

Baize v 24 Hour Fitness
2023 NY Slip Op 35230(U)
August 25, 2023
Supreme Court, Queens County
Docket Number: Index No. 701032/20
Judge: Karina E. Alomar
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.
This opinion is uncorrected and not selected for official publication.

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: Honorable **KARINA E. ALOMAR**

IA PART 23

Justice

-----X

MICHAEL BAIZE,

Index No. 701032/20

Motion Date: 8/17/23

Plaintiff,

Motion Seq. No. 7

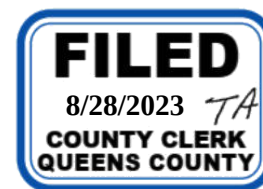
-against-

24 HOUR FITNESS, 24 HOUR FITNESS USA, INC.
and 24 HOUR FITNESS HOLDINGS LLC, Nominal
Defendants,

Defendants.

-----X

24 HOUR FITNESS, 24 HOUR FITNESS USA, INC.,
and 24 HOUR FITNESS HOLDINGS LLC, Nominal
Defendants,



Third-Party Plaintiffs,

-against-

J&D SERVICE SOLUTIONS CORP.,

Third-Party Defendant.

-----X

The following papers numbered 1 - 14 read on this motion by defendants/third-party plaintiffs, 24 Hour Fitness, 24 Hour Fitness USA, Inc., and 24 Hour Fitness Holdings LLC, Nominal Defendants to dismiss plaintiff's complaint, or in the alternative, precluding the pro se plaintiff from offering any evidence at the trial of this action, or, in the alternative, compelling plaintiff to appear for a further in-person video recorded deposition and provide appropriate and complete responses to discovery demands and notices within 30 days

PAPERS

NUMBERED

Notice of Motion-Affidavits-Exhibits.....	ECF Nos. 250-275
Answering Affidavits-Exhibits.....	ECF No. 276
Reply.....	ECF Nos. 277-278

Upon the foregoing cited papers, it is ordered that defendants/third-party plaintiff's motion pursuant to CPLR 3126 and/or CPLR 3124, inter alia, dismissing plaintiff's complaint is decided as follows:

Plaintiff commenced this action to recover for injuries that allegedly occurred as a result of a slip and fall.

By way of background, on or about April 7, 2021, due to plaintiff's failure to comply with numerous discovery demands, defendants/third-party plaintiffs brought a motion pursuant to CPLR 3126 and/or 3124, which plaintiff opposed arguing that defendant's/third-party plaintiff's demands were either improper and/or not relevant. Prior to the motion being fully submitted a conference was held. Plaintiff herein is appearing pro-se in this action, and as such, the court spent a substantial amount of time with the parties reviewing each discovery request. Subsequent to the conference, the parties notified the court that they were withdrawing the motion, as they had come to a stipulation with regards to the outstanding discovery. The stipulation was thereafter So Ordered on May 19, 2021.

On November 30, 2021, defendant brought a subsequent motion seeking the same relief that was sought in the prior motion, due to plaintiff's failure to comply with the So Ordered Stipulation. As the court had previously held a two-hour conference to address disputed discovery matters and found the requests relevant, the plaintiff's failure to comply with the So-Ordered stipulation did not rise to the level of being willful, contumacious or in bad faith so as to warrant dismissal or preclusion of his trial evidence. As such, the court only granted defendant/third-party plaintiff's motion to the extent that plaintiff was directed to respond to defendant's discovery demands as specified by the So-Ordered Stipulation, within thirty (30) days of service of a copy of the decision and order, with notice of entry.

On June 10, 2022, after the parties appeared for a compliance conference, the Honorable Laurentina S. McKetney Butler issued an order which required plaintiff to appear for a deposition on September 30, 2022, and further directed that the physician(s) for the independent medical examination of plaintiff was to be designated on or before October 31, 2022, and scheduled within thirty days after such designation. Defendant/third-party plaintiff affirms that pursuant to the June 10, 2022, order the plaintiff did appear as required for a deposition on September 30, 2022, by virtual/remote means. After the deposition defendants/third-party plaintiffs thereafter served plaintiff with a post deposition notice for discovery and inspection dated October 14, 2022, and further forwarded him a copy of his deposition transcript for execution. Defendant/third-party plaintiff alleges that plaintiff's errata sheet materially alters his deposition testimony and that he has failed to comply with the post-deposition discovery demands. Namely, defendant/third party plaintiff allege in that plaintiff has failed provide various medical authorizations as well as authorizations for updated tax returns, an authorization for plaintiff's gym attendance records, records of any/all out-of-pocket expenses related to his alleged "stage production" (for which he claims to have suffered \$20 to \$40 million in damages), and the complete contact information for eyewitness, Michael Baize, Jr.

On February 10, 2023, this court issued an order directing defendant to schedule and independent medical examination for plaintiff to be examined by Paul Lerner, M.D. and failure to do so shall be deemed a waiver, moreover the order directed the plaintiff to appear for the independent medical examination and failed to do so, absent good cause, would result in preclusion. Lastly, the court ordered plaintiff to provide all outstanding medical authorizations, authorizations for updated tax returns, authorizations for his gym attendance records, records of any/all out-of-pocket expenses related to his alleged "stage production", along with the last known contact information of eyewitness, Michael Baize, Jr., within thirty (30) days of service of the within decision with notice of entry. Failure to comply absent good cause shall result in preclusion.

Thereafter, on March 2, 2023, the plaintiff served answers to Defendant's Post Deposition Notice for Discovery and Inspection and indicated that there were no contracts/agreements/invoices that existed prior to the accident. Plaintiff appeared for a deposition

on March 29, 2023 and testified to the existence of 100 documents and contracts that were previously undisclosed, and contrary to his initial deposition stating that these documents did not exist. Then, on April 3, 2023, defendants served a Post-Deposition Notice for Discovery and Inspection seeking the newly identified documents and on May 2, 2023, the plaintiff responded and provided 300 contracts/agreements for ticket sales and an outline for the script for the alleged stage production, as well as a caretaker agreement.

In response, defendant served a further Post-Deposition Notice for Discovery and Inspection dated May 19, 2023, seeking the contact information and affiliations of all individuals identified in the aforementioned contracts/agreements, banking/financial documentation related to these agreements and any documentation evidencing payments under the caretaker agreement. A Supplemental Notice was also served concerning newly identified medical treatment and vacations taken by plaintiff on or about May of 2023.

In June of 2023, plaintiff provided his response where in he contended that he is not in possession of any of the information sought or that he already provided the documents and materials sought. Thereafter, a compliance conference was held on July 10, 2023 where the court directed the parties to proceed by motion to ensure that these discovery issues were preserved in writing, however, an order to this affect was not issued. Defendants herein represent to the court that at the conference, plaintiff stated that he has no information about the 300 individuals that he contracted with, has no way of contacting them, and that no documents exist providing a way to contact these individuals.

Mr. Baize Jr., one of the individuals who entered into the contract, plaintiff's son, testified on June 13, 2023, that he pre-sold 500 tickets for the stage production, but never collected any monies for the tickets sold, nor was he able to identify any of the 500 individuals or whom he was to provide tickets. Moreover, he stated that no documentation was generated or prepared as to the identity of these individuals and no further explanation.

Defendants' motion is seeking either the dismissal of plaintiff's complaint due to his failure "to obey an order for disclosure" and willfully failing to "disclose information" (CPLR 3126[3].) "The drastic remedy of striking a pleading is warranted where a party's failure to comply with court-ordered disclosure is willful and contumacious." (*Mangru v Shering Corp.*, 90 AD3d 621 [2011].) "The willful and contumacious character of a party's conduct can be inferred from party's repeated failure to comply with discovery demands or orders without a reasonable excuse." (*Id.*)

Here, considering the history of this matter and the fact that plaintiff has responded to the numerous requests for discovery and inspection submitted by defendants/third-party plaintiffs, and the language stated in this Court's prior order, defendants/third-party plaintiff's motion is granted only to the extent that plaintiff is

ORDERED to provide the defendants/third-party plaintiffs herein with the contact and identifying information of the individuals identified in the contracts/agreements within thirty (30) days from the date of entry of this Order, and if no such information exists, then a notarized affidavit stating such shall be submitted and as a result, these individuals will be precluded to be called as witnesses at the trial of this action, and it is further

4 of 4

ORDERED that plaintiff is also directed to provide the defendants/third-party plaintiffs with banking/financial documentation related to the aforementioned contracts/agreements within thirty (30) days of the date of this order, and if no such information is provided, then a notarized statement stating such shall be submitted in response, otherwise this evidence is precluded from being introduced as trial.

Defendants/third-party plaintiff's motion is denied in all other respects.

This constitutes the decision and order of the court.

Dated: August 25, 2023



KARINA E. ALOMAR, J.S.C.

