

Mickens v Iqbal

2020 NY Slip Op 35626(U)

October 20, 2020

Supreme Court, Queens County

Docket Number: Index No. 717117/2018

Judge: Maurice E. Muir

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Short Form Order

FILED

**10/21/2020
11:11 AM**

NEW YORK SUPREME COURT – QUEENS COUNTY

**COUNTY CLERK
QUEENS COUNTY**

Present: HONORABLE MAURICE E. MUIR
Justice

ALLEN E. MICKENS,

Plaintiff,

-against-

AMIR IQBAL and GREEN LEASING INC.,

Defendants.

IAS Part - 42

Index No.: 717117/2018

Motion Date: 9/24/20

Motion Cal. No. 8

Motion Seq. No. 2

The following electronically filed documents read on this motion by Allen E. Mickens (“Mr. Mickens” or “plaintiff”) for an order: (a) striking the Answer of Green Leasing Inc. (“Green Leasing”) and Amir Iqbal (“Mr. Iqbal”) (collectively, the “defendants”), pursuant to CPLR § 3126, or in the alternative; (b) precluding defendants from offering testimony at the time of trial, pursuant to CPLR § 3126.

	<u>Papers Numbered</u>
Notice of Motion - Affirmation- Exhibits-Service.....	EF 13
Affirmation in Opposition - Exhibits.....	EF 23 - 25
Reply Affirmation.....	EF 26

Upon the foregoing papers, it is ordered that this motion is determined as follows:

BACKGROUND

This is an action to recover damages for personal injuries allegedly sustained by the plaintiff due to a motor vehicle collision. In particular, the plaintiff alleges on June 26, 2016, he was the operator of a motor vehicle that was completely stopped on Flatbush Avenue at its intersection with Empire Boulevard, in Brooklyn, New York, when suddenly and without warning, the vehicle operated by Mr. Iqbal and owned by Green Leasing reversed into the front of his vehicle. As a result, on or about November 7, 2018, the plaintiff commenced the instant action against the defendants. On or about January 2, 2019, issue was joined wherein, the

defendants interposed an answer. On April 4, 2019, the parties appeared for a preliminary conference (“PC”), wherein the defendants were instructed to appear for an examination before trial (“EBT”) on or before July 9, 2019. Thereafter, September 30, 2019, the parties appeared for a compliance conference (“CC”) wherein, the defendants were directed to appear for deposition on December 18, 2019 at 10:00 a.m. In particular, the compliance conference order (“CCO”) provides that “... any failure to comply strictly with the terms of this order shall be grounds for the striking of pleadings or other relief pursuant to CPLR 3126.” On January 2, 2020, the plaintiff filed and served a motion to strike defendants’ Answer for their failure to appear for three (3) scheduled depositions, in violation of two (2) court orders, or in the alternative, to preclude defendants from offering any testimony at the time of trial unless they appear for a deposition on a date certain. However, on February 20, 2020, the court denied the motion because, the movant failed to strictly comply with 22 NYCRR § 202.7[c]. Pursuant to the COC, on February 28, 2020, the plaintiff filed his note of issue (“NOI”) with the clerk of the court.

Notwithstanding on the same, on March 19, 2020, the plaintiff filed the instant motion seeking an order to either to strike the defendants’ answer or to preclude them for offering testimony at the time of trial. Specifically, the plaintiff contends that despite the court’s issuance of a PCO and CCO, the defendants failed to appear for an EBT. In opposition, counsel for the defendant argues that they have not been able to locate Mr. Iqbal. As a result, they have hired a private investigator to locate Mr. Iqbal’s whereabouts. Moreover, their investigator has been conducting a CD-ROM/database and internet search, searching a national telephone listing, contacting directory assistance, conducting a postal search and searching the records of the department of motor vehicles in order to obtain an up to date address and or telephone number for Mr. Iqbal. Furthermore, defense counsel argues that “[w]hen a Defendant cannot be located to appear for an EBT, after a diligent good faith effort to produce him, the appropriate remedy is not to strike the Answer but to Order a Conditional Preclusion if they do not appear for EBT thirty (30) days before the trial of this action. Thereby preventing prejudice to movant at trial but allowing the matter to proceed on its merits.” In reply, counsel for the plaintiff argues that “[s]hould this Court decide not to strike the Defendants’ Answer, then Plaintiff asks that this Court issue an Order for the deposition of Defendants on a date certain, otherwise their Answer shall be stricken.”

APPLICABLE LAW

“[A] trial court is given broad discretion to oversee the discovery process” (*Castillo v. Henry Schein, Inc.*, 259 AD2d 651, 652 [2d Dept 1999]). Although actions should be resolved on the merits wherever possible (*see Cruzatti v. St. Mary’s Hosp.*, 193 AD2d 579 [2d Dept 1999]), a court may strike the “pleadings or parts thereof” (CPLR 3126 [3]) as a sanction against a party who “refuses to obey an order for disclosure or willfully fails to disclose information which the court finds ought to have been disclosed” (CPLR § 3126). While the nature and degree of the sanction to be imposed on a motion pursuant to CPLR § 3126 is a matter of discretion with the court (*see Soto v. City of Long Beach*, 197 AD2d 615, 616 [2d Dept 1993]; *Spira v. Antoine*, 191 AD2d 219 [2d Dept 1993]), “the remedy of dismissal is only warranted where there has been a clear showing that the failure to comply with discovery demands was willful and contumacious” (*see Rosenblatt v. Franklin Hosp. Med. Ctr.*, 165 AD3d 862 [2d Dept 2018] [internal quotation marks omitted]). Willful and contumacious conduct may be inferred from a party’s repeated failure to comply with court-ordered discovery, coupled with inadequate explanations for the failures, or a failure to comply with court-ordered discovery over an extended period of time (*see Maliah-Dupass v. Dupass*, 166 AD3d 873, 875 [2d Dept 2018]; *Teitelbaum v. Maimonides Med. Ctr.*, 144 AD3d 1013 [2d Dept 2016]; *Gutman v. Cabrera*, 121 AD3d 1042, 1043 [2d Dept [2d Dept 2014]). Furthermore, it is well settled law that the drastic remedy of striking an answer is inappropriate absent a clear showing that a defendant’s failure to comply with discovery demands is willful and contumacious. (*Honghui Kuang v. MetLife*, 159 AD3d 878 [2d Dept 2018]; *Zubaidi v. Hasbani*, 136 AD3d 708 [2d Dept 2016] citing *Poveromo v. Kelley–Amerit Fleet Servs., Inc.*, 127 AD3d 1048 [2d Dept 2015]; *Dutchess Truck Repair, Inc. v. Boyce*, 120 AD3d 543 [2d Dept 2014]; *JP Morgan Chase Bank, N.A. v. New York State Dept. of Motor Vehs.*, 119 AD3d 903 [2d Dept 2014]).

DISCUSSION

Here, the court finds that despite the defendants’ contentions, the plaintiff has demonstrated that it made a good faith effort to resolve the instant discovery dispute with opposing counsel – as required by 22 NYCRR § 202.7[c]. Moreover, the courts finds that the plaintiff has demonstrated unusual or unanticipated circumstances, which warrants allowing him additional discovery after he filed the NOI. Pursuant to 22 NYCRR 202.21, it states, in relevant part, that “[w]here unusual or unanticipated circumstances develop subsequent to the filing of a note of issue and certificate of readiness which require additional pretrial proceedings to prevent

substantial prejudice, the court, upon motion supported by affidavit, may grant permission to conduct such necessary proceedings.” (*Roye v. Gelberg*, 172 AD3d 1260 [2d Dept 2019]; *Arroyo v. Lacuesta*, 140 AD3d 994 [2d Dept 2016]; *James v. New York City Transit Authority*, 294 AD2d 471 [2d Dept. 2002]). Here, the plaintiff filed his note of issue on February 28, 2020, just twelve (12) days before the COVID-19 pandemic.

Lastly, the court finds that Mr. Iqbal has failed to appear for scheduled EBTs on numerous occasions (e.g., 7/8/19, 9/27/19, 12/17/19, and 2/17/20); and the counsel for the defendants admittedly has been forced to retain a private investigator to locate Mr. Iqbal whereabouts. Contrary to the defendant's contention, the fact that Mr. Iqbal has disappeared or made himself unavailable does not provide a basis for denying that branch of the plaintiff's motion to strike his answer for his failure to appear at a EBT and to comply with court-ordered discovery requests. (*Carmona v. HUB Properties Trust*, 2020 NY Slip Op 05030 [2d Dept 2020]; see also *Bouri v. Jackson*, 177 AD3d at 949835 [2d Dept 2019]; *Sepulveda v. 101 Wooddruff Avenue Owner, LLC*, 166 AD3d 835 [2d Dept 2018]).

Accordingly, it is hereby

ORDERED that plaintiff's motion for an order striking defendants' answers is denied; and it is further,

ORDERED that plaintiff motion for an order to preclude, pursuant to CPLR 3126, is granted to the extent that defendant Amir Iqbal is hereby conditionally precluded from offering any testimony in this action at the time of trial provided he is not produced at examination before trial on or before January 15, 2021; and it is further,

ORDERED that the plaintiff is directed to serve defendants with a copy of this Order with Notice of Entry, via certificate of mail, on or before November 30, 2020.

The foregoing constitutes the decision and order of the court.

Dated: October 20, 2020
Long Island City, NY

FILED

10/21/2020
11:11 AM

COUNTY CLERK
QUEENS COUNTY



MAURICE E. MUIR, J.S.C.