

Mealy v Atlantic Brookland, LLC
2021 NY Slip Op 30505(U)
February 18, 2021
Supreme Court, Kings County
Docket Number: 514600/18
Judge: Lawrence S. Knipel
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At an IAS Term, Part 57 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 18th day of February 2021.

P R E S E N T:

HON. LAWRENCE KNIPEL,

Justice.

-----X
JOSEPH MEALY,

Plaintiff,

- against -

Index No. 514600/18

ATLANTIC BROOKLAND, LLC,

Defendants.
-----X

The following e-filed papers read herein:

NYSCEF Doc Nos.¹

Notice of Motion/Order to Show Cause/

Petition/Cross Motion and

Affidavits (Affirmations) Annexed_____

26-37

Opposing Affidavits (Affirmations)_____

39-40

Reply Affidavits (Affirmations)_____

43

Upon the foregoing papers in this labor law action, plaintiff, Joseph Mealy (plaintiff) moves (in motion sequence [mot. seq.] two) for reargument and reconsideration of this court's October 21, 2020 mot. seq. one order, which declined to strike defendant's answer and extended the time to complete discovery and file the note of issue.

Plaintiff, in his complaint, filed July 17, 2018 (*see* NYSCEF Doc No. 1), alleges that he was seriously injured after stepping aside to allow a truck to pass and falling into a pit at a work site. Defendant, Atlantic Brookland, LLC (defendant), the general

¹New York State Courts Electronic Filing Document Numbers.

contractor on that job filed its answer containing 15 affirmative defenses on December 21, 2018, but no combined discovery demands were served with the answer (*see* NYSCEF Doc No. 4).

A preliminary conference was held on May 23, 2019, defendant failed to appear and an order (*see* NYSCEF Doc Nos. 7, 30, annexed as exhibit C to plaintiff's moving papers), prepared by plaintiff on defendant's default, was entered. The order contained a written-in portion that directed defendant to provide a bill of particulars as to affirmative defenses within 45 days of the date of the preliminary conference order or date of demand, whichever was later. Court filings contain no indication that plaintiff made a demand for a bill of particulars or for any other discovery.

The completed, preprinted preliminary conference form requires plaintiff to provide authorizations as to his medical treatments for the accident, both parties to provide witness information and that defendant disclose insurance policies covering the claim. Neither party has moved to compel responses to the preliminary conference order.

Defendant thereafter failed to appear for two compliance conferences, the first on September 9, 2019 (*see* NYSCEF Doc Nos. 8, 31, annexed as exhibit D to plaintiff's moving papers) and the second on January 13, 2020 (*see* NYSCEF Doc Nos. 9, 32, annexed as exhibit E to plaintiff's moving papers). Both compliance conference orders, prepared by plaintiff on defendant's default, scheduled depositions and defense medical examinations and provided for postdeposition demands. Neither sets forth any outstanding discovery responses due. The completed, preprinted forms directed both parties to respond to any outstanding demands, but no demands were made.

Plaintiff sent a letter dated March 16, 2020, the eye of the “New York Pause Period” (Pause Period), to defendant (*see* NYSCEF Doc No. 19), both questioning who represented it, as the attorneys who had answered on its behalf had advised that they no longer represented defendant, and also seeking insurance information. Eventually, plaintiff filed a motion on September 23, 2020, mot. seq. one, to strike defendant’s answer (*see* NYSCEF Doc Nos. 11-12) for defendant’s failure to respond to the March 16, 2020 letter, sent six months earlier, to proceed with discovery and to properly substitute counsel. The good faith affirmation (*see* NYSCEF Doc No. 13) cites only to the March 16, 2020 letter as plaintiff’s good faith effort to resolve the issues before making the motion.

Defendant’s current counsel filed a notice of appearance dated October 20, 2020 (*see* NYSCEF Doc No. 21, 35, annexed as exhibit H to plaintiff’s moving papers), and the following day, October 21, 2021, the return date of the motion, defendant filed opposition to the motion (*see* NYSCEF Doc No. 23) with the insurance information requested in plaintiff’s March 16 letter (*see* NYSCEF Doc No. 24). Defendant urged that, having filed a notice of appearance on behalf of defendant, having responded to both items set forth in plaintiff’s letter and having provided insurance information, the motion to strike should be denied. The court’s October 21, 2020 order (*see* NYSCEF Doc No. 25, 37, annexed as exhibit J to plaintiff’s moving papers) accordingly declined to strike defendant’s answer, and, in the interests of justice and in providing the opportunity for the case to be determined upon its merits, extended the time for the parties to complete discovery.

Plaintiff now seeks reconsideration of that order and asserts that the court erred in not striking the answer either for defendant's failure to properly substitute counsel during the year and a half that answering counsel allegedly was not representing defendant or for defendant's failure to move forward with discovery. However, it must be noted in this regard that plaintiff did not move to strike at any time due to defendant's nonappearance at three separate court conferences, did not submit any discovery demands nor a demand for a bill of particulars as to affirmative defenses nor any motions to compel defendant to take depositions, or otherwise seek to proceed. It appears that plaintiff allowed this matter to languish until March 2020, more than a year and a half from the date of the preliminary conference. When plaintiff's counsel reached out to defendant's counsel, and first discovered that such counsel no longer represented defendant, that effort coincided with the eve of the Pause Period. Thereafter, plaintiff's first motion in this case sought to strike defendant's answer, and occurred without any prior good faith attempt to set a discovery schedule or comply with prior scheduling orders.

Ordinarily, the absence of a proper affirmation setting forth the efforts to resolve the issues pursuant to Uniform Rules for Trial Courts (22 NYCCRR) § 202.7 would, on its own, doom the motion, but here, the defendant is a corporation and cannot appear without counsel. As a practical matter, plaintiff could not resolve the issues in the motion until defendant obtained counsel, but plaintiff did not learn that defendant was unrepresented until a year and a half after plaintiff's own inactivity on this case.

Plaintiff has not established a good faith basis for reconsideration of this court's order nor demonstrated a basis to strike the answer at this juncture. Neither party made

any effort to move this case forward, such as noticing depositions or moving to compel compliance with prior scheduling orders before the motion to strike. Nevertheless, it is

ORDERED that defendant shall file a proper substitution of attorney forthwith; and it is further

ORDERED that the plaintiff's motion, mot. seq. two, is otherwise denied.

This constitutes the decision and order of the court.

E N T E R,

J. S. C.

HON. LAWRENCE KNIPEL
ADMINISTRATIVE JUDGE