Watson v City of New York
2015 NY Slip Op 32403(U)
November 25, 2015
Supreme Court, Bronx County
Docket Number: 306472/10
Judge: Larry S. Schachner
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX: PART STP

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JOSHUA WATSON, : Index No. 306472/10

Plaintiff, :

DECISION/ORDER

- against - :

THE CITY OF NEW YORK, DET. FRANK DIAZ SH.7314, DET. "JOHN" BROWN, FIRST NAME BEING FICTITIOUS AND UNKNOWN TO THE PLAINTIFF, HON. ROBERT T. JOHNSON, AND ADA PISHOY YACOUB, :

Present:
Hon. Larry S. Schachner
Justice, Supreme Court

Defendants. :

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Recitation, as required by CPLR 2219(a) of the papers considered in the review of these motions and cross motions to renew/reargue, vacate, dismiss, clarify and for sanctions:

Papers	**Numbered**
Notice of Motion, Affirmation and Exhibits Annexed	**1-3**
Notice of Cross Motion, Affirmation and Exhibits Annexed	**4-6**
Reply Affirmation and Exhibits Annexed	**7-11**
Sur-Reply and Exhibits Annexed	**12**
Affirmation in Opposition to Sur-Reply and Exhibits Annexed	**13**

Plaintiff commenced this action to recover monetary damages for personal injuries allegedly sustained on October 25, 2007, when plaintiff was allegedly falsely arrested, maliciously prosecuted and incarcerated for a period of approximately twenty (20) months for attempted murder.

Defendants City of New York, Det. Frank Diaz, Hon. Robert T. Johnson, and Assistant District Attorney (ADA) Pishoy Yacoub (collectively defendant City) now move to renew/reargue the decision of this court dated November 24, 2014 which struck the City's

answer, and for renewal of this court's August 9, 2013 decision which granted plaintiff's motion to compel to the extent of directing that the City turn over all documents ordered to be produced in the April 24, 2012 compliance conference order within 45 days of service of a copy of that order. In its second motion, the City moves to vacate the default judgment against Det. Frank Diaz entered on April 29, 2011 and to compel plaintiff's counsel to accept the second amended answer of defendant City and Det. Diaz. In its third motion, the City moves to dismiss plaintiff's complaint in its entirety as against all defendants and for dismissal of plaintiff's complaint as against District Attorney (DA) Johnson and ADA Yacoub. Plaintiff cross-moves against the City's first and third motions for costs, attorney's fees and sanctions for frivolous conduct pursuant to 22 NYCRR 130-1.1 (a) and (c). Plaintiff also cross-moves against the City's second motion for clarification of this court's November 24, 2014 order striking the answer of "defendants." The motions and cross motions are consolidated for disposition and decided as follows.

As a preliminary matter, plaintiff's motion to clarify the decision and order of this court, dated November 24, 2014, is granted to the following extent: Given that defendant City represented all of the named defendants, the striking of the "City's answer" in that decision included all of the defendants at the time of the decision. The remainder of the decision remains in full force and effect.

The City's motion to renew/reargue is denied in its entirety. With respect to reargument, the City has failed to demonstrate that the court misapplied the law or failed to consider any relevant fact. In addition, in its underlying motion papers, the City conceded that its motion was untimely.

With respect to renewal, the City has failed to meet the requirements for renewal. Although the City refers to the new section of the Uniform Civil Rules of the Supreme and County Courts, § 202.5(e), regarding the omission or redaction of confidential personal information, the court notes that this new rule would not change the prior determination as it does not apply to documents exchanged during discovery unless they are filed. The City also offers no "new facts" but now attempts to assert new reasons for its failure to provide an adequate excuse for its delay, namely, newly assigned assistant corporation counsel. However, the City provides no proof of an actual substitution of counsel, or that prior counsel formally withdrew from the matter, or any reasonable justification for the failure to present such facts on the prior motion. Rather, the record reflects that the Office of the Corporation Counsel has been and still is the attorney of record for this matter. Thus, there has been no showing of new case law or facts that would change the prior determination. The remainder of the City's contentions are without merit.

The City's motion to vacate the default against Det. Diaz and its motion to dismiss plaintiff's complaint are denied on all grounds as moot since the City's answer for all of its represented defendants was and still is stricken in the November 24, 2014 decision of this court. Once the defendant's answer has been stricken, he/she is not permitted to attempt to defeat plaintiff's cause of action. *See Hussein v Ratcher*, 272 AD2d 446 (2d Dept 2000) (citation omitted). Moreover, "[a]s a result of having their answer stricken, the defendants were deemed to admit all traversable allegations in the complaint, including the basic allegation of liability." *Almonte v Pichardo*, 105 AD3d 687, 688 (2013) (citations omitted).

With respect to plaintiff's cross motions for attorney's fees, costs and sanctions, the court

finds that the City has engaged in frivolous conduct. The motion to renew/reargue was essentially a renewal of the underlying "renewal" motion, and the motions to vacate the default of Det. Diaz and for dismissal of plaintiff's complaint when the City's answer had been stricken, are procedurally improper. The grounds for the City's attempt to renew/reargue the court's November 24, 2014 decision were patently insufficient. In addition, defendant City's argument that its failure to oppose the motion for a default judgment, its failure to promptly move to vacate the default judgment, and its repeated failure to provide court ordered discovery which resulted in the striking of its answer, is due to law office failure, is untenable. "The underlying principle of excusing delays and defaults based on law office failure is that counsel's isolated neglect should not deprive a party of his or her day in court in the absence of prejudice to the opponent." Alexander, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR 2005 (citations omitted). These are not instances of isolated neglect in the handling of this case. Rather, the City's answer was stricken due to its history of a pattern of non-compliance and delay during the discovery process in this action and not for an isolated instance of neglect. Defendant City's argument that there have been five different assistant corporation counsels assigned to this matter is not a reasonable excuse for not properly investigating the procedural history of this case and making procedurally improper motions. Each time a new assistant corporation counsel has been assigned to this case, he/she has revisited a previously litigated issue by a motion to renew/reargue or a belated motion intended to undo something the court decided years before. This practice has unduly protracted the litigation in this case, has caused plaintiff's counsel innumerable hours of unnecessary work, and has taxed the court's limited resources. Based on the extensive procedural history of this case, it is now clear that counsel for the City have

engaged in a continuous pattern of frivolous conduct throughout the course of discovery and by engaging in unnecessary motion practice.

Pursuant to 22 NYCRR § 130-1:1:

> (a) The court in its discretion, may award to any party or attorney in any civil action or proceeding before the court, except where prohibited by law, costs in the form of reimbursement for actual expenses reasonably incurred and reasonable attorney's fees, resulting from frivolous conduct as defined in this Part...
>
> (b) The court, as appropriate, may make such award of costs or impose such financial sanctions against either an attorney or a party to the litigation or against both...
>
> (c) For purposes of this Part, conduct is frivolous if:
>
> (1) it is completely without merit in law and cannot be supported by a reasonable argument for an extension, modification or reversal of existing law;
>
> (2) it is undertaken primarily to delay or prolong the resolution of the litigation, or to harass or maliciously injure another; or
>
> (3) it asserts material factual statements that are false.

As this court stated in its November 24, 2014 decision, "the City's conduct during this discovery process evinces a pattern of dilatory tactics and a willful failure to comply with this court's orders without adequate excuses." This overall pattern of dilatory, non-compliant and willful conduct in this action has continued and has reached the level of frivolous conduct as the City has repeatedly failed to comply with numerous court orders and has instead made the instant three meritless motions.

Accordingly, the City's motions are denied in their entirety, and plaintiff's cross motions for attorney's fees, costs and sanctions are granted to the extent that plaintiff is awarded $10,000.

for attorney's fees and costs. Defendant City shall make payment to plaintiff within thirty (30) days of service of this order with notice of entry.

This constitutes the decision and order of the court.

LARRY S. SCHACHNER, J.S.C.

Dated: November 25, 2015