Crandall v Equinox Holdings, Inc.

2022 NY Slip Op 34161(U)

December 8, 2022

Supreme Court, New York County

Docket Number: Index No. 157373/2018

Judge: Arlene P. Bluth

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. ARLENE P. BLUTH** — ***Justice*** — **PART 14**

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SHANE CRANDALL,

Plaintiff,

- v -

EQUINOX HOLDINGS, INC. D/B/A EQUINOX FITNESS CLUB D/B/A EQUINOX, EQUINOX GREENWICH AVENUE, INC.,NICK HAMMOND, JOSE TAVERAS, MARTIN 'DOE', 'JOHN DOE'

Defendant.

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INDEX NO. 157373/2018

MOTION DATE 12/07/2022

MOTION SEQ. NO. 005 006 007

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 005) 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 252, 253, 254, 255, 256

were read on this motion to/for QUASH SUBPOENA, FIX CONDITIONS.

The following e-filed documents, listed by NYSCEF document number (Motion 006) 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 264, 265, 266, 267, 268, 271

were read on this motion to/for VACATE - ORDER.

The following e-filed documents, listed by NYSCEF document number (Motion 007) 257, 258, 259, 260, 261, 262, 263, 269, 270, 272, 273

were read on this motion to/for VACATE/STRIKE - NOTE OF ISSUE.

Motion Sequence Numbers 005, 006 and 007 are consolidated for disposition. Defendants' motion (MS005) to quash certain subpoenas is granted in part. Plaintiff's motions to vacate a court order issued after a discovery conference (MS006) and to strike the note of issue (MS007) are denied.

Background

In this action filed in 2018, plaintiff contends that he was the victim of sexual assault in a steam room located in the Greenwich Avenue Equinox. After many, many discovery orders and discovery motions, the Court issued a discovery order dated April 26, 2022 in which it stated that all depositions had to be completed by August 31, 2022 (NYSCEF Doc. No. 177). The plaintiff's deposition was already taken in February 2021. The Court added that the depositions had to be completed absent good cause shown given that this case began in 2018 (*id.*). The Court concluded that "The failure to do any depositions may result in the Court finding that they were waived" (*id.*).

It is undisputed that plaintiff ignored the Court-ordered deadline and then, a week before the September 22, 2022 conference, he sent out *11* notices of deposition. At this late September conference, plaintiff failed to cite a reasonable excuse for not doing any depositions by the August 31, 2022 deadline. The Court ordered that a note of issue be filed and that the remaining depositions were deemed waived based on plaintiff's failure to do anything to take these depositions (NYSCEF Doc. No. 190).

Now, in motion sequence 006 and 007, plaintiff moves to vacate the Court's September 22, 2022 order and to vacate the note of issue (which was filed by defendants). Plaintiff explains that the parties finalized their "Redaction Agreement" on May 13, 2022 and that the parties eventually stipulated to withdraw an outstanding discovery motion a few days later (the Court uploaded a decision concerning this motion on May 23, 2022 [NYSCEF Doc. No. 182]). Counsel for plaintiff insists that the parties were working on "some collateral discovery issues" from June 6, 2022 through June 17, 2022. Mr. Nazryan explained that "I indicated I would be in

touch regarding depositions, Defendants never followed up with me about this" (NYSCEF Doc. No. 211, ¶ 23).

Counsel for plaintiff explains that he then went on family leave from June 25, 2022 until September 19, 2022 and had limited or no email access during this time period. He claims that defendants knew that he was going on family leave. Counsel for plaintiff expressed shock that when he returned, he found out that defendants characterized plaintiff as the party responsible for delays.

Plaintiff contends that defendants are to blame because they refused to turn over documents until a confidentiality order was entered into. Another attorney for plaintiff, Mr. Held, claims that he "was expecting to take Defendants' depositions while Mr. Nazryan was on leave, but it was also my understanding that Defendants had to reach out to me" (NYSCEF Doc. No. 212, ¶ 10). Mr. Held blames defendants for not reaching out to plaintiff to discuss the case or to schedule the outstanding depositions until September 13, 2022. He adds that "While I was aware of the August 31, 2022 deposition deadline in this case, given that Defendants were pushing to schedule Plaintiffs' depositions in the G.B. case and the same attorneys would be doing both cases, I reasonably assumed that Defendants intended to also move to extend the deadline" (*id.* ¶ 13).

In opposition, defendants claim that plaintiff presented no good cause for ignoring the Court order and that blaming defendants for the fact that no depositions were taken is besides the point. They insist that the purported "law office failure" does not justify vacating the Court's order or the note of issue.

The September 22, 2022 Order

The Court declines to vacate its order or to vacate the note of issue (filed with permission based on that order). Despite plaintiff's transparent attempts to deflect blame from his own failures, the fact is that plaintiff failed to offer a valid excuse for not doing a single thing to take a deposition between the April 2022 order and the August 31, 2022 deadline. The facts, *as presented by counsel for plaintiff*, demonstrate that 1) the law firm knew about the deadline and 2) utterly ignored it.

As a general matter, an attorney taking family leave constitutes a valid excuse for missing a Court deadline. But, here, the timeline shows that this purported justification does not fully explain plaintiff's failure to comply. Mr. Nazryan claims he started his family leave on June 25, 2022. The Court's order setting a deadline to take depositions was issued on April 26, 2022. Even accounting for the issues with the confidentiality order and the withdrawal of a discovery motion, as of May 24, 2022 (when Court closed out the motion), plaintiff had no reason not to issue deposition notices and take steps to schedule a deposition ; notably, plaintiff also had plenty of time to seek an extension of time based on extenuating circumstances (if such circumstances existed, which he does not even claim now).

Instead, Mr. Nazryan claims the parties were working on "collateral discovery issues" from June 6-17, 2022. That reasoning does not adequately explain why no deposition notices (or, for that matter, any demands to hold a deposition) were sent out between May 24, 2022 and June 25, 2022, before Mr. Nazryan went on family leave. Plaintiff wholly failed to point to anything to show that he took any steps to schedule a deposition during this time period.

Plaintiff's attempt to blame defendants for not scheduling their own deposition is ludicrous. While parties and their counsel should be courteous and cooperative, they have no

obligation to do the opposing parties' work for them. This is not a situation in which plaintiff claims that defendants refused to appear for a scheduled deposition or never responded to repeated inquiries about deposition dates. The proper procedure is clear to any experienced practitioner: serve a deposition notice, request dates formally or informally with the opposing party's counsel, and, if working with the opposing party is unsuccessful, then request Court intervention. Plaintiff did not submit any proof, such as an email demanding defendants show up at a certain date and time, to demonstrate that he ever tried to schedule a deposition.

Also concerning for the Court is what happened after the deadline. While Mr. Nazryan claims he was out until September 19, 2022, Mr. Held (on behalf of plaintiff) uploaded *11* notices of deposition on September 15 (NYSCEF Doc. No. 184). That directly contradicts counsel for plaintiff's claim that it is a small firm and the depositions simply were forgotten while the handling attorney was on family leave. Plaintiff cannot have it both ways; he cannot claim that he ignored the Court order because an attorney was out on family leave and then (*while that attorney was still out on family leave*) suddenly send out nearly a dozen notices of deposition. Clearly, counsel for plaintiff was capable of drafting these deposition notices before the August 31, 2022 deadline and no reason was cited to justify this failure.

And Mr. Held admitted that he thought he was going to take defendants' depositions and that he was aware of the Court deadline. While Mr. Held contends that he operates a small firm, the fact is that he is not a solo practitioner and surely had the resources to do something, anything really, to demonstrate attempted compliance with the Court's order.

The broader issue, of course, is not only that the depositions were not held. It is that plaintiff did not utilize any number of options to ensure that it complied with a clear Court order. Plaintiff did not show that he attempted to reach an agreement with defendants to extend the

Court deadline or even send a letter for the Court's approval *prior* to the deadline. He did not make a motion to extend the deadline for depositions. Instead, plaintiff waited until a week before the conference to suddenly realize he had blatantly violated this Court order. And then he asked for every conceivable deposition, depositions he clearly contemplated seeking for months or years prior to requesting them.

Unfortunately, court orders must have consequences especially if there are no ameliorating factors. If the Court were to vacate its order and permit plaintiff to pursue these depositions, then the Court's orders would have little meaning. A party would know it could choose to ignore a Court deadline and pursue discovery on its own schedule. Moreover, the deadline at issue here did not require a "Herculean" task in order to comply. Plaintiff was given more than four months to do depositions in a case that started in 2018. In fact, the Court's language specifically stated that depositions would be waived only if no depositions were taken by the deadline. That means that if plaintiff had simply taken, or genuinely attempted to take, a single deposition out of the apparently 11 he now seeks, he would have had a strong argument that he complied. The record shows that not only was a single deposition not taken, but plaintiff did not take a single step to schedule or hold a deposition.

The Court also emphasizes that the consequences of the Court's order are not drastic. This is not a situation where plaintiff's complaint is dismissed for failure to comply with discovery orders. Plaintiff is only losing the right to depose defendants' witnesses. He will still have the right to file or oppose dispositive motions (assuming they are timely) and, potentially, proceed to a trial.

Based on the above reasoning, the Court denies the motion to vacate the note of issue. The Court's September 22, 2022 order explicitly permitted any party to file the note of issue and defendants availed themselves of that opportunity.

MS005

In this motion, defendants seek to quash subpoenas allegedly served on various non-party witnesses in October 2022. Defendants contend that plaintiff failed to properly serve these four witnesses. They explain that three of the four subpoenas were directed at out-of-state non parties and there is no evidence that plaintiff complied with the applicable law to serve subpoenas in those jurisdictions. Defendants point out that one of the depositions was scheduled for November 2, 2022, two days after the note of issue deadline set by the Court (defendants filed the note of issue, as directed, on October 31, 2022).

Defendants also complain that the subpoenas seek documents and discovery that are outside the scope of permitted discovery in this matter. They point out that plaintiff is only permitted to seek discovery pertaining to the specific Equinox gym on Greenwich Avenue (where the incident occurred) and cannot demand discovery about other gyms. Defendants also claim that one of the subpoenaed witnesses never worked at the gym and so he need not respond.

In opposition, plaintiff contends that the discovery sought from these non-party witnesses is relevant. He contends that Mr. Foley, Mr. Lanning and Mr. Campbell (three of the witnesses subpoenaed) were all identified by the defendants as having a role in drafting, receiving and disseminating emails about inappropriate steam room behavior. Plaintiff insists that all three individuals have information about prior instances of assaults and misconduct at Equinox gyms.

Plaintiff admits that Mr. Tawfik did not work at the specific gym at issue here but plaintiff insists that he has knowledge of how Equinox investigated misconduct complaints.

Plaintiff maintains in opposition that he did not seek document requests from these parties and that there was no formal request for documents. With respect to the purported defects in the subpoenas, plaintiff claims that they were waived or immaterial. Plaintiff contends that Mr. Foley was served on October 3, 2022 and did not raise any objections. He admits that Mr. Lanning was not served. Plaintiff adds that the other two witnesses, Mr. Campbell and Mr. Tawfik, cooperated with plaintiff and that they tentatively agreed to submit an affidavit in lieu of appearing for a deposition. Plaintiff claims that no objection was raised until counsel for defendants got involved. Plaintiff asks that defendants pay a “bust fee” for one of the depositions.

In reply, defendants submit the affidavits of Mr. Foley and Mr. Campbell. Mr. Foley contends that he received the subpoena by mail at his residence in Texas on October 10, 2022 and Mr. Campbell claims he received the subpoena by mail on October 17, 2022 at his apartment in Manhattan. They also contend that plaintiff’s opposition confirms that the information sought has already been ruled irrelevant by this Court and the Appellate Division, First Department. Defendants insist that plaintiff is limited to seeking discovery about this particular gym and cannot conduct a fishing expedition into all Equinox gyms.

Defendants maintain that arguments about overlooking procedural defects in these subpoenas should not be countenanced. They point out that Mr. Foley was not served properly as a resident of Texas and there is no evidence that he waived any defenses. Defendants stress that plaintiff admits Mr. Lanning was never served and that the subpoena served on Mr. Campbell was not timely (it was allegedly served on October 13, 2022 and the deposition was scheduled

for October 28, 2022). Defendants argue that Mr. Tawfik, a New Jersey resident was also not served properly and the scheduled deposition date was for November 2, 2022 (after the note of issue deadline). They also point out that although plaintiff contends that he does not seek documents, the subpoenas are titled as Subpoenas Duces Tecum Ad Testificandum.

The Court grants defendants' motion. As an initial matter, plaintiff admits that he never served Mr. Lanning. Plaintiff also did not sufficiently explain how the Court can overlook the improper service on the out-of-state residents, Mr. Foley and Mr. Tawfik. And defendants established that plaintiff did not give enough notice to Mr. Campbell or to Mr. Foley as required under the CPLR. While plaintiff is correct that some witnesses may have attempted to cooperate, there is no basis to find that they waived their rights to raise objections. These witnesses were not represented by counsel.

Moreover, Mr. Tawfik did not work at the specific gym where the incident occurred. That raises another basis upon which this Court quashes these subpoenas. Plaintiff admits in his opposition that he wants information about Equinox gyms and all of the subpoenas seek information about "complaints of lewd behavior and sexual harassment occurring at Equinox gyms" (NYSCEF Doc. No. 195). They also explicitly seek information about "Equinox's knowledge that such events were occurring at their gyms (including the 97 Greenwich Avenue gym)" (*id.*). Clearly, the subpoenas request discovery about many Equinox gyms.

The First Department previously held that plaintiff could not compel the disclosure of records related to all Equinox gyms in New York City (*Crandall v Equinox Holdings, Inc.*, 206 AD3d 552, 552, 168 NYS3d 834 (Mem) [1st Dept 2022]). The First Department added that "Equinox gyms are not party of a unified complex but are single facilities scattered throughout the city's five boroughs" (*id.*). And, yet, plaintiff attempted to serve subpoenas that once again

sought overbroad disclosure about Equinox gyms instead of solely the gym at issue here. The Court declines to *sua sponte* modify or limit the scope of these subpoenas as plaintiff was well aware of the First Department's binding ruling.

Given that a note of issue has already been filed, the Court grants the motion and issues a protective order for these subpoenas. Discovery is complete. However, the Court declines to award defendants any sanctions. These subpoenas were served prior to the note of issue deadline. Simply because defendants successfully argued that they should be quashed does not make this attempt sanctionable.

Accordingly, it is hereby

ORDERED that defendants' motion (MS005) to quash four subpoenas directed towards non-parties is granted to the extent that the subpoenas are quashed and denied to the extent that they sought sanctions; and it is further

ORDERED that plaintiff's motions to vacate this Court's order (MS006) and to vacate the note of issue (MS007) is denied.

12/8/2022		ARLENE P. BLUTH, J.S.C.
DATE		

CHECK ONE:	[ ] CASE DISPOSED		[X] NON-FINAL DISPOSITION			
	[ ] GRANTED	[ ] DENIED	[ ] GRANTED IN PART		[X] OTHER	
APPLICATION:	[ ] SETTLE ORDER		[ ] SUBMIT ORDER			
CHECK IF APPROPRIATE:	[ ] INCLUDES TRANSFER/REASSIGN		[ ] FIDUCIARY APPOINTMENT		[ ] REFERENCE	