

Garcia v City of New York

2022 NY Slip Op 33333(U)

October 3, 2022

Supreme Court, New York County

Docket Number: Index No. 161140/2017

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

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TYRONE GARCIA,

Plaintiff,

- v -

CITY OF NEW YORK, NEW YORK CITY DEPARTMENT OF SANITATION, 1314 REALTY PARTNERS LLC, MELIN FOOD CORP., ST. NICHOLAS ONE SEVEN FIVE ASSOCIATES, L.L.C., CITI-CENTER SHOES, CORP.

Defendants.

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INDEX NO. 161140/2017

MOTION DATE

MOTION SEQ. NO. 005 006 007

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 005) 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 148, 149, 151

were read on this motion for DISCOVERY.

The following e-filed documents, listed by NYSCEF document number (Motion 006) 95, 96, 97, 98, 144, 145, 146, 147, 150, 152, 153, 154, 158

were read on this motion for DISMISS.

The following e-filed documents, listed by NYSCEF document number (Motion 007) 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 155, 156

were read on this motion for DISMISS.

In this personal injury action, defendants the City of New York, Melin Food Corp., and Citi-Center Shoes, Corp. move, pursuant to CPLR §3126, to dismiss the complaint based upon plaintiff's failure to produce outstanding discovery and appear for a deposition. Defendant Melin Food Corp. also seeks to compel discovery related to the source of plaintiff's funding for this litigation.

PROCEDURAL HISTORY

On July 9, 2020, defendant Melin Food Corp moved, pursuant to CPLR §3124 and §3126, to compel plaintiff to produce medical authorizations and appear for a deposition or strike plaintiff's answer based upon his failure to do so. This motion was resolved by stipulation of the parties, subsequently so-ordered by the Court, in which plaintiff agreed to serve all parties with HIPAA-compliant authorizations for various medical records within thirty days of the Court so-ordering the stipulation and further agreed to appear for a deposition on or before October 2, 2020 (NYSCEF Doc. No. 67 [So-Ordered Stipulation]).

Defendant Melin Food Corp. subsequently moved, pursuant to CPLR §3126, to dismiss plaintiff's complaint based upon plaintiff's failure to comply with this so-ordered stipulation. In a decision and order dated January 30, 2020, this Court (Hon. Dakota D. Ramseur) denied the motion, writing:

“The Court finds that Plaintiff's failure to comply has not been willful and contumacious, and affords Plaintiff additional time to response, with the caveat that Plaintiff has already had ample time to respond, and must demonstrate substantial efforts going forward to obtain the necessary discovery in an expeditious manner. It is therefore

ORDERED that...Plaintiff shall, within 45 days, comply with paragraph 1 of the July 21, 2020 so-ordered stipulation (NYSCEF 67), and shall confer with Defendants to schedule further depositions, including a deposition of Plaintiff to be held no later than 90 days from today absent good cause shown, and it is further

ORDERED that Plaintiff's failure to comply may result, upon further motion, in dismissal...”

(NYSCEF Doc. No. 90 [December 30, 2020 Decision and Order]).

In motion sequence 005, defendant Melin Food Corp. again moves, pursuant to CPLR §3126, to strike plaintiff's complaint or compel his compliance with the Court's December 30, 2020 decision and, further, to compel plaintiff to reveal the source of plaintiff's litigation funding.

In motion sequences 006 and 007, defendants Citi-Center Shoes, Corp. and 1314 Realty Partners, LLC move for the same relief. In opposition, plaintiff represents that he has complied with the December 30, 2020 order to the extent that all medical authorizations have been provided to defendants. Plaintiff objects, however, to Melin Food Corp.'s seeking discovery related to litigation funding, arguing that this information is not discoverable. In reply, defendants assert that they have received some but not all authorizations and that plaintiff had failed to provide each defendant with its own set of authorizations.

At oral argument on the motions, the Court directed plaintiff's counsel to email all HIPAA authorizations in plaintiff's possession to defendants' counsel by the end of that day. The Court further directed that plaintiff's deposition would be held on July 22, 2022. Defendants represent, however—and plaintiff does not dispute—that this deposition has not been held (NYSCEF Doc. No. 159 [August 1, 2022 Letter to the Court]).

These motions are consolidated for disposition and granted to the extent set forth below.

DISCUSSION

As a preliminary matter, that branch of defendant Melin Food Corp.'s motion to compel the production of information concerning litigation funding is denied (See Rodriguez v Rosen & Gordon, LLC, 2022 NY Slip Op 30690[U], 4 [Sup Ct, NY County 2022] [litigation funding information not material and necessary]). “Here, the litigation funding in question is not the subject of plaintiff's claim for damages, and is not a collateral source pursuant to CPLR §4545. As such, defendants are not entitled to the discovery relating to any litigation funding herein” (Heidi Alberto Coronado v Veolia N. Am. Inc. & Subsidiaries, 2021 WL 1374261 [Sup Ct, NY County 2021]).

The remainder of defendants' motions, which seek to strike plaintiff's complaint, are granted to the limited extent set forth below. CPLR §3126 authorizes the court to sanction a party

who “refuses to obey an order for disclosure or willfully fails to disclose information which the court finds ought to have been disclosed.” However, “[t]he striking of a party’s pleadings should not ... be imposed except in instances where the party seeking disclosure demonstrates conclusively that the failure to disclose was willful, contumacious or due to bad faith” (Gonzalez v 431 E. 115 St. LLC, 68 Misc 3d 1207(A) [Sup Ct, NY County 2020] citing Hassan v Manhattan & Bronx Surface Tr. Operating Auth., 286 AD2d 303, 304 [1st Dept 2001]). While plaintiff has failed to appear for three court-ordered depositions, it would be inappropriate, at this juncture, to immediately impose the “extreme penalty of dismissal” where there has been no clear and unequivocal indication that this sanction was imminent (Armstrong v. B.R. Fries & Assoc., Inc., 95 AD3d 697, 698 [1st Dept 2012]). However, in light of plaintiff’s repeated failures to appear for court-ordered deposition, defendants’ motions are granted to the limited extent that plaintiff is directed to appear for a deposition with sixty days of the date of this decision and order and, should he fail to do so, his complaint will be stricken.

In light of the foregoing, it is

ORDERED that defendants’ motions are granted to the extent that plaintiff is hereby ordered to schedule and appear for a deposition within sixty days from date of this decision and order and are otherwise denied; and it is further

ORDERED that, should plaintiff fail to appear for his deposition within sixty days from the date of this decision and order, defendants may file an affirmation, upon due notice, detailing plaintiff’s failure to appear and renewing this motion, at which point the complaint shall be dismissed; and it is further

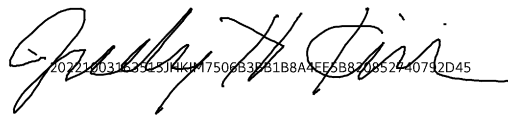
ORDERED that any other outstanding depositions, excluding plaintiff’s deposition, shall be completed within ninety days from the date of this decision and order; and it is further

ORDERED that the Note of Issue shall be filed one hundred and twenty days from the date of this decision and order; and it is further

ORDERED that none of the foregoing dates may be extended without express permission from the Court; and it is further

ORDERED that the Clerk of the Court is directed to set this matter down for pre-trial conference in the DCM Part on or after January 31, 2023.

This constitutes the decision and order of the Court.



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10/3/2022

DATE

HON. JUDY H. KIM, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE