Panarello v Town of Huntington Hart Bus Co.
2020 NY Slip Op 34763(U)
June 8, 2020
Supreme Court, Suffolk County
Docket Number: Index No. 611959-2016
Judge: David T. Reilly
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SUPREME COURT OF THE STATE OF NEW YORK
I.A.S. PART 30 SUFFOLK COUNTY

PRESENT:
HON. DAVID T. REILLY, JSC

INDEX NO.: 611959-2016

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JEFFREY PANARELLO,
Plaintiff,

-against-

TOWN OF HUNTINGTON HART BUS COMPANY, HUNTINGTON AREA RAPID TRANSIT, TOWN OF HUNTINGTON AND COUNTY OF SUFFOLK AND "JOHN DOE" TRUE NAME BEING UNKNOWN, PERSON INTENDED
BEING THE OPERATOR OF THE BUS ON MAY 11, 2015 AT APPROXIMATELY 1:30 PM ON LARKFIELD ROAD AT THE INTERSECTION
WITH PULASKI ROAD, EAST NORTHPORT, NY,
Defendants.

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MOTION DATE:	09/28/18
SUBMITTED:	01/14/20
MOTION SEQ. NO.:	1 & 2
MOTION DEC.:	
001	MG
002	MotD

Upon the reading and filing of the following papers in this matter: (1) Plaintiff's Order To Show Cause (001) dated August 29, 2018 and supporting papers; (2) Defendants' Notice of Motion (002) dated September 12, 2018 and supporting papers; (3) Plaintiff's Affirmation In Opposition dated December 30, 2019 and supporting papers; and (4) Defendants' Reply Affirmation filed on January 14, 2020 (~~and after hearing counsel in support and in opposition to the motion~~) it is,

ORDERED that Mot. Seq. No. 001 and Mot. Seq. No. 002 are consolidated for purposes of this determination; and it is

ORDERED that counsel's application to withdraw from representing plaintiff is granted to the extent discussed below; and it is

ORDERED that defendants' motion seeking an Order dismissing plaintiff's complaint pursuant to CPLR 3124, 3125, 3126, 3211 and 3212 is granted in part and denied in part as set forth below.

Plaintiff commenced this action seeking money damages for personal injuries sustained on May 11, 2015 when, as a passenger on a Town of Huntington Hart Bus, he was allegedly caused to fall from his seat. In his complaint, and as amplified by his testimony during a deposition held pursuant to Public Authorities Law §1276, plaintiff maintains that he was seated behind the bus driver having a conversation with another passenger. Plaintiff only recalls being awoken by paramedics as they were attempting to remove plaintiff from the floor of the bus and into a waiting ambulance.

By way of procedural history, on October 10, 2017 the parties appeared in Court for the purpose of completing a preliminary conference order. Within that order the parties scheduled plaintiff's deposition for January 4, 2018. According to the defendants, plaintiff adjourned the date of his deposition several times and it was finally rescheduled for April 27, 2019. Plaintiff again failed to appear indicating that he was ill. The deposition was rescheduled for June 5, 2019. On that date defendants maintain that plaintiff failed to appear in a condition fit to testify. Stated otherwise, defendants maintain that plaintiff appeared, but was unable to answer simple questions after consuming three types of pain medication several hours previous to the deposition. The Court directed the parties to appear in Court on June 12, 2019 for a scheduled compliance conference.

On June 12, 2019 plaintiff appeared in Court with his attorney, however it became evident to the attorneys and the Court that plaintiff was unable to proceed with the deposition due to his lack of capacity. The Court directed plaintiff to, within sixty days of that date, secure a letter from his primary care physician and/or pain management doctor regarding plaintiff's medicinal regiment with an indication as to when the plaintiff might be expected to proceed with the deposition. The matter was adjourned to August 14, 2018. It is sufficient to state that the Court never received such communication from the plaintiff. At a subsequent compliance conference it is the Court's recollection that it suggested that counsel for the plaintiff aid in the commencement of a Mental Hygiene Law Article 81 proceeding before the Guardianship Part of the Court to determine if a guardian should be appointed for plaintiff. At around the same time plaintiff's counsel submitted a motion to be relieved as counsel for plaintiff in this action.

Accordingly, the Court marked the instant matter as "stayed" pending the outcome of the guardianship proceeding. It is worthy to note that during this time period plaintiff made hundreds of telephone calls to the undersigned and sent dozens of emails to the part's email address. The unsolicited phone calls were most often made either before or after normal office hours and voice messages, primarily undecipherable, were left on the answering machine. The contents of the emails

sent were equally unclear as they relate to the responsibility of the Court. For example, one email, sent by plaintiff on October 21, 2019 at 10:49 p.m. contained the following:

> I'M BACK FROM ST. CATHERINESTHEY SAID THAT IF I DON'T GET
> INTERFERON INJECTIONS BY THS WEDNESDAY OR IMDEAD.
> DO YOU ASSHOLES GET IT.
> DEAD. BY THE 23 OF OCTOBER.
> FUCK EVERY ONE OF YOUYOU ALL KILLED ME.
> YOU KNOW MY NAME
> JEFFPANARELLO 6319019829
> BEN KNOWSDEAL WITH HIM.

On November 12, 2019 plaintiff's motion to discontinue the guardianship proceeding was granted (Horowitz, J.). In light of that determination this Court indicated to the attorneys here that the motion to withdraw as counsel and the defendants' to dismiss would proceed to submission. In addition, the Court attempted to engage the parties in settlement negotiations, however those discussions proved fruitless.

Turning first to defendants' motion to dismiss plaintiff's complaint pursuant to CPLR 3124, 3125 and 3126, parties to litigation are entitled to "full disclosure of all evidence material and necessary in the prosecution or defense of an action, regardless of the burden of proof" (CPLR 3101[a]). While actions should be resolved on the merits whenever possible (*see* ***Ingoglia v. Barnes & Noble Coll. Booksellers, Inc.***, 48 A.D.3d 636, 852 N.Y.S.2d 337 [2nd Dept 2008]; ***Pascarelli v. City of New York***, 16 A.D.3d 472, 791 N.Y.S.2d 617 [2nd Dept 2005]), a court may strike a pleading or impose other sanctions against a party who "refuses to obey an order for disclosure or willfully fails to disclose information which the court finds should have been disclosed" (CPLR § 3126; *see* ***Nicolia Ready Mix, Inc., v. Fernandes***, 37 A.D.3d 568, 829 N.Y.S.2d 704 [2nd Dept 2007]; ***Mendez v City of New York***, 7 A.D.3d 766, 778 N.Y.S.2d 501 [2nd Dept 2004]). The penalties authorized by CPLR § 3126 are designed "to prevent a party who has refused to disclose evidence from affirmatively exploiting or benefitting from the unavailability of the proof" during a civil action (***Oak Beach Inn Corp. v. Babylon Beacon***, 62 N.Y.2d 158, 166, 476 N.Y.S.2d 269 [1984]. A party seeking the drastic sanctions of striking a pleading or preclusion has the initial burden of coming forward with evidence clearly showing that the failure to comply with disclosure orders or discovery demands was willful, contumacious or in bad faith (*see* ***Conciatori v. Port Auth. of N.Y. & N.J.***, 46 A.D.3d 501, 846 N.Y.S.2d 659 [2nd Dept 2007]; ***Shapiro v. Kurtzman***, 32 A.D.3d 508, 820 N.Y.S.2d 311 [2nd Dept 2006]).

Willful and contumacious conduct may be inferred from a party's repeated failure to adequately respond to discovery demands or to comply with disclosure orders, coupled with inadequate excuses for such default (*see* ***McArthur v. New York City Hous. Auth.***, 48 A.D.3d 431, 851 N.Y.S.2d 271 [2nd Dept 2008]; ***Duncan v. Hebb***, 47 A.D.3d 871, 850 N.Y.S.2d 610 [2nd Dept 2008]), or a failure to comply with court-ordered discovery over an extended period of time (*see* ***Vanalst v. City of New York***, 302 A.D.2d 515, 755 N.Y.S.2d 260 [2nd Dept 2003]).

Here, it is beyond cavil that plaintiff has repeatedly failed to appear for scheduled depositions and, when he did appear, was in no capacity to undertake his discovery obligation. Further, plaintiff has to this day failed to provide a letter from a medical provider which would explain his impaired condition so as to provide explanation for his repeated failures. That being said, this Court finds that fairness dictates that he be afforded one last opportunity to appear for a deposition and complete the discovery process before his complaint is dismissed. The Court notes his impaired mental condition when he appeared in Court and attributes that condition to the effect of his medication. With that in mind the Court directs that plaintiff make himself available for a deposition within ninety (90) days of the date of this decision and Order at a time and place reasonable under the current Covid-19 epidemic. This Court holds dear the truth that all matters before it should be resolved on the merits.

To the extent that defendants' seek an Order granting them summary judgment, a party moving for such relief must make a prima facie showing of entitlement to judgment as a matter of law (***see Winegrad v New York Univ. Med. Ctr.***, 64 NY2d 851, 487 NYS2d 316 [1985]). "[A] party does not carry its burden in moving for summary judgment by pointing to gaps in its opponent's proof, but must affirmatively demonstrate the merits of its claim or defense" (***George Larkin Trucking Co. v Lisbon Tire Mart***, 185 AD2d 614, 615, 585 NYS2d 894 [4th Dept 1992]). If the moving party meets this burden, the burden then shifts to the opposing party, who must demonstrate evidence of the existence of a material issue of fact (*see* ***Alvarez v Prospect Hosp.***, 68 NY2d 320, 508 NYS2d 923 [1986]; ***Zuckerman v City of New York***, 49 NY2d 557, 427 NYS2d 595 [1980]). The failure of the moving party to make this prima facie showing requires denial of the motion (***Winegrad v New York Univ. Med. Ctr.***, *supra*). Since the court's function on such a motion is to determine whether issues of fact exist, not to resolve issues of fact or to determine matters of credibility, the facts alleged by the opposing party and all inferences that may be drawn are to be accepted as true (*see* ***Roth v Barreto***, 289 AD2d 557, 735 NYS2d 197 [2d Dept 2001]; ***O'Neill v Town of Fishkill***, 134 AD2d 487, 521 NYS2d 272 [2d Dept 1987]).

In support of their application the defendants submit, among other things, a copy of the plaintiff's pre-claim hearing stenographic minutes and an affidavit of the bus driver, Mario Corvera. According to that affidavit, Mr. Corvera states that he was operating the bus northbound on Larkfield Road at the time of the incident when a vehicle cut in front of him. He avers that he depressed the brakes with moderate pressure to avoid an accident. He states that the bus did not actually stop as he was able to slow the bus in a non-violent manner. Mr. Corvera further maintains that the bus was in good working order, was equipped with seat belts and had no mechanical issues.

Defendants also assert that the emergency doctrine warrants dismissal of the plaintiff's claim. They contend that the admissible evidence shows that Mr. Corvera did not create the situation that precipitated the occurrence, rather it was the vehicle which came across his lane of travel that necessitated him depressing the brakes with moderate force to avoid a collision. Defendants argue that there was nothing the bus driver could not have done to avoid the incident.

The emergency doctrine "recognizes that when an actor is faced with a sudden and unexpected circumstance which leaves little or no time for thought, deliberation or consideration,

or causes the actor to be reasonably so disturbed that the actor must make a speedy decision without weighing alternative courses of conduct, the actor may not be negligent if the actions taken are reasonable and prudent in the emergency context, provided the actor has not created the emergency" (***Lifson v City of Syracuse***, 17 NY3d 492, 497, 934 NYS2d 38 [2011]). "Questions regarding the existence of an emergency and the reasonableness of the response to it will ordinarily present questions to be resolved by the trier of fact" (***Welch v Suffolk Coach, Inc.***, 162 AD3d 1097, 1098, 80 NYS3d 114 [2d Dept 2018]). However, "those issues may in appropriate circumstances be determined as a matter of law" (***Majid v New York City Tr. Auth.***, 128 AD3d 648, 649, 8 NYS3d 432 [2d Dept 2015]).

Here, while Mr. Corvera stated in his affidavit that he applied moderate pressure to the bus brakes in an attempt to avoid the collision, he further stated that he observed the offending vehicle prior to braking when he witnessed the vehicle cross the opposite lanes of traffic and swerve in front of the bus. Because "an operator of a motor vehicle has a "common-law duty to see that which [he or she] should have seen through the proper use of [his or her] senses" (***Botero v Erraez***, 289 AD2d 274, 275, 734 NYS2d 565, 566 [2d Dept 2001]), the Court finds a triable issue of fact exists as to whether Mr. Corvera appropriately applied his brakes with such "moderate" force as he thought necessary. In addition, although the bus driver states that he was traveling below the stated speed limit, plaintiff avers in his affidavit in opposition to the motion that Mr. Corvera was driving approximately fifty miles per hour, twenty miles over the stated speed limit. Based on the foregoing the Court finds that defendants' motion for summary judgment with respect to the Town of Huntington defendants must be denied.

However, that portion of the defendants' application seeking dismissal of the complaint as it relates to the County of Suffolk is granted without opposition. The moving papers indicate that the Town of Huntington has admitted ownership of the subject bus and that their employee, Mr. Corvera, was operating the bus at the time of the incident. Therefore, it appears to the satisfaction of the Court that the County of Suffolk is not a proper party defendant. Further, when a respondent fails to oppose matters advanced on a motion, the facts alleged in the moving papers may be deemed admitted by the Court (***Kuehne & Nagel, Inc. v Baiden***, 36 NY2d 539 [1975]; ***Madeline D'Anthony Enter., Inc. v Sokolowsky***, 101 AD3d 606 [1st Dept 2012]).

It is therefore,

ORDERED that defendants' motion seeking dismissal of the plaintiff's complaint is granted to the limited extent that any cause of action against the County of Suffolk is dismissed and the motion is otherwise denied; and it is

ORDERED that plaintiff counsel's application to withdraw as the attorney for the plaintiff in this action is granted; and it is

ORDERED that the matter is stayed for a period of sixty (60) days from the date of this decision and Order to allow plaintiff to retain new counsel, if he so chooses; and it is

ORDERED that outgoing counsel is directed to serve a copy of this decision and Order with notice of entry upon the plaintiff by certified mail, return receipt requested and ordinary mail and on the defendants' attorney by NYSCEF all within fifteen (15) days of the date hereof; and it is

ORDERED that outgoing counsel shall also file a copy of this decision and Order upon the Calendar Clerk of the Court within fifteen (15) days of the date hereof; and it is

ORDERED that a compliance conference will be scheduled for August 19, 2020 at 11:30 AM. The parties are directed to contact sufreilly@nycourts.gov one week prior to the scheduled date to secure a telephone conference number if the Court has not returned to normal operations by that time.

The foregoing constitutes the decision and Order of this Court.

Dated: June 8, 2020
Riverhead, New York

DAVID T. REILLY
JUSTICE OF THE SUPREME COURT

_____ FINAL DISPOSITION ___X___ NON-FINAL DISPOSITION