Hogan v City of New York
2014 NY Slip Op 33945(U)
December 5, 2014
Supreme Court, New York County
Docket Number: 106954/2011
Judge: Kathryn E. Freed
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: Part 5

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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 (LIMITED), SAAB MANAGEMENT, ACHS MANAGEMENT and HARCO CONSULTANTS CORP.,

Defendants.

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DECISION/ORDER

Index No. 106954/2011
Seq. No. 006

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

HON. KATHRYN E. FREED:

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 A-K).
ORDER TO SHOW CAUSE AND AFFIDAVITS ANNEXED.....	.....
AFFIRMATION IN OPP AND EXHIBITS.....	..4 (Exs A-L)..
REPLY AFFIRMATION.....	.....6.....

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

Defendant 301-303 West 125 LLC ("301-303") moves, pursuant to CPLR 5015(a) (1) and (2) and CPLR 2221, for an order granting it leave to vacate this Court's order, dated March 27, 2013, which struck 301-303's Answer. The plaintiff opposes. No opposition has been received from any other named party. After a review of the papers presented, all relevant statutes and case law, the

Court **grants the motion in part and denies in part.**

Factual and Procedural Background:

Plaintiff seeks to recover monetary damages for injuries he allegedly sustained on February 15, 2011, while a pedestrian on a public sidewalk in front of the premises known as 2335, 2337 and 2339 Frederick Douglas Boulevard in New York County. The sidewalk caved in while plaintiff was stepping on it, resulting in his falling into the hole, which measured 5 feet, 5 inches in diameter. Consequently, plaintiff filed a notice of claim dated February 18, 2011, alleging that the sidewalk was defective, unsafe, hazardous, negligent, and unrepaired, and that the defect consisted of an improperly laid, applied, maintained sidewalk that was broken, cracked, uneven and consisted of eroded concrete. Plaintiff claims that, as a result of the alleged incident, he had to undergo spinal surgery, including an anterior cervical diskectomy and fusion.

Plaintiff commenced the instant action against 301-303 West 125 LLC and co-defendant, the City of New York, via filing a summons and complaint on or about July 28, 2011. Issue was joined by service of 301-303 West 125 LLC's verified answer on August 25, 2011. Thereafter, plaintiff served a supplemental summons and verified complaint on or about August 23, 2012, naming Consolidated Edison of New York, Inc. ("Con Ed") and Empire City Subway Company (Limited) ("Empire City"), as defendants. 301-303 and Empire City served their answers on September 4 and 17, 2012, respectively.

On January 13, 2013, plaintiff moved, pursuant to CPLR 3126, to strike the answer of 301-303 due to its intentional failure on two occasions to take plaintiff's deposition on a date certain. That motion was returnable on February 4, 2013. On March 27, 2013, this Court granted the motion to strike noting, *inter alia*, that defendant 301-303 failed to oppose the motion. However, plaintiff

did not serve the order with notice of entry until May 23, 2014, over a year after this Court's order. See Exhibit "I" to Movant's Affirmation in Support.

Positions of the Parties:

Defendant 301-303 now moves to vacate the order of March 27, 2013 or, in the alternative, to reargue plaintiff's motion to strike. 301-303, by its attorney, Amy Lynn Pludwin, avers that the movant did indeed timely serve and file opposition to plaintiff's motion to strike. A copy of that opposition and proof of service is annexed as Exhibit "G." 301-303 also argues that this Court's order, dated March 27, 2013, should be considered moot, because plaintiff's deposition was taken in or about November, 2013. Defendant further notes that it produced a witness for a deposition on November 6, 2013.

Defendant 301-303 further argues that plaintiff has also been remiss about court-ordered directives, in that he failed to timely serve a copy of this Court's order, dated March 27, 2013, instead serving notice of entry almost 14 months later. The Court notes that notice of entry was filed with the County Clerk's office on May 28, 2014. 301-303 additionally alleges that plaintiff has apparently still not served the Trial Support Office as directed by this Court and that plaintiff failed to appear on June 4, 2013 in room 103 at 80 Centre Street to set a trial date as this Court ordered.

301-303 argues that pursuant to CPLR 5015, a Court may relieve a party from its default upon a showing of a reasonable excuse. Here, 301-303 served opposition to plaintiff's motion which, allegedly through no fault of its own, the court did not receive, thereby leaving the court with no recourse but to find that it failed to oppose the motion. In its motion, 301-303 submits a date stamped copy of the opposition papers it served on the City as proof that it did indeed oppose plaintiff's motion. See Exhibit "H." Even if the opposition were filed incorrectly, 301-303 argues

it is in the discretion of this Court to find that law office failure is an excusable default. See *Vasquez v. New York City Housing Authority*, 51 A.D.3d 781 (2nd Dept 2008). 301-303 urges this Court to find its default excusable and to vacate its default.

Plaintiff opposes 301-303's motion, asserting that, not only did 301-303 fail to comply with two court orders as of the time of this Court's decision of March 27, 2013, but continued to exhibit similar conduct and failed to comply with a total of seven court orders. See Plaintiff's Affirmation In Opposition, ¶9. Plaintiff argues that, based on this pattern of conduct, 301-303 continued its willful and contumacious behavior and therefore this Court should not vacate its order. Plaintiff cites *Goldstein v. CIBC World Markets Corp.*, 30 A.D.3d 217 (1st Dept 2006) in support of his position that such a pattern of noncompliance gives "rise to an inference of willful and contumacious conduct" and that, therefore, this Court should not vacate its Order of March 27, 2013. *See also Lavi v Lavi*, 256 AD2d 602 (2d Dept 1998); *Robinson Saw Mill Works, Inc., v Speilman*, 256 AD2d 604 (3rd Dept 1999).

Plaintiff also argues that 301-303 fails to meet the two pronged test of CPLR 5015(a)(1), in that it both fails to give a reasonable excuse for its default in filing its opposition to plaintiff's motion, and did not demonstrate that it has a meritorious defense to the action.

First, plaintiff argues that, while the sufficiency of an argument is left up to the sound discretion of the court, the case of *Spatz v Bajramoski*, 214 AD2d 436 (1st Dept 1995) holds that "bare allegations of incompetence" by an attorney are not sufficient to set aside a court's order under CPLR 5015. Plaintiff also argues that, while one law office failure may be excused, this case involves 301-303's pattern and practice of ignoring court orders and its failure to timely file papers must be viewed in that light. *See also AWL Industries, Inc., v. OBE Insurance Corp.*, 65 AD3rd 904 (1st Dept 2009); *Okun v. Tanners*, 11 NY3d 762 (2008); and *Star Industry, Inc., v Innovative*

Beverages, Inc., 55 AD3d 903, 904 (2nd Dept 2008).

This Court has reviewed all of the motion papers and exhibits and, in addition, has combed through the entire case file in an attempt to discern the history of this matter. It is clear that there have been overlapping motions and numerous court orders which were ignored or not complied with in a timely fashion.

Initially, this Court addresses 301-303's argument that it should vacate its order of March 27, 2013. Most persuasive to this Court are the actions of the parties subsequent to the issuance of the order. After the order was issued, the parties continued to conference the case and schedule depositions of all of the parties. Depositions of 301-303 were scheduled for July 9 and November 6, 2013. Additional times for the EBT of Plaintiff were set for July 8 and October 23, 2013. Notably, plaintiff again moved, by notice of motion dated July 2, 2013, to strike 301-303's answer due to its failure to take plaintiff's deposition. This Court finds that, by making this superseding motion, plaintiff abandoned its earlier motion to strike 301-303's answer. Plaintiff's second motion was resolved by this Court's order dated September 3, 2013, in which this Court noted that, should the EBTs of both plaintiff and 301-303 not proceed, then this Court would entertain a motion to strike or for preclusion. Clearly, all parties, including the plaintiff, treated this Court's order of March 27, 2013 as a nullity.

Conclusions of Law:

Although this Court's research has not revealed a case directly on point, it has identified cases in which parties continued to conduct discovery after a matter had been stricken from the calendar. In *O'Boye v Con Edison*, 168 AD2d 219 (1st Dept 1990), the Appellate Division, First Department held that, by continuing to conduct discovery after the matter was stricken from the

calendar, it was clear that the parties "never intended to abandon their case." *Id.*, at 219. In that case, the Appellate Division upheld the IAS court's restoration of the case to the calendar.

In *Pryor v. Long Island Rail Road*, 40 AD3d 726 (2nd Dept 2007), where a matter had been marked off the calendar to permit additional discovery, the Court held that the "plaintiff demonstrated a lack of intent to abandon the action and a lack of prejudice to the defendants...and the parties continued to conduct discovery beyond that period of time." *Id.*, at 727. Plaintiff had moved, pursuant to CPLR 5015 (a)(5), to vacate an order of the trial court which dismissed the underlying action as abandoned. The Appellate Division reversed the IAS court's order and restored the matter to the trial calendar. Additionally, in *Cutrone v General Motors Corp.*, 157 AD2d 648, (2nd Dept 1990) the court held that "a defendant may waive the right to seek a dismissal ...by his or her conduct (*Myers v Slutsky*,139 AD2d 709, 710)." *See also McPhail v F&B Associates*, 160 AD2d 398 (1st Dept 1990).

Both parties, by their conduct, treated this Court's order dated March 27, 2013 as a nullity. Neither party bothered to investigate this Court's decision and the plaintiff failed to act on it until 14 months later, after both parties had continued to conduct conferences with this Court and continued to conduct discovery with each other as well as with other parties to the action. Plaintiff had a duty to inquire into the status of the motion but instead "sat on his hands" until the instant motion was made and offers no explanation for his delay. *See Garcia v City of New York*, 72 AD3d 505, 507 (1st Dept 2010). Given their conduct, neither party will be prejudiced by this Court's decision to deem the March 27, 2013 order a nullity. Indeed, plaintiff's motion of July 2, 2013, was clearly identical motion to its earlier motion, with the exception of additional discovery dates. Based on the foregoing, this Court hereby vacates its order dated March 27, 2013. Therefore, this Court need not determine defendant 301-303's motion to reargue or to vacate its default. This Court notes

that plaintiff alleges in his reply papers that 301-303 has still not complied with this Court's decision of September 3, 2103. Defendant denies this allegation. However, since plaintiff only raises this issue in its Affirmation in Opposition, there is no current motion before this Court that would allow it to address this matter.

Therefore, in accordance with the foregoing, it is hereby:

ORDERED that this Court's order dated March 27, 2013, is hereby vacated and superseded by this Court's order dated September 3, 2013; and it is further,

ORDERED that that branch of defendant 301-303 West 125 LLC's motion to vacate its default and to reargue this Court's order dated March 27, 2013 is denied as moot; and it is further,

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

DATED: December 5, 2014

ENTER:

Hon. Kathryn E. Freed,
J.S.C.
HON. KATHRYN FREED
JUSTICE OF SUPREME COURT