

Vonweken v Oglesby
2021 NY Slip Op 30094(U)
January 5, 2021
Supreme Court, Kings County
Docket Number: 515308/16
Judge: Lawrence S. Knipel
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At an IAS Term, Part 57 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 5th day of January, 2021

P R E S E N T:

HON. LAWRENCE KNIPEL,
Justice.

-----X

JOHN VONWEKEN and DESIREE CURLEY
VONWEKEN,

Plaintiffs,

- against -

Index No. 515308/16

CHRISTOPHER OGLESBY, PILKU CONSTRUCTION
SERVICES INC. and MADISON 30 31 OWNER LLC,

Defendants.

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The following e-filed papers read herein:

NYSCEF Doc Nos.

Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed_____	<u>113-124</u>
Opposition Affidavits (Affirmations)_____	<u>126</u>
Reply Affidavits (Affirmations)_____	<u>129</u>

Upon the foregoing papers in this action for assault and battery, plaintiffs John Vonweken and Desiree Curley Vonweken (collectively, plaintiffs) move (in motion sequence [mot. seq.] seven) for an order vacating this court's July 28, 2020 decision and order, by which this court granted defendant's unopposed discovery motion, struck the complaint and dismissed the action (Dismissal Order).

On August 31, 2016, plaintiffs commenced this action by filing a summons and a verified complaint alleging that plaintiff John Vonweken was "wrongfully and

maliciously attacked . . .” by defendant Christopher Oglesby (Oglesby) on January 22, 2016 at 132 Madison Avenue in New York, a construction site owned by defendant Madison 30 31 Owner LLC (Madison) while Oglesby was employed by defendant Pilku Construction Services Inc. (Pilku).

On December 15, 2016, Madison answered the complaint. On January 11, 2017, Pilku answered the complaint. Oglesby failed to answer or otherwise respond to the complaint. Thereafter, discovery ensued.

On September 12, 2019, after a conference in the Final Compliance Part (FCP), the court (Colon, J.) issued a Final Pre-Note Order which directed, among other things, that the continued deposition of plaintiffs be held on or before December 13, 2019.

On February 19, 2020, after another FCP conference, the court (Colon, J.) issued another Final Pre-Note Order which directed, among other things, that “[a] further EBT of plaintiff [to be held on or before] 3 – 12 – 2020.”

On March 13, 2020, defendant Madison moved for an order striking the complaint for John Vonweken’s “willful and contumacious failure to appear for his court-ordered deposition,” or, alternatively, compelling him to appear for a deposition.

On May 19, 2020, counsel for defendant Madison filed a letter to the court (Jimenez-Salta, J.) requesting that Madison’s unopposed discovery motion either be deemed “fully submitted” or, alternatively, that “the Court set a new return date for the motion as well as a briefing schedule for the filing of opposition and reply papers.”

Plaintiffs' counsel, in response, also filed a May 19, 2020 letter to the court (Jimenez-Salta, J.) advising that:

"In response to Defense Counsel's correspondence, please be advised that Plaintiff has every intention to appear for depositions. In fact, Plaintiffs have already appeared for a deposition, however, in light of the pending criminal case involving Defendant Oglesby, all parties agreed to cancel and reschedule.

"If the parties cannot amicably agree on a date for depositions, then Plaintiff does intend to oppose Defendant MADISON 30 31 OWNER LLC's motion to strike. . . ."

Despite the parties' request to Justice Jimenez-Salta for a briefing schedule, by the July 28, 2020 Dismissal Order, this court granted defendant's motion, on default, and held that "[b]ased upon plaintiff's failure to comply with court orders dated September 12, 2019 and February 19, 2020, plaintiff's [complaint] is hereby stricken and the action is hereby dismissed."

Plaintiffs now move to vacate the Dismissal Order based on their compliance with defendants' outstanding discovery requests and the prior discovery orders and the parties' correspondence to Justice Jimenez-Salta requesting a briefing schedule for the motion. Plaintiffs' counsel explains that "plaintiff's intention was to resolve the discovery issue so that the motion would be withdrawn. In the alternative, the parties intended to adjourn the motion and create a briefing schedule for opposition and reply, if necessary." Plaintiffs' counsel asserts that "[i]n light of the fact that the parties were attempting to amicably resolve the pending discovery motion the prior Order should be modified or

vacated.” Plaintiffs submit copies of the verified complaint and their verified bills of particulars to establish that they have a meritorious claim for assault and battery.

Madison, in opposition, asserts that plaintiffs’ motion to vacate the Dismissal Order should be denied “on procedural grounds” because “the motion does not contain any Affidavits demonstrating that this action has merit.” Madison’s counsel, however, acknowledges that “[p]laintiff is correct that the parties were in the process of working out a briefing schedule at the time the Court entered the instant [Dismissal] Order.” If the Dismissal Order is vacated, Madison requests an order compelling plaintiff John Vonweken to appear for his continued deposition on a date certain.

It is well-settled that “[a] trial court has the discretion to grant a motion to vacate its own order in the interest of justice” (*Armstrong Trading, Ltd. V MBM Enterprises*, 29 AD3d 835, 836 [2006]). Under the circumstances presented here, where the parties requested a briefing schedule for Madison’s discovery motion before the Dismissal Order was issued, an order vacating the Dismissal Order is warranted in the interest of justice. Furthermore, plaintiffs have indicated that they have every intention of expeditiously moving forward with the continued deposition of John Vonweken, especially since the criminal action against Oglesby has concluded. Accordingly, it is hereby

ORDERED that plaintiffs’ motion (in mot. seq. seven) is granted, this court’s July 28, 2020 Dismissal Order is hereby vacated, the action is restored to active status and

John Vonweken is hereby directed to appear for his continued deposition on or before February 16, 2021.

This constitutes the decision and order of the court.

E N T E R,

J. S. C. 