

Wolfe-Santos v NYS Gaming Commn.

2021 NY Slip Op 31623(U)

May 12, 2021

Supreme Court, New York County

Docket Number: 160963/16

Judge: Lynn R. Kotler

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.

This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. LYNN R. KOTLER, J.S.C.

PART 8

Marivi Wolfe-Santos

INDEX NO. 160963/16

- v -

MOT. DATE

NYS Gaming Commission et al.

MOT. SEQ. NO. 007

The following papers were read on this motion to/for
Notice of Motion/Petition/O.S.C. — Affidavits — Exhibits ECFS DOC No(s).
Notice of Cross-Motion/Answering Affidavits — Exhibits ECFS DOC No(s).
Replying Affidavits ECFS DOC No(s).

According to her notice of motion for sequence 7 filed on March 8, 2021 (NYSCEF Document Number 153) plaintiff moves pursuant to CPLR 3025(b) for leave of Court to file and serve her 2nd Amended Complaint dated December 7, 2017 and to "deny[] defendants' motion to dismiss, in part, Plaintiff's claims pursuant to CPLR 3211(a)(7) in its entirety". Meanwhile, plaintiff's affirmation in support seeks an order vacating this court's order dated May 21, 2020 pursuant to CPLR § 5015[a][1]. The 5/21/20 Order dismissed plaintiff's claims against defendant M&A Gourmet Deli ("M&A") without opposition. M&A opposes the instant motion. For the reasons that follow, the motion is denied.

Even though improperly noticed, the court will consider plaintiff's motion as a motion to vacate the dismissal of her personal injury claims against M&A as there is no confusion as to the relief plaintiff seeks. At the outset, the court must consider M&A's argument that plaintiff and her husband's affidavits are not in proper form since they were sworn to out-of-state and lack a certificate of conformity. Since plaintiff has submitted proper certificates on reply, the court now turns to the merits of the motion.

A defendant moving to vacate a default judgment must demonstrate both an excusable default and a meritorious defense (CPLR § 5015; see i.e. Romero v. Alezeb Deli Grocery, Inc., 115 AD3d 496 [1st Dept 2014]). A motion to vacate under CPLR § 5015[a][1] must be made within one year of service of the notice of entry of the order upon the moving party.

Plaintiff claims in her sworn affidavit that her prior counsel, her husband's cousin, falsely represented to her that he "was skilled in personal injury law". Plaintiff further denies knowledge that her prior counsel failed to appear for prior court appearances and that she failed to comply with numerous court orders to provide discovery. Annexed to plaintiff's motion are several emails between her and her counsel as well as print-outs of text messages between plaintiff's husband and her prior counsel.

Dated: 5/12/21

HON. LYNN R. KOTLER, J.S.C.

- 1. Check one: [] CASE DISPOSED [X] NON-FINAL DISPOSITION
2. Check as appropriate: Motion is [] GRANTED [X] DENIED [] GRANTED IN PART [] OTHER
3. Check if appropriate: [] SETTLE ORDER [] SUBMIT ORDER [] DO NOT POST
[] FIDUCIARY APPOINTMENT [] REFERENCE

The court's 5/21/20 decision/order outlines the scope of plaintiff's noncompliance with her discovery obligations as to M&A in this action, all of which plaintiff feigns ignorance of:

The record reveals that plaintiff has woefully disregarded her discovery obligations by failing to respond to M&A's discovery demands and comply with so-ordered stipulations dated October 3, 2019, December 3, 2019, January 28, 2020 and March 5, 2020. Indeed, on March 5, 2020, the same laundry list of demands which plaintiff had repeatedly agreed to respond to was set forth in another so-ordered stipulation signed by plaintiff's counsel. The March 5, 2020 so-ordered stipulation confirms that any representation in motion sequence 006 by plaintiff's counsel that plaintiff had fully responded to M&A's discovery demands was patently false.

Plaintiff's counsel has demonstrated a persistent pattern of neglect in responding to M&A's discovery requests. Plaintiff's failure to respond to M&A's demands has left this case at a standstill and has significantly undermined M&A's ability to defend against plaintiff's personal injury claim. Further, the court finds that plaintiff's failure to provide meaningful discovery was willful. The excuses advanced by plaintiff's counsel in his affirmation filed in support of motion sequence 006 are unavailing. It is irrelevant whether plaintiff's counsel is a solo practitioner or mainly prosecutes employment discrimination claims where plaintiff has failed to provide any discovery despite numerous extensions of her time to do so with no end in sight to her noncompliance. And while the court is sympathetic to the personal issues raised by plaintiff's counsel in said affirmation, those issues do not demonstrate good cause for plaintiff's demonstrated pattern of disregard.

In the present motion sequence, plaintiff blames her repeated failure to provide any responsive discovery to M&A on her prior counsel. She asserts that he seemingly coerced her to let him take over the personal injury component of this action, that he failed to apprise her of her noncompliance with basic discovery obligations and that he essentially strung plaintiff along into believing that he would file the instant motion to vacate.

Meanwhile, M&A argues that plaintiff has neither demonstrated a reasonable excuse for her default or a meritorious defense to the underlying motion to dismiss nor a meritorious cause of action.

On reply, plaintiff maintains that her action has merit, that she has substantially complied with her discovery obligations in this case and she further submits a two-page affirmation from her prior counsel which essentially confirms her claims.

First, plaintiff's reply goes beyond the scope of matters permitted on reply since it does not merely respond to matters raised in M&A's opposition papers but amplifies and goes beyond even the arguments she made in her underlying motion. For example, plaintiff has improperly submitted her prior attorney's affirmation (which should be in the form of an affidavit) on reply, thus depriving M&A of the ability to rebut counsel's claims. Thus, while the court should decline to even consider plaintiff's prior counsel's "affirmation", even if it does so consider, the motion would still be denied. Therefore, the court will consider plaintiff's otherwise improper reply as M&A will not be prejudiced in light of the result.

The court agrees with M&A that plaintiff has failed to establish entitlement to the relief sought. Plaintiff's ignorance of the status of this action does not demonstrate a reasonable excuse to vacate her underlying defaults in complying with discovery demands and court orders. Indeed, not only does plaintiff need to vacate her default in failing to oppose M&A's motion to dismiss, she must also demonstrate a meritorious opposition to that motion and essentially provide a reasonable excuse for failing to comply with four separate court-ordered stipulations or even respond to M&A's demands in the first instance.

Plaintiff has not even provided a reasonable excuse for waiting nearly ten months to bring this motion. Indeed, plaintiff admits to learning that her case was dismissed in September 2020, but explains that thereafter, her prior counsel “kept promising to vacate the dismissal... [t]his went on for months, but he never filed any motion papers to vacate the dismissal... I was disgusted. On January 29, 2021, I fired Jimmy.” The timeline of events which plaintiff asserts is unreasonable and as M&A points out, plaintiff’s delay has prejudiced M&A. Plaintiff’s accident allegedly occurred on April 15, 2016, approximately five years before she retained present counsel and filed this motion. During the passage of this time, plaintiff has not provided significant, meaningful discovery nor even sat for her own deposition. Memories fade, and M&A’s ability to locate witnesses has also been impeded.

While plaintiff may have a legitimate gripe against her former counsel, that does not warrant reinstatement of her claims against M&A. Court-imposed deadlines have meaning and plaintiff’s attempt to blame her prior counsel for failing to comply with stipulations he signed on her behalf or even file opposition to M&A’s prior motion is unavailing. Plaintiff herself has demonstrated willful neglect by failing to retain a new attorney and/or move for the relief she now seeks, this motion having been marked submitted approximately eleven months after plaintiff’s claims against M&A were dismissed. When plaintiff learned her claims against M&A were dismissed in September 2020, it behooved her to find out why and to retain an attorney who could adequately represent her interests, rather than wait and hope that her prior counsel would timely move to vacate the dismissal. Indeed, even if prior counsel had so moved, the motion would likely have been denied, since plaintiff’s only opposition to M&A’s prior motion is to essentially blame her prior attorney for her noncompliance. Certainly, these circumstances are not the type which would warrant the relief plaintiff seeks (*see i.e. Hudson City Sav. Bank v Bomba*, 149 AD3d 704 [2d Dept 2017]).

Plaintiff’s present counsel now incredibly claims on reply that “Defendant’s January 6, 2020, motion requests the response that Plaintiff comply with outstanding discovery, which, upon information and belief, has now largely been complied with. See January 17, 2020, email from Mr. Santos to Danielle B. Hoffman. Bush Ex. “27”. See also the February 27, 2020, Affirmation of Mr. Santos, who testified that he provided Ms. Hoffman with as many as thirty-four (34) authorizations and over three hundred (300) pages of medical records.” Again, these are matters which should have been raised in the first instance in plaintiff’s motion-in-chief, since it was plaintiff’s burden to establish entitlement to the relief sought. Even on the merits, these claims are unavailing because plaintiff is foreclosed from claiming compliance with her discovery obligations as set forth in the 3/5/20 so ordered stipulation as of that date. Indeed, this court expressly found that “[t]he March 5, 2020 so-ordered stipulation confirms that any representation in motion sequence 006 by plaintiff’s counsel that plaintiff had fully responded to M&A’s discovery demands was patently false.” Further, plaintiff’s prior counsel’s “affirmation” does not claim that plaintiff complied in any way with her discovery obligations owed to M&A. Rather, Attorney Santos states:

During the time that discovery was owed to M&A and the Court executed several orders to produce such discovery, I was suffering from clinical depression which resulted in a loss of motivation to comply with the Court orders, a failure to provide the outstanding discovery to M&A and adequately represent Plaintiff’s interests.

I never told Plaintiff that the Court had ordered the undersigned to produce discovery owed to M&A for months after the case against M&A was dismissed.

As a result of my failure to adequately represent Plaintiff’s interests in this action, I also did not advise her that my ability to adequately represent her was compromised by, not only of my depression, but also that my law firm was understaffed at the time.

Notably, plaintiff has still not provided any of the discovery demanded by M&A, which includes a bill of particulars and authorizations for plaintiff’s legal file for prior and subsequent actions, collateral

sources, employment and attendance records, workers compensation records, physical therapy records, psychological records, diagnostic records/films and primary care physician records, neurological records, IRS and state tax records transcripts regarding any prior and pending actions.

Finally, the court agrees with M&A that plaintiff has failed to demonstrate a meritorious cause of action either. Rather, she merely claims that she has a viable cause of action and points to surveillance video which is not in her possession as proof of her claim. Mere speculation that plaintiff has a meritorious cause of action for negligence against M&A will not suffice to meet plaintiff's burden on this motion. While the sanction of dismissal is necessarily harsh, it was warranted on this record based upon plaintiff's undisputed failure to provide basic discovery, and the claims she makes in this motion do not warrant vacatur.

Accordingly, it is hereby

ORDERED that plaintiff's motion is denied in its entirety; and it is further

ORDERED that as per the court's order dated March 3, 2021, which directed plaintiff to resume prosecution of this action within 90 days and warned that her "failure to comply with this order shall result in an order dismissing this action for unreasonably failing to prosecute pursuant to CPLR 3126", plaintiff is directed to meet and confer with the remaining defendants and set deadlines for all outstanding discovery in a written stipulation and submit same to be so ordered by the court.

The court takes this opportunity to remind plaintiff that there will be no further extensions of the deadline to file note of issue absent good cause shown in writing (and/or on consent in a written stipulation signed by both sides) and plaintiff's failure to resume prosecution of her remaining claims in this action will result in an order of dismissal for unreasonably failing to prosecute pursuant to CPLR § 3216.

Any requested relief not expressly addressed herein has nonetheless been considered and is hereby expressly rejected and this constitutes the decision and order of the court.

Dated: 5/12/21
New York, New York

So Ordered:



Hon. Lynn R. Kotler, J.S.C.