

Perez v Fortune JD, LLC
2022 NY Slip Op 32079(U)
March 11, 2022
Supreme Court, New York County
Docket Number: Index No. 159564/2017
Judge: Sabrina Kraus
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. SABRINA KRAUS PART 57TR

Justice

-----X

HECTOR PEREZ,

Plaintiff,

- v -

FORTUNE JD, LLC, NEW AGE DEVELOPMENT GROUP, INC., BLUEPEARL HOLDINGS, LLC,

Defendant.

-----X

FORTUNE JD, LLC

Plaintiff,

-against-

BLUEPEARL HOLDINGS, LLC

Defendant.

-----X

NEW AGE DEVELOPMENT GROUP, INC.

Plaintiff,

-against-

FORGE ENTERPRISES INC.

Defendant.

-----X

BLUEPEARL HOLDINGS, LLC

Plaintiff,

-against-

FORGE ENTERPRISES INC.

Defendant.

-----X

INDEX NO. 159564/2017
MOTION DATE 03/03/2022
MOTION SEQ. NO. 004

DECISION + ORDER ON MOTION

Third-Party
Index No. 595054/2018

Second Third-Party
Index No. 595279/2018

Third Third-Party
Index No. 595817/2019

The following e-filed documents, listed by NYSCEF document number (Motion 004) 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117

were read on this motion to/for DISMISS

BACKGROUND

Plaintiff commenced this action to seek damages for personal injury he alleges were sustained while he was working on a construction site in October 2017.

Pursuant to a decision and order dated April 2, 2021, plaintiff's counsel was given permission to withdraw from further representation of plaintiff in this action. Since that date no new attorney has appeared on behalf of plaintiff, plaintiff has not indicated an intention to proceed *pro se* and plaintiff has failed to respond to numerous outstanding discovery requests including a request to appear for a continued deposition.

PENDING MOTIONS

On March 3, 2022, Bluepearl Holdings, LLC moved for an order dismissing the action pursuant to CPLR §3126(3).

On the same date, Fortune, JD LLC moved for an order dismissing the complaint on the same grounds and for an order deeming its crossclaims against all co-defendants "converted into a third-party action."

Additional cross-motions seeking the dismissal of the complaints were filed by New Age Development Group, Inc. and Forge Enterprises, Inc..

On March 3, 2022, the motions were marked submitted and the court reserved decision.

The motions are consolidated herein for disposition.

For the reasons stated below, the motion and cross-motions are granted in their entirety.

PROCEDURAL HISTORY

Plaintiff, Hector Perez, alleges that he sustained personal injuries when he fell through an unguarded open floor on October 5, 2017, during the scope of his employment at the premises located at 190 3rd Avenue, Brooklyn, New York.

On November 5, 2018, Bluepearl filed an Amended Answer to Plaintiffs' Amended Complaint. A Preliminary Conference Order was issued on October 25, 2018, ordering Plaintiff to appear for a deposition on February 14, 2019. Thereafter, the Hon. Robert R. Reed So-ordered a Stipulation dated March 28, 2019, by the parties in which the Plaintiff's deposition was scheduled for April 18, 2019. On April 18, 2019, Plaintiff appeared for his deposition. However, that was not completed as the parties agreed at 4:15 p.m. to adjourn and scheduled a date to continue the liability and damages portion of the deposition of Mr. Perez.

A Status Conference Order dated December 15, 2019, ordered that the Plaintiff's continued deposition be held on February 27, 2020. The Plaintiff failed to appear for his scheduled EBT on February 27, 2020. On March 12, 2020, a second Status Conference Order was issued ordering that Plaintiff appear for his continued deposition on April 7, 2020. Plaintiff again failed to appear for the scheduled deposition on April 7, 2020.

On June 11, 2020, Brody, O'Connor & O'Connor, Esq. were substituted as attorneys for Bluepearl. A Notice to Take Deposition Upon Oral Examination dated October 8, 2020, was served on the Plaintiff scheduling the deposition of Plaintiff for December 12, 2020. Plaintiff failed to appear for the scheduled deposition on December 12, 2020.

On January 28, 2021, Bluepearl served a Demand for Income Tax Records on the plaintiff's attorney. On November 10, 2020, the parties agreed to continue the Plaintiff's deposition on February 2, 2021. However, on February 1, 2021, the Plaintiff's attorney said that

they were not producing their client for a deposition on February 2, 2021, because of a snowstorm.

On February 22, 2021, Bluepearl requested the Plaintiff's attorney to provide dates for the plaintiff's continued deposition. However, the Plaintiff's attorney did not respond to the request to schedule the Plaintiff's continued deposition.

On March 21, 2021, Plaintiff's attorneys Gorayeb & Associates, P.C. filed an Order to Show Cause, requesting that their firm be withdrawn as counsel to Plaintiff. An order was issued by the court on April 2, 2021, by the Honorable Shawn T. Kelly.

Bluepearl forwarded a letter dated September 14, 2021, directly to Plaintiff, Hector Perez, in English and Spanish, requesting Plaintiff contact our office to schedule his deposition and respond to our Demand for Income Tax Records.

As no response was received, on November 2, 2021, follow up letters, in English and Spanish, were forwarded to Plaintiff, via first class and certified mail, requesting Plaintiff to contact Bluepearl's counsel to schedule his deposition and requesting Plaintiff respond to their Demand for Income Tax.

The plaintiff, however, did not respond to said letters and has failed to participate in this action or prosecute his claims.

DISCUSSION

The Motion to Dismiss Plaintiff's Complain is Granted as Plaintiff Shows no Sign of being interested in the Continued Prosecution of this action

CPLR §3126 provides in pertinent part:

If any party, or a person who at the time a deposition is taken or an examination or inspection is made is an officer, director, member, employee or agent of a party or otherwise under a party's control, refuses to obey an order for disclosure or willfully fails to disclose information which the court finds ought to have been disclosed pursuant to this article, the court may make such orders with regard to the failure or refusal as are just, among them:

.....
3. an order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or any part thereof, or rendering a judgment by default against the disobedient party.

N.Y. C.P.L.R. 3126 (McKinney)

CPLR §3101(a) requires the full disclosure of all information that is material and necessary to the defense of an action. “The words, ‘material and necessary,’ are...to be interpreted liberally to require disclosure, upon request, of any facts bearing on the controversy which will assist preparation for trial by sharpening the issues and reducing delay and prolixity. The test is one of usefulness and reason.” *Allen v. Crowell-Collier Publishing Co.*, 21 NY2d 403, 406 288 NYS2d 449 (1968).

A court is empowered to strike a pleading where a party in an action continually refuses to provide discovery. *United States Fire Insurance Co. v. J.R. Green Inc.*, 272 A.D.2d 148, (1st Dept. 2000). The decision to strike a pleading applies to the failure to comply with a Preliminary Conference Order. *Richard’s Home Center & Lumber Inc. v. Kownacki*, 247 A.D.2d 371 (2nd Dept. 1998).

The unconditional striking of a pleading is appropriate where the resisting party’s default is deliberate and contumacious. *Pimental v. City of New York*, 246 A.D.2d 467 (1st Dept. 1998). A party’s failure as willful and contumacious can be demonstrated by repeated failure to comply with outstanding discovery demands and court orders. *Id.* The defaulting party then bears the burden of establishing a reasonable excuse for its numerous defaults. *Id.*

The Court of Appeals has affirmed the drastic remedy of dismissal of a party’s claim when that party failed to comply with a court order. *Kihl v. Pfeffer*, 94 N.Y.2d 118 (1999). In that case, the Plaintiff failed to respond to defendant’s request for interrogatories. The Court of Appeals dismissed Plaintiff’s complaint noting that “when a party fails to comply with a court order and

frustrates the disclosure scheme set forth in the CPLR, it is well within the Trial Judge's discretion to dismiss the complaint." (*Id.* At 122.)

A Plaintiff's complaint should be dismissed when a litigant ignores court orders. *Id.*; *Gibbs v. St. Bernabas Hosp.*, 16 N.Y.3d 74 (2010) [*Where plaintiff failed to comply with a court order to provide discovery demands, the trial court did not need to find plaintiff's failure to be willful in order to enforce its preclusion order.*] In *Gibbs* the Court of Appeals addresses the use of a two-prong test where a party fails to provide discovery pursuant to a court order. *Id.* The defaulting party needs to show a reasonable excuse for the failure to produce the requested items and the existence of a meritorious claim or defense. *Id.* at 80.

Finally, in cases that involve a *pro se* litigant, courts are "not obligated to indulge the excesses of a *pro se* litigant at the expense of decorum, judicial economy and fairness to opposing parties." *Couri v. Siebert*, 48 A.D.3d 370 (2008). The Appellate Division, First Department, specifically held that "pro se is not a license to ignore court orders, engage in dilatory and constructive conduct or malign officers of the court." *Id.* at 4. In that case, Plaintiff failed to produce tax returns or provide releases for those records despite three ordering to provide those documents. The Appellate Division found that pursuant to CPLR §3126(3) "the absence of any semblance if an excuse for noncompliance, striking a pleading was warranted. *Id.* at 1. Here, like in *Couri*, Plaintiff failed to appear for his deposition and failed provide discovery pursuant to numerous court orders. Specially, there are five court Orders from the onset of this action which Plaintiff has failed to comply to. He has not appeared to provide any excuse as to his failure to appear for his continued deposition or provide discovery.

Indeed, the basis for plaintiff's attorney having moved to withdraw was that plaintiff failed to communicate with his counsel and appear for various appointments scheduled with them.

Based on the record, it does not appear as if plaintiff is interested in the continued prosecution of this action. As such the motion and cross-motions seeking dismissal of the complaint are granted.

The Cross-Motion Of Fortune JD, LLC To Deem Its Cross-Claims Converted Into A Third Party Action Is Also Granted

Fortune JD, LLC moves to deem its cross-claims converted into a third party action. This relief is granted without opposition.

CONCLUSION

WHEREFORE it is hereby:

Defendants having established that plaintiff has willfully and contumaciously failed to provide discovery as directed as specified above and in that plaintiff has failed and refused, despite specific directives in said orders, and without good cause, to produce documents and to appear for continued deposition on the dates directed therein, it is hereby

ORDERED that the motion of defendant to strike the plaintiff's pleading and dismiss this case is granted; and it is further

ORDERED that the complaint is stricken and the action is dismissed; and it is further

ORDERED that the Clerk is directed to enter judgment of dismissal in favor of defendants, with costs and disbursements to defendant as taxed by the Clerk; and it is further

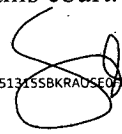
ORDERED that Bluepearl Holdings, LLC shall serve this decision with notice of entry on plaintiff by regular mail and certified mail RRR within 10 days of receipt of same; and it is further

ORDERED that, within 20 days from entry of this order, Bluepearl Holdings, LLC shall serve a copy of this order with notice of entry on the Clerk of the General Clerk's Office (60 Centre Street, Room 119); and it is further

ORDERED that such service upon the Clerk shall be made in accordance with the procedures set forth in the *Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases* (accessible at the "E-Filing" page on the court's website at the address www.nycourts.gov/supctmanh); and it is further

ORDERED that any relief not expressly addressed has nonetheless been considered and is hereby denied; and it is further

ORDERED that this constitutes the decision and order of this court.


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3/11/2022
DATE

SABRINA KRAUS, J.S.C.

CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION
	<input checked="" type="checkbox"/>	GRANTED	<input 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