Alfaro v Lizardo

2011 NY Slip Op 33336(U)

November 30, 2011

Supreme Court, Richmond County

Docket Number: 102825/05

Judge: Joseph J. Maltese

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF RICHMOND DCM PART 3

Index No.: 102825/05
Motion No.: 9

VICTOR ANTHONY ALFARO, JR., an infant under the age of fourteen by his Mother and Natural Guardian TOMASIA TOMAYO, and TOMASIA TOMAYO, Individually,

Plaintiffs

against

ELENITO LIZARDO

DECISION & ORDER

HON. JOSEPH J. MALTESE

Defendant

The following items were considered in the review of a motion by the plaintiffs to strike the defendant's answer, preclude the defendant from disputing failure to exercise due care, or to compel compliance with discovery demands and compel a continued examination before trial, each with a time certain for compliance, and to extend the time for the plaintiff to file a Note of Issue; and the cross-motion by the defendant to sanction the plaintiff for a frivolous motion.

Papers	Numbered
Notice of Motion and Affidavits Annexed	1
Notice of Cross-motion and Affidavits Annexed	2
Answering Affidavits	3, 4 & 5
Replying Affidavits	6
Exhibits	Attached to Papers

Upon the foregoing cited papers, the Decision and Order on the Motion and Cross-motion is as follows:

The plaintiffs, Victor Anthony Alfaro Jr., an infant under the age of fourteen by his Mother and Natural Guardian Tomasia Tomayo, and his mother Tomasia Tomayo individually, move to strike the answer of the defendant, Elenito Lizardo. The plaintiffs further move to preclude the defendant from disputing notice of defective and hazardous peeling, chipped and cracked lead based paint in the plaintiffs' apartment rented by the defendant. The plaintiffs also move to compel the defendant to comply with court orders, to respond to the plaintiffs' discovery demands, and to compel another examination before trial of the defendant. The plaintiffs further move to strike the answer or to

preclude, and for awarding from the defendant attorney fees and costs. The plaintiff additionally moves for extension of time to file the note of issue in this cause of action. The motion is granted in part and denied in part. The defendant cross-moves seeking sanctions against the plaintiffs. The cross-motion is denied.

Facts

The basis of the underlying action is an allegation that Victor Anthony Alfaro, Jr. suffered *in utero* and post-natal lead poisoning as a result of the conditions both of his and of his mother's residence in the defendant's property commonly known as 22 Haughwout Avenue, Staten Island, New York 10302. In a notice dated May 9, 2007, the plaintiffs made demands for discovery and inspection. A second notice for discovery and inspection was dated March 3, 2009. The defendant acknowledges the demand of March 3, 2009 was resent on February 10, 2011, and was received by them. The plaintiffs assert the defendant failed to comply with the demands for disclosure.

A third notice for discovery and inspection was dated February 11, 2011. In response, the defendants provided documents to comply with certain of the demands. However, the defendant states that the terms "closing papers," "inspections records," "engineer reports," and "federally-mandated lead disclosure forms" are vague, and that he was unable to comply with the demand because of vagueness.

Examinations before trial of the defendant were held in the English language on February 5, 2009 and on April 1, 2011. The plaintiffs allege that the defendant delayed in answering, and gave unresponsive and vague answers. The defendant's primary language was acknowledged to be Spanish, but the defendant stated he understood English. No translator was made available for either deposition, by either party. Neither party documented the defendant's level of fluency in the English language. A note of issue was filed by the defendant on December 22, 2010, but was vacated on February 10, 2011.

On February 7, 2011, the court ordered an examination before trial of the defendant on or before March 31, 2011(this was permissively rescheduled for April 1, 2011). That order further directed the defendant respond to the notice for discovery dated May 9, 2009 by March 11, 2011. A demand for discovery and inspection made in response to the previous examination before trial was ordered to be made by the plaintiffs on or before February 18, 2011 or the demand would be waived, with an answer to the demand required by March 11, 2011. By the order of February 7, 2011, all the plaintiffs' hospital records obtained by the defendant were to be provided to the plaintiffs by March 11, 2011.

Discussion

A party may seek relief from an adversary unresponsive to proper demands for discovery, and just penalties may be imposed.[1] The court is not limited, but among possible penalties, the court may order that an issue pertinent to the information withheld be deemed resolved in favor of the party denied discovery, that the withholding party be denied claims, defenses, and use of evidence or witnesses, or that pleadings or parts of pleadings be struck, an action or part thereof be dismissed, or that judgment by default be entered against the withholding party.[2]

Here, the plaintiff seeks relief alleging that the defendant has not complied with demands for disclosure made in notices for discovery and inspection dated March 3, 2009 and February 11, 2011. The defendant has documented the responses made to the demands of February 11, 2011. Those responses do not include the requested closing documents on the subject property including "closing papers for purchasing on the subject building, including but not limited to any and all inspection records, Engineer reports and federally-mandated Lead Disclosure forms." The defendant deems this request to be vague. The court takes judicial notice of generally accepted meanings of the items requested, and directs the defendant to provide this information to the plaintiff by **Monday, December 19, 2011**, or the defendant's answer shall be stricken.

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[1]CPLR § 3042 (d)

[2]CPLR § 3126.

The defendant asserts that it had never received the plaintiffs' notice of discovery and inspection of March 3, 2009. The plaintiffs assert this was mailed through the United States Postal Service and an affirmation to this is dated March 4, 2011. Ordinarily, proof of proper mailing gives rise to the presumption that the item was received by the addressee.[3] However, the defendant has demonstrated that the plaintiffs listed invalid addresses for the defendant on the plaintiffs' documents. Submission of evidence may rebut the presumption of receipt.[4] Therefore, the defendant has rebutted the presumption that it received the notice of discovery and inspection mailed on March 3, 2009. The court directs that the defendant shall comply with the notice of discovery and inspection of March 3, 2009 within twenty-one days from the date of this order or the defendants answer will be stricken.

The plaintiffs assert that the defendant failed to answer questions during his examination before trial. Failure to answer a question during a deposition or examination before trial may give rise to a negative inference against the non-responsive party.[5] However, the plaintiffs do not specify those additional questions previously unasked during the plaintiffs' two prior opportunities to examine the defendant. It is not necessary in this instance to require an additional examination before trial.

The plaintiffs move for extension of the time for filing a note of issue. The previously issued note of issue was ordered struck from the record by order of this court entered February 18, 2011.

Both parties assert their adversary's motions are frivolous and without merit for sanctions, costs, and reasonable attorney fees.[6] Frivolous conduct is "completely without merit"[7] and "undertaken primarily to delay or prolong the resolution of the litigation, or to harass or maliciously injure

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[3]*Holland v. New York City*, 271 AD 2d 609,610 [2d Dept 2000].

[4]*Holland v. New York City*, 271 AD 2d at 610.

[5]*Carey v. Foster*, 164 AD 2d 930 [2d Dept 1990].

[6]CPLR § 8303-a .

[7]22 *NYCRR* § 130-1.1 (c)(1).

another..."[8] The Appellate Division, Second Department defines a frivolous claim as "... without any reasonable basis in law or fact and could not be supported by a good faith argument for an extension, modification, or reversal of existing law."[9] The Appellate Division, Second Department holds that the outcome of a motion is not consequential in determining whether it is frivolous.[10]

Sanctions are within the sound discretion of the Court and are reserved for serious transgressions. The Court does not find that either party engaged in frivolous motion practice. Their motions were not "commenced, used or continued in bad faith, solely to prolong resolution of litigation or to harass or maliciously injure"[11] and were not "without any reasonable basis in law or fact."[12] The plaintiffs' motion and the defendant's cross-motion, whether for sanctions, costs, or attorney fees, are denied.

Accordingly, it is hereby:

ORDERED, that the plaintiffs' motion to strike the defendant's answer is denied at this time; and it is further

ORDERED, that the plaintiffs' motion demanding that the defendant produce the closing papers for purchase of the subject building, including but not limited to any and all inspection records, engineering reports and federally-mandated lead disclosure forms, is granted insofar as the defendant has them in his possession or under his control, and the defendant must reply by **Monday, December 19, 2011**, or the defendant's answer shall be stricken; and it is further

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[8] 22 *NYCRR* § 130-1.1 (c)(2).

[9] *Zysk v. Kaufman*, 53 AD 3d 482 [2d Dept 2008].

[10] *Mazo v. NYRAC, Inc.*, 191 AD 2d 617 [2d Dept 1993].

[11] CPLR § 8303-a (c)(i).

[12] *Id.,* (c)(ii).

ORDERED, that the plaintiffs' motion demanding the production by the defendant of items demanded in the notice of discovery and inspection dated March 3, 2009, is granted, insofar as the items demanded are in the possession of the defendant or under his control, and the defendant must comply by **Monday, December 19, 2011,** or the defendant's answer will be stricken; and it is further

ORDERED, that the plaintiffs' motion to require further examination before trial of the defendant is denied; and it is further

ORDERED, that the plaintiffs' motion to extend the filing of a note of issue is moot; and it is further

ORDERED, that the plaintiffs' motion seeking attorney fees and costs from the defendant is denied; and it is further

ORDERED, that the defendant's cross-motion seeking sanctions against the plaintiffs is denied; and it is further

ORDERED, that the parties must return to **DCM Part 3** at **130 Stuyvesant Place**, **Third Floor, Staten Island, New York** on **Tuesday, December 20, 2011** at **9:30 AM** for pre-trial conference for issuance of a certification order, and that counsel for each party are to appear at that time and may not utilize the services of "*per diem*" or "of counsel" attorneys.

ENTER,

DATED: November 30, 2011

Joseph J. Maltese
Justice of the Supreme Court