

Bain v 50 W. Dev., LLC
2022 NY Slip Op 33379(U)
October 6, 2022
Supreme Court, New York County
Docket Number: Index No. 160488/2016
Judge: Frank P. Nervo
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. FRANK P. NERVO PART 04

Justice

-----X

KENDELL BAIN,

Plaintiff,

- v -

50 WEST DEVELOPMENT, LLC, HUNTER ROBERTS
CONSTRUCTION GROUP, LLC,

Defendant.

-----X

50 WEST DEVELOPMENT, LLC, HUNTER ROBERTS
CONSTRUCTION GROUP, LLC

Plaintiff,

-against-

VLADLENA TOTINO

Defendant.

-----X

INDEX NO. 160488/2016

MOTION DATE 08/12/2022,
09/02/2022

MOTION SEQ. NO. 006 007

**DECISION + ORDER ON
MOTION**

Third-Party
Index No. 595368/2019

The following e-filed documents, listed by NYSCEF document number (Motion 006) 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 222, 223

were read on this motion to/for DISCOVERY.

The following e-filed documents, listed by NYSCEF document number (Motion 007) 219, 220, 221, 224, 225, 226, 227, 228

were read on this motion to/for VACATE/STRIKE - NOTE OF ISSUE/JURY
DEMAND/FROM TRIAL CALENDAR.

By Decision and Order dated March 31, 2022, the Court resolved discovery disputes regarding prior injuries and amended bills of particular. In doing so, the Court set a final discovery schedule for this matter, requiring all discovery be completed no later than September 2, 2022.

Counsels' submissions on these motions and cross-motion make plain that they have unilaterally, and without the Court's permission, modified the deadlines imposed by the Court's March 31, 2022, order. Having disregarded the Court's discovery deadlines, counsel now find themselves with incomplete discovery and an inarguably improper note of issue – advising that discovery was complete notwithstanding that significant post-deposition discovery remained outstanding following plaintiff's deposition which had been completed three days prior to filing the note of issue.

“A party that permits discovery to ‘trickl[e] in [with a] cavalier attitude should not escape adverse consequence” (*Henderson-Jones v. City of New York*, 87 AD3d 498, 504 [1st Dept 2011] quoting *Figdor v. City of New York*, 33 AD3d 560, 561 [1st Dept 2006]). As the Court of Appeals has repeatedly underscored, “our court system is dependent on all parties engaged in litigation abiding by the rules of proper practice. The failure to comply with deadlines not only impairs the efficient functioning of the courts and adjudication of claims, but it places jurists unnecessarily in the position of having to order enforcement remedies to respond to the delinquent conducts of members of the bar, often to the detriment of the litigants they represent. Chronic noncompliance with deadlines breeds disrespect for the dictates of the Civil Practice law and Rules

and a culture in which cases can linger for years without resolution” (*Gibbs v. St. Barnabas Hosp.*, 16 NY3d 74 [2010]). Compliance requires a timely response and good faith effort to provide a meaningful response (*Kihl v. Pfeffer*, 94 NY2d 118, 123 [1999]). Disregard of discovery deadlines will not be tolerated (*Andrea v. Arnone, Hedin, Casker, Kennedy & Drake, Architects & Landscape Architects, P.C.*, 5 NY3d 514, 521 [2005]; see also *Arpino v. F.J.F. & Sons Elec. Co., Inc.*, 102 AD3d 201, 208 [2d Dept 2012]). “[U]pon learning that a party has repeatedly failed to comply with discovery orders, [trial courts] have an affirmative obligation to take such additional steps as are necessary to ensure future compliance” (*Figdor v. City of New York*, 33 AD3d 560, 561 [1st Dept 2006]).

The Court’s March 31, 2022, order was designed to ensure future compliance and the completion of discovery in this much delayed matter. However, significant discovery remains incomplete, the parties did not timely seek to extend or modify the March 31, 2022, order, and the parties are, once again, before this Court on multiple entirely avoidable motions regarding the most routine of discovery.

Defendant’s motion seeking discovery related to plaintiff’s back is granted. Notwithstanding that plaintiff’s lawsuit under Index No. 519886/2019

was publicly available to defendants, and defendants' research failed to reveal same, plaintiff failed to disclose his subsequent arrest and back injuries claimed as a result of that arrest. There can be no argument that plaintiff, by claiming injuries to his back in this matter, has placed the medical condition of his back at issue. Defendants are entitled to the entirety of plaintiff's medical records related to his back, regardless of the alleged cause of any injury to same.

Accordingly, it is

ORDERED that within 14 days plaintiff shall provide defendants with:

- (1) authorizations for all medical records associated with the October 15, 2018, arrest and incident;
- (2) All documents related to any other personal injury lawsuit by plaintiff, including but not limited to pleadings, bills of particulars, interrogatories, and plaintiff's deposition transcript(s);
- (3) Identifying information for any other personal injury lawsuit(s) by plaintiff, including but not limited to: caption, venue, index number (or case number), date of loss, and judgment;
- (4) Authorizations to retain all records associated with the matter of *Kendell v. Bain v. City of New York et al* (Index Number 519886/2019); and it is further

ORDERED that plaintiff shall appear for further deposition on December 1, 2022, regarding the October 15, 2018, incident, including but not limited to circumstances related to and surrounding the lawsuit under Index Number 519886/2019, where, following his arrest, plaintiff claimed injury to his back; and it is further

ORDERED that post-deposition demands related to the above deposition shall be served within 20 days; responses thereto shall be served within 20 days of receipt of demand. Failure to timely serve post-deposition demands shall constitute waiver of same. Failure to timely respond to timely served post-deposition demands shall result in sanctions, including but not limited to the striking of pleadings, preclusion of evidence, and such other sanction as appropriate, in the Court's discretion; and it is further

ORDERED that plaintiff's cross-motion seeking sanctions under motion sequence 006 is granted to the extent that Frederick McRoberts, Esq. of Lewis Brisbois Bisgaard & Smith, attorneys for 50 West Development and Hunter Roberts, and Jeffrey Singer, Esq. of Segan Nemerov Singer Sonnin & Tancer attorneys for plaintiff shall show cause before this Court on October 28, 2022, on paper submissions only, why sanctions should not be imposed against

counsel for frivolous conduct pursuant to Part 130 of the Rules of the Chief Administrative Judge for their failure to abide by the Court's March 31, 2022 order imposing discovery deadline dates, failure to seek permission for modification of the March 31, 2022 order, and for improperly filing a note of issue when it is beyond argument that discovery remained outstanding; and it is further

ORDERED that papers in opposition of the above sanction shall be filed via NYSCEF, with courtesy copy of same to chambers, no later than October 28, 2022; and it is further

ORDERED that counsel shall appear on January 5, 2023 at 11:00am for oral argument on the sanctions motion; and it is further

ORDERED that, for a second time, plaintiff's note of issue is stricken; and it is further

[continued on following page]

ORDERED that no note of issue shall be filed without further order of this Court authorizing filing same.

THIS CONSTITUTES THE DECISION AND ORDER OF THE COURT.

10/6/2022
DATE

CHECK ONE:

CASE DISPOSED
 GRANTED DENIED

APPLICATION:

SETTLE ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

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



HON. FRANK P. NERVO
J.S.C.