Norman v 659 Rest. Inc
2021 NY Slip Op 32605(U)
January 29, 2021
Supreme Court, Queens County
Docket Number: Index No. 010280/2016
Judge: Maurice E. Muir
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Short Form Order

NEW YORK SUPREME COURT – QUEENS COUNTY

Present: HONORABLE MAURICE E. MUIR
Justice

BERRY NORMAN,

Plaintiff,

-against-

659 REST. INC. d/b/a MERCURY BAR and
659 REALTY LLC,

Defendants.

IAS Part - 42

Index No.: 010280/2016

Motion Date: 1/21/21

Motion Cal. No. 31

Motion Seq. No. 10

659 REST. INC. d/b/a MERCURY BAR and
659 REALTY LLC,

Third-Party Plaintiffs,

-against-

ELITE PLUS SECURITY LLC,

Third-Party Defendant.

The following papers numbered 1 to 4 were read on this motion by 659 Rest. Inc. d/b/a/ Mercury Bar and 659 Realty LLC ("Mercury Bar " or "defendant") for Order for the following relief: a) dismissing plaintiff's verified complaint and amended complaint, pursuant to CPLR § 3126; alternatively, b) vacating plaintiff's Note of Issue and Certificate of Readiness for Trial, pursuant to 22 NYCRRR 202.21; and c) directing plaintiff and third-party defendant to provide the outstanding discovery within 30 days, and extend dispositive motion deadline for 120 days after completion of discovery.

	Papers Numbered
Notice of Motion-Affirmation-Exhibits-Service.....	1 - 4

Upon the foregoing papers, it is ordered that this motion is determined as follows:

BACKGROUND

This is an action to recover damages for personal injuries. Specifically, Berry Norman ("Mr. Norman" or "plaintiff") alleges that on March 19, 2016, he was a patron at 659 Rest. Inc. d/b/a Mercury Bar ("Mercury Bar") when he was allegedly assaulted by its employee, agent and/or security guard. As a result, on September 1, 2016, the plaintiff commenced the instant action against Mercury Bar and 659 Realty LLC ("659 Realty') (collectively, the "defendants"). On October 31, 2016, issue was joined, wherein defendants interposed an answer. Thereafter, on or about February 3, 2017, Mercury Bar and 659 Realty commenced a third-party action against Elite Plus Security LLC ("Elite Plus Security"). On June 8, 2017, the court issued a preliminary conference order ("PCO"), which directed the parties to conduct examinations before trial ("EBT") on or before September 20, 2017, *inter alia.* On October 16, 2017, the court issued a compliance conference order ("CCO"), which directed the parties to complete EBTs on or before January 9, 2018. Moreover, on May 3, 2018, the Honorable Rudolph E. Greco, Jr. issued an order directing the plaintiff to provide authorizations for Lennox Hill Hospital, PCP, physical therapy, all collateral source providers, employment and tax records. Moreover, on June 26, 2018, Judge Greco issued another order, which directed Elite Plus Security to provide the complete employment files of Miguel Castro and Terrell Davis. Even though there was outstanding discovery, on May 23, 2019, the plaintiff filed the Note of Issue and Certificate of Readiness for Trial ("NOI") with the clerk of the court. Subsequently, on August 16, 2019, the Judge Greco granted Harmon, Linder & Rogowsky's motion to be relieved as plaintiff's counsel, pursuant to CPLR § 321; and he stayed the instant action for a period of sixty (60) days. On or about November 25, 2020, the defendant filed the instant motion, wherein it argues that Elite Security Guards failed to provide the employment records and attendance records of Mr. Castro and Mr. Davis. Moreover, the plaintiff failed to provide either records from his primary care physician, employment records or collateral source records; and he failed to appear for an EBT.

APPLICABLE LAW

CPLR § 3101(a)(1) provides, in relevant part, that "[t]here shall be full disclosure of all matter material and necessary in the prosecution or defense of an action." The terms "material and necessary" in this statute "must be 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" (*Matter of Kapon v. Koch*, 23 NY3d 32, 38 [2014], quoting *Allen v. Crowell-Collier Publ. Co.*, 21 NY2d 403, 406 [1968]; *see also Brito v. Gomez,* 33 NY3d 1126 [2019]; *Foster v. Herbert Slepoy Corp.*, 74 AD3d 1139 [2d Dept 2010]). At the same time, a party is "not entitled to unlimited, uncontrolled, unfettered disclosure" (*Geffner v. Merry Med. Ctr.*, 83 AD3d 998, 998 [2d Dept 2011]; *see also Quinones v. 9 E. 69th St., ILC*, 132 AD3d 750, 750 [2d Dept 2015]). "It is incumbent on the party seeking disclosure to demonstrate that the method of discovery sought will result in the disclosure of relevant evidence or is reasonably calculated to lead to the discovery of information bearing on the claims" (*Crazytown Furniture v. Brooklyn Union Gas Co.*, 150 AD2d 420, 421 [2d Dept 1989]; *see Quinones v. 9 E. 69th St., ILC*, 132 AD3d at 750, *supra*).

Furthermore, pursuant to CPLR § 3126, "[i]f any party . . . refuses to obey an order for disclosure or willfully fails to disclose information which the courts finds ought to have been

disclosed pursuant to this article, the court may make such orders with regard to the failure or refusal as are just, among them . . . an order striking out pleading or part thereof, or dismissing the action or any part thereof . . . ." (see *Fish & Richardson, P.C. v. Schindler*, 75 AD3d 219, 220 [1st Dept 2010]). In *Friedman, Harfenist, Langer & Kraut v. Rosenthal*, 79 AD3d 798 [2d Dept 2010], the court ruled that "[t]he nature and degree of the penalty to be imposed pursuant to CPLR 3126 rest within the discretion of the Supreme Court (see *Raville v. Elnomany*, 76 AD3d 520 [2d Dept 2010]; *Estaba v. Quow*, 101 AD3d 940 [2d Dept 2012]; *Morson v. 5899 Realty, LLC*, 171 AD3d 916 [2d Dept 2019]). "[W]hen a party fails to comply with a court order and frustrates the disclosure scheme set forth in the CPLR, it is well within the Trial Judge's discretion [to dismiss a pleading]" (*Kihl v. Pfeffer*, 94 NY2d 118, 122 [1999]; *Honghui Kuang v. MetLife*, 159 AD3d 878 [2d Dept 2018]). "While actions should be resolved on the merits when possible, a court may strike [a pleading] upon a clear showing that a party's failure to comply with disclosure order was the result of willful and contumacious conduct." (*Almonte v. Pichardo*, 105 AD3d 687 [2d Dept 2012]; *Harris v. City of New York*, 117 AD3d 790 [2d Dept 2014]; *Arpino v. F.J.F. & Sons Elec. Co., Inc.*, 102 AD3d 201 [2d Dept 2012]; *Zakhidov v. Boulevard Tenants Corp.*, 96 AD3d 737 [2d Dept 2012]; *see also Brannigan v. Door*, 44 AD3d 959 [2d Dept 2016]). "Willful and contumacious conduct may be inferred from a party's repeated failure to comply with court-ordered discovery, coupled with inadequate explanations for the failure to comply, or a failure to comply with court-ordered discovery over an extended period of time" (*Rock City Sound, Inc. v. Bashian & Farber, LLP*, 83 AD3d 685, 686-687 [2d Dept 2011]; [internal quotation marks and citations omitted]; *Teitelbaum v. Maimonides Med. Ctr.*, 144 AD3d 1013 [2d Dept 2016]; *Orgel v. Stewart Tit. Ins. Co.*, 91 AD3d 922 [2d Dept 2012].)

Additionally, pursuant to the Uniform Rules for Trial Courts, "[w]ithin 20 days after service of a note of issue and certificate of readiness, any party to the action . . . may move to vacate the note of issue, upon affidavit showing in what respects the case is not ready for trial, and the court may vacate the note of issue if it appears that a material fact in the certificate of readiness is incorrect" (Uniform Rules for Trial Courts § 202.21[e]). A statement in a certificate of readiness to the effect that all pretrial discovery has been completed is a material fact, and where that statement is incorrect, the note of issue should be vacated (*see Cioffi v. S.M. Foods, Inc.*, 178 AD3d 1003 [2d Dept 2019]; *citing Barrett v. New York City Health & Hosps. Corp.*, 150 AD3d 949 [2d Dept 2017]; *cf. Slovney v. Nasso*, 153 AD3d 962 [2d Dept 2017]; *Rizzo v. Balish & Friedman*, 153 AD3d 869 [2d Dept 2017]; *see also Bundhoo v. Wendy's*, 152 AD3d 734 [2d Dept 2017]).

DISCUSSION

Here, the court finds that Mercury Bar is entitled to depose plaintiff and to obtain the required authorizations from the plaintiff in connection with his employment and medical records (i.e., plaintiff's primary care physician, collateral source providers; employment authorizations and tax records, etc.). Moreover, Mercury Bar is entitled to obtain the complete employment files of Miguel Castro and Terrell Davis in accordance with Judge Greco's order. It is well settled that CPLR § 3101(a)(1) requires full disclosure of all matters material and necessary in the prosecution or defense of an action. "Material and necessary information is that which is required to be disclosed because it bears upon the controversy at issue and will assist

the requesting party in preparing for trial" (*Brito v. Gomez*, 33 NY3d 1126 [2019; *Greco v. Wellington Leasing Limited Partnership*, 144 AD3d 981 [2d Dept 2016]). Furthermore, "Courts are to interpret discovery requests liberally in favor of disclosure" (*M.C. v. Sylvia Marsh Equities, Inc.*, 103 AD3d 676 [2d Dept 2013]; *Kakharov v. Archer*, 166 AD3d 746 [2d Dept 2018]). Additionally, the defendant has demonstrated that this case is not ready for trial. Clearly, the defendant has not had an opportunity to either depose the plaintiff or conduct post-EBT discovery. Thus, the court must vacate the NOI and strike this action from the trial calendar. (*see Drapaniotis v. 36-08 33rd Street Corp.*, 288 AD2d 254 [2d Dept 2001]; *Bundhoo v. Wendy's*, 152 AD3d 734 [2d Dept 2017]; *Lynch v. Vollono*, 6 AD3d 505 [2d Dept 2004]; *Slovney v. Nasso*, 153 AD2d 962 [2d Dept 2017]). The vacatur of the NOI returns the case to pre-note of issue status. As such, the defendant's request for an extension of time to file a motion for summary judgment is moot. (*Montalvo v. Episcopal Health Services, Inc.*, 172 AD3d 1357 [2d Dept 2019]; *Montalvo v. Mumpus Restorations, Inc.*, 110 AD3d 1045 [2d Dept 2013]; *Farrington v. Heidkamp*, 26 AD3d 459 [2d Dept 2006]).

Accordingly, it is hereby

ORDERED that defendant's motion to dismiss the complaint and amended complaint, pursuant to CPLR § 3126, is granted to the extent, if the plaintiff fails to comply with this court order; and it is further,

ORDERED that defendant's motion to vacate the Notice of Issue and Certificate of Readiness for Trial, and to strike this action from the trial calendar, pursuant to 22 NYCRR § 202.21(e), is granted without opposition; and it is further,

ORDERED that the defendant's motion to extend the time to move for summary judgment, pursuant to CPLR § 3212(a), is denied; and it is further,

ORDERED that plaintiff shall produce HIPAA compliant authorizations for his medical records from primary care physician and employment records on or before March 5, 2021; and it is further,

ORDERED that plaintiff shall appear for an examination before trial on or before March 31, 2021; and it is further,

ORDERED that Elite Plus Security shall produce the complete employment files of Miguel Castro and Terrell Davis within thirty (30) days of service of this order with notice of entry or be precluded from testifying at the time of trial; and it is further,

ORDERED that if the plaintiff fails to comply with this court order this action is dismissed without further court order; and it is further,

ORDERED that defendant shall serve a copy of this decision and order with notice of entry upon all parties, via regular and certified mail, and the clerk of this court on or before on or before February 15, 2021.

The foregoing constitutes the Decision and Order of the court.

Dated: January 29, 2021
Long Island City, New York

Maurice E. Muir

MAURICE E. MUIR, J.S.C.