Lind v Tishman Constr. Corp. of N.Y.
2018 NY Slip Op 30816(U)
May 1, 2018
Supreme Court, New York County
Docket Number: 154781/2016
Judge: Barbara Jaffe
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. BARBARA JAFFE** *Justice* **PART** 12

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EARL LIND, JR. and DOROTHY LIND,

Plaintiffs,

- v -

TISHMAN CONSTRUCTION CORPORATION OF NEW YORK, TISHMAN CONSTRUCTION CORPORATION,

Defendants.

---X

INDEX NO. 154781/2016

MOTION DATE

MOTION SEQ. NO. 3

DECISION AND ORDER

By notice of motion, defendants move pursuant to CPLR 3124 for an order compelling plaintiff to appear for an independent medical examination (IME). Plaintiffs oppose and, by notice of cross motion, move for a protective order relating to the IME. Defendants oppose the cross motion.

I. PERTINENT BACKGROUND

By notice dated October 24, 2016, plaintiffs demanded that defendants conduct a physical examination of plaintiff Earl Lind, Jr., at plaintiffs' counsel's office on Staten Island at 2pm on January 25, 2017. (NYSCEF 139).

On November 16, 2016, the parties appeared for a preliminary conference and agreed, as pertinent here, that Earl's IME would be held within 45 days after his completed examination

before trial (EBT), which was scheduled to be held on or before February 6, 2017. The parties' stipulation was so-ordered. (NYSCEF 25).

The first compliance conference was held on February 22, 2017, at which a so-ordered stipulation was entered into whereby it was agreed that Earl's EBT would be held on or before May 6, 2017, and the IME within 45 days thereafter. (NYSCEF 31). At the next compliance conference and by so-ordered stipulation dated July 5, 2017, Earl's EBT was rescheduled for on or before September 13, 2017, and the IME for within 45 days thereafter. (NYSCEF 36).

By letter dated October 31, 2017, defendants notified plaintiffs that they had designated a physician to perform Earl's IME on December 19, 2017, at the physician's office in Uniondale, New York. (NYSCEF 124). In response, by letter dated November 13, 2017, plaintiffs' counsel objected to the location of the IME "as it is in Nassau County and it will be too painful of a ride for my client to travel that far from his home and this would involve he be [sic] in a car for more than 3 hours." She thus advised that defendants should contact her to make different arrangements, and that "[w]e have no problem attending the physical at your office or a Manhattan, Brooklyn location." (NYSCEF 80).

The parties were unable to resolve the issue. (NYSCEF 126, 127).

II. MOTION TO COMPEL

Pursuant to 22 NYCRR § 202.17(a), at any time after joinder of issue and service of a bill of particulars, the party to be examined may serve on all other parties a notice fixing the time and place of the examination. Unless otherwise stipulated, the examination must be held not less than 30 nor more than 60 days after service of the notice, and any party may move to modify or vacate the notice within 10 days of its receipt.

Here, plaintiffs' notice was dated and served on October 24, 2016, and purported to schedule the examination for January 25, 2017, more than 60 days from the date of the notice. Having failed to comply with the requirement that the examination be held no more than 60 days from receipt of the notice, the notice is defective on its face.

Defendants did not waive their right to object to plaintiffs' notice as 22 NYCRR § 202.17(a) does not require that an objection be made; rather, it provides that a party "may" object. (*See Resnick v Seher*, 198 AD2d 218, 218 [2d Dept 1993] [defendant's failure to object to notice within 10-day period did not warrant denial of motion to vacate notice; rules set forth in 22 NYCRR § 202.17 binding "except where the court otherwise directs"]; *see also Leugemors v Slawinski*, 255 AD2d 913 [4th Dept 1998] [court had discretion to grant motion to compel examination despite argument that objection waived by failing to conduct examination within time period in examination notice; delay in seeking examination minimal and discovery incomplete]).

In any event, plaintiffs apparently abandoned the October 2016 notice and their preferred location of Staten Island for the IME, having failed, at several succeeding compliance conferences, to mention either (NYSCEF 31, 36) and, after receiving defendants' designation letter, by objecting solely on the ground that the location proposed by defendants was inconvenient to Earl, and by proposing other options, *eg*, having the IME at defense counsel's office or anywhere in Manhattan or Brooklyn.

Plaintiffs' demand was also rendered academic by the so-ordered compliance conference stipulations scheduling and rescheduling the IME. (*See Henderson-Jones v City of New York*, 104 AD3d 411 [1st Dept 2013] [while plaintiff argued that defendants' failure to specify time for IME in IME notice in violation of CPLR 3121(a) and 22 NYCRR § 202.17(a) constituted waiver

of IME, IME was directed in so-ordered stipulation and thereby directed by court order, thus removing issue of notice]).

By contrast, although defendants did not object to the October 2016 demand, they did not waive their right to an IME, as the parties agreed to future dates for it pursuant to the November 2016, February 2017, and July 2017 so-ordered stipulations. And, while plaintiffs had purported to schedule the IME on January 25, 2017, having agreed on November 6, 2016 that the IME would be conducted within 45 days after Earl's scheduled EBT on February 7, 2017, the January 25 date was effectively superseded, and at no time in the last year did plaintiffs cite to or rely on the October 2016 notice whenever the issue of Earl's IME was raised. Rather, it was not until defendants filed this motion that plaintiffs have sought to resurrect the superseded October 2016 notice.

Even if plaintiffs had not abandoned their right to choose the location of the IME, a court may vacate a notice providing for an examination to be held at an attorney's office, rather than a medical office, as it is a "common sense notion that medical examinations are more properly conducted in medical offices than in the offices of an attorney." (*Resnick*, 198 AD2d at 218-219). Moreover, the defendant is entitled to retain a physician of its choosing to examine the plaintiff, as "the defense must be able to retain a doctor in whom they have confidence to not only perform the examination, but to be in a position to testify as well." (*Chen v Zhi,* 109 AD3d 815 [2d Dept 2013], quoting *Chong v New York Downtown Hosp.,* 2012 WL 6139908, 2012 NY Slip Op 32877[U] [Sup Ct, New York County]). "The designation of the doctor who will conduct the independent medical examination of the plaintiff shall not be limited or circumscribed by the plaintiff." (*Id.* at 817).

Defendants thus establish their entitlement to an order compelling Earl to appear for an IME at the office of their designated physician. Plaintiffs cite no authority to support their argument that because the action is pending in New York County, the IME may only be conducted in this county. Nor have they demonstrated that having the IME performed on Long Island is an undue hardship for Earl, absent a physician's note.

The submitted correspondence between the parties clearly reflects that that they were unable to agree on the location for the IME despite several attempts. (*See e.g.*, letter dated Nov. 13, 2017, from plaintiff's counsel to defense counsel [rejecting location of IME] [NYSCEF 125]; letter dated Nov. 17, 2017, from defense counsel to plaintiffs' counsel ["(t)his letter shall serve as a good-faith effort to address your ( ) response before a motion to compel your client's appearance at his (IME) . . . is necessary] [NYSCEF 126]; letter dated Nov. 28, 2017, from plaintiffs' counsel ["(i)n response to your . . . letters (sic) request for discovery . . . and your response to plaintiff's rejection of the location of plaintiff's defense physical in Nassau County, be advised that plaintiff's position has not changed."] [NYSCEF 127]). Consequently, an affirmation of good faith is not required. (*See Baulieu v Ardsley Assocs. L.P.*, 84 AD3d 666 [1st Dept 2011] [failure to provide affirmation of good faith excusable as any effort to resolve dispute without judicial intervention would have been futile]).

III. CROSS MOTION FOR PROTECTIVE ORDER

Based on the above, plaintiffs' cross motion for a protective order is denied. However, I address certain allegations set forth therein. My Part Rules, available on the Court's website at http://www.nycourts.gov/courts/1jd/supctmanh/Uniform_ Rules.pdf, strongly discourage motions relating to discovery, and provide that "[i]f a discovery dispute arises after the issuance of a preliminary or compliance conference order, it must be directed to the Part Clerk who will

promptly schedule a new conference or advance the date of a previously-scheduled conference." Experience shows that the resolution of discovery issues is often best accomplished through discussion among the attorneys with or without the assistance of a court attorney, rather than by motion.

The court record reflects the following:

By motion dated October 9, 2017 (sequence two), plaintiffs moved for orders striking defendants' answer for their failure to respond to discovery demands, granting them a default judgment against defendants, and awarding them sanctions, costs, attorney fees, and other relief. (NYSCEF 72). By stipulation dated October 12, 2017, the parties agreed to adjourn the return date of the motion to December 6, 2017. (NYSCEF 79). The motion was submitted on December 6, 2017, and not scheduled for oral argument, as I do not hold oral argument on discovery motions. Rather, the motion was to be addressed on January 17, 2018, the next scheduled compliance conference, as is my practice relating to discovery motions.

By motion dated January 3, 2018 (sequence three), defendants moved to compel Earl's IME; that motion was returnable on February 8, 2018. (NYSCEF 118).

On January 17, 2018, the parties appeared for the scheduled compliance conference. Plaintiffs' counsel refused to proceed with the conference because her motion to strike the answer (sequence two) was pending and she asserted a need for an immediate decision on it as the statute of limitations to bring in new parties was to expire on March 27, 2018. The conference was thus adjourned to January 31, 2018, at 2:15 pm, for a decision to be made on the motion to strike by that date. The motion was not scheduled for oral argument. Again, my Part Rules do not provide for oral argument on discovery motions; all other motions are scheduled for Wednesdays mornings only. Thus, court reporters are ordinarily not present in the courtroom on

Wednesday afternoons as they are on Wednesday mornings. Moreover, pursuant to the so-ordered stipulation memorializing the January 17 compliance conference, it is the conference that was adjourned, not the motion. (NYSCEF 131 ["As motion seq. 002 is pending, and (plaintiff's counsel) represents that the SOL is on March 27, 2018, and the issues in seq. 002 affect her ability to bring in new parties before the SOL expires, conf. is adjourned."]).

Given plaintiffs' expressed urgency in obtaining a decision on their motion to strike (sequence two), by decision and order dated January 29, 2018, the motion was decided and the parties were directed to proceed with discovery at the next compliance conference, scheduled for January 31, 2018. The decision was entered on January 30, 2018, so that the parties would have it in advance of the conference the next day.

When the parties appeared for the conference on January 31, they were shown a copy of the e-filed decision and order, at which time plaintiffs' counsel objected to it and alleged that she had assumed that the January 31 appearance was for oral argument on the motion and that no decision would be made until after oral argument. Despite advice from the court attorney that oral arguments are not held on discovery motions and that the conference, not the motion, had been adjourned to January 31 pursuant to the previous so-ordered stipulation, counsel persisted, maintaining that oral argument was required on the motion, notwithstanding the court attorney's additional advice that neither the CPLR nor any court rule mandates oral argument on a motion. Rather, the holding of argument is a matter within the court's discretion. (22 NYCRR § 202.8[d] [motion papers deemed submitted as of return date and "the assigned judge, in his or her discretion or at the request of a party, thereafter may determine that any motion be orally argued and may fix a time for oral argument."]). Moreover, pursuant to the rule, a party requesting oral argument must set forth its request, as pertinent here, in its notice of motion, and even when all

parties to a motion request oral argument, argument will not be granted if the court determines it unnecessary. (*Id.*). Here, plaintiffs did not request oral argument in their notice of motion.

Plaintiffs' counsel also asserts that I improperly decided the motion relating to the IME (sequence three) before she filed her opposition. Given the apparent merit of defendants' motion, and the initial erroneous belief that it was the motion that needed a prompt decision, I granted it and then realized that it was not the decision that plaintiffs urgently needed. The decision was thus placed in the compliance conference folder pending receipt of plaintiffs' opposition. The court clerk, finding it in the folder before the conference that day, inadvertently advised the parties of it. As the decision had neither been filed nor entered, counsel's awareness of it is not significant. In any event, even after submission of plaintiffs' opposition, the motion remains meritorious; the opposition does not warrant a different result. (*See supra*, II.).

Plaintiffs' counsel characterizes as a "threat" advice that Earl's failure to appear for an IME may result in sanctions. It is standard, however, to issue a conditional order when it appears that a party has not complied with repeated orders. (*See e.g., Arts4All, Ltd. v Hancock*, 54 AD3d 286 [1st Dept 2008] ["substantial deference should be accorded to the trial court's considerable discretion to compel compliance with discovery orders"], *affd* 12 NY3d 846 [2009]). To the extent that plaintiff refused to appear for the IME as set forth above (NYSCEF 127), the conditional order was not inappropriate.

Plaintiffs otherwise contend that defendants' repeated failures to comply with discovery orders were apparently countenanced by me, which they assert sets a double standard for the parties. The pertinent sequence of events follows: In the November 2016 compliance conference order, the parties agreed to provide discovery responses by December 5, 2016. By letter dated December 16, 2016, defense counsel advised, without dispute, that they served their responses

on December 6, 2016. The so-ordered stipulation entered into at the next compliance conference held on February 22, 2017, contains no indication that defendants failed to provide a response to discovery demands. Instead, defendants agreed to respond to a new set of discovery requests dated February 21, 2017, and to provide a bill of particulars on the affirmative defenses. Thus, while plaintiffs argued then and now that they did not move to strike until defendants had failed to comply with three court orders, the record reflects that it was not until the third compliance conference that there is any indication that defendant failed to file a written response. Thus, plaintiffs demonstrate an insufficient predicate for striking the answer.

Consequently, when plaintiffs' motion to strike (sequence two) was submitted in December 2016 and decided in January 2017, the requested relief was not warranted. There is a meaningful difference between no response to a demand and a response that a party deems incomplete or insufficient. The record reflects that defendants provided discovery responses, and plaintiffs' assertion that they are non-responsive was to be addressed at a compliance conference or by a motion to compel, which plaintiffs have now filed. While CPLR 3126 permits a court to issue an order striking pleadings, among other relief, upon a party's failure to obey an order of disclosure or willful failure to disclose information, the drastic remedy of striking a pleading is generally considered unwarranted absent a party first moving to compel compliance with discovery demands and/or a showing that the other party's failure to obey discovery orders was willful or contumacious. (*See W&W Glass, LLC v 1113 York Ave. Realty Co. LLC*, 83 AD3d 438 [1st Dept 2011] ["there appear to be no prior motions by plaintiff to compel disclosure, rendering any motion to strike the answer pursuant to CPLR 3126 premature in this case."]; *Double Fortune Prop. Investors Corp. v Gordon*, 55 AD3d 406 [1st Dept 2008] [as plaintiff responded to discovery requests, proper course was for defendant to move to compel further discovery rather

than moving to strike complaint]; *see also Pehzman v Dept. of Educ. of City of New York*, 95 AD3d 625 [1st Dept 2012] [striking of answer is ultimate penalty that may be imposed only upon extreme conduct]; *Palmenta v Columbia Univ.*, 266 AD2d 90 [1st Dept 1999] [striking answer inappropriate absent clear showing that failure to comply was willful, contumacious, or in bad faith, which moving party must affirmatively establish]; *Commerce & Indus. Co. v Lib-Com, Ltd.*, 266 AD2d 142 [1st Dept 1999] [striking of pleading "not a sanction to be routinely imposed whenever a party fails to comply with *any* item of discovery"] [emphasis in original]).

In *Barber v Ford Motor Co.*, the Appellate Division, First Department observed that

> plaintiff's direct resort to a motion for sanctions was not the proper procedure to address purported deficiencies in [defendant's] responses to plaintiff's discovery demands and/or the [ ] preliminary conference order. The proper course would have been to proceed with the ordered depositions, determine at that time whether or not other documents were available, request their production pursuant to CPLR 3120, and make a good faith effort to bring a non-judicial resolution of any remaining discovery disputes. If, at that juncture, the parties had been unable to resolve their differences, a motion pursuant to CPLR 3124 to compel further discovery would have been the appropriate means of proceeding.

(250 AD2d 552 [1st Dept 1998] [internal citations removed]).

IV. CONCLUSION

Based on the procedural history of this action and the applicable caselaw, my decisions on plaintiffs' motion to strike and on defendants' motion to compel an IME comport with the pertinent rules and law. It nonetheless bears observing that this action presents an anomaly in that most attorneys conduct discovery without the necessity of any court intervention. Here, by contrast, counsels continually engage in disputes which serve only to extend this stage of the litigation.

Accordingly, it is hereby

ORDERED, that defendants' motion to compel is granted, and plaintiff Earl Lind, Jr., is directed to appear for an IME at the office of the physician designated by defendants within 30 days of the date of this order; and it is further

ORDERED, that plaintiffs' cross motion for a protective order is denied.

5/1/2018
DATE

BARBARA JAFFE, J.S.C.
HON. BARBARA JAFFE

CHECK ONE:	[ ]	CASE DISPOSED			[X]	NON-FINAL DISPOSITION	
	[ ]	GRANTED	[ ]	DENIED	[X]	GRANTED IN PART	[ ] OTHER
APPLICATION:	[ ]	SETTLE ORDER			[ ]	SUBMIT ORDER	
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