

Philanthrope v Papa John's Pizza

2021 NY Slip Op 30480(U)

February 18, 2021

Supreme Court, New York County

Docket Number: 450723/2018

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

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 MARIE PHILANTHROPE,

Plaintiff,

-against-

PAPA JOHN'S PIZZA, PAPA JOHN'S USA, INC.,
 and 146-148 LAWRENCE, LLC.

Defendants.

-----X
 146-148 LAWRENCE, LLC,

Third-party Plaintiff,

-against-

A.M.S.N. INC. d/b/a PAPA JOHN'S PIZZA,
 A.M.S.N. INC., F.N.J., INC. d/b/a PAPA JOHN'S
 PIZZA and F.N.J., INC.,

Third-Party Defendants.

-----X
 NERVO, J.

Defendants move, pursuant to CPLR § 3126, for an order striking plaintiff's complaint due to her failure to appear for deposition. The motion is unopposed.

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 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]).

“[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” (*Gibbs v. St. Barnabas Hosp.*, 16 NY3d 74 [2010]). Compliance requires a timely response and good faith effort to provide a meaningful response (*Kihl v. Pfeffer*, 94 NY2d 118, 123 [1999]). Disregard of discovery 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]). “[U]pon learning that a party has repeatedly failed to comply with discovery order, [trial courts] have an affirmative obligation to take such additional steps as are necessary to ensure future compliance” (*Figdor v. City of New York*, 33 AD3d 560, 561 [1st Dept 2006]).

The Court ordered, inter alia, plaintiff's deposition be held on or before April 16, 2020 (see March 13, 2020 Compliance Conference Order - NYSCEF Doc. No. 124).¹ This conference order was issued immediately before the COVID-19 pandemic impacted in-person Court functions and in-person gatherings throughout the State. Plaintiff's deposition was not held in April, due to the impacts of COVID-19. Defendants contend they contacted plaintiff to reschedule her deposition, virtually, twice in April and once in July, without response. Defendants emailed plaintiff again in September, and plaintiff's counsel responded, however plaintiff's counsel failed to select a deposition date from defendants' availability. Plaintiff's counsel did not respond to defendants' final email in November.

Plaintiff's counsel's failure to reschedule the deposition, or to meaningfully respond to defendants' attempts at same, amounts to bad faith nondisclosure and failure to comply with previous Court order, behavior sufficient to warrant striking the complaint. Further supporting this finding of willful and contumacious conduct is plaintiff's counsel's failure to appear on this motion (*Figiel v. Met Food*, 48 AD3d 330 [1st Dept 2008]).

Notwithstanding, given the impacts of COVID-19, the Court, in its discretion, will not strike plaintiff's complaint outright, at this time. Instead, the Court finds conditionally striking plaintiff's complaint is sufficient, at this time, to ensure future compliance (see *Figdor v. City of New York*, 33 AD3d at 561). Therefore, plaintiff's

¹ Defendants' previous motion, seeking to compel discovery from plaintiff, was withdrawn in accordance with the March 13, 2020 conference order (see Decision and Order - NYSCEF Doc. No. 125).

complaint is conditionally stricken should plaintiff fail to appear for a deposition, as ordered below.

Accordingly, it is

ORDERED that plaintiff's complaint is conditionally stricken should plaintiff fail to appear at the below deposition; and it is further

ORDERED that should plaintiff fail to appear at the below deposition, defendants shall bring an application dismissing the action, pursuant to this Order, within 30 days; and it is further

ORDERED that plaintiff shall appear for a deposition on March 16, 2021 beginning at 10:00am and continuing thereafter day-to-day until completion; and it is further

ORDERED that the deposition shall occur either in-person or through electronic videoconference means; and it is further

ORDERED that post-deposition demands shall be served within 20 days the deposition's completion, and responses thereto shall be served within 20 days of receipt of demand; and it is further

ORDERED that failure to timely serve post-deposition demands shall constitute waiver of same; and it is further

ORDERED that the deadline to file a note of issue is extended to May 14, 2021; and it is further

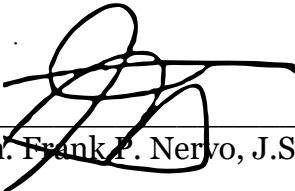
ORDERED that failure to timely file the note of issue may result in dismissal of the action, in the Court's discretion and upon further application; and it is further

ORDERED that the parties are reminded that the part's rules require extension of the note of issue deadline be brought by motion and prohibit post-note of issue discovery.

THIS CONSTITUTES THE DECISION AND ORDER OF THE COURT.

Dated: February 18, 2021

ENTER:



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