Cini v Hudson Riv. Park Trust
2018 NY Slip Op 31208(U)
June 14, 2018
Supreme Court, New York County
Docket Number: 157215/2015
Judge: Robert D. Kalish

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. ROBERT DAVID KALISH PART IAS MOTION 29EFM
Justice

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DION CINI,

Plaintiff,

- v -

HUDSON RIVER PARK TRUST, LLOYD JONES, HUDSON RIVER PARK, THE CITY OF NEW YORK, CITY OF NEW YORK DEPARTMENT OF PARKS & RECREATION A/K/A NEW YORK CITY DEPARTMENT OF PARKS & RECREATION

Defendants.

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INDEX NO. 157215/2015

MOTION DATE 06/05/2018

MOTION SEQ. NO. 006

DECISION AND ORDER

The following e-filed documents, listed by NYSCEF document number (Motion 006) 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 127, 128, 129, 130, 131, 132, 133

were read on this motion to/for RESTORE TO TRIAL CALENDAR

Motion by Plaintiff Dion Cini pursuant to CPLR 5015 (a) to vacate this Court's January 30, 2018 dismissal of the action pursuant to CPLR 3126 is denied.

BACKGROUND

This Court dismissed the instant action on January 30, 2018, for Plaintiff's failure to comply with this Court's compliance conference orders of November 15, 2017, and December 12, 2017. (Fundaro affirmation, exhibit E [Tr].) In the November 15, 2017 order, the Court had directed that Plaintiff was to "respond to Defendants' outstanding discovery demands by December 11, 2017, by email." (Fundaro affirmation, exhibit D, at 2.) In the December 12, 2017 order, the Court determined that its November 15, 2017 order "ha[d] not been complied with in that Plaintiff ha[d] failed to serve a bill of particulars and other discovery requested by Defendants, including authorizations." (*Id.* at 3.) Accordingly, the Court ordered that "Plaintiff [was] to respond to Defendants' demand for a bill of particulars and discovery within 45 days of [December 12, 2017]. If Plaintiff fail[ed] to respond completely and timely, the Court w[ould] consider dismissing the action." (*Id.*)

At the January 30, 2018 conference in this case, the Court found that Plaintiff had not complied with said demands. (*See* Tr.) With respect to the outstanding discovery, Plaintiff's counsel stated,

> "[y]our Honor, I don't dispute that we owe this discovery. Our firm has had, again, by way of explanation, no[] excuse, our firm had a lot of turnover lately, including, I believe, one or two calendar clerks last year, we've had several attorneys leave.

"I've been at the firm about three weeks, I'm currently trying to catch up on all of this discovery.

"Again, I did try to call plaintiff -- I apologize for being so late, that's just when I got around to it, and all I can really say is that given a short adjournment, if the Court grants that, I can definitely work with defendant and get him all the discovery that his firm requires."

(Tr at 5, lines 5–26; at 6, lines 2–3.)

The Court then replied as follows:

"Counsel, as much as I appreciate what you are saying, the fact of the matter is if the Court's orders have any meaning, they need to be complied with, otherwise, I'm just spinning my wheels sitting here each and every week conducting either preliminary conferences or compliance conferences. I actually take the trouble to speak to each of the attorneys and I don't just simply sign some order.

"And I did speak, not to you, obviously, to your predecessor in this case on two different occasions, indicating that this needed to be done. Therefore, since the bill of particulars hasn't been served, the discovery hasn't been served, it would appear to the Court that although you were supposed to be before me on three occasions, this case was before Judge Perry, in the past, I guess it was a City case.

"There was also an indication in the file at some point that Judge Kotler had the case, also maybe in the same part when the City of New York was involved.

"So there have been numerous occasions that this matter has been before a judge and you would think that preliminary matters would have been complied with after two-and-a-half years. At a minimum, you would think the bill of particulars would have been served, authorizations should have been obtained and given.

"Having said that, the Court does believe, pursuant to CPLR 3126, the Court has authority and this Court will, in fact, exercise, this matter will be dismissed for failure to serve the appropriate responses and comply with the appropriate orders of the Court. The order specifically of December 12th, if anybody at the firm had bothered to read what I wrote, all I said was if you fail to do it, the court will consider [dismissing the case]. You would think that you would read that to understand that I'm not ordering myself to do it, I didn't say I shall, I said I would consider it. But I'm not getting any explanation from the firm other than -- and I appreciate the fact that you have simply recently become a member of that organization, that doesn't change the fact that the partners in the firm or your predecessor should have read the order that I gave and should have complied. Accordingly, the action -- and based upon the motion made by defendant, the matter will be dismissed."

(Tr at 6, lines 4–26; at 7, lines 2–21.)

Plaintiff now moves pursuant to CPLR 5015 (a) to vacate the Court's January 30, 2018 order dismissing the action. In support of her motion, Plaintiff submits an affirmation by Casey Fundaro, a member of the law firm of Munawar & Andrews-Santillo, LLP, attorneys for Plaintiff. (Affirmation of Fundaro.) Counsel argues that this is a meritorious personal injury action where, on April 16, 2014, Plaintiff, while operating a bicycle, was struck by Defendants' vehicle. (*Id.* ¶ 3.) Counsel then argues that "[a] conference was held on December 12, 2017[,] and the Plaintiff sent a per diem with little knowledge of the case." (*Id.* ¶ 4.) Counsel further argues that, "[o]n January 30, 2018, Plaintiff sent in a new associate who failed to see that discovery had been served." (*Id.*) Counsel then indicates that its firm encountered a significant staff reduction in 2017 and has had significant employee turnover. (*Id.* ¶ 5.) Counsel next states that "my caseload is in the hundreds, and although I did my best to keep track of what discovery was served and owed in this case, I missed it here. I also mistakenly relied on a new associate who should have received more guidance from me." (*Id.*)

Plaintiff also submits: a copy of the summons and verified complaint, dated July 15, 2015, which was verified by Plaintiff; a copy of Defendants' verified answer, dated November 22, 2016; and a copy of Plaintiff's verified bill of particulars, dated April 10, 2017, which was verified by Mark S. Grodberg, Esq., and which was accompanied by Plaintiff's "Response to Defendants' Combined Demand for Discovery and Inspection," dated April 10, 2017. (Fundaro affirmation, exhibits A–C.)

In opposition to the motion, defendants Lloyd Jones and the City of New York submit an affirmation in opposition. (Affirmation of Henig.) Counsel argues, in sum and substance, that Plaintiff has failed to show either a reasonable excuse or a meritorious cause of action. Specifically, counsel further argues that Plaintiff's counsel's alleged law office failure is not a sufficient excuse. Counsel states that it never received Plaintiff's April 10, 2017 verified bill of particulars, which was not directed to counsel. Counsel further states that he corresponded with Andrew Bruskin, Esq., of Plaintiff's counsel's law office, on December 11, 2017, by email, who was present at the November 15, 2017 compliance conference, who acknowledged that no discovery responses had been served to date, and who agreed to email counsel the outstanding discovery responses prior to the adjourn date of the next conference but failed to do so.

In reply, Plaintiff submits, for the first time, an affidavit, dated May 24, 2018, by Ashley Andrews-Santillo, a partner from Munawar & Andrews-Santillo, LLP, and an affidavit of merit, dated May 24, 2018, by Plaintiff. Plaintiff also submits a further verified bill of particulars and "Response to Defendant's Combined Demands," both dated May 23, 2018.

DISCUSSION

CPLR 5015 (a) (1) provides, in relevant part, that "[t]he court which rendered a judgment or order may relieve a party from it upon such terms as may be just, on motion of any interested person with such notice as the court may direct, upon the ground of[] excusable default." On a motion for relief pursuant to CPLR 5015 (a) (1), upon the ground of excusable default, the movant must submit a reasonable excuse for its default and establish a meritorious claim. (*See*

Eugene Di Lorenzo, Inc. v A.C. Dutton Lbr. Co., 67 NY2d 138, 141 [1986]; *see also Caesar v Harlem USA Stores, Inc.*, 150 AD3d 524 [1st Dept 2017].) "What constitutes a reasonable excuse generally lies within the sound discretion of the motion court." (*Gecaj v Gjonaj Realty & Mgt. Corp.*, 149 AD3d 600, 602 [1st Dept 2017] [internal quotation marks omitted].)

The Court of Appeals has stated that "when a party fails to comply with a court order and frustrates the disclosure scheme set forth in the CPLR, it is well within the Trial Judge's discretion to dismiss the complaint." (*Kihl v Pfeffer*, 94 NY2d 118, 122 [1999].) Referring to a situation such as Cini's as a "scenario that is all too familiar," the Court of Appeals opined that:

> "If the credibility of court orders and the integrity of our judicial system are to be maintained, a litigant cannot ignore court orders with impunity. Indeed, the Legislature, recognizing the need for courts to be able to command compliance with their disclosure directives, has specifically provided that a 'court may make such orders . . . as are just,' including dismissal of an action (CPLR 3126). Finally, we underscore that compliance with a disclosure order requires both a timely response and one that evinces a good-faith effort to address the requests meaningfully."

(*Id.* at 123.)

In the instant motion, Plaintiff has submitted essentially the same excuse offered and considered by the Court at the January 30, 2018 conference. As the Court stated, "the partners in the firm or [appearing counsel's] predecessor should have read the order[s] . . . and should have complied." (Tr at 7, lines 18–19.)

To the extent Plaintiff has submitted affidavits for the first time in her reply papers, they are not properly before the Court, and the Court declines to consider them. (*See King v Dobriner*, 106 AD3d 1053, 1054 [2d Dept 2013]; *Siculan v Koukos*, 74 AD3d 946, 947 [2d Dept 2010]; *Glatt v Mariner Partners, Inc.*, 66 AD3d 440, 441 [1st Dept 2009]; *Schulte Roth & Zabel, LLP v Kassover*, 28 AD3d 404, 405 [1st Dept 2006]; *Juseinoski v Board of Educ. Of City of New York*, 15 AD3d 353, 355 [2d Dept 2005]; *Salzano v Korba*, 296 AD2d 393, 395 [2d Dept 2002].)

Based upon the foregoing, the Court finds that movant has failed to submit a reasonable excuse for her default in complying with this Court's November 15, 2017 and December 12, 2017 compliance conference orders.

While the Court need not consider the question of whether Plaintiff has established a meritorious claim, the Court does note that while Plaintiff's affidavit of merit was not properly before the Court on this motion, movant did submit a complaint verified by Plaintiff, which is ordinarily sufficient to establish merit, and the opposition papers did fail to address Plaintiff's inclusion of the verified complaint in her moving papers.

CONCLUSION

Accordingly, it is

ORDERED that the motion by Plaintiff Dion Cini pursuant to CPLR 5015 (a) to vacate this Court's January 30, 2018 dismissal of the action pursuant to CPLR 3126 is denied; and it is further

ORDERED that defendants Lloyd Jones and the City of New York shall serve a copy of this order with notice of entry upon Plaintiff within 10 days of entry.

The foregoing constitutes the decision and order of the Court.

6/14/2018
DATE

HON. ROBERT DAVID KALISH, J.S.C.

CHECK ONE: [X] CASE DISPOSED [ ] NON-FINAL DISPOSITION

APPLICATION: [ ] GRANTED [X] DENIED [ ] GRANTED IN PART [ ] OTHER

CHECK IF APPROPRIATE: [ ] SETTLE ORDER [ ] SUBMIT ORDER

[ ] INCLUDES TRANSFER/REASSIGN [ ] FIDUCIARY APPOINTMENT [ ] REFERENCE