

De Leon v 2 Thayer St. Realty Corp.

2019 NY Slip Op 33683(U)

December 20, 2019

Supreme Court, New York County

Docket Number: 152366/2018

Judge: Barbara Jaffe

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. BARBARA JAFFE PART IAS MOTION 12EFM

Justice

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GRICELDA DE LEON,

Plaintiff,

- v -

2 THAYER STREET REALTY CORP.,

Defendant.

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INDEX NO. 152366/2018
MOTION DATE
MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 14-39, 42-61 were read on this motion to vacate.

Defendant moves pursuant to CPLR 3104 for an order vacating the compliance conference order dated July 31, 2019, suspending disclosure pending the determination of this motion, and ordering the parties to enter into a new compliance conference order. Plaintiff opposes and cross-moves pursuant to CPLR 3126 for an order striking defendant's answer, or in the alternative, deeming plaintiff's deposition waived. Defendant opposes.

By compliance conference order dated July 31, 2019, defendant was ordered, over objection, to respond to plaintiff's demands dated July 29, 2019, party depositions were ordered to proceed, and defendant's request that plaintiff be compelled to respond to its third demand for authorizations was rejected upon plaintiff's representation that she had withdrawn her claim for psychological injuries. (NYSCEF 39).

On August 6, 2019, defendant filed this motion. (NYSCEF 14).

By compliance conference order dated October 23, 2019, defendant was again ordered to provide a response to plaintiff's demands dated July 29, 2019, and party depositions were again

ordered to proceed. It was noted therein that defendant's motion to vacate the prior compliance conference order provided no basis for non-compliance with the July 31 order. (NYSCEF 62).

Pursuant to CPLR 3104, on the motion of a party, the court may designate a referee, or the parties may stipulate that a named attorney act as a referee, to supervise disclosure, and a party may move to vacate a disclosure order entered by such a referee. Here, no referee was appointed by the court or selected by the parties and defendant offers no authority for the proposition that court attorneys who facilitate compliance conferences are contemplated as referees within the meaning of the statute. Nonetheless, as a motion to vacate is appropriate here (*see Mega Const. Corp. v Benson Park Assocs., LLC*, 60 AD3d 826, 827 [2d Dept 2009], citing *Levine v St. Luke's Hosp. Ctr.*, 109 AD2d 694, 695 [1st Dept 1985] [as conference order is not appealable, proper procedure is to move to vacate or modify order]), defendant's motion is considered, *dehors* CPLR 3104.

Defendant contends that the July 31 order should be vacated because it is unprepared to proceed with depositions without the medical records requested in its demands for authorizations. However, as the issues concerning defendant's demands for authorizations concern damages alone, there is no need to delay plaintiff's deposition as to liability or defendant's deposition. Thus, there is no basis to vacate the July 31 order.

While defendant details alleged deficiencies in plaintiff's disclosure responses throughout the entirety of the litigation, it does not specify in its requested relief what disclosure it seeks, nor has it sought to compel disclosure pursuant to CPLR 3124. Rather, the sole relief it requests is an order requiring the parties to enter into a new compliance conference order. Accordingly, the motion is granted only to the extent of ordering the parties to appear for a compliance conference.

As defendant's motion is resolved by this order, defendant's request that disclosure be suspended pending decision on this motion is denied as moot.

Plaintiff contends that defendant's motive for filing this motion is to adjourn her deposition. As defendant's request for an adjournment was denied at the July 31 conference and as defendant has repeatedly demanded authorizations for records to which it is not entitled, plaintiff asserts that its answer should be stricken for its "repeated failures to provide discovery and ignore court orders," or in the alternative, that her deposition should be deemed waived.

While CPLR 3126 permits a court to, *inter alia*, issue an order striking pleadings upon a party's failure to obey an order of disclosure or a willful failure to disclose information, the striking of a pleading is a drastic remedy and generally unwarranted absent a showing that the other party's failure to obey discovery orders is willful or contumacious. (*See Pehzman v Dept. of Educ. of City of New York*, 95 AD3d 625, 625-626 [1st Dept 2012] [striking answer is ultimate penalty that may be imposed only upon "extreme conduct"]; *Palmenta v Columbia Univ.*, 266 AD2d 90, 91 [1st Dept 1999] [striking answer inappropriate absent clear showing that failure to comply willful, contumacious, or in bad faith, which moving party must affirmatively establish]; *Commerce & Indus. Co. v Lib-Corn, Ltd.*, 266 AD2d 142, 145 [1st Dept 1999] [striking of pleading not a sanction to be routinely imposed whenever party fails to comply with item of discovery]). Although no justification is demonstrated for delaying depositions in this case, the delay does not warrant the requested sanction. Should defendant fail to appear for deposition on the date scheduled at the next compliance conference, a sanction will be imposed.

Accordingly, it is hereby

ORDERED, that defendant's motion is granted only to the extent that the parties are directed to appear for the previously-scheduled conference on January 8, 2020 at 2:15 pm at 60

