

Barfield v 545 Edgecombe BCR, LLC

2020 NY Slip Op 33259(U)

October 5, 2020

Supreme Court, New York County

Docket Number: 155464/2019

Judge: Kathryn E. Freed

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This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. KATHRYN E. FREED **PART** **IAS MOTION 2EFM**

Justice

-----X

ANDY BARFIELD,

Plaintiff,

- v -

545 EDGECOMBE BCR, LLC, MGJ REALTY CORPORATION, and BIG CITY REALTY MANAGEMENT, LLC,

Defendants.

-----X

INDEX NO. 155464/2019

MOTION SEQ. NO. 002

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 002) 21, 22, 23, 24, 25, 26, 27, 28, 30

were read on this motion to/for DISCOVERY.

In this personal injury action commenced by plaintiff Andy Barfield, defendants 545 Edgecombe BCR, LLC (“Edgecombe”), MGJ Realty Corporation (“MGJ”), and Big City Realty Management, LLC (“BCR”) move: 1) pursuant to CPLR 3126, to dismiss the complaint due to plaintiff’s failure to provide discovery; 2) pursuant to CPLR 3042, precluding plaintiff from offering proof at the trial of this action due to its failure to provide a verified bill of particulars; 3) pursuant to CPLR 3124, compelling plaintiff to provide the discovery outstanding by a date certain upon penalty of dismissal; and 4) for such other relief as this Court deems just and proper. Plaintiff opposes the motion. After a review of the parties’ contentions, as well as a review of the relevant statutes and case law, the motion is decided as follows.

FACTUAL AND PROCEDURAL BACKGROUND:

This action arises from an incident on November 9, 2017 in which plaintiff was allegedly injured when a ceiling fell on him at 545 Edgecombe Avenue in Manhattan, where he resided. Doc. 1. Plaintiff claimed that the accident occurred due to the negligence of defendants in their ownership, control, maintenance, and/or management of the premises. Doc. 1. Plaintiff commenced the captioned action by filing a summons and complaint on May 31, 2019. Doc. 1.

Edgecombe and BCR joined issue by their answer filed August 13, 2019. Doc. 6. Concomitantly with the service of their answer, Edgecombe and BCR served plaintiff with a demand for a verified bill of particulars as well as a set of combined discovery demands (“the combined demands”), which included demands for, inter alia: witness and expert witness information; statements; collateral source information; insurance information; employment, medical record, and Medicare/Medicaid authorizations; photographs and videotapes; accident reports; and contracts. Doc. 26.

On October 30, 2019, by which date plaintiff still had not responded to the demand for a bill of particulars or to the combined demands, defendants’ counsel wrote to plaintiff’s attorney in a good faith attempt to obtain a response to the same. Doc. 23 at par. 9.

On December 4, 2019, an amended answer was served on behalf of Edgecombe, BCR, and MGJ. Doc. 16.

Defendants now move for the relief set forth above. In support of the motion, defendants submit, inter alia, an attorney affirmation, an affirmation of good faith, a copy of the combined demands served by Edgecombe and BCR, and the good faith letter sent to plaintiff’s counsel on October 30, 2019 seeking the outstanding discovery. In his affirmation in support of the motion, defendants’ attorney argues that “[d]ue to plaintiff’s willful refusal to comply with the duly served

demands, it is respectfully submitted that this Court should issue an [o]rder dismissing plaintiff's [c]omplaint or, alternatively, to preclude and compel plaintiff to provide the outstanding discovery, and appear for a deposition after his medical, employment, and collateral source records are received via the authorizations that have not yet been provided by plaintiff." Doc. 23 at par. 9.

In opposition, plaintiff's counsel argues that the motion must be denied since there is no basis upon which to conclude that plaintiff willfully refused to provide discovery. Doc. 30. Counsel maintains that his office asked plaintiff to provide the names and addresses of his medical providers and to provide information about his employment, but that that plaintiff still has not responded. Counsel further asserts, in effect, that this matter was delayed by a motion for default against MGJ, which was withdrawn once an answer was served on all of the defendants. Docs. 8, 16, 20, 30. Additionally, asserts counsel, further delay of this action resulted from the fact that this motion was filed shortly before the Covid-19 pandemic began. Doc. 30.

LEGAL CONCLUSIONS:

Although a court may, in its discretion, strike a pleading pursuant to CPLR 3126 due to a party's willful failure or refusal to provide discovery (*see Suarez v Dameco Indus., Inc.*, 167 AD3d 501 [1st Dept 2018]), there is no evidence of any willful conduct by plaintiff herein. Although plaintiff's counsel failed to respond to the combined demands, he represents that he has been in contact with his client and was attempting to obtain the information necessary to respond. Additionally, defendants do not contend that they have been prejudiced in any way by plaintiff's failure to provide responses to the combined demands. Therefore, this Court declines to strike the complaint.

However, this Court directs plaintiff to respond to the combined demands within 45 days pursuant to CPLR 3124, which statute grants it the discretion to compel the production of discovery. *See O'Halloran v Metro. Transp. Auth.*, 169 AD3d 556, 557 (1st Dept 2019). This Court finds that, even taking any delay caused by the pandemic into consideration, plaintiff's counsel has had ample time to provide the discovery demanded.

Additionally, plaintiff is required to provide defendants Edgecombe and BCR with a verified bill of particulars. CPLR 3042(c) provides that "[i]f a party fails to respond to a demand [for a bill of particulars] in a timely fashion or fails to comply fully with a demand [for the same], the party seeking the bill of particulars may move to compel compliance, or, if such failure is willful, for the imposition of penalties pursuant to subdivision (d) of this rule." Although CPLR 3042(d) vests a court with broad discretion to fashion a remedy for a party's failure to provide a bill of particulars, sanctions for violating CPLR 3042 "may be granted at the court's discretion and only when such failure is willful. In addition, before the sanction of preclusion can be granted or a pleading stricken, the court must be convinced that a showing of 'willful or contumacious conduct' has been made." *Estate of Friedrich Karl Lutz*, 2017 NYLJ LEXIS 2828, *1-2 (Surr Ct, New York County 2017) citing *Fairbanks Capital Corp. v. Nagel*, 289 AD2d 99, 101 (1st Dept 2001).

Just as with plaintiff's failure to provide responses to the combined demands, defendants have not shown that plaintiff's failure to provide a verified bill of particulars was willful. Thus, no sanction for plaintiff's failure to provide the same is warranted herein. However, plaintiff is directed to provide defendants Edgecombe and BCR with verified bills of particular within 45 days.

Therefore, in light of the foregoing, it is hereby:

ORDERED that the branch of the motion by defendants 545 Edgecombe BCR, LLC, MGJ Realty Corporation, and Big City Realty Management, LLC, pursuant to CPLR 3124, seeking to compel plaintiff to respond to the combined discovery demands served by defendants 545 Edgecombe BCR, LLC and Big City Realty Management, LLC on or about August 13, 2019 is granted, and responses to said demands shall be served within 45 days of the filing of this order on NYSCEF; and it is further

ORDERED that the branch of the motion by defendants 545 Edgecombe BCR, LLC, MGJ Realty Corporation, and Big City Realty Management, LLC, pursuant to CPLR 3042(c), seeking to compel plaintiff to respond to the demand for a bill of particulars served by defendants 545 Edgecombe BCR, LLC and Big City Realty Management, LLC on or about August 13, 2019 is granted, and a verified bill of particulars shall be served on said defendants within 45 days of the filing of this order on NYSCEF; and it is further

ORDERED that the motion is otherwise denied; and it is further

ORDERED that the parties are to participate in a preliminary conference with Part 2 by telephone on January 4, 2021 at 3:30 p.m.; and it is further

ORDERED that this constitutes the decision and order of the court.

10/5/2020
DATE



KATHRYN E. FREED, J.S.C.

CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	
	<input type="checkbox"/>	GRANTED	<input type="checkbox"/>	GRANTED IN PART	<input type="checkbox"/>
			<input type="checkbox"/>	DENIED	
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>	SUBMIT ORDER	
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/>
					REFERENCE