

Martin v Roosevelt Is. Operating Corp.
2021 NY Slip Op 32437(U)
November 23, 2021
Supreme Court, New York County
Docket Number: Index No. 158560/2015
Judge: Barbara Jaffe
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. BARBARA JAFFE **PART** **12**

Justice

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GERARD MARTIN,

Plaintiff,

- v -

INDEX NO. 158560/2015

MOTION DATE _____

MOTION SEQ. NO. 008 009 010

THE ROOSEVELT ISLAND OPERATING CORP.
OF THE STATE OF NEW YORK, COLER,
GOLDWATER SPECIALTY HOSPITAL, NEW
YORK HEALTH & HOSPITALS CORP.,
ROOSEVELT ISLAND PUBLIC SAFETY DEPT.,
RIVERWALK LANDING CONDOMINIUM ASSOC.,
GERAD MOSES, JOHN DOE, ABC CORP.,

Defendants.

**DECISION + ORDER ON
MOTION**

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The following e-filed documents, listed by NYSCEF document number (Motion 008) 226-238, 260 were read on this motion for reargument.

The following e-filed documents, listed by NYSCEF document number (Motion 009) 241-252, 261-276 were read on this motion for reargument.

The following e-filed documents, listed by NYSCEF document number (Motion 010) 253-258, 277-294 were read on this motion to modify order.

By notice of motion, defendant Board of Managers of Riverwalk Landing Condominium i/s/h/a Riverwalk Landing Condominium Association (Riverwalk) moves for an order granting it leave to reargue its cross motion for an order striking plaintiff's complaint for failure to provide discovery (mot. seq. eight). Plaintiff opposes; co-defendants Roosevelt Island Public Safety Department and Roosevelt Island Operating Corporation (collectively, Roosevelt) join in the motion.

By notice of motion, defendants Coler, Goldwater Specialty Hospital & Nursing Facility

and New York City Health and Hospitals Corporation (collectively, Hospital) move for leave to reargue their cross motion for an order striking plaintiff's complaint (mot. seq. nine). Plaintiff opposes, and Roosevelt joins in the motion.

By notice of motion, plaintiff moves for leave to reargue Riverwalk's cross motion to the extent that sanctions were imposed against him (mot. seq. 10). Riverwalk, Hospital, and Roosevelt oppose.

The motions are consolidated for disposition.

I. JULY 15, 2021 DECISION (NYSCEF 219)

By decision and order dated July 15, 2021, defendants' motions to strike were granted to the extent of precluding plaintiff from offering in evidence proof related to injuries due to his failure to produce evidence despite several court orders, including an order dated April 2021 wherein he was warned that a failure to comply would lead to the imposition of sanctions against him. The missing documents include updated medical records related to plaintiff's continued treatment, medical authorizations, and certain discovery responses. It was also determined that plaintiff's conduct in failing to provide the documents and in failing to oppose the motions to strike was willful and contumacious. (NYSCEF 214).

II. ANALYSIS

Defendants allege that given plaintiff's non-compliance and failure to provide discovery, they are unable to defend themselves sufficiently, and that as he engaged in willful and contumacious conduct, dismissal of his complaint is the appropriate sanction, rather than preclusion. They argue that caselaw permitting the striking of a pleading based on a failure to comply with discovery orders was overlooked in deciding the motions. Defendants also observe that in the July 2021 decision and order, plaintiff's failure to appear at a scheduled IME is not

mentioned, which constitutes further support of their argument that dismissal is appropriate here. (NYSCEF 227).

Plaintiff alleges that he provided the required discovery to defendants and has attempted to reschedule his IME, explaining his failure to appear previously as resulting from the COVID-19 pandemic and a misunderstanding of the IME process. Plaintiff's counsel contends that he did not serve timely discovery responses or oppose defendants' affirmations of non-compliance as he is a solo practitioner inundated with legal work that had accumulated during the pandemic. (NYSCEF 262).

In reply, defendants contend that plaintiff still has not provided the required discovery, nor has he provided a reasonable excuse for the failure to do so or to appear for an IME. (NYSCEF 292).

A review of the parties' submissions reflects that plaintiff attempted to comply with the April 2021 order, and counsel offers a reasonable excuse for his failures. (NYSCEF 266-274). Moreover, a court has broad discretion in supervising disclosure, and there is a strong preference for resolving cases on their merits. (*Youwanes v Steinbrech*, 193 AD3d 492 [1st Dept 2021]). The cases cited by defendants do not require the dismissal of a pleading for failure to provide discovery; rather, it is one of the sanctions that a court may order.

However, to the extent that plaintiff still owes discovery to defendants, in the exercise of discretion, plaintiff is given one final opportunity to provide any remaining discovery to defendants and appear for his IME. This is a self-executing order; if plaintiff fails to comply, his complaint will be dismissed.

III. CONCLUSION

Accordingly, it is hereby

ORDERED, that defendants' motions for leave to reargue (seq. eight, nine) and plaintiff's motion for leave to reargue (seq. 10) are held in abeyance pending plaintiff's compliance with this order; it is further

ORDERED, that plaintiff provide any remaining discovery to defendants within 45 days of the date of this order; it is further

ORDERED, that plaintiff contact defendants, within 10 days of the date of this order, to schedule his IME, and he is directed to appear for the IME on the agreed-upon date; it is further

ORDERED, that if plaintiff fails to comply with this order, defendants may file an affirmation of non-compliance, and if it is determined that plaintiff failed to comply, the complaint will be dismissed; and it is further

ORDERED, that if plaintiff complies with the order, the parties are directed to notify the court by email to cpaszko@nycourts.gov.

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BARBARA JAFFE, J.S.C.

11/23/2021
DATE

CHECK ONE:

CASE DISPOSED
GRANTED DENIED
SETTLE ORDER
INCLUDES TRANSFER/REASSIGN

NON-FINAL DISPOSITION
GRANTED IN PART
SUBMIT ORDER
FIDUCIARY APPOINTMENT

OTHER

REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: