

Rodriguez v City of New York

2013 NY Slip Op 33140(U)

November 4, 2013

Sup Ct, New York County

Docket Number: 109444/2011

Judge: Kathryn E. Freed

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SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

HON. KATHRYN FREED
JUSTICE OF SUPREME COURT

PRESENT: _____
Justice

PART 5

Index Number : 109444/2011
RODRIGUEZ, CARLOS
vs.
CITY OF NEW YORK
SEQUENCE NUMBER : 001
STRIKE CALL # 65

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

FILED

NOV 12 2013

NEW YORK
COUNTY CLERK'S OFFICE

DECIDED IN ACCORDANCE WITH
ACCOMPANYING DECISION / ORDER

FILED

NOV 12 2013

NEW YORK
COUNTY CLERK'S OFFICE

Dated: 11-4-13

NOV 04 2013



J.S.C.

HON. KATHRYN FREED
JUSTICE OF SUPREME COURT

- 1. CHECK ONE: CASE DISPOSED NON-FINAL DISPOSITION
- 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

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
CARLOS RODRIGUEZ,

Plaintiff,

-against-

DECISION/ORDER
Index No. 109444/2011
Seq. No. 001

THE CITY OF NEW YORK,

Defendant.

FILED

NOV 12 2013
X

-----X
KATHRYN E. FREED, JSC:

**NEW YORK
COUNTY CLERK'S OFFICE**

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

PAPERS	NUMBERED
NOTICE OF MOTION AND AFFIDAVITS ANNEXED.....1-2 (Exs. C, E &F)
ORDER TO SHOW CAUSE AND AFFIDAVITS ANNEXED.....
ANSWERING AFFIDAVITS.....4.(Exhs. A-B)
REPLYING AFFIDAVITS.....5.....
EXHIBITS.....
OTHER.....(Cross-Motion).....3.....

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

Defendant the City of New York (“the City”), moves for an and Order pursuant to CPLR§ 3126, striking plaintiff’s claim for lost earnings for his failure to provide copies of his tax returns and authorizations for said tax returns for two years prior to the date of incident to the present, and his failure to respond to the City’s demands for information relative to his claim, and precluding plaintiff from offering evidence at the time of trial with respect to his claim for lost earnings, or in the alternative, pursuant to CPLR§ 3124, compelling plaintiff to respond to the City’s demands and provide the City with copies of his tax returns and authorizations for his tax returns for two years prior to the date of the incident to the present.

Plaintiff cross-moves for a protective order pursuant to CPLR§ 3103(b), with respect to the City's demand for production of his tax returns for two years prior to the date of the subject occurrence.

After a review of the papers presented, all relevant statutes and case law, the Court denies the motion and denies the cross-motion.

Factual and procedural background:

Plaintiff, a sanitation worker, seeks to recover monetary damages for personal injuries he sustained on January 26, 2011. At that time, while walking through the parking lot of the facility where he worked, a New York City Department of Sanitation ("DOS") truck, while backing into the bay of a garage, located at 2 Bloomfield Street, in New York County, struck a parked vehicle, propelling said vehicle into plaintiff. Consequently, plaintiff sustained injuries, requiring multi-level spinal surgery.

Thereafter, plaintiff commenced the instant action via service of a Summons and Complaint on or about August 18, 2011. The City joined issue via service of an Answer on or about September 9, 2011. In his Bill of Particulars, plaintiff seeks approximately two million dollars in lost earnings, which include overtime pay and full disability from his employment with Radio City Music Hall, as well as loss of medical and other benefits. On September 9, 2011, the City served a Combined Demand for a Verified Bill of Particulars and Discovery. Within said Demand, the City requested copies of plaintiff's tax returns for two years prior to his accident to the present. Additionally, by correspondence dated September 29, 2011, the City requested authorizations for plaintiff's tax filings.

The Case Scheduling Order dated January 6, 2012 specifically directs that to the extent there is a claim for lost income or wages “...plaintiff shall provide authorization for W-2 forms or employment records shall be provided for the year of, year before and year after the date of the alleged accident, as well as for the period of time lost from work as a result of the alleged incident, or IRS records if provided by law.” The City asserts that by Notice for Discovery and Inspection dated December 20, 2012, it again requested authorizations to obtain plaintiff’s tax returns for two years prior to the plaintiff’s incident to the present.

On January 2, 2013, a compliance conference was held before this Court, wherein the issue regarding the request for copies of tax returns and authorizations for same was discussed. Having failed to reach a mutual agreement, the instant motion was necessitated.

Positions of the parties:

The City argues that plaintiff’s lost earnings claim should be stricken as he has failed to provide copies of his tax returns and authorizations for same for two years prior to the date of the subject accident to the present, and further failed to respond to the Case Scheduling Order and the City’s numerous demands for tax information relative to plaintiff’s lost earnings claim during the course of discovery.

The City asserts that the Case Scheduling Order (“CSO”), dated January 6, 2012, specifically directs plaintiff to provide authorizations for W-2 forms or employment records for the year prior to and subsequent to the accident, as well as for the period of time lost from work as a result of the accident, or IRS records if provided by law. By Notice of Discovery and Inspection dated December 20, 2012, the City again requested authorizations to obtains plaintiff’s tax returns for two years prior to his accident to the present. Furthermore, on December 20, 2012, in light of plaintiff’s post-

surgical intervention and subsequent pension decision granting him an Accident Disability Pension, the City served both correspondence and a Notice for Discovery and Inspection wherein, among other discovery, its demand for authorizations for tax returns for two years prior to the incident were again requested and refused.

Positions of the parties:

The City argues that since plaintiff alleges that he has yet to return to work following his post-accident surgical intervention, he has a continuing obligation to provide copies of tax records and authorizations for tax records to the City pursuant to the case scheduling order and the its initial Demand for Discovery and Inspection. The City also argues that it is well settled that a party's pleadings may be stricken where the non disclosure is willful, contumacious or amounts to bad faith. Additionally, it argues that CPLR§3126 allows for the striking of a pleading where plaintiff has failed to comply with court-ordered discovery.

The City also argues that given the nature of the instant claim for lost earnings and the fact that the City is the only defendant being sued, it is essential to its defense that it be afforded the opportunity to fully investigate the legitimacy of the claim. Additionally, the City argues that plaintiff's tax returns will divulge whether he has obtained other gainful employment following the date of his disability retirement from the Department of Sanitation on December 26, 2012. The City further argues that even if the Court declines to strike plaintiff's claim for lost earnings, he should nevertheless, be compelled to provide his tax returns.

Plaintiff argues that the City has failed to establish that the information contained in his tax returns cannot be obtained from other sources, and thus, has not satisfied the controlling legal standard. Plaintiff assert that the City is already in possession of his W-2's and employment records,

and is aware of his complete earnings history. Plaintiff also emphasizes the fact that the City has failed to cite any cases where a plaintiff who is not self-employed was required to exchange his tax returns. Plaintiff also argues that tax returns are not discoverable in the absence of a strong showing that the information is indispensable to the claim and cannot be obtained from other sources.

Conclusions of law:

“[I]t is well settled that the drastic remedy of striking a party’s pleading pursuant to CPLR §3126 for failure to comply with a discovery order is appropriate only where the moving party conclusively demonstrates that the non-disclosure was willful, contumacious or due to bad faith” (*McGilvery v. New York City Tr. Auth.*, 213 A.D.2d 322, 324 [1st Dept. 1995]). Willful and contumacious behavior can be inferred by a failure to comply with court orders, in the absence of adequate excuses (see *Johnson v. City of New York*, 188 A.D.2d 302 [1st Dept. 1992]; *Nunez v. City of New York*, 37 A.D.3d 434 [2d Dept. 2007]; *Touray v. Munoz*, 96 A.D.3d 623 [1st Dept. 2012]; *Silverio v. Arvelo*, 103 A.D.3d 401 [1st Dept. 2013]).

Article 31 of the CPLR determines the items that are discoverable. Generally, the test for disclosure pursuant to CPLR§ 3101 is whether the information is “material and necessary.” This test is one of relevance, usefulness and reason (*Allen v. Crowell-Collier Publ. Co.*, 21 N.Y.2d 403 [1968]). Indeed, while courts have liberally construed the scope of material that is considered discoverable, there is a long recognized exception regarding tax returns. It is well settled that “[b]ecause of their confidential and private nature, disclosure of tax returns is disfavored. The party seeking disclosure must make a strong showing of necessity and demonstrate that the information contained in the returns is unavailable from other sources” (*Gordon v. Grossman*, 183 A.D.2d 669, 670 [1st Dept. 1992]; see also *Williams v. New York City Hous. Auth.*, 22 A.D.3d 315 [1st Dept.

2005], *lv denied* 13 N.Y.3d 702 [2009]; *Latture v. Smith*, 304 A.D.2d 534 [2d Dept. 2003]; *Sachs v. Adeli*, 26 A.D.3d 52 [1st Dept. 2005]; *Four Aces Jewelry Corp. v. Smith*, 256 A.D.2d 42 [1st Dept. 1998]).

Due to the confidential and private nature of tax returns, a party seeking discovery of them must establish that information contained therein is “indispensable to litigation and unavailable from other sources,” (*Briton v. Knott Hotels Corp.*, 111 A.D.2d 182 [1st Dept. 1985]; *Nanbar Realty Corp. v. Pater Realty Co.*, 242 A.D.2d 208 [1st Dept. 1997]; *Altidor v. State-Wide Ins. Co.*, 22 A.D.3d 435 [2d Dept. 2005]). The party seeking to compel production of a tax return must identify the particular information the return will contain, its relevance, explain why other possible sources of the information sought are inaccessible or likely to be unproductive and limit examination of the return to relevant material through reduction of extraneous information (see *Nanbar Realty Corp.* 242 A.D.2d 208 at 210). Moreover, tax returns may be discoverable if a plaintiff’s loss of earnings is in issue (44 A NY Jur 2d, Disclosure § 219, *Singh v. Singh*, 51 A.D.3d 770 [2d Dept. 2008]).

In the case at bar, the Court finds the City’s assertion that plaintiff may currently be working at another job to be speculative, conclusory, unconvincing, and insufficient to demonstrate a showing of necessity. Indeed, the City has not proffered any evidence which sufficiently establishes a good faith basis for disclosure of plaintiff’s tax returns. Nor, has it shown that the information contained in said tax returns is indispensable to plaintiff’s claim and cannot be obtained from other sources. More importantly, plaintiff has provided the City with authorizations to obtain his W-2’s, and his full pension records and employment records, thus undermining the City’s accusation of contumacious behavior. It is plausible that the same information contained in the tax returns would also be included in the financial records. Finally, in consideration of the foregoing, the Court finds that

plaintiff's cross-motion for a protective order is unnecessary.

Therefore, in accordance with the foregoing, it is hereby

ORDERED that defendant City of New York's motion for an order striking plaintiff's claim for lost earning, and precluding plaintiff from offering evidence at the time of trial with respect to his claim for lost earnings is denied; and it is further

ORDERED that plaintiff's cross-motion for a protective order is also denied; and it is further

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

DATED: November 4, 2013

ENTER:

NOV 04 2013



Hon. Kathryn E. Freed

HON. KATHRYN FREED
J.S.C.
JUSTICE OF SUPREME COURT

FILED

NOV 12 2013

NEW YORK
COUNTY CLERK'S OFFICE