

Yarborough v City of New York
2020 NY Slip Op 33789(U)
November 13, 2020
Supreme Court, New York County
Docket Number: 150013/2016
Judge: Dakota D. Ramseur
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.
This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

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

Justice

-----X

INDEX NO. 150013/2016

RONNELL YARBOROUGH,
Plaintiff,

MOTION DATE 07/31/2020

- v -

MOTION SEQ. NO. 003

THE CITY OF NEW YORK, THE NEW YORK CITY POLICE
DEPARTMENT, P.O. HARRIGAN, POLICE OFFICER JOHN
DOE,

**DECISION + ORDER
ON MOTION**

Defendants.

-----X

The following e-filed documents, listed by NYSCEF document number, were considered on this motion to dismiss/compel (sequence 003): 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 62, 63, 64, 65, 68, 69, 70, 71, 72

Plaintiff Ronnell Yarborough commenced this action to recover damages for false arrest and imprisonment, malicious prosecution, assault and battery, and related state and federal claims stemming from December 13, 2014 arrest for jumping a turnstile in an underground subway passageway in Manhattan. Defendants City of New York, NYPD, and NYPD Officer Harrigan move, pursuant to CPLR 3126, to dismiss the Complaint for failure to provide a Verified Bill of Particulars, response to the City’s combined demands, or a HIPAA authorization, arguing that Plaintiff has wilfully failed to respond to discovery demands. Plaintiff opposes, and provides the discovery. For the reasons below, the motion is denied.

BACKGROUND AND PROCEDURAL HISTORY

Plaintiff filed the Complaint on January 4, 2016 (*NYSCEF 1*). On April 28, 2016, the City filed its answer (later amended to include Officer Harrigan), accompanied by a demand for a Verified Bill of Particulars and Combined Demands, including demands for a CPL §160.50 authorization for NYPD and Criminal Court records and HIPAA authorizations for Plaintiff’s medical records (*NYSCEF 45*). On June 14, 2016, the City wrote to inform Plaintiff that responses remained outstanding (*NYSCEF 46*). The City reiterated its requests in another letter on September 20, 2017 (*NYSCEF 47*). Plaintiff did not respond.

On February 22, 2018, the City moved to dismiss the Complaint or, in the alternative, compel Plaintiff to provide the outstanding discovery (*NYSCEF 49*). On May 29, 2018, the Court (Saunders, J.) granted the motion to the extent of issuing a case scheduling order setting forth discovery deadlines, including 30 days to respond to the demands and provide HIPAA authorizations (*NYSCEF 15*). Plaintiff again failed to respond.

On August 22, 2018, the City wrote to inform Plaintiff that responses remained outstanding (*NYSCEF 52*). Plaintiff again failed to respond. On November 13, 2018, the parties

entered into a court-ordered stipulation requiring that, within 45 days, Plaintiff respond to the Case Scheduling Order and demands (*NYSCEF 53*). Plaintiff again failed to respond.

On May 7, 2019, the parties entered into another so-ordered stipulation requiring Plaintiff to respond within 10 days (*NYSCEF 54*). Plaintiff again failed to respond. On September 16, 2019, the City moved for a second time to dismiss or compel (*NYSCEF 55*). Plaintiff did not oppose, and on December 2, 2019, the Court (Saunders, J.) granted the motion to the extent of ordering Plaintiff to provide the outstanding discovery within 45 days, and further ordered “that if [P]laintiff fails to serve [D]efendant with responses to its discovery demand in accordance with this order, [D]efendant¹ shall be precluded from introducing evidence on issues of physical or psychological damages at trial” (*NYSCEF 56* p 2). Pursuant to the order, the City filed and served the order with notice of entry within 15 days (*NYSCEF 57*). Still, Plaintiff failed to provide Defendants with a Bill of Particulars, a response to the City’s Combined Demands, or HIPAA authorizations. Accordingly, the City moves to dismiss for a third time.

DISCUSSION

CPLR 3126 provides, as relevant here, that

If 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 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.

“[W]hen a party fails to comply with a court order and frustrates the disclosure scheme set forth in the CPLR, it is well within the Trial Judge’s discretion to dismiss the complaint” (*Kihl v Pfeffer*, 94 NY2d 118, 122-23 [1999] [“If the credibility of court orders and the integrity of our judicial system are to be maintained, a litigant cannot ignore court orders with impunity.”]). Disclosure sanctions are appropriate in the presence of a party’s “wilful and contumacious conduct, which may be inferred from...repeated and unexplained failure to comply with various disclosure orders” (*Hamilton v Ctr. for Urban Community Servs.*, 29 Misc 3d 133[A], 133A, 2010 NY Slip Op 51929[U], *1 [App Term 1st Dept 2010], citing *Goldstein v CIBC World Mkts. Corp.*, 30 AD3d 217, 217 [1st Dept 2006] [“Plaintiff’s year-long pattern of noncompliance with the court’s repeated compliance conference orders gave rise to an inference of willful and contumacious conduct (*see Merchants T & F, Inc. v Kase & Druker*, 19 AD3d 134, 796 NYS2d 343 [2005]).

The City, through its submission of prior motions and numerous court orders stemming from those motions and court conferences, has demonstrated a clear pattern of non-compliance. Indeed, Plaintiff’s counsel concedes non-compliance, but denies any intent to abandon the claims and argues that the City has not shown any prejudice. Plaintiff’s counsel cites several reasons for non-compliance: that counsel is a solo practitioner who “lost the one secretary who had been

¹ This was clearly a scrivener’s error and is intended to preclude Plaintiff, the non-compliant party.

with me for quite some time and was thoroughly familiar with the office files.” that the action was not properly diared and erroneously placed in the closed filed box in an off-site storage unit in Brooklyn,” and that counsel moved offices during the pendency of the action (*NYSCEF 62/Pl Opp* ¶ 7). Plaintiff’s counsel also explained that the Covid-19 pandemic made retrieval of the file from the storage unit difficult until July 5, 2020 (*id.* ¶ 16). Plaintiff’s counsel attaches to the motion a Verified Bill of Particulars, combined discovery responses, and Plaintiff’s demands (*NYSCEF 63-65*).

In reply, the City concedes that Plaintiff’s responses are complete, but argues that because Plaintiff did not “completely provide all outstanding discovery responses until July 23, 2020,” filed late opposition, and has not demonstrated any reasonable excuse for the delay, the Complaint should nevertheless be dismissed. The City correctly argues that self-executing conditional order became absolute upon the failure to timely comply with that order (*AWL Indus., Inc. v QBE Ins. Corp.*, 65 AD3d 904, 905 [1st Dept 2009]). The Court also agrees that Plaintiff’s counsel’s stated excuses are ambiguous, unsupported, or insufficient; in particular, Plaintiff’s counsel’s failure to oppose prior motions is completely inexcusable. Nevertheless, as Plaintiff argues in opposition, “[e]ven if the entire period of counsel’s delay was not excusable, a client should not be deprived of his day in court by his attorney’s neglect or inadvertent error, especially where the other party cannot show prejudice ... and the complaint has merit” (*Nicholos v Cashelard Rest.*, 249 AD2d 187, 190 [1st Dept 1998]).

Though the City credibly argues that four years of delays can be construed as prejudicial—and the City is correct that the delay is certainly less than ideal—the City’s argument relating to its ability to identify witnesses and obtain records related to Plaintiff’s arrest and prosecution are undermined by the fact that the City’s employees were involved in arresting, processing, and prosecuting Plaintiff (*see e.g. Grullon v City of NY*, 222 AD2d 257, 258 [1st Dept 1995] [permitting claims for false arrest and imprisonment, but not claims for assault or negligence in handcuffing and physically handling petitioner at the time of the arrest, where there was no showing that the City had timely notice, and therefore a timely opportunity to investigate those claims]). In the view of the “strong public policy favoring resolution of litigation on the merits,” (*Country-Wide Ins. Co. v Valdan Acupuncture, P.C.*, 150 AD3d 560, 561 [1st Dept 2017]), Plaintiff’s opposition is sufficient, albeit barely so, in light of Plaintiff’s substantial compliance with the demands (*see also Spectrum Sys. Intl. Corp. v Chem. Bank*, 78 NY2d 371, 376 [1991] [“[CPLR 3101] embodies the policy determination that liberal discovery encourages fair and effective resolution of disputes on the merits, minimizing the possibility for ambush and unfair surprise”]; *Cambry v Lincoln Gardens*, 50 AD3d 1081, 1082 [2d Dept 2008] [“Belated but substantial compliance with a discovery order undermines the position that the delay was a product of willful or contumacious conduct.”]). The Court cautions Plaintiff’s counsel, however, that future delays will not be tolerated, and encourages the parties to proceed expeditiously.

CONCLUSION/ORDER


For the reasons above, it is

ORDERED that Defendants' motion to dismiss and/or preclude is **DENIED**; and it is further

ORDERED that Plaintiff shall, within 30 days, e-file and serve a copy of this decision upon Defendants; and it is further

ORDERED that the parties shall, within 30 days, email Samuel Wilkenfeld (swilkenf@nycourts.gov) to schedule a compliance conference to be held as soon as practicable based on Mr. Wilkenfeld's schedule.

This constitutes the decision and order of the Court.



11/13/2020
New York, NY

DAKOTA D. RAMSEUR, J.S.C.

CHECK ONE:

CASE DISPOSED
GRANTED
SETTLE ORDER
INCLUDES TRANSFER/REASSIGN

DENIED

NON-FINAL DISPOSITION
GRANTED IN PART
SUBMIT ORDER
FIDUCIARY APPOINTMENT

OTHER

REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: