

Maldonado v Ruppert Hous. Co., Inc.

2020 NY Slip Op 33763(U)

November 12, 2020

Supreme Court, New York County

Docket Number: 153148/2018

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
EMILY MALDONADO and STEVEN TORRES,

Plaintiffs,

-against-

RUPPERT HOUSING COMPANY, INC. and
MAXWELL-KEATS, INC.,

Defendants.

-----X
FRANK P. NERVO, J.S.C.

DECISION AND ORDER

Index Number

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Defendants Rupert Housing Company and Maxwell-Keats move to dismiss the action against them, pursuant to CPLR § 3126, due to plaintiffs’ failure to comply with prior discovery orders of this Court. Plaintiff Torres opposes contending he has now provided the discovery sought by defendants and that defendants stipulated to withdraw their motion. In reply, defendants contend plaintiffs’ opposition is untimely, the stipulation withdrew the motion as to plaintiff Torres only, and plaintiff Maldonado has not opposed the motion or provided the discovery sought therein.

As an initial matter, a stipulation withdrawing the motion, either in whole or in part, was not filed with the Court. Furthermore, the email copy of the stipulation, which plaintiffs purport withdrew the motion in its entirety, is unsigned by defendants’ counsel (NSYCEF Doc. No. 48). Consequently, consideration of an unsigned stipulation is inappropriate. In any event, it is beyond cavil that the stipulation is clear on its face and proposes withdrawal of the motion as to “plaintiff Steven Torres, ONLY” (*id.* [emphasis in original]). Movant’s reply purports to seek relief only as to plaintiff

Maldonado, although they also seek, inconsistently, to have their motion granted in “its entirety”.¹ Notwithstanding, given the delays outlined herein, the Court has considered the motion as against both plaintiffs.

Turning to the issue of timeliness, the parties agreed to adjourn the instant motion to October 30, 2020, with opposition papers due 7 day prior. Plaintiff Torres’ opposition was filed October 26, 2020, and is, consequently, late.² The Court notes that plaintiffs have routinely failed to comply with deadlines in this matter, giving rise to the instant motion. Plaintiff Torres’ counsel represents the handling attorney left the firm, resulting in the late filing. Given this Court’s preference to determining matters on the merits (*Scott v. Allstate Ins. Co.*, 124 AD2d 481 [1st Dept 1986]), the Court has considered plaintiff’s opposition (*see e.g. Meyer v. Rose*, 160 AD2d 565 [1st Dept 1990] Court properly considered filing where brief delay did not prejudice adversary).

CPLR § 3101(a) directs that there “shall be full disclosure of all matter material and necessary to the prosecution or defense of an action, regardless of the burden of proof” (*Forman v. Henkin*, 30 NY3d 656, 661 [2018]). The test utilized is “one of usefulness and reason” (*id.*). CPLR § 3126 subsection three provides that the Court may strike a pleading 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. This remedy is drastic and should only be imposed when the movant has “clearly shown

¹ “Wherefore it is respectfully requested that the [sic] grant the defendants’ motion in its entirety, as against plaintiff Emily Maldonado only, together with such other and further relief the Court deems just and proper” (NYSCEF Doc. No. 50)

² Only plaintiff Torres has opposed this motion; it is unopposed as to plaintiff Maldonado.

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]). 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]; *see also Shah v. Oral Cancer Prevention Intl., Inc.*, 138 AD3d 722 [2d Dept 2016]).

Here, plaintiffs have failed to comply with the Court's orders of February 22, 2019, June 28, 2019, October 11, 2019, and January 10, 2020. Defendants contend that plaintiffs have engaged in a willful pattern of delay in this matter in that they have failed to provide medical authorizations, delayed depositions that require plaintiffs' medical records and thus authorizations, and failed to timely file a change of attorney with the Court.

The Court is cognizant of the impact of COVID-19 on discovery deadlines in this matter, as well as delays which are not contributable to plaintiffs, including plaintiff Torres' hospitalization and the arrest of plaintiffs' prior counsel (*see* October 11, 2019 and January 10, 2020 conference orders). Nevertheless, plaintiff Torres failed to retain substitute counsel until September 22, 2020, nearly one-year after this Court's initial order providing plaintiffs' 90-days to find substitute counsel (NSYCEF Doc. 34). The Court further notes plaintiff Torres did not file a substitution of counsel until after defendants brought the instant motion, and plaintiff Maldondao has not yet retained substitute counsel, nor has she appeared on this motion (*see* NYSCEF Doc. No. 33 – Consent to Change Attorney, as to Steven Torres only). The failure to oppose a motion

seeking to strike a party's pleading for noncompliance with prior Court order supports a finding of willfulness and contumacious conduct warranting striking the pleading (*Figiel v. Met Food*, 48 AD3d 330 [1st Dept 2008]).

As the Court of Appeals has reiterated, compliance with Court ordered deadlines is mandatory, and parties bear the consequences of their failure(s) to comply (*Gibbs v. St. Barnabas Hosp.*, 16 NY3d 74 [2010]). “[O]ur court system is dependent on all parties engaged in litigation abiding by the rules of proper practice. The failure to comply with deadlines not only impairs the efficient functioning of the courts and adjudication of claims, but it places jurists unnecessarily in the position of having to order enforcement remedies to respond to the delinquent conducts of members of the bar, often to the detriment of the litigants they represent. Chronic noncompliance with deadlines breeds disrespect for the dictates of the Civil Practice law and Rules and a culture in which cases can linger for years without resolution” (*id.*).

The disregard of Court imposed deadlines will not be tolerated (*Andrea v. Arnone, Hedin, Casker, Kennedy & Drake, Architects & Landscape Architects, P.C.*, 5 NY3d 514, 521 [2005]; *see also Arpino v. F.J.F. & Sons Elec. Co., Inc.*, 102 AD3d 201, 208 [2d Dept 2012]). Therefore, “a party that permits discovery to ‘trickl[e] in [with a] cavalier attitude should not escape adverse consequence” (*Henderson-Jones v. City of New York*, 87 AD3d 498, 504 [1st Dept 2011] quoting *Figdor v. City of New York*, 33 AD3d 560, 561 [1st Dept 2006]).

The Court finds plaintiff Maldonado's noncompliance willful and contumacious. Consequently, her pleading is stricken, as ordered below. The Court also finds plaintiff Torres has also engaged in willful dilatory conduct that would support striking his pleading; however, his appearance on this motion and purported compliance with prior discovery/Court orders militates against immediately striking his pleading. Consequently, plaintiff Torres' pleading is conditionally stricken should he fail to comply as ordered below.

Accordingly, it is

ORDERED that plaintiff Emily Maldonado's complaint is stricken; and it is further

ORDERED that the first cause of action, brought by plaintiff Emily Maldonado, is dismissed; and it is further

ORDERED that the second cause of action, on behalf of Steven Torres, is severed and shall continue consistent with the directives herein; and it is further

ORDERED that the motion is granted to the extent of conditionally striking Steven Torres' complaint should he fail to provide all outstanding discovery as previously ordered in the Court's prior conference orders within 90-days of notice of entry of this decision and order; and it is further

ORDERED that defendants shall notice the Independent Medical Exam (IME) within 30

days of notice of entry of this decision and order and plaintiff Torres shall appear for an IME within 60 days of such notice, and the IME report shall be served within 45 days of examination; and it is further

ORDERED that counsel for plaintiff Torres shall file an affirmation to NYSCEF, and serve upon defendants, attesting to his compliance with this order upon completion of same; and it is further

ORDERED that outstanding depositions shall be completed either in-person or by electronic/virtual means; and it is further

ORDERED that plaintiff Torres shall file a note of issue by March 19, 2021, and this extension is FINAL absent extraordinary circumstances, as found by the Court.

THIS CONSTITUTES THE DECISION AND ORDER OF THE COURT.

Dated: *Nov. 12, 2020*

ENTER:



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