

Vacharasovan v Macy's Inc.

2022 NY Slip Op 32501(U)

July 26, 2022

Supreme Court, New York County

Docket Number: Index No. 159065/2018

Judge: J. Machelle Sweeting

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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. J. MACHELLE SWEETING PART 62

Justice

-----X

RACHEL VACHARASOVAN,

Plaintiff,

- v -

MACY'S INC, MACY'S OF NEW YORK, MACY'S PARADE
AND ENTERTAINMENT GROUP, CITY OF NEW YORK,
CITY OF NEW YORK POLICE DEPARTMENT, P.O. JOHN
DOE, P.O. JOHN DOE, P.O. JOHN DOE, P.O. JOHN DOE

Defendants.

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INDEX NO. 159065/2018
MOTION DATE 06/29/2022
MOTION SEQ. NO. 004

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 004) 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95

were read on this motion to/for PRECLUDE.

In the underlying action, plaintiff seeks monetary compensation for a trip and fall accident that occurred as plaintiff was attempting to view the Macy's Fourth of July fireworks, on July 4, 2017, from a public area designated for such viewing, on or near the East 30th Street ramp leading to the FDR Drive/Highway in the City, State and County of New York. The defendants include Macy's Inc, Macy's Of New York and Macy's Parade And Entertainment Group (collectively, "Macy's"), and the City Of New York and the City Of New York Police Department (collectively, the "City").

Relevant Facts and Procedural History

The Summons and Complaint were filed on October 1, 2018.

On August 8, 2019, about ten months after this action was initiated, Macy's filed Motion #001, seeking an order (a) pursuant to Civil Practice Law and Rules ("CPLR") Section 3042, precluding the plaintiff from offering any evidence as to the items requested in defendants' demands for a verified bill of particulars and various discovery demands; or in the alternative (b) compelling the production of responses to defendants' demand for a bill of particulars and discovery demands pursuant to CPLR §3124. In their motion, Macy's argues that despite its good faith efforts, plaintiff failed to respond to Macys' discovery demands.

Plaintiff filed no opposition to Motion #001, and in a decision dated December 23, 2019, the court (Hon. Julio Rodriguez III) granted the motion as unopposed, and plaintiff was ordered to respond to defendants' demands for a bill of particulars and discovery, within 30 days of the date of the order.

On March 13, 2020, Macy's filed Motion #002, seeking an order, pursuant to CPLR §3126:

- a. dismissing plaintiff's Summons and Complaint for failing to serve a Verified Bill of Particulars and responses to movants' multiple discovery demands; and
- b. precluding plaintiff for producing such evidence if such Verified Bill of Particulars and discovery responses are not served within 30 days after the date of such a conditional order; and
- c. compelling plaintiff to respond to the discovery demands served by the movants by a date certain.

In their motion, Macy's argued that despite the court order with respect to Motion #001, and despite Macys' additional good-faith attempts, plaintiff still did not respond to plaintiff's discovery demands.

The City also filed a cross-motion, under Motion Sequence #002, seeking an order, pursuant to CPLR § 3126, dismissing the complaint for plaintiff's failure to serve a Verified Bill of Particulars or to respond to movants' discovery demands. The City argued that despite the court's order on Motion #001, plaintiff had not responded to the City's discovery demands. Again, plaintiff did not oppose this motion.

Subsequently, in a letter to the court, dated October 30, 2020, (NYSCEF Document #32), plaintiff's counsel requested a 45-day extension in which to respond to defendant's motion. Plaintiff alleged that the delay in responding was due to the Covid-19 pandemic.

In an order dated November 4, 2020, (NYSCEF Document #32), this court granted plaintiff a 45-day extension. Nevertheless, plaintiff still did not file any opposition papers.

On March 12, 2021, Macy's and the City each informed the court in writing that they were still pursuing their respective motion and cross-motion, as plaintiff still had not responded to discovery.

On March 17, 2021, the court sent a courtesy email to which plaintiff's counsel responded requesting an additional 60 days to respond. Specifically, counsel stated:

Yes, we are opposing the relief requested and ask for an additional 60 days to respond at which we anticipate that our office will re-open as we anticipate we will be fully vaccinated against the Covid-19 threat.

On March 29, 2021, the undersigned issued a decision (NYSCEF Document #33) that directed plaintiff to strictly comply with any and all discovery notices and demands served by Macy's or by the City; and to serve a Verified Bill of Particulars and responses to movants' multiple discovery demands within 30-days from the date of the order.

On May 26, 2021, approximately two months after the above order was issued, Macy's filed Motion #003 seeking an order, pursuant to CPLR 53126, dismissing plaintiff's Summons and Complaint with prejudice for failing to serve a response to movant's various discovery demands, and for violating this court's orders. In the motion, Macy's argued that to date, plaintiff had not responded to the movant's discovery demands and had also failed to comply with both the court order on Motion #001 and the court order on Motion #002.

Under the same motion sequence number (Motion #003), the City filed a cross-motion seeking an order, pursuant to CPLR § 3126, dismissing the complaint for plaintiff's failure to prosecute this matter. The City argued that it had been more than 30 days since this court's order on Motion #002 and more than two years since plaintiff had filed a summons and complaint. Yet, to date, the City had not received plaintiff's Verified Bill of Particulars or a response to the City's Discovery Demands.

Plaintiff initially failed to file any opposition to this motion, and instead plaintiff's counsel filed an application on June 24, 2021 seeking an adjournment of this motion (NYSCEF Document #55). The application stated, *inter alia*:

I am a sole practitioner and attorney for the plaintiff, Rachel Vacharasovan [...]

Due to Covid-19 stay-at-home orders and illnesses suffered by plaintiff and her counsel, the progress on this matter has been extremely slow, but it should not be dismissed [...]

[...] This matter should not be dismissed. Large corporations draw from a pool of attorneys to stand in if one falls down. Sole practitioners do not have that option. Macy's defendants make legal arguments and cite precedents ignoring the local and novel global impact brought on by a pandemic [...]

On July 1, 2021, one week after plaintiff filed his request for an adjournment, the return date of the motion was extended by the Clerk of the Court to July 26, 2021. On July 26, 2021, the return date of Motion #003, plaintiff filed a Bill of Particulars with respect to the City, and a Bill

of Particulars with respect to Macy's. On July 27, 2021, one day after the return date of Motion #003, plaintiff filed opposition papers to said motion.

On August 4, 2021, Motion #003 was conferenced before the undersigned. In a decision and order issued that same day, (NYSCEF Document #70), this court, *inter alia*, denied Motion #003 and the cross-motion seeking dismissal of this action. No later than September 1, 2021, plaintiff's counsel was directed to provide defendants' counsel with the specified releases/authorizations that had remained outstanding.

Subsequently, on September 8, 2021, counsel for Macy's submitted a letter to the court, (NYSCEF Document #72), that indicated that the outstanding authorizations had been received.

Instant Motion

Now pending before the court is Motion #004 wherein Macy's seeks an order (a) pursuant to CPLR §3126, precluding the plaintiff from testifying at trial for failure to appear for a deposition, in violation of prior Court Order; and (b) renewing defendants' prior motion to dismiss plaintiff's complaint for repeated failures to comply with discovery obligations. Macy's argues that to date, and more than one year after this court's order on Motion #003, plaintiff still has not responded to defendants' numerous attempts to schedule depositions in this matter. Macy's also provides details of the numerous attempts it made to resolve this matter without judicial intervention.

Plaintiff did not file any opposition to this motion or contact the court in any way.

Conclusions of Law

CPLR 3126 (Penalties for refusal to comply with order or to disclose) provides, in 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 wilfully 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.

CPLR 3216 (Want of prosecution) provides, in relevant part:

(a) Where a party unreasonably neglects to proceed generally in an action or otherwise delays in the prosecution thereof against any party who may be liable to a separate judgment, or unreasonably fails to serve and file a note of issue, the court, on its own initiative or upon motion, with notice to the parties, may dismiss the party's pleading on terms. Unless the order specifies otherwise, the dismissal is not on the merits.

[...]

(e) In the event that the party upon whom is served the demand specified in subdivision (b)(3) of this rule fails to serve and file a note of issue within such ninety day period, the court may take such initiative or grant such motion unless the said party shows justifiable excuse for the delay and a good and meritorious cause of action.

Here, the Affidavit of Service shows that this motion was served on the office of plaintiff's counsel, yet no opposition was filed and there is no indication on this record that plaintiff opposes the relief requested.

As noted in detail above, plaintiff has repeatedly failed to respond to discovery demands in a timely manner. The accident in this case allegedly occurred on July 4, 2017, over five years ago, and the complaint was filed on October 1, 2018, almost four years ago.

It is undisputed that as of today, plaintiff herself has yet to be deposed. Further, plaintiff's counsel provides no explanation on this record for any of the delays, other than stating that he is a solo practitioner and alluding vaguely to delays caused by Covid-related shutdowns, a number of which have been abated. Given this, the court hereby GRANTS the motion. See Aziz v City of New York, 130 AD3d 451 (1st Dept 2015) ("The balance of plaintiff's motion, which was for permission to serve the note of issue and reconsideration of the court's dismissal of the complaint, was, however properly denied. Plaintiff failed to appear for an IME between the time of defendant's initial scheduled IME request in May 2005 and her death in September 2010 [...]"); Jones v Green, 34 AD3d 260 (1st Dept 2006) ("The motion court providently exercised its discretion in dismissing the complaint because of plaintiffs' long continued pattern of noncompliance with court orders and discovery demands (CPLR 3126), which gave rise to an inference of willful and contumacious conduct [...]. We note that plaintiffs failed to offer any excuse [...], much less a reasonable one"); Bd. of Managers of Lafayette St. Condominium v 129 Lafayette St., LLC, 103 AD3d 511 (1st Dept 2013) ("Plaintiff contends that the action should not have been dismissed because its behavior was neither willful nor contumacious. However, plaintiff engaged in a long continued pattern of noncompliance with court orders and discovery demands [... and...] Plaintiff failed to offer any excuse for ignoring the court's disclosure orders"); Goldstein v CIBC World Markets Corp., 30 AD3d 217 (1st Dept 2006) ("Plaintiff's year-long pattern of noncompliance with the court's repeated compliance conference orders gave rise to an inference of willful and contumacious conduct"); Milton v 305/72 Owners Corp., 19 AD3d 133 (1st Dept 2005) ("Plaintiff repeatedly failed to comply with court orders to supply medical authorizations, and failed to appeal from any of those orders until after the complaint was dismissed. Plaintiff also failed to offer a reasonable excuse for disobeying the court's orders [...]

Absent a reasonable excuse for plaintiff's disobedience, dismissal of the action was a proper exercise of discretion").

Conclusion

It is hereby:

ORDERED that Macy's motion is GRANTED; and it is further

ORDERED that the complaint is hereby DISMISSED with prejudice as against all defendants.

7/26/2022
DATE



J. MACHELLE SWEETING, J.S.C.

CHECK ONE:

CASE DISPOSED

GRANTED

DENIED

NON-FINAL DISPOSITION

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE