

Hogan v City of N.Y.

2013 NY Slip Op 30617(U)

March 27, 2013

Sup Ct, New York County

Docket Number: 106954/201

Judge: Kathryn E. Freed

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SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

PRESENT: HON. KATHRYN FREED
JUSTICE OF SUPREME COURT Justice

PART 5

Index Number : 106954/2011
HOGAN, MARSHALL
vs.
CITY OF NEW YORK
SEQUENCE NUMBER : 003
STRIKE ANSWER 244 # 46

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____

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

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____	No(s). _____
Answering Affidavits — Exhibits _____	No(s). _____
Replying Affidavits _____	No(s). _____

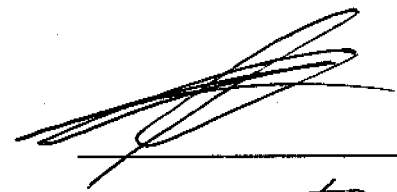
Upon the foregoing papers, it is ordered that this motion is

**DECIDED IN ACCORDANCE WITH
ACCOMPANYING DECISION / ORDER**

FILED
MAR 29 2013
NEW YORK
COUNTY CLERK'S OFFICE

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

Dated: 3-27-13
MAR 27 2013


_____, J.S.C.

1. CHECK ONE: CASE DISPOSED
2. CHECK AS APPROPRIATE: MOTION IS: GRANTED DENIED GRANTED IN PART OTHER
3. CHECK IF APPROPRIATE: SETTLE ORDER SUBMIT ORDER
- DO NOT POST FIDUCIARY APPOINTMENT REFERENCE

HON. KATHRYN FREED
JUSTICE OF SUPREME COURT

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

-----X
MARSHALL HOGAN,

Plaintiff,

-against-

THE CITY OF NEW YORK, 301-303 WEST 125 LLC.
CONSOLIDATED EDISON COMPANY OF
NEW YORK, INC. and EMPIRE CITY SUBWAY
COMPANY,

Defendants.

-----X
HON. KATHRYN E. FREED:

RECITATION, AS REQUIRED BY CPLR §2219(a), OF THE PAPERS, CONSIDERED IN THE REVIEW OF
THIS MOTION.

PAPERS

NOTICE OF MOTION AND AFFIDAVITS ANNEXED.....1-2.....
ORDER TO SHOW CAUSE AND AFFIDAVITS ANNEXED.....
ANSWERING AFFIDAVITS.....
REPLYING AFFIDAVITS.....
EXHIBITS.....3-4.....
STIPULATIONS.....
OTHER.....

FILED
MAR 27 2013
NEW YORK
CLERK'S OFFICE
NUMBERED

UPON THE FOREGOING CITED PAPERS, THIS DECISION/ORDER ON THIS MOTION IS AS FOLLOWS:

Plaintiff moves for an Order pursuant to CPLR§ 3126 striking defendant 301-303 West 125 LLC's Answer for deliberately failing to take plaintiff's deposition, or in the alternative, pursuant to CPLR§ 3124(2), compelling said defendant to appear for Court Ordered depositions on a date certain. No opposition has been submitted

After a review of the instant motion, all relevant statutes and case law, the Court grants the motion pursuant to CPLR§ 3126, and strikes defendant 301-303 West 125 LLC's Answer.

Factual and procedural background:

This is a negligence action wherein plaintiff seeks to recover damages for personal injuries allegedly sustained as a result of an accident occurring on February 15, 2011, on a sidewalk located in front of the premises known as 2335, 2336 & 2339 Frederick Douglass Boulevard in New York County. The sidewalk was caused to cave in by plaintiff stepping on it, causing him to fall into a hole in the ground measuring 5 feet 5 inches, deep.

On March 9, 2011, plaintiff filed a Notice of Claim. On June 22, 2011, he filed a Summons and Verified Complaint, and a Supplemental Summons was filed on August 16, 2011. On April 3, 2012, a preliminary conference was held, wherein an Order was rendered by Justice Barbara Jaffe. Said Order is annexed to plaintiff's motion as Exhibit "D." The Order reads in pertinent part that the deposition of both plaintiff and defendant 301-303 West 125 LLC was to be held on May 21, 2012 at a location to be agreed upon by the parties. Subsequently, at a compliance conference held on September 18, 2012, another Order rendered by Justice Jaffe indicated in pertinent part that plaintiff's deposition was to be held on December 18, 2012. This Order is annexed as Exhibit "F."

Plaintiff alleges that defense counsel for defendant 301-303 West 125 LLC, has failed to appear for the aforementioned two scheduled depositions, in violation of two Court Orders. He argues that CPLR§ 3126 is an appropriate remedy in response to such "flaunting of the discovery process."

Conclusions of law:

CPLR§ 3126 addresses penalties for the refusal to comply with discovery. It permits the rendering of "an order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or any part thereof, or rendering a judgment by default

[* 4]
against the disobedient party,” as a remedy/penalty.

To invoke the drastic remedy of striking an answer, it must be demonstrated that a defendant’s failure to comply with discovery was the result of willful, contumacious and deliberate conduct (*see* CPLR§ 3126; Cianciolo v. Trism Specialized Carriers, 724 A.D.2d 369, 370 [2d Dept. 2000]; Vancott v. Great Atl.& Pac. Tea Co., 271 A.D.2d 438 [2d Dept. 2000]; Williams v. Ryder TRS, Inc., 29 A.D.3d 784 [1st Dept. 2006].

In the case at bar, the Court finds that defendant 301-303 West 125 LLC’s failure to appear at two previously Court Ordered depositions was willful and contumacious. Defendant has failed to meet its burden of demonstrating a reasonable excuse for its nonappearance on two occasions. Indeed, it has failed to submit any opposition to the instant motion. In considering defendant’s previous and current behavior, affording it another opportunity to appear for a deposition seems pointless (Touray v. Munoz, 96 A.D.3d 623 [1st Dept. 2012]; Silverio v. Arvelo, 103 A.D.3d 401 [1st Dept. 2013]). Thus, striking its Answer is an appropriate and necessary remedy.

Therefore, plaintiff having established that defendant 301-303 West 125 LLC has willfully failed to appear at two court ordered depositions as directed in the preliminary conference order dated April 3, 2012 and the compliance conference order dated September 18, 2012, respectively, despite specific directives in said orders, and without good cause, to appear for deposition on the dates directed therein, it is hereby

ORDERED that the motion of plaintiff to strike defendant 301-303 West 125 LLC’s Answer is granted, and it is further

ORDERED that defendant 301-303 West 125 LLC is precluded from offering proof in opposition to plaintiff’s claim of an unsafe condition; and it is further

ORDERED that plaintiff-movant shall serve a copy of this order on all other parties and the Trial Support Office, 60 Centre Street, Room 158. and it is further

ORDERED that counsel shall appear on June 4, 2013, in Room 103 at 2:00 p.m., 80 Centre Street, to set a trial date on the remaining issues in the case; and it is further

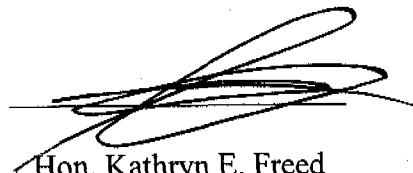
ORDERED that a note of issue and statement of readiness shall be determined at the aforementioned conference; and it is further

ORDERED that this constitutes the decision and order of the Court.

DATED: March 27, 2013

MAR 27 2013

ENTER:



Hon. Kathryn E. Freed
J.S.C.

**HON. KATHRYN FREED
JUSTICE OF SUPREME COURT**

FILED

MAR 29 2013

**NEW YORK
COUNTY CLERKS OFFICE**