Argueta v White
2021 NY Slip Op 32406(U)
November 18, 2021
Supreme Court, Kings County
Docket Number: 10766/2015
Judge: Carl J. Landicino

At an IAS Term, Part 81 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on the 18th day of November 2021.

PRESENT:
HON. CARL J. LANDICINO,
Justice.

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SANTOS ARGUETA,

Plaintiff,

-against-

DEBORAH WHITE, DEBORA NORFORT, Individually and as the Executrix of the Estate of Michael Norfort, its heirs and assigns,

Defendants.

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Index No. 10766/2015

DECISION AND ORDER

Motions Sequence #5

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motion:

Papers Numbered (NYSCEF)
Notice of Motion/Cross Motion and
Affidavits (Affirmations) Annexed 68-86,
Opposing Affidavits (Affirmations)..... 87-89,
Reply Affidavits (Affirmations) 90-95

After a review of the papers, the Court finds as follows:

Plaintiff, Santos Argueta, moves (Motion Sequence No. 5) for "(a) an Order of the instant Motion *in Limine* pursuant to CPLR 3126(2) prohibiting Defendant from opposing the claims contained in the first cause of action or from producing evidence or from using certain witnesses in opposition to Defendant's first cause of action; (b) pursuant to CPLR 3126 (3) precluding Defendant from testifying or entering any evidence on issues for which discovery was demanded but not provided and for an adverse inference against Defendant on any evidence which was demanded and not provided on the grounds that the Defendant failed to produce any documents as demanded in the Plaintiff's Demand for Production of

Documents as required by the Conditional Order of Judge Knipel dated June 7, 2021; (c) striking the Defendant's amended answer for willfully failing to comply with Judge Knipel Conditional Order dated June 7, 2021..." The trial in this matter is scheduled to commence on November 29, 2021.

The Plaintiff principally relies on the Order of the Honorable Lawrence Knipel, J.S.C. dated June 7, 2021 (Motion Sequence Seq. No. 4) in which the Court held, *inter alia*, that Plaintiff's "... motion to preclude White from producing evidence at trial in opposition to the First Cause of Action and granting an adverse interest against [Defendant Debora] White regarding any evidence which was demanded and not provided is granted as requested unless White produces all outstanding discovery within 30 days after service of this order with notice of entry thereof." Justice Knipel stated that he was affording White "... one last opportunity to produce the outstanding discovery" and that "White's contention that Argueta's discovery demands are 'palpably improper and objectionable' is rejected..." However, Justice Knipel did not order a discovery response, but instead provided for a conditional order of preclusion and an adverse inference if the outstanding discovery was not provided. Accordingly, as an initial matter, the court denies the relief sought which is in addition to the relief provided for in Justice Knipel's order. Justice Knipel addressed this issue and has already clearly determined what the remedy would be in the event that Defendant White failed to provide the outstanding discovery.

Plaintiff served a copy of Justice Knipel's Order with notice of entry on June 8, 2021 and Defendant responded to the outstanding demands on July 2, 2021. This response was timely pursuant to Justice Knipel's Order. Many of the interrogatory responses related to 1) the Defendant purportedly not being involved in the activity in question or 2) the Defendant's failure to recall. As to the document demand response, the Plaintiff's demand sought the following and the Defendant responded as follows:

> **Unless otherwise specified, Defendant is to produce the original of the requested documents, as follows:**

A. All documents not previously requested which are material or relevant to any issue in this litigation; including but not limited to documents pertaining to: any arrangement between the parties for the payment of rental or payment of the mortgage;

Defendant is not currently in possession of any documents believed to be relevant to this demand.

B. All documents filed with any governmental agency concerning this property during the relevant time period;

Defendant is not currently in possession of any documents believed to be relevant to this demand, other than those provided by Plaintiff or those available through ACRIS.

C. Any documents produced at the purported sale of the property between the parties on or about September 6, 2008;

Defendant is not currently in possession of any documents believed to be relevant to this demand, other than those provided by Plaintiff or those available through ACRIS.

D. Any documents reflecting a retainer relationship in your possession between you and/or your husband with William Goodman;

Defendant is not currently in possession of any documents believed to be relevant to this demand.

E. Any documents concerning meetings between you and Mr. Goodman over any aspect of this retainer with respect to the real property or in defense of this action.

Defendant is not currently in possession of any documents believed to be relevant to this demand. In addition, the demand is palpably improper in that it seeks information subject to the attorney client privilege.

The Defendant gave no explanation or indication of her efforts to determine whether she had possession of the documents sought. She makes general and conclusory statements of a lack of possession.

The Defendant even calls into question whether she did have possession of documents but determined that they were otherwise irrelevant. This is reflected in her use of the phrase "believed to be relevant." The Court fails to understand why, in light of the underlying order of Justice Knipel, and the history of non-compliance he raised therein, the Defendant would not have indicated in a detailed fashion what steps she took to find the documents requested. Certainly, the Court cannot expect a party to produce something they do not have, however, the guiding principles of the discovery process demand that responses contain more than just a general statement of no possession or impropriety. Justice Knipel indicated same when he stated that "…White failed to challenge the propriety of Argueta's discovery requests…" when an order to produce was issued. As the Court held in *Jackson v. City of New York,*

> Here, after years of delay, the affidavit presented by the City made no showing as to where the subject records were likely to be kept, what efforts, if any, were made to preserve them, whether such records were routinely destroyed, or whether a search had been conducted in every location where the records were likely to be found. In short, the affidavit provided the court with no basis to find that the search had been a thorough one or that it had been conducted in a good faith effort to provide these necessary records to plaintiff.
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> For this reason, we find that the issue of notice to the City of the alleged defective condition that caused the plaintiff's injuries should be resolved in favor of the plaintiff and defendant is precluded from raising any issue with respect thereto.

Jackson v. City of New York, 185 A.D.2d 768, 770, 586 N.Y.S.2d 952 [1st Dept 1992].

Moreover, in *Bender, Jenson & Silverstein, LLP v. Walter* the Court held that

> Since the defendant failed to establish that she made any effort to comply with the plaintiff's repeated discovery requests, the Supreme Court properly considered her lack of cooperation to be willful and contumacious, and properly conditionally granted the plaintiff's motion to preclude her from introducing the requested documents in evidence.

Bender, Jenson & Silverstein, LLP v. Walter, 67 A.D.3d 839, 840, 891 N.Y.S.2d 92 [2d Dept 2009].

Additionally, in *Gibbs v. St. Barnabas Hosp* the Court held that

> Hence, we have made clear that to obtain relief from the dictates of a conditional order that will preclude a party from submitting evidence in support of a claim or defense, the defaulting party must demonstrate (1) a reasonable excuse for the failure to produce the requested items and (2) the existence of a meritorious claim or defense.
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> As this Court has repeatedly emphasized, our court system is dependent on all parties engaged in litigation abiding by the rules of proper practice.
>
> The failure to comply with deadlines not only impairs the efficient functioning of the courts and the adjudication of claims, but it places jurists unnecessarily in the position of having to order enforcement remedies to respond to the delinquent conduct of members of the bar, often to the detriment of the litigants they represent.
>
> For these reasons, it is important to adhere to the position we declared a decade ago that '[i]f the credibility of court orders and the integrity of our judicial system are to be maintained, a litigant cannot ignore court orders with impunity.' (*Kihl*, 94 NY2d at 123).

Gibbs v. St. Barnabas Hosp., 16 N.Y.3d 74, 80, 942 N.E.2d 277 [2010]

In the instant proceeding, the Defendant provided a response but it was wholly insufficient. Although the Defendant did not fail to respond, and the response did not arguably constitute a default, it basically constituted no response at all. In any event, even assuming that the Defendant's actions constituted a default, under the analysis provided in *Gibbs v. St.* Barnabas the Defendant failed to demonstrate (1) a reasonable excuse for the failure to produce the requested items and (2) the existence of a meritorious claim or defense. The Court in *Gibbs v. St. Barnabas Hosp* further held that

> Finally, we reject plaintiff's premise, accepted by the dissent, that the conditional preclusion order should not be enforced because plaintiff's conduct during the discovery process was not willful.
>
> The courts usually prefer to determine whether the disclosure is required and, if it is, to make an order directing the party to make the disclosure whether the prior refusal was willful or not. The order is usually a conditional one, applying a sanction unless the disclosure is made within a stated time. With this conditioning, the court relieves itself of the unrewarding inquiry into whether a party's resistance was willful. (Siegel, N.Y. Prac. § 367, at 608 [4th ed.]).

Gibbs v. St. Barnabas Hosp., 16 N.Y.3d 74, 82, 942 N.E.2d 277, 281 [2010].

The Conditional Order of Judge Knipel dated June 7, 2021 was clear regarding the Defendant's failure to provide sufficient discovery and provided for a conditional order of preclusion and an adverse inference. Accordingly, it is hereby

ORDERED that Plaintiff Argueta's motion (motion sequence 5) is hereby granted solely to the extent that White is precluded from producing evidence at trial in opposition to the First Cause of Action and there shall be an adverse inference against White, regarding any evidence which was demanded and not provided. All other relief sought is denied.

This constitutes the Decision and Order of the Court.

ENTER:

Carl J. Landicino, J.S.C.