Campeas v City of New York

2012 NY Slip Op 31568(U)

June 7, 2012

Supreme Court, New York County

Docket Number: 114752/08

Judge: Barbara Jaffe

Republished from New York State Unified Court System's E-Courts Service.
Search E-Courts (http://www.nycourts.gov/ecourts) for any additional information on this case.

This opinion is uncorrected and not selected for official publication.

SCANNED ON 6/14/2012

[* 1]

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: JAFFE BARBARA JAFFE J.S.C. Justice — PART 5

David Campbell

- v -

City of NY

INDEX NO. 114752/08

MOTION DATE

MOTION SEQ. NO. 4

MOTION CAL. NO.

The following papers, numbered 1 to ___ were read on this motion to/for ___

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1
Answering Affidavits — Exhibits	2
Replying Affidavits	

Cross-Motion: ☐ Yes ☒ No

Upon the foregoing papers, it is ordered that this motion

DECIDED IN ACCORDANCE WITH ACCOMPANYING DECISION / ORDER

FILED

JUN 14 2012

NEW YORK COUNTY CLERK'S OFFICE

RECEIVED

JUN 11 2012

MOTION SUPPORT OFFICE NYS SUPREME COURT - CIVIL

Dated: 6/7/12

JUN 07 2012

BARBARA JAFFE J.S.C.

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

☐ SUBMIT ORDER/ JUDG. ☐ SETTLE ORDER/ JUDG.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : PART 5

---x

DAVID CAMPEAS and LYNN REYMAN,

Plaintiffs,

-against-

THE CITY OF NEW YORK, and DETECTIVE ARTHUR MOLNAR, JR.,

Defendants.

---x

Index No. 114752/08

Motion Date: 3/20/12
Motion Seq. No.: 004

DECISION AND ORDER

FILED
JUN 14 2012
NEW YORK
COUNTY CLERK'S OFFICE

BARBARA JAFFE, JSC:

For plaintiffs:
Elizabeth Eilender, Esq.
Jaroslawicz & Jaros, LLC
225 Broadway, 24th Fl.
New York, NY 10007
212-227-2780

For defendants:
David DePugh, ACC
Michael A. Cardozo
Corporation Counsel
100 Church St.
New York, NY 10007
212-788-0597

By order to show cause dated March 6, 2012, defendants move pursuant to CPLR 2004, 2005, and 3123 for an order extending their time to respond to plaintiffs' notice to admit dated April 28, 2009 and compelling plaintiffs to accept service, *nunc pro tunc,* of their response. Plaintiffs oppose.

Defendants' counsel argues that Corporation Counsel's records do not reflect that City was ever served with the notice and that to the extent it was served, its failure to respond resulted from law office failure, and that plaintiffs cannot show prejudice resulting from the delay. Defendants also object to one of the requested admissions on the ground that it relates to an ultimate issue in the action. (Affirmation of David DePugh, ACC, dated Mar. 1, 2012).

Plaintiffs observe that City was served with the notice approximately three years ago, and

[* 3]

object to an extension of time on the grounds that the parties engaged in years of discovery based in part on the admissions contained in the notice and that defendants' three-year delay in serving a response is prejudicial. (Affirmation of Elizabeth Eilender, Esq., dated Mar. 9, 2012).

Pursuant to CPLR 3123(a), upon service of a notice to admit:

> Each of the matters of which an admission is requested shall be deemed admitted unless within twenty days after service thereof or within such further time as the court may allow, the party to whom the request is directed serves upon the party requesting the admission a sworn statement either denying specifically the matters of which an admission is requested or setting forth in detail the reasons why he cannot truthfully either admit or deny those matters.

Pursuant to CPLR 3123(b), the court may at any time permit a party TO??? withdraw any admission upon such terms as may be just. A notice to admit should be used "only for disposing of uncontroverted questions of fact or those that are easily provable, and not for the purpose of compelling admission of fundamental and material issues or ultimate facts that can only be resolved after a full trial." (*The Hawthorne Group, LLC v RRE Ventures,* 7 AD3d 320 [1st Dept 2004]).

Here, City's explanation that law office failure caused its three-year delay in responding to the notice is conclusory and vague. However, plaintiff's contention that City's failure to respond to the notice has prejudiced them is also conclusory and vague, and, in any event, the notice improperly requested City's admission to an ultimate issue in this matter, namely, whether Molnar had physical contact with and/or assaulted plaintiff Campeas. (*See Rosario v City of New York*, 261 AD2d 380 [2d Dept 1999] [court properly excused City's failure to respond to notice to admit as allegations therein related to police officers' involvement in incident at issue, which was at heart of controversy]; *Vurdak v Eagle Ins. Co.*, 200 AD2d 518 [1st Dept 1994] [court was

within discretion in excusing defendant's default in failing to respond to notice to admit due to law office failure absent showing of prejudice]; *Howlan v Rosol*, 139 AD2d 799 [3d Dept 1988] [although defendants did not respond to notice, court had discretion to review propriety of notice]; *Clark v Prudential Ins. Co. of Am.*, 18 AD2d 1090 [2d Dept 1963] [permitting plaintiff to respond to notice although served almost two years earlier as defendant not substantially prejudiced by delay, which was caused by attorney oversight]; *but see Matter of Civ. Serv. Bar Assn., et al. v City of New York*, 83 AD2d 815 [1st Dept 1981] [denying City's motion to vacate default in failing to respond to notice to admit for two years]).

Indeed, a party has no obligation to respond to an improper notice to admit. (*See Nacherlilla v Prospect Park Alliance, Inc.*, 88 AD3d 770 [2d Dept 2011] [notice to admit improper as it sought admission as to defendant's ownership and control of premises, which was at heart of controversy and in substantial dispute as defendant had denied ownership in answer]; *Meadowbrook-Richman, Inc. v Cicchiello*, 273 AD2d 6 [1st Dept 2000] [notice to admit improperly requested defendant to concede disputed matters]; *Riner v Texaco, Inc.*, 222 AD2d 571 [2d Dept 1995] [excusing defendant's failure to respond to notice which requested that it admit ownership and control of property at issue]; *Orellana v City of New York*, 203 AD2d 542 [2d Dept 1994] [City not required to respond to notice which sought admission of contested issues and not clear-cut and undisputed factual matters]; *see also Morreale v Serrano*, 67 AD3d 655 [2d Dept 2009] [plaintiff could not rely on defendant's response to notice to admit as it improperly sought admissions as to facts at issue]).

Accordingly, it is hereby

ORDERED, that defendants' motion is granted to the extent of compelling plaintiffs to

accept, *nunc pro tunc*, defendants' response to the notice to admit annexed to the moving papers.

ENTER:

Barbara Jaffe, JSC

DATED: June 7, 2012
New York, New York

JUN 07 2012

FILED
JUN 14 2012
NEW YORK
COUNTY CLERK'S OFFICE