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| Moore v NJ Tr. Corp. |
| 2022 NY Slip Op 31431(U) |
| May 2, 2022 |
| Supreme Court, New York County |
| Docket Number: Index No. 153229/2018 |
| Judge: Lisa S. Headley |
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. LISA HEADLEY PART 22M

Justice

-----X

STEVEN MOORE,

Plaintiff,

- v -

NJ TRANSIT CORP. A/K/A AND/OR D/B/A NJ TRANSIT
AND/OR NEW JERSEY TRANSIT BUS OPERATIONS,
INC.,MARIO RIOJA

Defendant.

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INDEX NO. 153229/2018

MOTION DATE N/A, N/A

MOTION SEQ. NO. 001 002

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 12, 13, 14, 15, 16, 17, 18, 19, 20, 22, 23, 24, 29, 31

were read on this motion to/for STRIKE PLEADINGS.

The following e-filed documents, listed by NYSCEF document number (Motion 002) 25, 26, 27, 28, 30, 33, 34, 35, 36

were read on this motion to/for DISMISSAL.

In this personal injury action arising out of an alleged motor vehicle/bus accident, plaintiff Steven Moore moves (Motion Seq. 001) (Doc No. 12) 1 for an Order (CPLR 3126) striking the Answer (Doc. No. 16) of defendants NJ Transit Corp., a/k/a and/or d/b/a New Jersey Transit Bus Operations, Inc., (collectively, defendant NJ Transit), and Mario Rioja (defendant Rioja), for defendants' willful failure to respond to plaintiff's Combined [Discovery] Demands (discovery demands) (Doc No. 18) and failure to appear for a deposition as directed to do so by an 11/25/2019 Compliance Conference Order (the CC Order) (Doc No. 19). Alternatively, plaintiff seeks an Order precluding defendants from giving any testimony at the time of trial for failure to comply

1 References to "Doc No." followed by a number refers to documents filed in NYSCEF.

with discovery demands, and/or a conditional order precluding defendants from giving any testimony at the time of trial unless defendants appear for a deposition on or before a date certain.

Defendants cross-move in Motion Seq. 001 for an Order (CPLR 3211 [a] [2]), dismissing the Summons and Complaint (the Complaint) (Doc No. 15) for lack of subject matter jurisdiction. Separately, by Notice of Motion (Motion Seq. 002), defendants again move (CPLR 3211 [a] [2]) to dismiss the Complaint for lack of subject matter jurisdiction.

At the onset, within this Court's discretion, defendants' Motion Seq. 002 is denied as a duplicative application to defendants' cross motion in Motion Seq. 001. However, the Court will consider the parties Reply papers (Doc Nos. 30 and 34)² filed under Motion Seq. 002, solely to the extent that the Reply papers address the original application under Motion Seq. 001. Additionally, this Court rejects any letter correspondences (Doc Nos. 35 and 36) addressing the substance of the applications before this Court as leave to submit such sur-replies was not requested by the parties, nor granted by this Court.

FACTUAL AND PROCEDURAL BACKGROUND

The Complaint alleges that on August 28, 2017, plaintiff was operating a motor vehicle bearing New York State license plate number HMZ3064 (plaintiff's vehicle) at or near "578 9th Avenue" at an intersection with West 42nd Street located in New York County when defendant Moore was operating a bus bearing New Jersey State license plate number 0XX738I (the Bus) and both vehicles came into contact with each other (the Accident) (see generally, the Complaint). Defendant NJ Transit, it is alleged, owned and controlled the Bus and employed Moore (*id.*).

Plaintiff claims that the Accident was caused by defendants' "negligence, carelessness and [r]ecklessness ... in the ownership, operation, maintenance and control of" the Bus (*id.* at ¶ 34)

² By stipulation (Doc No. 33) the parties agreed to submission of Reply papers.

which resulted in plaintiff sustaining severe permanent and personal injuries as defined by “Section 5102 (d) of the Insurance Law of the State of New York and/or [caused plaintiff] economic loss greater than basic economic loss as defined in Section 5102 (a) of the Insurance Law of the State of New York” (*id.* at ¶ 36).

Plaintiff further asserts in the Complaint that “on or about November 6, 2017, and within ninety days of” the Accident, “plaintiff served a notice of claim on” (the Notice of Claim) defendants, in accordance with § 50-h (the 50-h Hearing) of the General Municipal Law (GML), identifying plaintiff’s name, address, plaintiff’s attorney, the nature of the claim and the details surrounding the time, place and manner of the Accident (the Complaint at ¶7). A hearing, pursuant to GML’s § 50-h (the 50-h Hearing) was never held or noticed to plaintiff (*id.* ¶ 8) and after having complied with the condition precedent to commencing this action in accordance with the GML and “more than thirty (30) days” having elapsed since service of the Notice of Claim upon defendants and defendants’ waiver of the 50-h Hearing, plaintiff, on or about April 10, 2018, commenced the instant action by service of a Complaint seeking an award of damages for the injuries alleged to have been sustained as a result of the Accident (*id.* at ¶¶ 6-9).

In their responsive pleading filed on or about August 21, 2018 (the Answer) (Doc No. 16), defendants generally denied the allegations in the Complaint and interposed “Separate Defenses.” Specifically, relevant to the applications herein, defendants assert that plaintiff is “barred” from commencing this action against defendants because this Court lack jurisdiction “if plaintiff has failed to comply with the statutory requirements or conditions precedent provided for in N.Y. Unconsolidated §§ 7107 et seq. (McKinney’s Consolidated Laws of N.Y. 2000” (the Answer at ¶¶ 2 and 3).

After issue was joined in this action, plaintiff's attorney affirms that discovery demands were served upon defendants on or about August 11, 2019 (plaintiff's Discovery Demands)³ to which defendants, at that juncture, failed to comply with. On or about November 22, 2019, plaintiff served a Verified Bill of Particulars (the BP) (Doc No. 17), as demanded by defendants. At a compliance conference held before the Court on November 25, 2019, Justice Silvera issued a Compliance Conference Order (the CC Order) directing that: (a) defendants comply with plaintiff's Discovery Demands within 30 days of November 25, 2019; (b) plaintiff's deposition be held on or before February 2020; (c) defendants' depositions be held on or before March 6, 2020; and (d) the independent medical examination(s) be completed pursuant to the Preliminary Conference Order (the PC Order) (Doc No. 8).

On or about July 30, 2020, plaintiff interposed the within application (Motion Seq. 001) for an order striking defendants' Answer for failure to comply with discovery demands and court orders directing completion of discovery. Defendants cross-moved therein to dismiss the Complaint on grounds of lack of subject matter jurisdiction.

ARGUMENTS

Plaintiff contends that the court must strike defendants' Answer, or alternatively issue an order of preclusion against defendants because: (1) defendants' willful failure to respond to discovery demands and appear for deposition is a "recalcitrance" pattern warranting the relief sought; and (2) without court intervention, defendants "will continue to adjourn depositions and ignore" court orders.

³ Unfortunately, a copy of plaintiff's Discovery Demands has been "administratively" redacted, in its entirety by the Clerk of the Court because this document appeared to have listed confidential information such as "social security numbers" (see Court Notice under Doc No. 18).

In opposition, defendants argue that plaintiff's application to strike the Answer for defendants' purported failure to comply with discovery demands must be denied because: (1) defendants have a good faith basis for believing that discovery in this matter is not necessary in that this Court lacks subject matter jurisdiction; (2) if defendants' application to dismiss the Complaint on grounds of lack of subject matter jurisdiction is not granted, defendants request that the Court issue an Order directing that defendant Rioja's⁴ deposition take place within 30 days of the Court's order; and (3) any delays in compliance with discovery demands have been due to the pandemic and "any sanction ... should be against [defendants' counsel], not against defendant[s]" (see Memorandum of Law at page 12, Doc No. 22 and ¶¶12 and 13 of defendants' Attorney aff, Doc No. 23); and (4) "defendants completed and served written discovery responses on plaintiff and provided plaintiff with dates for the deposition of defendant Mario [Rioja], the defendant bus operator whom plaintiff wishes to depose (and on whom plaintiff's discovery Motion is based), including dates before the return date of" plaintiff's application herein (defendants' Attorney aff at ¶ 16).

In reply, plaintiff makes no further arguments in support of the motion-in-chief to strike the Answer (CPLR 3126) for defendants' failure to comply with discovery demands.

Defendants argue that the cross motion to dismiss the Complaint on grounds that the Court lacks subject matter jurisdiction to hear this matter, must be granted because: (1) defendants NJ Transit and its employee, defendant Rioja, are "Arms of The State of New Jersey" and can therefore only be sued in New Jersey's State Courts; and (2) defendants, having sovereign immunity, may raise the defense of lack of subject matter jurisdiction, at any stage of the litigation and therefore have not waived this defense in this action.

⁴ Defendants' erroneously stated defendant Rioja's name as "Aroja" in their Memorandum of Law (Doc No. 22) and in their Attorneys' affirmation (Doc No. 23).

In opposition, plaintiff contends that defendants' cross motion to dismiss the Complaint on grounds that this Court lacks subject matter jurisdiction, must be denied because: (1) this Court does have subject matter jurisdiction over all the named defendants in accordance with established case law; (2) this Court has subject matter jurisdiction over motor vehicle accidents occurring in the State of New York as is undisputedly the case here; and (3) plaintiff is prejudiced by defendants' delay in interposing the within application to dismiss the Complaint especially when defendants did not assert the defense of sovereign immunity in their Answer and waited close to three years, after the statute of limitations expired, to make the instant application and granting defendants' relief now would preclude plaintiff from commencing this action anew in the State of New Jersey where defendants maintain does have subject matter jurisdiction to hear this matter.

In reply to their cross motion to dismiss, defendants re-iterate their arguments for dismissal of this action against them.

DISCUSSION

Dismissal of the Complaint pursuant to CPLR 3126 for defendants' purported failure to comply with discovery is not warranted under the facts of this case. Although CPLR 3126 is an enforcement mechanism, giving the court power to impose penalties for failure to obey a court order (*Postel v New York Univ. Hosp.*, 262 AD2d 40, 42 [1st Dept 1999]; and *Armstrong v B.R. Fries & Assoc., Inc.*, 95 AD3d 697 [1st Dept 2012]), striking a pleading is a drastic measure and plaintiff has failed to demonstrate that defendants' non-compliance with court orders and discovery demands was willful, contumacious or due to bad faith (see *Youwanes v Steinbrech*, 193 Ad3d 492 [1st Dept, 2021]). Plaintiff's application must therefore be denied because there has been no showing of defendants' "willful" disregard of the subject court orders directing completion of discovery in light of the fact that defendants' have substantially complied by provided responses

to plaintiff's subject discovery demands. Similarly, plaintiff's alternative relief sought for an order of preclusion, is denied, within this Court's discretion.

Defendants' cross motion application to dismiss the Complaint, pursuant to CPLR 3211 (a) (2), on grounds of lack of subject matter jurisdiction, is denied. Defendants plead in the Answer as a "Separate Defense" to the Complaint that the Court lacked subject matter/personal jurisdiction over defendants "if" plaintiff failed to "comply with the statutory requirements or conditions precedent provided for in N.Y. Unconsolidated §§ 7107 et seq. (McKinney's Consolidated Laws of N.Y. 2000)" (see Answer at ¶ 3). Defendants never raised this argument in their cross-motion papers and there has been no showing by plaintiff of a failure to comply with a condition precedent to commencing this action. Instead, defendants assert in their cross motion papers, rather than in their responsive pleadings, that this Court lacks subject matter jurisdiction based on a completely different ground than that stated in the Answer, to wit, that plaintiff is barred from proceeding with this action as against defendants based on the doctrine of "sovereign immunity."

Contrary to defendants' contention, a defense based on the doctrine of sovereign immunity can be waived. When defendants appeared in this action and elected to file an Answer to the Complaint without objecting to jurisdiction, and proceeded instead to: appear at a preliminary conference resulting in a PC Order; appear at a compliance conference resulting in the CC Order; exchange discovery demands; accept discovery responses from plaintiff; and recently produce responses to plaintiff's discovery demands, then defendants have sufficiently engaged in the litigation of this action enough to amount to a waiver of the sovereign immunity/lack of subject matter jurisdiction defense (see *Fetahu v New Jersey Tr. Corp.*, 197 Ad3d 1065 [1st Dept 2021]; *Belfand v Petosa*, 196 AD3d 60 [1st Dept 2021]; and *Taylor v New Jersey Tr. Corp.*, 199 AD3d 540 [1st Dept 2021]).

The Court has considered any remaining arguments by the parties and find them unavailing, without merit and/or moot. Accordingly, it is

ORDERED that the application (Motion Seq. No. 001) by plaintiff Steven Moore for an Order (CPLR 3126) striking defendants, NJ Transit Corp., a/k/a and/or d/b/a New Jersey Transit Bus Operations, Inc., and Mario Rioja's Answer, is denied, in its entirety; and it is further


ORDERED that the cross motion application in Motion Seq. 001 by defendants NJ Transit Corp., a/k/a and/or d/b/a New Jersey Transit Bus Operations, Inc., and Mario Rioja for an Order (CPLR 3211 [a] [2]) dismissing the Summons and Complaint on grounds that this Court lacks subject matter jurisdiction, is denied, in its entirety; and it is further

ORDERED that the application (Motion Seq. 002) by defendants NJ Transit Corp., a/k/a and/or d/b/a New Jersey Transit Bus Operations, Inc., and Mario Rioja for an Order (CPLR 3211 [a] [2]) dismissing the Summons and Complaint is denied as duplicative of movants' cross motion relief sought in Motion Seq. 001; and it is further

ORDERED that counsel are directed to appear for a status conference before IAS Part 22 and are directed to contact the Clerk of the Court to arrange for the date, time and place to appear, forthwith.

This constitutes the Decision/Order of the Court.

5/2/2022
DATE


LISA HEADLEY, J.S.C.

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| CHECK ONE: | <input type="checkbox"/> CASE DISPOSED | <input checked="" type="checkbox"/> NON-FINAL DISPOSITION |
| | <input type="checkbox"/> GRANTED <input type="checkbox"/> DENIED | <input checked="" type="checkbox"/> GRANTED IN PART <input type="checkbox"/> OTHER |
| APPLICATION: | <input type="checkbox"/> SETTLE ORDER | <input type="checkbox"/> SUBMIT ORDER |
| CHECK IF APPROPRIATE: | <input type="checkbox"/> INCLUDES TRANSFER/REASSIGN | <input type="checkbox"/> FIDUCIARY APPOINTMENT <input type="checkbox"/> REFERENCE |