Powlis v Agyeman
2020 NY Slip Op 32488(U)
June 10, 2020
Supreme Court, Bronx County
Docket Number: 28921/2018E
Judge: John R. Higgitt

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX: IA PART 14

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LORRAINE P. POWLIS,

Plaintiff,

- against -

ISSAC AGYEMAN, TAN YUEO WU CIYUN and DANIEL AU,

Defendants.

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DECISION AND ORDER

Index No. 28921/2018E

Present: John R. Higgitt, J.S.C.

Upon defendant Agyeman's May 4, 2020 notice of motion and the affirmation, affidavit and exhibits submitted in support thereof; the May 29, 2020 affirmation in opposition of defendants Tan Yueo Wu Ciyun and Daniel Au ("the Au defendants") and the exhibits submitted therewith; and due deliberation; defendant Agyeman's motion for leave to reargue the Au defendants' motion seeking an order precluding defendant Agyeman from offering any evidence in this matter and striking said defendant's answer, deemed one seeking leave to reargue the January 31, 2020 decision and order of the undersigned striking defendant Agyeman's answer, is granted in part.

The Au defendants' prior motion sought an order striking defendant Agyeman's answer for his failure to appear for deposition. Defendant Agyeman's appearance at a deposition is required by the March 1, 2019 preliminary conference order, the April 26, 2019 compliance conference order, and the July 19, 2019 and November 8, 2019 status conference orders. Plaintiff appeared for deposition on August 12, 2019.

Defendant Agyeman asserts that the Au defendants had unclean hands when they moved to strike defendant Agyeman's answer because they had not yet appeared for deposition. Defendant Agyeman, however, is the first-named defendant, and has not demonstrated special

circumstances or that the Au defendants engaged in such dilatory conduct so as to deprive them of their priority of deposition (*see Bennett v Riverbay Corp.*, 40 AD3d 319 [1st Dept 2007]; *see also Koch v Sheresky, Aronson & Mayefsky LLP*, 33 Misc 3d 1228[A], 2011 NY Slip Op 52149[U] [Sup Ct, N.Y. County 2011]).

Defendant Agyeman further asserts that the court overlooked the holding in *Heywood v Benyarko*, 82 AD2d 751 (1st Dept 1981). The *Heywood* court modified an order striking a defendant's answer by substituting a provision precluding the defendant from testifying at trial. The *Heywood* court reasoned that the failure of a client who cannot be located despite good faith efforts to appear for deposition cannot be willful because the failure of communication means that the client has not been informed of the deposition, and "the real party in interest (presumably the insurance company) should [not] be precluded from defending the action if the client cannot be located" (*id.* at 751).[1]

In opposition to the prior motion, defendant Agyeman's counsel asserted, "This office has made and continues to make a diligent and good faith effort to produce defendant for a deposition. This office has also assigned an in-house investigator to make contact with defendant Issac Agyeman and secure his cooperation and availability for a deposition. Efforts to secure same remain ongoing." Defendant Agymen's counsel provided no details of these efforts.

Notably, the sanction of preclusion may be imposed even where the failure to disclose was neither willful nor contumacious (*see Vandashield Ltd v Isaacson*, 146 AD3d 552 [1st Dept 2017]). "[I]t is unnecessary to demonstrate willful and contumacious behavior in order to impose a sanction like a monetary sanction or preclusion, as opposed to a more drastic sanction such as the striking of a pleading" (*Metropolitan Bridge & Scaffolds Corp. v N.Y.C. Hous. Auth.*, 168

[1] The Appellate Division conditionally affirmed Supreme Court's decision in the event that the defendant failed to timely pay a monetary sanction to plaintiff's counsel.

AD3d 569 [1st Dept 2019]). Defendant Agyeman's failure to cooperate with his insurance-provided civil defense attorney does not relieve him of his obligation to appear for a deposition or prevent the imposition of sanctions for his failure to so appear (*see Reidel v Ryder TRS, Inc.*, 13 AD3d 170 [1st Dept 2004]).

"[A] casual, superficial and one-time attempt by an investigator to locate the party fails to meet the required showing of good-faith efforts and counsel may not permit an indifferent client to slip into obscurity and thereafter contend that the client's failure to appear pursuant to court orders cannot be met with the appropriate sanction" (*Montgomery v Colorado*, 179 AD2d 401, 402 [1st Dept 1992] [citations and quotation marks omitted]). The drastic sanction of striking a party's pleading is appropriate "where efforts to produce an individual for deposition are merely superficial or undisclosed" (*Shorter v Luxury Auto Rentals*, 234 AD2d 158, 159 [1st Dept 1996] [citations omitted]), particularly where a party repeatedly commits to deposition dates and fails to timely notify the court of difficulties in locating its witness (*see Periphery Loungewear v Kantron Roofing Corp.*, 214 AD2d 438 [1st Dept 1995]).

Nevertheless, because the court retains jurisdiction to vacate its orders upon sufficient reason and in the interest of substantial justice (*see City of N.Y. v OTR Media Grp., Inc.*, 175 AD3d 1163, 1163 [1st Dept 2019]), because defendant Agyeman's failure to appear after the completion of plaintiff's deposition was not inordinately protracted, and because defendant Agyeman's counsel has offered an explanation, which explanation provides sufficient reason for the court to reconsider its prior discovery directive, for his extended failure to communicate with counsel (*cf. Racer v Mazel. USA LLC*, 150 AD3d 437 [1st Dept 2017]; *Perez v City of N.Y.*, 95 AD3d 675 [1st Dept 2012]), defendant Agyeman shall be given a final opportunity to appear for his deposition to avoid the sanction imposed by the January 31, 2020 order.

Given defendant Agyeman's failure in his affidavit to address his failure to appear for deposition, and bearing in mind the court's broad discretion in discovery matters (*see Kuti v Sera Sec. Servs.*, 2020 NY Slip Op 02153 [1st Dept 2020]), a monetary sanction is appropriate (*see Cherokee Owners Corp. v DNA Contracting, LLC*, 74 AD3d 411 [1st Dept 2010]). "It is within the trial court's discretion to determine the nature and degree of the penalty … The sanction should be commensurate with the particular disobedience it is designed to punish, and go no further than that" (*Merrill Lynch, Pierce, Fenner & Smith, Inc. v Global Strat Inc.*, 22 NY3d 877, 880 [2013] [citations and quotation marks omitted]).

Given that defendant Agyeman has now been located, there is no reason to delay his deposition until 30 days prior to trial.

Accordingly, it is

ORDERED, that defendant Agyeman's motion for leave to reargue the Au defendants' motion seeking an order precluding defendant Agyeman from offering any evidence in this matter and striking defendants' answers, deemed one seeking leave to reargue the January 31, 2020 decision and order of the undersigned striking defendant Agyeman's answer, is granted solely to the extent that if defendant Agyeman fails to appear for deposition within 30 days after service of a copy of this order with written notice of its entry, defendant Agyeman shall be precluded from offering affidavits with respect to liability on dispositive motions and from testifying at trial with respect to liability, and that if the defendant Agyeman so appears, the January 31, 2020 order shall be vacated; and it is further

ORDERED, that no party shall unreasonably withhold consent to a deposition conducted by videographic or other remote means; and it is further

ORDERED, that within 45 days after service of a copy of this order with written notice

of its entry, defendant Agyeman's counsel shall pay to plaintiff's counsel the sum of $250.00; and it is further

ORDERED, that the motion is otherwise denied.

The parties are reminded of the August 17, 2020 pre-trial conference before the undersigned.

This constitutes the decision and order of the court.

Dated: June 10, 2020

Hon. John R. Higgitt, J.S.C.