

Aponsah v City of New York

2023 NY Slip Op 34064(U)

November 17, 2023

Supreme Court, New York County

Docket Number: Index No. 450857/2020

Judge: Judy H. Kim

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. JUDY H. KIM

PART 05RCP

Justice

-----X

INDEX NO. 450857/2020

LADYPEARL APONSAH, AISHA LLEWELLYN,

MOTION DATE 10/16/2023

Plaintiffs,

MOTION SEQ. NO. 001

- v -

CITY OF NEW YORK, POLICE OFFICER DELWYN DAVIS,
POLICE OFFICER JOHN DOE,

DECISION + ORDER ON
MOTION

Defendants.

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62

were read on this motion to

STRIKE PLEADINGS

Plaintiffs Ladypearl Aponsah and Aisha Llewellyn commenced this action against defendants the City of New York and New York City Police Department ("NYPD") officer Delwyn Davis (collectively, the City") for false arrest and malicious prosecution based on their arrests on December 20 and December 27, 2023, respectively, and subsequent prosecutions (NYSCEF Doc. No. 47 [Compl. at ¶¶9-18, 60-69]).

Pursuant to a so-ordered stipulation dated October 12, 2021, the City was directed to produce Davis for an examination before trial ("EBT") on or before February 11, 2021 (NYSCEF Doc. No. 36). The City failed to produce Davis for an EBT by this date. Pursuant to a June 14, 2022 so-ordered stipulation, the City was directed to produce Davis for an EBT by September 22, 2022 or October 6, 2022, depending on Davis's "regular days off" (NYSCEF Doc. No. 50). The City failed to produce Davis for an EBT on either of these dates. Pursuant to so-ordered stipulations dated October 18, 2022 the City was, again, directed to produce Davis for an EBT by January 23,

2023 (NYSCEF Doc. No. 51) and, again, failed to do so. On September 5, 2023, following a discovery conference, the Court ordered the City to produce Davis for an EBT by September 27, 2023 and that its failure to do so would “result in the imposition of approved penalty, e.g., preclusion” (NYSCEF Doc. No. 53). The City failed to comply with the Court’s September 5, 2023 order.

Plaintiffs now move for an order, pursuant to CPLR §3126, striking the City’s answer based upon Davis’ failure to appear for an EBT or, alternatively, precluding the City from offering Davis’s testimony at trial or an affidavit in support or opposition to dispositive motions. Plaintiffs also moves for an order, pursuant to CPLR §3124, compelling the City to produce material responsive to plaintiffs’ September 1, 2023 Notice for Discovery and Inspection (NYSCEF Doc. No. 54).

The City opposes plaintiffs’ motion, arguing that its failure to produce Davis for an EBT is neither willful nor contumacious but due to Davis’s unavailability and plaintiffs’ failure to timely confirm his EBT on September 26, 2023 and requests, pursuant to CPLR §2004, a thirty-day extension to comply with the September 5, 2023 court order. In addition, the City cross-moves for an order compelling plaintiffs to agree to the terms of its proposed confidentiality stipulation, which directs that the production of Davis’ personnel, investigative, and disciplinary records shall be subject to redactions of personal and privileged information, limited to litigation-use, and destroyed or returned to the City upon conclusion of the instant action (See NYSCEF Doc. No. 60). Alternatively, the City seeks a protective order, pursuant to CPLR §3103, limiting the production of these records to the terms set forth in its proposed confidentiality stipulation. Plaintiff does not submit any reply papers or oppose the City’s cross-motion.

DISCUSSION

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.” Although “[t]he striking of a party’s pleadings should not ... be imposed except in instances where the party seeking disclosure demonstrates conclusively that the failure to disclose was willful, contumacious or due to bad faith” (Hassan v Manhattan & Bronx Surface Tr. Operating Auth., 286 AD2d 303, 304 [1st Dept 2001]) such a sanction may be “warranted when a party repeatedly and persistently fails to comply with several disclosure orders issued by the court” (Gonzalez v 431 E. 115 St. LLC, 68 Misc 3d 1207(A) [Sup Ct, NY County 2020] citing Min Yoon v Costello, 29 AD3d 407 [1st Dept 2006]).

In this case, the willful and contumacious nature of the City’s conduct may be inferred from its repeated failures to comply with four court orders directing the City to produce Davis for an EBT¹ (See e.g., Reidel v Ryder TRS, Inc., 13 AD3d 170, 171 [1st Dept 2004]). Davis’s unavailability on the dates of the scheduled EBTs does not provide a reasonable excuse for the City’s non-compliance (See Silverio v Arvelo, 103 AD3d 401, 401 [1st Dept 2013] “[t]he fact that defendant has disappeared or made himself unavailable provides no basis for denying a motion to strike his answer, particularly in the face of continued defaults in appearance for examination before trial”). Accordingly, that branch of plaintiffs’ motion for sanctions is granted to the extent that the City is to produce Davis for an EBT **on or before January 19, 2024** and, should the City fail to do so, then the City shall be precluded from offering Davis’s testimony at trial or in any affidavit in support or opposition to any dispositive motions (CPLR §3126[2]; see

¹ Although the City also argues in opposition that plaintiffs’ good faith affirmation does not comply with 22 NYCRR §202.7(c), the Court excuses any deficiencies in their good faith affirmation as the City’s repeated failures to produce Davis for an EBT establishes that “any effort to resolve the dispute non-judicially would have been futile” under the circumstances (Scaba v Scaba, 99 AD3d 610, 611 [1st Dept 2012]).

Rocco v Advantage Sec. & Protection Inc., 283 AD2d 317, 318 [1st Dept 2001]; Reidel v Ryder TRS, Inc., 13 AD3d 170, 171 [1st Dept 2004]). However, that branch of plaintiffs' motion compelling the City to respond to its September 1, 2023 Notice for Discovery and Inspection is denied without prejudice as premature—the City's time to respond to plaintiffs' discovery demand had not yet expired as of plaintiffs' filing of the instant motion on September 29, 2023 (See e.g., Jones v LeFrance Leasing LP, 81 AD3d 900, 902 [2d Dept 2011]).

The City's cross-motion for an order compelling plaintiffs to agree to the terms of the City's proposed confidentiality stipulation is granted without opposition. The City has demonstrated that the material at issue, although discoverable, may be "subject to abuse if widely disseminated" (Butt v NY Med. Coll., 7 AD3d 744, 745 [2d Dept 2004] citing McLaughlin v G. D. Searle, Inc., 38 AD2d 810 [1st Dept 1972]) and that proper redactions, and limitation of the use of this material to the instant litigation, is warranted (See e.g., Simar Holding Corp. v. Green Sky Corp., 21 Misc. 3d 1105(A) [Sup Ct, Kings County 2008]). Accordingly, the parties are directed to execute the City's proposed confidentiality stipulation within thirty days from the date of this decision and order.

Accordingly, it is

ORDERED that plaintiffs' motion to strike defendants' answer or preclude the defendants from offering defendant Delwyn Davis's testimony at trial or in any affidavit in support or opposition to any dispositive motions is granted to the extent that defendant Delwyn Davis shall appear for an examination before trial on or before January 19, 2024; and it is further

ORDERED that, should defendant Delwyn Davis fail to appear for said examination before trial, plaintiffs shall file an affirmation, upon due notice, detailing defendants' failure to appear and renewing this motion, at which time defendant Delwyn Davis shall be precluded from

offering any testimony at trial or in any affidavit in support or opposition to any future dispositive motions; and it is further

ORDERED that plaintiffs' motion to compel is denied without prejudice; and it is further

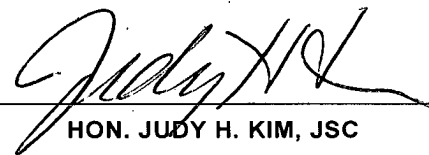
ORDERED that defendants' cross-motion is granted and the parties are directed to execute the proposed confidentiality stipulation in the form annexed to defendants' moving papers (NYSCEF Doc. No. 60) within thirty days from the date of this decision and order; and it is further

ORDERED that plaintiff shall serve a copy of this decision and order, with notice of entry, upon defendants as well as the Clerk of the Court (60 Centre Street, Room 141B) and the Clerk of the General Clerk's Office (60 Centre Street, Room 119) within fifteen days of the date of this decision and order; and it is further

ORDERED that service upon the Clerk of the General Clerk's Office shall be made in accordance with the procedures set forth in the *Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases* (accessible at the "E-Filing" page on the court's website at the address www.nycourts.gov/supctmanh).

This constitutes the decision and order of the Court.

DATE: 11/17/2023


HON. JUDY H. KIM, JSC

Check One: Case Disposed Non-Final Disposition
Check if Appropriate: Other (Specify _____)