

Agosto v City of New York

2022 NY Slip Op 32051(U)

July 1, 2022

Supreme Court, New York County

Docket Number: Index No. 160115/2020

Judge: Judy H. Kim

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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. JUDY H. KIM **PART** **05RCP**

Justice

-----X

CHARLES AGOSTO,

Plaintiff,

- v -

THE CITY OF NEW YORK, SERA SECURITY SERVICES,
 LLC, MR. JOHN (FIRST NAME UNKNOWN) KENDAL

Defendant.

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INDEX NO. 160115/2020

MOTION DATE 05/10/2022

MOTION SEQ. NO. 001 & 002

**DECISION + ORDER ON
 MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 001) 7, 8, 9, 10, 11, 12, 13, 14, 15, 18, 19

were read on this motion to STRIKE PLEADINGS.

The following e-filed documents, listed by NYSCEF document number (Motion 002) 24, 25, 26

were read on this motion to WITHDRAW AS COUNSEL.

Upon the foregoing documents, the motion by defendants Sera Security Services, LLC and Steven Kendal (sued here as “John” Kendal) to strike plaintiff’s answer is denied, and the motion by plaintiff’s counsel, Beldock Levine & Hoffman LLP, for leave to withdraw as counsel is granted.

FACTUAL BACKGROUND

On June 22, 2011, plaintiff Charles Agosto lived in a shelter run by defendant the City of New York (the “City”) at 8 East 3rd Street, New York, NY 10003 (NYSCEF Doc. No.1 [Compl. at ¶¶ 10, 14]). Defendant Sera Security Services, LLC (“Sera”) is a multi-state security company contracted by the City of New York to provide security for this homeless shelter (NYSCEF Doc. No. 1 [Compl. at ¶¶ 11, 13 and 15]). Plaintiff alleges that on June 22, 2011, defendant Steven

Kendal—a contractor employed by Sera—attacked the plaintiff, causing him injury (NYSCEF Doc. No.1 [Compl. at ¶¶ 12 and 16]).

Plaintiff commenced this action on November 3, 2020, asserting claims for: (1) assault and battery; (2) discrimination; (3) negligence; (4) negligent hiring, retention, training, supervision and retention; and (5) respondeat superior (NYSCEF Doc. No. 1 [Compl. at ¶¶ 18-38]).

In motion sequence 001, Sera and Steven Kendal move, pursuant to CPLR §3126, for an order striking plaintiff's complaint or precluding plaintiff from offering any evidence in support of his claim at trial or, alternatively, pursuant to CPLR §3124, compelling plaintiff to respond to defendant's discovery demands by a date certain. In motion sequence 002, Beldock Levine & Hoffman, LLP moves, pursuant to CPLR §321(b)(2), for leave to withdraw as counsel for plaintiff.

These motions are consolidated for disposition.

DISCUSSION

Pursuant to CPLR §3126, the Court may make such orders with regards to a party's refusal to obey an order for disclosure or willful failure to disclose information which the court finds ought to have been disclosed pursuant to this section. "The Supreme Court has broad discretion in making determinations concerning matters of disclosure, including the nature and degree of the penalty to be imposed under CPLR §3126" (Dimoulas v Roca, 120 AD3d 1293 [2d Dept 2014] quoting Arpino v F.J.F. & Sons Elec. Co., Inc., 102 AD3d 201, 209 [2d Dept 2012]). "To invoke the drastic remedy of preclusion, which effectively results in the striking of a pleading, the court must determine that the party's failure to comply with a disclosure order was the result of willful, deliberate, and contumacious conduct or its equivalent" (Vancott v Great Atlantic & Pacific Tea Co. Inc., 271 AD2d 438 [2d Dept 2000]).

As a threshold matter, plaintiff’s counsel’s efforts to procure discovery detailed in his good faith affirmation—a letter, email, and phone call in July 2021—do not “evince a diligent effort by the plaintiff to resolve the discovery dispute,” a necessary predicate for the relief sought (Roye v Gelberg, 172 AD3d 1260, 1263 [2d Dept 2019] [internal citations omitted]). Even leaving this aside, Sera and Kendal have not demonstrated that plaintiff’s non-compliance with discovery demands was willful or deliberate. Finally, as there are no prior Court orders directing the disclosure sought here—the Court has not yet issued any preliminary conference, compliance conference, or other discovery orders—sanctions under CPLR §3126 are unavailable (See Emigrant Mortg. Co., Inc. v Beckerman, 105 AD3d 895, 896 [2d Dept 2013]). Accordingly, Sera and Kendal’s motion pursuant to CPLR §§3124 and 3126 is denied.

The motion by Beldock Levine & Hoffman, LLP, to withdraw as plaintiff’s counsel is granted. CPLR §321 permits the attorney of record for a party to withdraw upon a showing that good cause exists to end the relationship with the client (CPLR §321[b][2]). Such good cause is generally based upon an irretrievable breakdown in the relationship or a failure of cooperation by the client (See Farage v Ehrenberg, 124 AD3d 159 [2d Dept 2014]; see also McCormack v Kamalian, 10 AD3d 679 [2d Dept 2004] [“A lawyer may withdraw from representing a client, if the client, by his or her conduct, ‘renders it unreasonably difficult for the lawyer to carry out employment effectively’”]). Here, Beldock Levine & Hoffman, LLP has demonstrated that it is unable to represent Agosto in this case due to a lack of cooperation in prosecuting the action and an inability to effectively communicate with Agosto for over a year (Rankin Affirm. at ¶9). Accordingly, Beldock Levine & Hoffman, LLP’s motion for leave to withdraw as plaintiff’s counsel is granted without opposition, and the instant action is hereby stayed for sixty days for plaintiff to retain new counsel.

In light of the foregoing, it is hereby:

ORDERED that in motion sequence 001, Sera and Kendal’s motion to strike and compel is denied; and it is further

ORDERED that in motion sequence 002, Beldock Levine & Hoffman, LLP’s motion is granted on default of the plaintiff to the extent of permitting Beldock Levine & Hoffman, LLP to withdraw as plaintiff’s counsel in this matter; and it is further

ORDERED that Beldock Levine & Hoffman, LLP shall, within five days of filing of this order on NYSCEF, serve a copy of this order, with notice of entry, upon the plaintiff by e-mail and U.S. first-class mail, and serve upon defendants by e-filing same via NYSCEF; and it is further

ORDERED that this action is stayed for a period of sixty days from the date of this order within which time plaintiff must retain a substitute attorney or shall be deemed to be proceeding pro se; and it is further

ORDERED that the Clerk of the Court is directed to set this matter down for a preliminary conference in the DCM Part on the next available date on or after August 30, 2022.

This constitutes the decision and order of the Court.



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JUDY H. KIM, J.S.C.

7/1/2022
DATE

CHECK ONE:

CASE DISPOSED
GRANTED DENIED
SETTLE ORDER
INCLUDES TRANSFER/REASSIGN

NON-FINAL DISPOSITION
GRANTED IN PART OTHER
SUBMIT ORDER
FIDUCIARY APPOINTMENT REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: