

Rosario v Port Auth. of N.Y. & N.J.
2021 NY Slip Op 31184(U)
April 9, 2021
Supreme Court, New York County
Docket Number: 150040/2018
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
NEW YORK COUNTY**

PRESENT: HON. FRANK P. NERVO PART IAS MOTION 4

Justice

-----X

MIGUEL ROSARIO,

Plaintiff,

- v -

THE PORT AUTHORITY OF NEW YORK & NEW JERSEY,
ONE WORLD TRADE CENTER LLC, BP MECHANICAL
CORP., WTC TOWER 1 LLC, TOWER 5 LLC,

Defendant.

-----X

BP MECHANICAL CORP.

Plaintiff,

-against-

ATLANTIC CONTRACTING & SPECIALTIES, LLC

Defendant.

-----X

**DECISION + ORDER ON
MOTION**

Third-Party
Index No. 595271/2018

The following e-filed documents, listed by NYSCEF document number (Motion 003) 93, 94, 95, 96, 97, 98, 99, 100

were read on this motion to/for EXTEND - TIME.

Upon the foregoing documents, the motion is decided in accordance with the annexed decision and order of even date. Any requested relief not addressed therein has nevertheless been considered and is hereby denied.

4/9/2021
DATE


FRANK P. NERVO, J.S.C.

CHECK ONE:

CASE DISPOSED
GRANTED DENIED
SETTLE ORDER
INCLUDES TRANSFER/REASSIGN

NON-FINAL DISPOSITION
GRANTED IN PART
SUBMIT ORDER
FIDUCIARY APPOINTMENT

OTHER
 REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK, PART IV

-----X
MIGUEL ROSARIO,

Plaintiff,

-against-

DECISION AND ORDER

INDEX NO. 150040/2018

THE PORT AUTHORITY OF NEW YORK & NEW JERSEY,
ONE WORLD TRADE CENTER LLC, BP MECHANICAL
CORP., WTC TOWER 1 LLC and TOWER 5, LLC,

Defendants

-----X
BP MECHANICAL CORP.,

Third-Party Plaintiff,

-against-

ATLANTIC CONTRACTING & SPECIALTIES, LLC,

Third-Party Defendant.

-----X
NERVO, J.:

The World Trade Center and Port Authority defendants move to extend the note of issue (NOI) deadline and for a protective order staying the filing of the note of issue until the completion of discovery. No party opposes this application. The parties sought the instant relief by Court conference, in contravention of the Part Rules. The Court advised the parties that the NOI could not be extended at conference and such relief was properly sought by motion. Notwithstanding, the Court held a conference where the parties discussed their proposed discovery schedule, in the event the Court granted the instant motion.

As an initial matter, while movants correctly state that this application is the first motion to extend the NOI, the Court notes that it is not the first extension of the NOI deadline. At the compliance conference of February 2020, the Court set July 31, 2021 as the NOI deadline. Thereafter, and following the initial impact of the COVID pandemic, the Court, by Decision and Order of September 3, 2020, extended the NOI deadline more than six months to March 31, 2021 (NSYCEF Doc. No. 90). The Court's decision considered the impacts of COVID-19 on discovery, directed the deposition of plaintiff occur on or before November 30, 2020, and directed all other depositions be completed on or before December 31, 2020. In further consideration of the impact of COVID-19, the Court directed that depositions proceed "either in-person or by electronic means" (*id.*). Likewise, the Court ordered plaintiff's medical exam occur on or before January 31, 2021. Notwithstanding, depositions have not occurred, nor has a medical examination of plaintiff been conducted.

As the Court of Appeals has repeatedly underscored, "our 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]).

A pattern of default, lateness, and failure to comply with court orders can give rise to an inference of willful and contumacious conduct sufficient to strike a pleading or impose sanctions (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]). “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]). Furthermore, “[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]).

This is precisely the situation at bar. Here, movants cite the generalized impacts of COVID-19 as the reason for the parties’ non-compliance with the Court’s prior orders. However, the Court’s September 3, 2020 Decision and Order considered these impacts, as well as the continued impacts of COVID-19, in extending discovery deadlines. It

cannot be gainsaid that the parties' noncompliance is due to their apparent lack of urgency in completing discovery in this matter.

Further supporting a finding that the parties have approached discovery and compliance with the Court's orders in a lackadaisical fashion, is the timing of the instant motion. This motion to extend the NOI deadline was filed a week before the deadline for same; four months after the Court ordered deadline to depose plaintiff had passed, three months after the Court ordered deadline to complete all other depositions had passed, and two months after the Court ordered deadline to complete plaintiff's independent medical examination (*see* NYSCEF Doc. 90; 93). Moreover, it is not lost on the Court that the parties completed only that discovery upon which the Court conditionally struck plaintiff's pleading, ignoring the remainder of the Court's order imposing further deadlines for depositions and medical exams (*id.*). Consequently, the Court finds all counsel have engaged in contumacious, bad-faith noncompliance with the Court's prior order and that such behavior is sanctionable. The Court further finds the instant order necessary to ensure future compliance.

Accordingly, it is

ORDERED that to the extent the motion seeks a protective order it is denied; and it is further

ORDERED that to the extent the motion seeks to extend the NOI deadline it is granted consistent with the below; and it is further

ORDERED that counsel for plaintiff, Gorayeb & Associates, P.C.; defendants, London Fischer LLP; third-party plaintiff, The Law Offices of James J. Toomey; and third-party defendant, Hannum Feretic Prendergast & Merlino, LLC, are each sanctioned in the amount of \$1,500.00, payable to the Lawyer's Fund for Client Protection, 119 Washington Avenue Albany, New York 12210; and it is further

ORDERED that the aforementioned sanction shall not be billed to counsels' clients; and it further

ORDERED that imposition of the above sanction is stayed until the compliance conference of September 30, 2021; and it is further

ORDERED that the note of issue deadline is extended to September 29, 2021; and it is further

ORDERED that all depositions shall be completed by June 30, 2021;

ORDERED that post-deposition demands shall be served within 20 days of EBT 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 defendants shall notice plaintiff's IME on or before June 30, 2021, plaintiff shall appear for a deposition within 30 days of notice of same, and defendants shall serve a copy of the IME report within 30 days of exam; and it is further

ORDERED that failure to notice the IME as above shall constitute waiver of same; and it is further

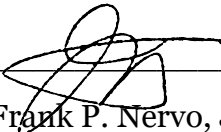
ORDERED that the end date for all discovery shall be September 17, 2021; and it is further

ORDERED that counsel appear for a compliance conference before Justice Nervo on September 30, 2021 at 11:30am via Microsoft Teams.

THIS CONSTITUTES THE DECISION AND ORDER OF THE COURT.

Dated: April 9, 2021

ENTER:



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