

Lezhen Liu v Bowery Mission Women's Ctr.
2022 NY Slip Op 34009(U)
November 28, 2022
Supreme Court, New York County
Docket Number: Index No. 155067/2018
Judge: William Perry
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. WILLIAM PERRY PART 23

Justice

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LEZHEN LIU,

Plaintiff,

- v -

BOWERY MISSION WOMEN'S CENTER, CHRISTIAN
HERALD ASSOCIATION INC. D/B/A THE BOWERY
MISSION, CHRISTIAN HERALD HOUSING
DEVELOPMENT FUND CORPORATION

Defendant.

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INDEX NO. 155067/2018

MOTION DATE 03/16/2022

MOTION SEQ. NO. 003

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 003) 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61

were read on this motion to/for EXAMINATION ORDER.

In this action for personal injury, defendants move, pursuant to CPLR 3126, for an order: dismissing the complaint, or in the alternative, compelling plaintiff, Lezhen Liu, to appear for an independent medical examination (IME) before Dr. Bender pursuant to the prior orders of the court. The motion is submitted to the court without opposition. For the reasons stated below, the motion is granted.

Background

On January 30, 2017, plaintiff fell in the basement of the Bowery Mission Women’s Center (BMWC) and allegedly sustained severe and permanent injuries as a result of the fall (complaint, ¶ 32, NYCEF Doc. No. 54; plaintiff tr at 19-20, NYSCEF Doc. No. 59).

Plaintiff filed the summons and complaint on May 31, 2018, which defendants answered on July 10, 2018 (NYSCEF Doc. Nos. 1, 7). By motion dated August 21, 2018, defendants Bowery Mission Women’s Center (BMWC), Christian Herald Association Inc. d/b/a The

Bowery Mission and Christian Herald Development Fund Corporation (Christian Herald) moved for summary judgment dismissal of the complaint, as well as all crossclaims and counterclaims against defendant Christian Herald, and seeking an order granting summary judgment in favor of Christian Herald (motion seq. no. 001).

In addition, by motion dated August 31, 2018, plaintiff moved, pursuant to CPLR 3123, for an order compelling BMWC and Christian Herald to respond to plaintiff's notice to admit dated July 20, 2018 (motion seq. no. 002). Defendants cross-moved for an order pursuant to CPLR 3013 granting a protective order vacating and striking the notice to admit dated July 3, 2018 [sic] and directing plaintiff to pay moving defendants' costs and expenses incurred in having to make the motion (002).

On February 7, 2019, the court, after review of the motion papers and oral argument, issued a decision and order: (1) granting the motion for summary judgment dismissing the complaint as against Christian Herald; (2) denying plaintiff's motion to compel a response to the notice to admit dated July 20, 2018; and (3) granting defendants' motion for a protective order regarding the notice to admit dated July 20, 2018 (NYSCEF Doc. Nos. 43, 44).

Plaintiff's Failure to Appear for an IME

On October 8, 2019, the parties appeared for a preliminary conference wherein plaintiff was to appear for her IME within 45 days after her deposition (NYSCEF Doc. No. 57). In addition, the parties appeared for a compliance conference on February 4, 2020, wherein it was again ordered that the IME of plaintiff was to be taken within 45 days after plaintiff's deposition (NYSCEF Doc. No. 58). Plaintiff's deposition was taken on July 20, 2020 (NYSCEF Doc. No. 59). Plaintiff's continued deposition took place on December 21, 2020 (NYSCEF Doc. No. 60).

Thereafter, IMEs were scheduled. Plaintiff appeared for a spinal IME with Dr. Brandoff but she failed to appear for her IME with Dr. Bender (Filardi affirmation in support, ¶ 5, NYSCEF Doc. No. 52). The IME with Dr. Bender was scheduled for the following dates: May 13, 2021, June 17, 2021, October 20, 2021 and January 25, 2022 (*id.*). Plaintiff failed to appear for each of the scheduled dates.

Additionally, by letter dated February 28, 2022, defense counsel wrote to plaintiff's counsel, via email, requesting counsel schedule an IME of plaintiff with Dr. Bender within 10 days in order to avoid motion practice (NYSCEF Doc. No. 61). To date, plaintiff has neither scheduled nor appeared for this IME (*Filardi good faith affirmation*, ¶ 4, NYSCEF Doc. No. 53).

Discussion

“The determination whether to strike a pleading for failure to comply with court-ordered disclosure lies within the sound discretion of the trial court” (*Fishbane v Chelsea Hall, LLC*, 65 AD3d 1079, 1081 [2d Dept 2009]).

“However, the drastic remedy of striking a pleading pursuant to CPLR 3126 should not be imposed unless the failure to comply with discovery demands or orders is clearly willful and contumacious. Willful and contumacious conduct may be inferred from a party's repeated failure to comply with court-ordered discovery, coupled with inadequate explanations for the failures to comply or a failure to comply with court-ordered discovery over an extended period of time”

(*Orgel v Stewart Tit. Ins. Co.*, 91 AD3d 922, 923 [2d Dept 2012] [internal quotation marks and citations omitted]). It has been held that the willful failure to appear for an IME may warrant dismissal of the action (*see e.g., Aziz v City of New York*, 130 AD3d 451 [1st Dept 2015]).


CPLR 3101 (a) provides that “[t]here shall be full disclosure of all matter material and necessary in the prosecution or defense of an action, regardless of the

burden of proof . . .” The words “material and necessary” have been “interpreted liberally to require disclosure . . . of any facts bearing on the controversy which will assist preparation for trial by sharpening the issues and reducing delay and prolixity.” *Allen v Crowell - Collier Publ. Co.*, 21 NY2d 403, 406 [1968]; *Reyes v Lexington 79th Corp.*, 149 AD3d 508, 508 [1st Dept 2017]). Plaintiff alleges severe and permanent injuries and an IME of those injuries is clearly relevant to the defense of this action (*see e.g., Laboy v 1045 Park Ave. Owners Corp.*, 2016 WL 2839342 [Sup Ct, NY County May 11, 2016, index No. 157353/14, Bannon, J.]).

The defendant having established that plaintiff has willfully failed to provide discovery as directed in the preliminary and compliance conference orders of this court (NYSCEF Doc Nos. 47, 48) in that plaintiff has failed to appear for an IME. Accordingly, it is hereby

ORDERED that the motion by defendants is granted to the extent that plaintiff is ordered to schedule and appear for an IME with Dr. Bender within 45 days from notice of entry of this decision and order; and it is further

ORDERED that defendant’s motion is granted and the plaintiff’s failure to appear for an IME will result in striking of the complaint upon notice by defense counsel unless within 45 days from service of a copy of this order with notice of entry, plaintiff shall for an IME at the office of Dr. Bender, at a date and time convenient for Dr. Bender and the parties.

<u>11/28/2022</u> DATE					 WILLIAM PERRY, 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