2019 WL 295232 (N.Y.Sup.), 2019 N.Y. Slip Op. 30182(U) (Trial Order)
Supreme Court of New York.
New York County

**1 George LOPEZ, Plaintiff,

v.

225 4TH AVENUE PROPERTY OWNER LLC, Piece Management LLC, Defendants.

No. 153044/2017.
January 23, 2019.

Decision and Order

Present: Hon. Arlene P. Bluth, Justice.

MOTION DATE *11/29/2018*

MOTION SEQ. NO. *002*

**1 The following e-filed documents, listed by NYSCEF document number (Motion 002) 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 61, 62, 63, 64, 65, 66, 67, 68, 69, 71 were read on this motion to/for *STRIKE PLEADINGS*.

Upon the foregoing documents,

Defendant 225 4th Avenue Property Owner LLC's motion to strike plaintiff's Summons and Verified Complaint dated March 29, 2017 pursuant to CPLR 3126 is granted.[1] Defendant's motion for the defendant's fees for opposing plaintiff's motion for default judgment and attending two discovery conferences, pursuant to the Unified Rules of the Trial Courts § 130-1.1 [a] is denied.

Background

The facts underlying this case concern the alleged injuries suffered by plaintiff because of a construction accident that took place on defendant's property. The current motion is in response **2 to plaintiff's delay in providing materials during the discovery process. The parties had a preliminary conference on August 1, 2017 in which they agreed that plaintiff would respond to several of defendant's discovery demands on or before September 8, 2017 (NYSCEF Doc. No. 18). At issue here is the May 25, 2017 "Demand for Social Media Information and Preservation of Same." Plaintiff failed to respond to said demand by the agreed upon date.

The parties had a compliance conference on December 5, 2017 in which this Court issued a second order requiring plaintiff to provide full and complete responses to defendant's discovery demands by January 5, 2018 (NYSCEF Doc. No. 20). Again, plaintiff ignored the order and failed to provide a response to the social media demands.

A status conference was held on February 8, 2018 in which the Court ordered, for the third time, that plaintiff provide full and complete responses to defendant's discovery demands by February 22, 2018, or else "be precluded (over objection) from offering evidence at trial of negligence or damages without further order of this court unless good cause

shown" (NYSCEF Doc. No. 21). Furthermore, the Court instructed plaintiff that all objections other than privilege had been waived because of plaintiff's failure to raise such objections over the course of the last eight months.

On or about February 22, 2018, defendant received plaintiff's initial discovery responses. Plaintiff responded to the social media demands by categorically denying all social media demands, stating, "there is a lack of factual predict of relevancy and such demand is a fishing expedition" (NYSCEF Doc. No. 53).

**3 On February 27, 2018, plaintiff filed for a default judgment against defendant. The Court denied plaintiff's motion, noting there was no basis for the motion and even though the error was brought to the attention of plaintiff's attorney several times, plaintiff's attorney ignored the defendant's pleas to withdraw the motion. Plaintiff admits this default judgment application was filed erroneously and that plaintiff failed to withdraw it in a timely manner.

*2 In the afternoon on March 22, 2018, the parties had another compliance conference in which the Court noted that discovery and depositions of all parties remained outstanding (NYSCEF Doc. No. 40). Defendant again raised the issue of the social media disclosures. Plaintiff expressed his concerns regarding the disclosures and stepped out of the courtroom to discuss the matter with his office. Upon plaintiff's return, the Court reminded plaintiff that, pursuant to the prior conference order, any objections to the discovery demands had been waived due to plaintiff's failure to assert timely objections.

After the conference, but on the same day, defendant received plaintiff's supplemental discovery responses, including the social media account information. Defendant attempted to log onto the Facebook account at 4:45 p.m. on March.22, 2018. Defendant claims that his attempt to log in failed, and a message appeared stating that the password had been changed two hours ago (NYSCEF Doc. No. 57). This would mean that the password was changed during the afternoon court conference while the exact matter was being discussed in front of the Court. Upon discovering this, defendant wrote a letter to the Court explaining the situation (NYSCEF Doc. No. 36).

**4 On April 26, 2018, defendant made this motion (NYSCEF Doc. No. 44). On August 7, 2018 the parties attempted to resolve the motion by entering into a stipulation in which plaintiff agreed to provide defendant with the Facebook disclosures as defendant requested within 20 days (NYSCEF Doc. No. 71). This stipulation was signed by both parties and "so ordered" by the Court. The balance of the motion, for sanctions, was adjourned to November 27, 2018; obviously, the hope was that plaintiff would respond and the penalty, if any, would be minor. Despite the fact that the stipulation was ordered by the Court and agreed upon by both parties, plaintiff still failed to provide the social media information. Plaintiff failed to produce the required discovery disclosures pertaining to the Facebook account by November 27, 2018, the date the sanctions motion was scheduled to be heard.

Discussion

CPLR 3126 provides that,
"If any party, or a person who at the time a deposition is taken or an examination or inspection is made is an officer, director, member, employee or agent of a party or otherwise under a party's control, refuses to obey an order for disclosure or wilfully fails to disclose information which the court 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:

1. an order that the issues to which the information is relevant shall be deemed resolved for purposes of the action in accordance with the claims of the party obtaining the order; or

2. an order prohibiting the disobedient party from supporting or opposing designated claims or defenses, from producing in evidence designated things or items of testimony, or from introducing any evidence of the physical, mental or blood condition sought to be determined, or from using certain witnesses; or

3. an order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or any part thereof, or rendering a judgment by default against the disobedient party"

"[T]he drastic remedy of striking a party's pleading pursuant to CPLR 3126 for failure to comply with a discovery order or request is appropriate only where the moving party conclusively ****5** demonstrates that the non-disclosure was willful, contumacious or due to bad faith" (*McGilvery v New York City Transit Auth.*, 624 NYS2d 158, 160 [1st Dept 1995]). "Willful and contumacious behavior can be inferred by a failure to comply with court orders, in the absence of adequate excuses" (*Henderson-Jones v City of New York*, 928 NYS2d 536, 541 [1st Dept 2011]). For example, a plaintiff's "[u]nexplained noncompliance with a series of court-ordered disclosure mandates over a period of nearly two years sufficiently created an inference of willful and contumacious conduct" (*Brewster v FTM Servo, Corp.*, 844 NYS2d 5, 6-7 [1st Dept 2007]).

***3** The Unified Rules of the Trial Courts § 130-1.1 [a] allow the court to award "actual expenses reasonably incurred and reasonable attorneys' fees, resulting from frivolous conduct as defined in this Part." "Conduct is frivolous if: (1) it is completely without merit in law and cannot be supported by a reasonable argument for an extension, modification or reversal of existing law; (2) it is undertaken primarily to delay or prolong the resolution of the litigation, or to harass or maliciously injure another; or (3) it asserts material factual statements that are false" *id.* at § 130-1.1[c][1]-[c][3].

Defendant claims that plaintiff engaged in willful and contumacious conduct by purposefully obstructing defendant's investigative efforts and by filing a frivolous motion for default judgment, and asks the court to impose sanctions including striking the plaintiff's Verified Summons and Complaint, or alternatively, preventing plaintiff from presenting any evidence or testimony at trial concerning the issues of liability and damages, and/or imposing monetary sanctions against the plaintiff in the form of awarding defendant reimbursement of costs and ****6** attorneys' fees reasonably incurred in opposing plaintiff's motion for default judgment and in attending the compliance conferences on February 8 and March 22, 2018.

Defendant's motion to strike plaintiff's Verified Summons and Complaint is granted. Plaintiff engaged in willful and contumacious behavior by continuously failing to respond to court orders. Plaintiff appeared in front of this Court on four different occasions to attend conferences. Plaintiff failed to fully abide by the orders stated in all four of the conferences despite agreeing to do so while present at the conferences. Furthermore, on August 7, 2018 defendant gave plaintiff another chance to provide the discovery disclosures by entering into a stipulation that was agreed upon and signed by both parties, stating "Within 20 days, plaintiff shall provide defendants with an appropriate authorization permitting the disclosure from Facebook..." (NYSCEF Doc. No. 71). Notwithstanding the four conference orders, defendant's motion, and the so-ordered stipulation between the plaintiff and defendant, plaintiff still failed to provide the necessary disclosures by the oral argument date for the motion. That means plaintiff had five chances to produce the Facebook information and, despite agreeing to do so, he willfully refused.

Additionally, plaintiff purposely thwarted the discovery process by changing his Facebook password while plaintiff's attorney was conferencing with the Court. Pre-accident and post-accident information posted on social media sites is discoverable information (*see Forman v Henkin*, 30 NY3d 656 [2018]). By purposefully blocking the defendant's ability to obtain discoverable information, plaintiff engaged in willful and contumacious behavior. Because plaintiff does not address the issues relating to the Facebook account in its opposition papers, he ****7** admits his egregious conduct. He has made no argument to explain his actions which greatly, and wrongfully, prejudice defendant's case.

In responding to defendant's motion, plaintiff alleges defendant also engaged in willful and contumacious behavior by not disclosing that defendant was the attorney of record for the general contractor in the case. This claim does not adequately respond to defendant's allegations regarding plaintiff's conduct and refusal to abide by court orders.

Defendant's motion for reimbursement of costs and attorneys' fees reasonably incurred in opposing Plaintiff's motion for default judgment and attending the February 8, 2018 and March 22, 2018 conferences is denied. While the plaintiff's conduct was willful and contumacious, the court finds that dismissing plaintiff's case is an adequate remedy under the circumstances.

***4** Accordingly, it is hereby

ORDERED that defendant's motion to strike plaintiff's Summons and Verified Complaint pursuant to CPLR 3126 is granted and this action is hereby dismissed with prejudice, and it is further

ORDERED that that portion of the defendant's motion that seeks the recovery of attorney's fees is denied

DATE ***January 22, 2019***

<<signature>>

ARLENE P. BLUTH, J.S.C.

Footnotes

1 The case against defendant Piece Management, Inc. has been discontinued pursuant to stipulation (NYSCEF Doc. No. 13).

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