

Ewa v City of New York
2017 NY Slip Op 32775(U)
December 8, 2017
Supreme Court, Richmond County
Docket Number: 100005/17
Judge: Thomas P. Aliotta
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF RICHMOND: PART C-2

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KATHY EWA,
Plaintiff(s),

-against-

DECISION AND ORDER

Index No. 100005/17

THE CITY OF NEW YORK, NEW YORK CITY
POLICE DEPARTMENT (NYPD), NYPD POLICE
OFFICERS: DET. JAMES MCKENNA, DET.
LOUIS DARIA, OFFICERS INVOLVED IN THE
INCIDENT, 'JOHN DOES', JANE DOES', DR.
MARIA JACQUELINE NIETO, CANCER/
ONCOLOGY: WYCKOFF HEIGHTS MEDICAL
CENTER, DR. JOEL IDOWU, FORENSIC
PSYCHIATRIST; RICHMOND UNIVERSITY
MEDICAL CENTER,

Motion Nos.¹ 2806 - 001
3026 - 002
3543 - 003

Defendant(s).

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The following papers numbered "1" to "9" were marked fully submitted on the 20th of September 2017.

	Papers Numbered
Notice of Motion to Dismiss by Defendant JOEL IDOWU, M.D., with Supporting Papers, Exhibits (dated July 12, 2017).....	1
Notice of Motion to Dismiss by Defendants THE CITY OF NEW YORK and THE CITY OF NEW YORK s/h/a NEW YORK CITY POLICE DEPARTMENT, with Supporting Papers, Exhibits (dated July 20, 2017).....	2
Notice of Motion to Dismiss by Defendant MARIA JACQUELINE NIETO, M.D., with Supporting Papers, Exhibits (dated August 31, 2017).....	3

¹ The motions have been consolidated for purposes of disposition.

Affirmation in Opposition to Defendant JOEL IDOWU, M.D.’s Motion to Dismiss by Pro-Se Plaintiff KATHY EWA, (dated September 6, 2017)4

Affirmation in Opposition to Defendants THE CITY OF NEW and THE CITY OF NEW YORK s/h/a NEW YORK CITY POLICE DEPARTMENT’s Motion to Dismiss by Pro-Se Plaintiff KATHY EWA, (dated September 6, 2017)5

Affirmation in Opposition to Defendant MARIA JACQUELINE NIETO, M.D.’s Motion to Dismiss by Pro-Se Plaintiff KATHY EWA, (dated September 6, 2017)6

Reply Affirmation of Defendant JOEL IDOWU, M.D. (dated August 21, 2017).....7

Reply Affirmation of Defendants THE CITY OF NEW and THE CITY OF NEW YORK s/h/a NEW YORK CITY POLICE DEPARTMENT, (dated September 19, 2017)8

Reply Affirmation of Defendant MARIA JACQUELINE NIETO, M.D., (dated September 18, 2017)9

Upon the foregoing papers, defendants’ motions (Numbered 2806, 3026 and 3543) to dismiss are granted to the extent hereinafter provided.

Pro-se plaintiff KATHY EWA commenced this action to recover damages for injuries allegedly sustained by her as a result of wrongful incarceration by police officers employed by defendant NEW YORK CITY POLICE DEPARTMENT.² More specifically, it has been alleged that on April 30, 2015, plaintiff was unlawfully arrested and handcuffed outside her home located in Staten Island, New York, without either a warrant or probable cause. Plaintiff alleges that the arrest was based on a false complaint made by defendant DR. MARIA JACQUELINE

² The action was originally commenced in Kings County and was subsequently transferred to Richmond County pursuant to an Order dated October 7, 2016 by Justice Dawn Jiminez-Salta.

NIETO of WYCKOFF HEIGHTS MEDICAL CENTER, in collusion with defendant DR. JOEL IDOWU, FORENSIC PSYCHIATRIST at RICHMOND COUNTY MEDICAL CENTER, to the defendant NEW YORK CITY POLICE DEPARTMENT. According to plaintiff, defendant police officers used excessive force in front of her neighbors by forcefully twisting and squeezing plaintiff's arms into tight handcuffs, resulting in bruises and severe redness. Plaintiff also alleges, *inter alia*, negligent and intentional infliction of emotional distress, assault, battery, invasion of privacy, police brutality, gross negligence, libel, slander, defamation, and violations of both federal and state civil rights laws. In addition, plaintiff alleges that all of the defendants were acting in concert, and in the course of their employment on the night of her wrongful arrest, and therefore their actions raise a cause of action for negligent hiring and retention. As a result of said wrongful arrest, plaintiff alleges to have sustained, *inter alia*, pain and suffering, physical injury, loss of earnings, loss of enjoyment of life, loss of freedom, emotional distress, mental anguish, shame, humiliation, and damage to her reputation. According to plaintiff, all of the criminal charges against her were eventually dropped and dismissed by the Brooklyn District Attorney on August 6, 2015, and her record was immediately sealed.³

In the current applications, the defendants each move pursuant to CPLR §§3126 and 3124 for dismissal of the complaint due to plaintiff's failure to serve a bill of particulars, and for failing to respond to numerous discovery demands in spite of several good faith requests. In the alternative, defendants request that plaintiff either be precluded from offering evidence at trial on the issue of liability or from claiming damages in connection with the within motion practice, or instead, for a conditional order compelling plaintiff to comply with defendants' discovery

³ Details regarding the incarceration in Brooklyn Criminal Court, following her arrest in Staten Island, cannot be determined based on the papers presently before the Court.

demands, including providing a bill of particulars. In particular regard to THE CITY defendants, it has been requested that an authorization be provided to allow for the unsealing of records pertaining to the subject criminal incident pursuant to CPLR §160.50, so that THE CITY defendants can further and fully investigate both the subject incident and plaintiff's allegations in order to properly defend the claims against it.

Each of the defendants argue that in spite of their good faith attempts at resolving the issue of non-compliance with discovery demands, plaintiff has continued to ignore her obligations under the law, and has failed to respond to any of their demands, including providing a bill of particulars to each defendant. Defendants further argue that more than one year has elapsed since the service of their discovery demands and demand for a bill of particulars. It is argued that plaintiff's failure to produce any of the requested discovery items has been willful and persistent and warrants either dismissal, or a conditional order of dismissal should plaintiff fail to respond to defendants' discovery demands.

In particular regard to defendants NIETO and IDOWU, plaintiff claims that she had refused to respond to their discovery demands on the ground that they both allegedly defaulted by failing to timely answer the complaint. NIETO, however, contends that an affidavit of service confirms that her answer was timely, and was served within the twenty-day time limit pursuant to CPLR §3012. Accordingly, NIETO claims that plaintiff's refusal to respond to discovery demands is both meritless and frivolous. With regards to IDOWU, it is argued that on October 7, 2016, Justice Jiminez-Salta granted IDOWU's motion to compel plaintiff's acceptance of IDOWU's answer. Therefore, plaintiff's claim that IDOWU is not entitled to discovery is similarly meritless.

In support of their applications, defendants have submitted copies of their answers which included discovery demands, demands for various authorizations, and their demand for a bill of particulars. These defendants have also provided copies of written requests that were sent to plaintiff in a good faith attempt to obtain the requested discovery, but argue that in spite of their good faith efforts, plaintiff continued to refuse to respond. Based on such refusal, defendants now seek judicial intervention to either obtain the necessary discovery, or to dismiss the complaint.

According to these defendants, it is within the trial court's discretion to dismiss the complaint, especially where the disobedient party's conduct is willful. Plaintiff has outright refused to respond and refused to provide any discovery. Defendants argue that the requested discovery is necessary in order to fully investigate plaintiff's allegations and properly defend the claims against them. Based on plaintiff's willful refusal to respond to the requested discovery demands, dismissal of her complaint is warranted.

In the alternative, defendants request that plaintiff either be compelled to respond and/or provide the requested discovery and bill of particulars, or be precluded from offering evidence with regard to any claim of physical and emotional damage based on alleged false arrest, unlawful imprisonment and subsequent malicious prosecution. In addition, THE CITY defendants argue that they are unable to defend the claims made against them without the relevant arrest and court records relating to plaintiff's criminal procedure. THE CITY defendants argue that by commencing the within action, plaintiff has placed into issue elements common both to the civil and to a criminal prosecution, and has waived any privilege conferred under New York's CPL §160.50.

In opposition, plaintiff contends that both defendants ODOWU and NIETO failed to timely answer the complaint. According to plaintiff, Kings County Supreme Court Justice Dawn Jiminez-Salta improperly granted IDOWU's motion to compel plaintiff's acceptance of her answer, and erred in denying plaintiff's cross motion for a default judgment in her Decision and Order dated October 7, 2016 (*see* IDOWU's Exhibit F). Plaintiff further contends that Justice Jiminez-Salta erred in granting the change of venue motion by THE CITY defendants since a majority of incidents occurred in Kings County, and that the defendant police officers worked out of a Kings County police precinct. In her opposition, plaintiff also objects to the manner in which the change of venue motion was granted, *e.g.*, without a court reporter, and not in open court, but in a back office. Plaintiff further objects to allowing the defendants' substitution of attorneys without proper appearances before the Court. According to plaintiff, her due process rights have been violated, and she has been and continues to be treated unfairly, to her detriment.

It is well settled that the drastic sanction of striking a pleading should not be invoked unless the default is shown to be deliberate and contumacious (*see e.g.*, Mayers v. Consolidated Charcoal Co., 154 AD2d 277). Thus, in order to prevail on such a motion, it is the movant's burden to make a clear-cut showing of willfulness (*see* Rosner v. Blue Channel Corp., 131 AD2d 577). Here, while the Court is mindful of the fact that plaintiff has refused to comply with any of the discovery demands served upon her, it is the opinion of this Court that plaintiff's failure to respond was not based on deliberate or contumacious behavior, but instead, her obvious misinterpretation of procedural rules of the court. Nevertheless, in view of the fact that plaintiff has caused a significant delay in the prosecution of the case by failing to respond to defendants' discovery demands, and that the case cannot proceed without the exchange of necessary

discovery, plaintiff is required to respond to defendants' demands and serve a bill of particulars as to each defendant within 45 days as hereinafter provided, with the understanding that her complaint will be dismissed if she fails to comply with this order.

Insofar as THE CITY seeks access to plaintiff's sealed criminal records relative to the claims made against it, plaintiff has waived her right to the confidentiality protections afforded under CPL §160.50 by commencing the within civil action. By commencing such action, she has affirmatively placed in issue elements that are common or related to the prior criminal action, *e.g.*, false arrest, and therefore, THE CITY defendants are entitled to unconditional access to such records (*see Taylor v. New York City Tr Auth.*, 131 AD3d 460, 461).

The balance of the arguments tendered by plaintiff in opposition to defendants' motions have been considered and rejected, including the issue regarding IDOWU and NIETO's alleged failure to timely answer the complaint. The affidavit of service upon NIETO clearly established the dates of service of the pleadings, rendering service of defendant's answer timely. With regard to IDOWU, Kings County Justice Jiminez-Salta granted his motion to compel plaintiff to accept IDOWU's answer following oral argument. Given the fact that plaintiff has failed to either appeal such decision or move for leave to renew or reargue, the argument is moot. The same is true regarding the change of venue from Kings County to Richmond County, which was decided and has never been appealed from by plaintiff, nor has she moved to renew or reargue either decision. Moreover, the venue transfer was granted following oral argument and applies to the entire matter, and not just the moving party. Finally, the Court finds no issue with regard to the substitution of attorneys since valid Consents to Change Attorney have been submitted to the Court.

Accordingly, it is

ORDERED that defendants' motions (Nos. 001-2806, 002-3026, and 003-3543) are granted to the extent that plaintiff is hereby compelled to serve a bill of particulars upon each defendant and respond to the discovery demands outlined in each motion within 45 days of the service upon her of this Order with Notice of Entry; and it is further

ORDERED that plaintiff provide an authorization to defendants THE CITY OF NEW YORK and THE NEW YORK CITY POLICE DEPARTMENT, providing for the unsealing of, and access to plaintiff's criminal records relating to the within action; and it is further

ORDERED that plaintiff's failure to comply with this Order shall result in the dismissal of her complaint, with prejudice, against each of the defendants; and it is further

ORDERED that the balance of the motions are denied; and it is further

ORDERED that clerk shall enter judgment accordingly.

Dated:

DEC 08 2017

ENTER,



HON. THOMAS P. ALIOTTA, J.S.C.

GRANTED

DEC 27 2017
STEPHEN J. FIALA