SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART IAS MOTION 42EFM

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GRANITE STATE INSURANCE COMPANY,

Plaintiff,

- v –

OSMAR LOPEZ, CEYLON LEASING LIMITED PARTNERSHIP, RICONDA MAINTENANCE, INC., AIS CONSTRUCTION CONSULTING, INC., XCLENT PAINTING & CONSULTING, INC.

Defendants.

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INDEX NO. 653439/2018

MOTION DATE 10/28/2020

MOTION SEQ. NO. 003

DECISION + ORDER ON MOTION

NANCY M. BANNON, J.

I. INTRODUCTION

In this insurance coverage action, the plaintiff, Granite State Insurance Company (Granite), moves (1) to renew its previous motion pursuant to CPLR 3215 for leave to enter a default judgment against defendants AIS Construction Consulting, Inc. (AIS) and Xclent Painting & Consulting Inc. (Xclent) which was denied without prejudice by an order dated April 28, 2020, and (2) pursuant to CPLR 3212 for summary judgment as against answering defendants Osmar Lopez (Lopez), Ceylon Leasing Limited Partnership (Ceylon), and Riconda Maintenance Inc. (Riconda). Granite seeks, *inter alia*, a declaration that Lopez, who was injured in a construction site accident, did not suffer a "grave injury" within the meaning of the Worker's Compensation Law such that it has no duty to defend or indemnify in an underlying personal injury action.

Defendant Riconda opposes the motion and cross-moves pursuant to CPLR 3124 and 3126 for an order striking the complaint or precluding Granite from offering evidence due to its failure to comply with outstanding discovery or, alternatively, compelling Granite to provide discovery. The motion is denied. The cross-motion is granted in part.

II. BACKGROUND

In the underlying personal injury action pending in the Supreme Court, Bronx County, entitled Osmar Lopez and Miguelina Perez v Ceylon Leasing Limited Partnership and Riconda Maintenance, Inc., Index No. 305810/2014, Lopez seeks to recover damages for personal injuries, including multiple facial lacerations and scarring, he allegedly sustained on October 3, 2014, at a construction site when the scaffolding he was working on collapsed. Ceylon is the owner of the Queens premises where the work was being performed. Riconda was the general contractor for the project. AIS and Xclent were subcontractors on the project. Riconda's third-party complaint in that action asserts claims, *inter alia*, for contribution, contractual indemnification, common law indemnification and breach of contract against Xclent and AIS for their alleged failure to obtain an insurance policy naming Riconda as an additional insured.

Granite, which is Xclent's workers' compensation insurance carrier, seeks a declaration that Lopez did not suffer a grave injury within the meaning of Workers' Compensation Law (WCL) § 11, and thus it has no duty to defend or indemnify Xclent against Riconda's claims for common law indemnification and contribution, as such claims can only be sustained against an employer when the employee suffers a grave injury. See Rubeis v Aqua Club Inc., 3 NY3d 408 (2004). Granite seeks a further declaration that, pursuant to the terms of Xclent's policy, it is not required to defend or indemnify Xclent against Riconda's claims for contractual indemnification and failure to procure insurance as the policy excludes coverage for liability assumed by contract.

Granite previously moved pursuant to CPLR 3215 for leave to enter a default judgment solely against AIS and Xclent. By an order dated April 28, 2020, the court denied that motion, finding that the plaintiff failed to submit *prima facie* proof of its claims. The court held that Granite's submissions, which included a complaint verified only by Granite's attorney, Lopez's unverified Bill of Particulars in the Bronx action, an affirmation by Granite's attorney, Lopez's deposition testimony in the underlying action, and a stipulation entered into only by Granite and

Lopez, unsigned by the non-answering defendants, in which they purport to agree that Lopez did not suffer a grave injury as defined by WCL § 11, were insufficient to establish the plaintiff's entitlement to default judgment. This motion and cross-motion ensued.

III. DISCUSSION

A. The Plaintiff's Motion

Plaintiff Granite State Insurance Company again moves for leave to enter a default judgment against defendants AIS and Xclent but again fails to establish entitlement to relief under CPLR 3215. For the same reasons, it fails to establish entitlement to summary judgment under CPLR 3212 as against Lopez, Ceylon and Riconda. Both require that the movant establish a *prima facie* case. Granite has not met that burden.

"On a motion for leave to enter a default judgment pursuant to CPLR 3215, the movant is required to submit proof of service of the summons and complaint, proof of the facts constituting the claim, and proof of the defaulting party's default in answering or appearing (see CPLR 3215[f]; Allstate Ins. Co. v Austin, 48 AD3d 720, 720)." Atlantic Cas. Ins. Co. v RJNJ Services, Inc. 89 AD3d 649 (2nd Dept. 2011). The proof submitted must establish a *prima facie* case. See Silberstein v Presbyterian Hosp., 95 AD2d 773 (2nd Dept. 1983).

Furthermore, CPLR 3215[c] requires that any motion for a default judgment be made within one year and that any untimely motion be denied and the complaint dismissed as abandoned, upon motion or the court's own motion, absent "sufficient cause" shown. See Seide v Calderon, 126 AD3d 417 (1st Dept. 2015); Diaz v Perez, 113 AD3d 421 (1st Dept. 2014). While Granite's original motion for leave to enter a default judgment was timely, this motion seeking renewal of that motion is not, and subjects the complaint to dismissal as against defendants AIS and Xclent. The affidavits of service state that AIS and Xclent were served with the summons and complaint In July 18, 2018, and the instant motion was not filed until June

2020. It was however, filed soon after the prior order was issued. In any event, the motion is without merit as the defects identified in the prior motion were not cured.

On a motion for summary judgment, the moving party must make a *prima facie* showing of its entitlement to judgment as a matter of law by submitting evidentiary proof in admissible form sufficient to establish the absence of any material, triable issues of fact. See CPLR 3212(b); Jacobsen v New York City Health & Hosps. Corp., 22 NY3d 824, 833 (2014); Alvarez v Prospect Hosp., 68 NY2d 320, 324 (1986); Zuckerman v City of New York, 49 NY2d 557, 562 (1980). If the movant fails to meet this burden and establish its claim or defense sufficiently to warrant a court's directing judgment in its favor as a matter of law (see Alvarez v. Prospect Hospital, 68 NY2d 320 [1986]; Zuckerman v City of New York, supra; O'Halloran v City of New York, 78 AD3d 536 [1st Dept. 2010]), the motion must be denied regardless of the sufficiency of the opposing papers. See Winegrad v New York University Medical Center, supra; O'Halloran v City of New York, supra; Giaquinto v Town of Hempstead, 106 AD3d 1049 (2nd Dept. 2013). This is because "'summary judgment is a drastic remedy, the procedural equivalent of a trial. It should not be granted if there is any doubt about the issue.'" Bronx-Lebanon Hosp. Ctr. v Mount Eden Ctr., 161 AD2d at 480 (1st Dept. 1990) *quoting* Nesbitt v Nimmich, 34 AD2d 958, 959 (2nd Dept. 1970). There is doubt here.

In support of the instant motion, Granite submits the same evidence it submitted on the previous motion, the only addition being the verification page of the Bill of Particulars. This is insufficient to cure the defects from the prior motion. As discussed in the previous decision, a complaint verified by an attorney is insufficient to support entry of judgment pursuant to CPLR 3215. See Feffer v Malpeso, 210 AD2d 60 (1st Dept. 1994). Likewise, an attorney's affirmation is "utterly devoid of evidentiary value, and thus insufficient to support entry of a judgment pursuant to CPLR 3215." Beltre v Babu, 32 AD3d 722, 723 (1st Dept. 2006). Since plaintiff's counsel claims no personal knowledge of the underlying facts, his affirmation is without probative value or evidentiary significance. See Zuckerman v City of New York, 49 NY2d 557 (1980); Trawally v

East Clarke Realty Corp., 92 AD3d 471 (1st Dept. 2012); Thelen LLP v Omni Contracting Co. Inc., 79 AD3d 605 (1st Dept. 2010). Furthermore, the stipulation between Lopez and the plaintiff is not enforceable against any party except Lopez. See CPLR 2104.

Moreover, contrary to Granite's contention, the Bill of Particulars and deposition testimony fail to demonstrate, *prima facie*, that Lopez did not suffer a grave injury. A verified Bill of Particulars may be sufficient to establish entitlement to relief where the injuries alleged do not qualify as grave injuries within the meaning of WCL § 11. See Nat'l Union Fire Ins. Co. of Pittsburgh, PA v 221-223 W. 82 Owners Corp., 120 AD3d 1140 (1st Dept. 2014). WCL § 11 provides the following as an exhaustive definition of what constitutes a grave injury: "Death, permanent and total loss of use or amputation of an arm, leg, hand or foot, loss of multiple fingers, loss of multiple toes, paraplegia or quadriplegia, total and permanent blindness, total and permanent deafness, loss of nose, loss of ear, *permanent and severe facial disfigurement*, loss of an index finger or an acquired injury to the brain caused by an external physical force resulting in permanent total disability (emphasis added)."

"Injuries qualifying as grave are narrowly defined in Section 11, and the words in the statute should be given their plain meaning without resort to forced or unnatural interpretations." Eddine v Federated Dept. Stores, Inc., 72 AD3d 487 (1st Dept. 2010); see Spiegler v Gerken Building Corp., 35 AD3d 715 (2nd Dept. 2006). However, what constitutes "permanent and severe facial disfigurement" is unlike most of the other enumerated "grave" injuries, which are, on the whole, amenable to "objectively ascertainable" determinations as a matter of law. Fleming v Graham, 10 NY3d 296, 300 (2008). As explained by the Court of Appeals, "an injury disfigures the face when it detrimentally alters the plaintiff's natural beauty, symmetry or appearance, or otherwise deforms. A disfigurement is severe if a reasonable person viewing the plaintiff's face in its altered state would regard the condition as abhorrently distressing, highly objectionable, shocking or extremely unsightly. In finding that a disfigurement is severe, plaintiff's injury must greatly alter the appearance of the face from its appearance before the

accident." Id.; see also Barbieri v Mount Sinai Hosp., 264 AD2d 1 (1st Dept. 2000) [vague allegations of facial scarring insufficient]; Rosen v Nygren Dahly Co., 1 AD3d 998 (4th Dept. 2003) [minor facial scarring insufficient]; Krollman v Food Automation Serv. Techniques, Inc., 13 AD3d 1209 (4th Dept. 2004) [three-millimeter scar above eyebrow and "some mottling of her cheeks" insufficient].

Here, the verified Bill of Particulars states that Lopez sustained, *inter alia*: a seven-centimeter laceration of his left chin, a four-centimeter laceration of his forehead and five-centimeter laceration of his left jaw cheek requiring sutures with permanent scarring. At his deposition Lopez further testified that the accident caused the left side of his face to be "broken" and that he required 18 stitches on his face as a result of the accident. This proof alone is insufficient to establish, as a matter of law, that Lopez did not suffer a grave injury under WCL § 11. Although much of the scarring alleged in the Bill of Particulars may be the sort of scarring that did not rise to the level of a grave injury as found in Rosen v Nygren Dahly Co., and Krollman v Food Automation Serv. Techniques, Inc., supra, the determinations in those matters were based upon, *inter alia*, photographs of the injured parties' faces and medical reports discussing the permanency of such injuries. Here, no photographic or medical evidence was provided, and a determination solely on the allegations in the Bill of Particulars would be improvident. See Fleming v Graham, 10 NY3d 296, 300 (2008); Olszewski v Park Terrace Gardens, Inc., 306 AD2d 128 (1st Dept. 2003). Discovery is ongoing.

Where, as here, it appears that the facts essential to oppose a motion for summary judgment "exist but cannot then be stated" (CPLR 3212[f]), a court may deny the motion. "This is especially so where the opposing party has not had a reasonable opportunity for disclosure prior to the making of the motion." Wesolowski v St. Francis Hospital, supra at 526 [internal quotation marks omitted]; see Belziti v Langford, 105 AD3d 649 (1st Dept. 2013); Blech v West Park Presbyterian Church, 97 AD3d 443 (1st Dept. 2012). Granite has not provided the discovery directed by the court.

Granite's submission of Xclent's policy also fails to demonstrate entitlement to a declaration that it is not required to defend or indemnify Xclent against Riconda's claims for failure to procure insurance and contractual indemnification. The terms of the policy do exclude coverage for liability assumed under contract. See Sanginito v National Grange Mutual Ins. Co., 52 AD3d 267 (1st Dept. 2008) citing Continental Casualty Co. v Rapid American Corp., 80 NY2d 640 (1993). However, Granite fails to establish that it timely and properly disclaimed coverage. See Zappone v Home Ins. Co., 55 NY2d 131 (1982).

B. Defendant Riconda Maintenance, Inc.'s Cross-Motion

Riconda's cross-motion pursuant to CPLR 3124 and 3126 is granted to the extent that Granite is directed to respond to Riconda's outstanding discovery demands and appear for a deposition. CPLR 3126 authorizes the court to sanction a party who "refuses to obey an order for disclosure or willfully fails to disclose information which the court finds ought to have been disclosed" and that "a failure to comply with discovery, particularly after a court order has been issued, may constitute the "dilatory and obstructive, and thus contumacious, conduct warranting the striking of the [pleading]." Kutner v Feiden, Dweck & Sladkus, 223 AD2d 488, 489 (1st Dept. 1998); see CDR Creances S.A. v Cohen, 104 AD3d 17 (1st Dept. 2012); Reidel v Ryder TRS, Inc., 13 AD3d 170 (1st Dept. 2004). The court can infer willfulness from repeated failures to comply with court orders or discovery demands without a reasonable excuse. See LaSalle Talman Bank, F.S.B. v Weisblum & Felice, 99 AD3d 543 (1st Dept. 2012); Perez v City of New York, 95 AD3d 675 (1st Dept. 2012); Figiel v Met Food, 48 AD3d 330 (1st Dept. 2008); Ciao Europa, Inc. v Silver Autumn Hotel Corp., Ltd., 270 AD2d 2 (1st Dept. 2000).

A preliminary conference in this action was held on November 14, 2019. At that conference, the court directed the parties to serve their demands on or before December 5, 2019, and depositions were to be conducted on or before February 21, 2020. In a February 27, 2020, compliance conference order, the court noted that Riconda did not conduct a deposition

of a representative for Granite, without excuse, and ordered that the deposition was to occur on or before March 27, 2020. The order was silent as to whether Riconda had served demands and set a Note of Issue deadline of April 3, 2020. On March 13, 2020, Riconda served demands noticed a deposition for April 17, 2020. Granite rejected these demands as untimely and did not provide responses. Based upon these circumstances, relief under CPLR 3126 is not warranted, as Riconda contributed to Granite's non-compliance by failing to timely serve its demands. However, relief is warranted under CPLR 3124, which authorizes a court to compel a party to respond to duly served discovery demands. While Riconda's demands were served untimely, CPLR 3101(a) provides that "there shall be full disclosure of all matter material and necessary in the prosecution or defense of an action" and this language is "interpreted liberally to require disclosure, upon request, of any facts bearing on the controversy which will assist preparation for trial by sharpening the issues and reducing delay and prolixity." Osowski v AMEC Constr. Mgt., Inc., 69 AD3d 99, 106 (1st Dept. 2009) quoting Allen v Crowell-Collier Publ. Co., 21 NY2d 403, 406-407 (1968). Thus, Granite is directed to respond to Riconda's outstanding discovery demands within 30 days of this order and produce a representative for a deposition within 60 days. The final Note of Issue deadline is extended to April 30, 2021.

IV. CONCLUSION

Accordingly, it is hereby,

ORDERED that the motion of the plaintiff, Granite State Insurance Company, is denied in its entirety, and it is further

ORDERED that the cross-motion of defendant Riconda Maintenance Inc. pursuant to CPLR 3216 and 3214 is granted to the extent that the plaintiff is directed to respond to all outstanding document demands of Riconda Maintenance Inc. within 30 days of this order and produce a representative for deposition within 60 days, and is otherwise denied; and it is further,

ORDERED that the final Note of Issue deadline is extended to April 30, 2021; and shall not be further extended, and it is further,

ORDERED that the parties are to appear for a telephonic status conference on April 16, 2021, at 11:30 a.m.

This constitutes the Decision and Order of the court.

NANCY M. BANNON, J.S.C.
HON. NANCY M. BANNON

Dated: January 29, 2021