 58, Order.) On December 19, 2018, the Moving Defendants served discovery demands, interrogatories, and two notices of depositions upon plaintiff via NYSCEF. (NYSCEF 124, Notice for Discovery and Inspection, Interrogatories, Notices of Depositions [originals filed at NYSCEF 66-69].) In addition to filing these documents on NYSCEF, counsel for the Moving Defendants affirms that he also served these documents via first class mail. (NYSCEF 121, Camaj aff, ¶ 7.) Plaintiff asserts that these Notices and Interrogatories were mailed to an address where he no longer resides, and that he was not aware of the NYSCEF system nor was instructed how to use it by prior counsel. (NYSCEF 134, Gerasimowicz aff, ¶¶ 14, 15.)

On February 1, 2019, the Moving Defendants filed a "good faith" demand letter in NYSCEF, stating that, if the discovery documents were not delivered by February 28, 2019, the Moving Defendants would make a motion to compel discovery. (NYSCEF

125, Good faith Letter [original filed at NYSCEF 73].) This demand letter was also mailed to plaintiff via first class mail. (NYSCEF 121, Camaj aff, ¶ 9.) Plaintiff asserts that, for the same reasons stated above, he was not aware of the demand letter. (NYSCEF 134, Gerasimowicz aff, ¶¶ 16, 17.)

On March 7, 2019, the Court held a status conference. (*Id.* ¶ 18.) At the conference, plaintiff informed the court that Dimas was in possession of up to twenty-six boxes of documents relating to the case but had failed to provide them to plaintiff. (*Id.* ¶ 20.) The court ordered plaintiff to make a motion to compel Dimas to produce the documents. (NYSCEF 126, March 7 Order.) The court also ordered the Moving Defendants to re-serve their document requests upon plaintiff via email, whereupon plaintiff would have thirty days to respond. (*Id.*) On March 7, 2019, the Moving Defendant's re-served their document requests upon plaintiff via email. (NYSCEF 127, March 7th Email.) Plaintiff asserts that he was unable to comply with the March 7th order due to a health condition and a lack of legal assistance. (NYSCEF 134, Gerasimowicz aff, ¶¶ 23, 27.)

On June 5, 2019, A. Tommy Sgouras, Esq. appeared at a status conference with plaintiff, but had not been officially retained as counsel. (NYSCEF 128, June 5 Order.) The court found "that plaintiff did not comply with the court's March 7, 2019 order." (*Id.*) Nevertheless, the court gave plaintiff two additional weeks to comply with the March 7, 2019 order. (*Id.*) Plaintiff again did not comply. (NYSCEF 134, Gerasimowicz aff ¶ 35.)

On June 15, 2019, Alex Kleyman, Esq. filed a notice of appearance on behalf of plaintiff. (NYSCEF 136, Notice of Appearance). On August 13, 2019, the court held another status conference which was attended by attorney Kleyman, on behalf of plaintiff, and attorneys Camaj, Magriples, and Wood, on behalf of the various

defendants. (NYSCEF 129, August 13 Order.) The court ordered the Moving Defendants to re-serve their discovery demands on Kleyman and gave plaintiff an opportunity to serve discovery demands. (*Id.*) The court further ordered that plaintiff appear for a deposition before September 30, 2019 or the case would be dismissed. (*Id.*) The court also set the final status conference for October 7, 2019. (*Id.*)

The Moving Defendants emailed the outstanding discovery demands to Kleyman on August 14, 2019. (NYSCEF 130, August 14 Email.) Kleyman served responses; however there is a dispute whether these responses are complete. (NYSCEF 140, Responses; NYSCEF 134, Gerasimowicz aff, ¶ 52; NYSCEF 121, Camaj aff, ¶¶ 20, 21.) Plaintiff asserts that he made himself available for a deposition in September 2019, but it did not occur because counsel for the Moving Defendants did not wish to conduct depositions in September. (NYSCEF 134, Gerasimowicz aff ¶ 57.)

The court held a final status conference on October 7, 2019. (NYSCEF 131, October 7 Order.) Neither plaintiff nor Kleyman appeared at the conference. (*Id.*) The court also noted that plaintiff failed to comply with the prior order, despite the court's warning that the case would be dismissed if plaintiff did not appear for a deposition by September 30, 2019. (*Id.*) The court issued an order declaring plaintiff in default for his lack of appearance, and stated that "the [moving] Defendants must move for dismissal on notice within thirty days. Otherwise, the case shall proceed." (*Id.*)

Kleyman contacted the court the same day via letter explaining his absence as an "administrative and law-office error." (NYSCEF 139, Letter to the Court.) Specifically, Kleyman stated, "I mistakenly documented the Conference as being scheduled for 2:30 PM., as has been the case with the most of the previous conferences." (*Id.*) Kleyman also noted that he called the courtroom and informed the

court staff that he would be able "to appear within 30-40 minutes." (*Id.*) Kleyman further informed the court that he had prepared plaintiff for depositions; however, the Moving Defendants' counsel requested that "[d]epositions be adjourned pending my office providing clarifications with respect to certain documents destroyed by Plaintiff's previous counsel."¹ (*Id.*) Kleyman ended the letter, "I further respectfully ASK that in the event the case has been marked off as default, the Court allow me this one time courtesy and reinstate the matter." (*Id.*)

On November 7, 2019, the Moving Defendants nevertheless filed an initial motion to dismiss pursuant to 22 NYCRR 202.27 on November 7, 2019. (NYSCEF 121, Affirmation in Support of Motion ¶¶ 27.) The motion was denied on procedural grounds. (*Id.*) On December 10, 2019, the Moving Defendants subsequently filed this motion.²

Discussion

Section 202.27 of the Uniform Rules for the New York State Trial Courts, the only rule pursuant to which moving Defendants seek relief, states,

"At any scheduled call of a calendar or at any conference, if all parties do not appear and proceed or announce their readiness to proceed immediately or subject to the engagement of counsel, the judge may note the default on the record and enter an order as follows:

¹ Plaintiff's former counsel, Dimas, affirmed that twenty-six boxes of records were destroyed by a storage facility in which they were kept. (NYSCEF 142, Dimas Aff, ¶¶ 11, 12.) Dimas affirms that his firm was not reimbursed by the appointed bankruptcy trustee for the expense of storing the documents and was instructed by the storage facility that the documents would be destroyed for nonpayment. (*Id.* ¶¶ 9-10.) Under the alleged belief that the documents were not relevant to litigation, Dimas let the facility proceed with the alleged destruction. (*Id.* ¶ 11.) Dimas subsequently produced any remaining documents that may have pertained to the case to Kleyman. (*Id.* ¶ 13.)

² The court immediately scheduled the motion for oral argument on April 13, 2020, but cancelled argument due to the pandemic.

- (a) If the plaintiff appears but the defendant does not, the judge may grant judgment by default or order an inquest.
- (b) If the defendant appears but the plaintiff does not, the judge may dismiss the action and may order a severance of counterclaims or cross-claims.
- (c) If no party appears, the judge may make such order as appears just.”

In accordance with this section, the “Supreme Court has the authority to dismiss an action based on a plaintiff’s failure to attend a scheduled court appearance and may do so without providing notice to the parties of its intention in that respect.” (*Grant v Rattoballi*, 57 AD3d 272, 273 [1st Dept 2008] [citation omitted].)

While the prosecution of this matter has been troubling, plaintiff shall have a final chance. Plaintiff’s attorney, Kleyman, affirms that he made a scheduling mistake. His willingness to appear in the court less than an hour after the conference and his thorough letter indicate a good faith attempt to remedy that mistake. Moreover, in a similar case, albeit with different procedural postures, the First Department emphasized that “[a] client should not be deprived his day in court by his attorney’s neglect or inadvertent error” and “the strong public policy of this State to dispose of cases on their merits.” (*Chelli v Kelly Group, P.C.*, 63 AD3d 632, 633-634 [1st Dept 2009].)

The court emphasizes that plaintiff’s failure to comply with previous court orders is a serious matter. However, in light of plaintiff’s health condition, attempts to recover relevant documents from his former attorney, and alleged willingness to make himself availability for the September 2019 deposition, plaintiff shall have one final opportunity to comply with these discovery deadlines.

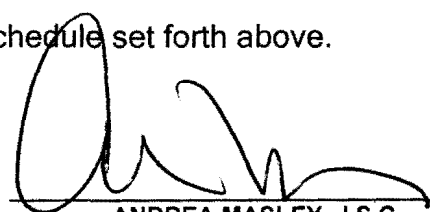
Therefore, plaintiff is directed to comply with any outstanding document requests by November 16, 2020. If plaintiff has produced all existing relevant documents, plaintiff shall submit a Jackson Affidavit by filing in NYSCEF and emailing the court and

defendants by November 16, 2020. (*Jackson v City of New York*, 185 AD2d 768 [1st Dept 1992].) If there is any outstanding document production by defendants, they too must produce by November 16, 2020. Counsel for all remaining parties shall meet and confer and complete any remaining depositions virtually by December 11, 2020. (*See Fineman v Qureshi*, 2020 NY Slip Op 32978[U], *2 [Sup Ct, NY County 2020] ["Since COVID-19 has disrupted the process of conducting in-person depositions safely within the state, numerous trial courts have found that virtual depositions are an acceptable alternative"].) Discovery shall be completed by December 18, 2020 and the note of issue shall be filed by December 21, 2020.

The court is hopeful that with attorney Kleyman assistance, plaintiff will meet these discovery deadlines. That being said, any failure to comply with these final discovery deadlines will result in dismissal. A motion need not be filed by the Moving Defendants, just an affirmation of noncompliance.

Accordingly, it is

ORDERED that the Moving Defendants' motion to dismiss is denied on the condition that plaintiff complies with the discovery schedule set forth above.



 ANDREA MASLEY, J.S.C.

10/27/2020
 DATE 10/29/2020

CHECK ONE:

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