

Kayantas v Restaurant Depot, LLC
2016 NY Slip Op 33075(U)
February 22, 2016
Supreme Court, Nassau County
Docket Number: 603995/15
Judge: Antonio I. Brandveen
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ORIGINAL

SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present: ANTONIO I. BRANDVEEN
J. S. C.

KOSTAS KAYANTAS,

Plaintiff,

- against -

RESTAURANT DEPOT, LLC,

Defendant.

TRIAL / IAS PART 35
NASSAU COUNTY

Index No. 603995/15

Motion Sequence No. 001, 002

The following papers having been read on this motion:

Notice of Motion, Affidavits, & Exhibits	<u>1, 2</u>
Answering Affidavits	<u>3, 4</u>
Replying Affidavits	<u>5</u>
Briefs: Plaintiff's / Petitioner's	_____
Defendant's / Respondent's	_____

The plaintiff moves (motion sequence 001) pursuant to CPLR 3403(a)(4) for an order granting the plaintiff a special preference. The plaintiff submits his New York driver's license, Medicare card and health care card showing the plaintiff, born in 1934, attained the age of 82. The plaintiff asserts he falls squarely within the statute which is to expedite the final disposition of the plaintiff's case who has exceeded the age of 70 years.

The defendant opposes the defense motion. The defense asserts the plaintiff failed to abide by the CPLR 3403(b) requirement that a note of issue must accompany the plaintiff's motion upon service. The defense points out the plaintiff filed and served the instant motion for special preference without the required note of issue. The defense avers this

motion is premature because the plaintiff failed to respond to any outstanding discovery matters.

In reply to the defendant's opposition, the plaintiff requests the Court grant the motion for preference and an expedited discovery briefing schedule based on the age, health and extenuating circumstances faced by the plaintiff's family, including financial hardship. The defense points to the plaintiff's affidavit dated February 8, 2016. The plaintiff states he was required to undergo emergency brain surgery due to a blood clot since tripping at the defendant's premises on February 7, 2016. The plaintiff's attorney asserts the plaintiff's wife stopped working in July 2015, to care for the plaintiff due to his weakness from the injuries and an overall decline in the plaintiff's health. The plaintiff's attorney also concedes a note of issue has not yet been filed, but requests the Court exercise its discretion, in the interests of justice and accelerate discovery and trial.

The defendant cross moves (motion sequence 002) pursuant to CPLR 3126 and 3124 for an order dismissing the complaint for the plaintiff's failure to comply with the defendant's notices duly served, or alternatively, for an order precluding the plaintiff from offering evidence at the trial of this action. The defense also requests, in the alternative, an order compelling the production of all outstanding discovery. The defense asserts the items duly demanded by the defendant remain outstanding.

The plaintiff opposes the plaintiff's cross motion. The plaintiff's attorney provides an affirmation dated December 3, 2015, that the plaintiff fully complied with all information and documents requested in the defendant's discovery demands. The plaintiff's attorney states the cross motion should be denied as moot. The plaintiff submits a verified bill of

particulars, authorizations to obtain medical records and responses to the defense demands for discovery in the opposition papers as Exhibit B.

CPLR 2001 provides:

At any stage of an action, including the filing of a summons with notice, summons and complaint or petition to commence an action, the court may permit a mistake, omission, defect or irregularity, including the failure to purchase or acquire an index number or other mistake in the filing process, to be corrected, upon such terms as may be just, or, if a substantial right of a party is not prejudiced, the mistake, omission, defect or irregularity shall be disregarded, provided that any applicable fees shall be paid.

CPLR 2004 provides: “[T]he court may extend the time fixed by any statute, rule or order for doing any act, upon such terms as may be just and upon good cause shown, whether the application for extension is made before or after the expiration of the time fixed.” The Court determines the plaintiff, under these circumstances and in the interests of justice, satisfies the CPLR 3403(a)(4) burden for an order granting the plaintiff a special preference. In opposition, the defendant does not show any substantial prejudice in granting a special preference (*see generally Grskovic v Holmes*, 111 A.D.3d 234, 972 N.Y.S.2d 650 [2013]).

The Court determines the defendant shows the plaintiff defaulted in complying with defense discovery demands. However, the defendant does not demonstrate the plaintiff willfully failed to disclose information. Moreover, the defendant does not provide a general pattern of delay by the plaintiff, or substantial prejudice to the defendant. In opposition, the plaintiff submits responses to the defendant’s discovery notices and a demand for a verified bill of particulars.

ORDERED that the plaintiff’s motion (motion sequence 001) is GRANTED

pursuant to CPLR 3403(a)(4) for an order granting the plaintiff a special preference, and it is also,

ORDERED that the plaintiff is GRANTED leave to file and serve in accord with CPLR 3403(b) *nunc pro tunc*, and it is also,

ORDERED that the defendant's cross motion (motion sequence 002) is DENIED pursuant to CPLR 3126 and 3124 for an order dismissing the complaint for the plaintiff's failure to comply with the defendant's notices duly served, or alternatively, for an order precluding the plaintiff from offering evidence at the trial of this action, and it is further,

ORDERED that all parties are reminded of their continuing obligations to provide discovery as required by law and court rules.

So ordered.

Dated: February 22, 2016

ENTER:



J. S. C.

ENTERED

FEB 26 2016

NASSAU COUNTY
COUNTY CLERK'S OFFICE

NON FINAL DISPOSITION