

Vasquez v Beckford

2020 NY Slip Op 35640(U)

October 1, 2020

Supreme Court, Bronx County

Docket Number: Index No. 21436/2018E

Judge: John R. Higgitt

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX: PART 34

-----X
VASQUEZ, MIGUEL A.

Index No. 21436/2018E

- against -

Hon. JOHN R. HIGGITT,

BECKFORD, PAUL, et al

J.S.C.

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The following papers numbered 25 to 42 and 48 to 52 in the NYSCEF System were read on this motion to **STRIKE ANSWER**, noticed on November 29, 2019 and duly submitted as No. on the Motion Calendar of July 6, 2020

	NYSCEF Doc. Nos.
Notice of Motion – Exhibits and Affidavits Annexed	25-35
Notice of Cross-Motion – Exhibits and Affidavits Annexed	
Answering Affidavit and Exhibits	36-39, 40-42, 48-52
Replying Affidavit and Exhibits	
Filed Papers	
Memoranda of Law	
Stipulations	

Upon the foregoing papers, plaintiff’s motion to strike defendants’ answers for failure to appear for deposition or, in the alternative, to preclude defendants from testifying at trial or presenting any evidence in connection with a dispositive motion, and for summary judgment on the issue of defendants’ liability for causing the subject accident is granted in part, in accordance with the annexed decision and order.

Dated: 10/01/2020

Hon. 
JOHN R. HIGGITT, J.S.C.

Check one:

- Case Disposed in Entirety
- Case Still Active

Motion is:

- Granted GIP
- Denied Other

Check if appropriate:

- Schedule Appearance
- Fiduciary Appointment
- Referee Appointment
- Settle Order
- Submit Order

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX: I.A.S. PART 34

-----X
MIGUEL A. VASQUEZ,

Plaintiff,

DECISION AND ORDER

- against -

Index No. 21436/2018E

PAUL BECKFORD, DAWN ANDERSON, SHELDON
MCLEAN and PV HOLDING CORP.,

Defendants.
-----X

John R. Higgitt, J.

Upon plaintiff’s November 13, 2019 notice of motion and the affirmation, affidavit, and exhibits submitted in support thereof; the November 26, 2019 affirmation in opposition of defendants McLean and PV Holding Corp. (“the McLean defendants”) and the exhibits submitted therewith; the December 16, 2019 affirmation in opposition of defendants Beckford and Anderson (“the Beckford defendants”); the McLean defendants’ June 16, 2020 affirmation in opposition; and due deliberation; plaintiff’s motion to strike defendants’ answers for failure to appear for a deposition or, in the alternative, preclude defendants from testifying at trial or presenting any evidence on a dispositive motion, and for summary judgment on the issue of defendants’ liability for causing the subject accident is granted in part.

Plaintiff commenced this action on February 2, 2018 to recover damages for personal injuries he allegedly sustained as a result of a June 19, 2016 motor vehicle accident. In support of his motion plaintiff submitted the pleadings, discovery orders, and the police accident report. Plaintiff seeks an order striking defendants’ answers for their failure to comply with various court orders directing the parties to appear for deposition.

On November 2, 2018, the court held a preliminary conference in which the court directed the parties to appear for deposition on February 20, 2019. Subsequently, the parties appeared for three additional compliance conferences; as a result of those conferences the parties were directed to appear for deposition on March 8, 2019, April 26, 2019, and July 8, 2019. On December 20, 2019, the court directed the parties to appear for deposition on or before March 20, 2020, and cautioned that the failure to appear for deposition would result in CPLR 3126 relief to the aggrieved party.

In opposition to the aspect of plaintiff's motion seeking to strike their answer, the McLean defendants assert that the motion should be denied as defendant McLean is now willing and able to appear for his deposition, and that his prior failure to appear was not willful or contumacious. The McLean defendants assert that their prior failure to appear for deposition was due to defense counsel's inability to find defendant McLean. Additionally, the McLean defendants assert that they were unable to comply with the December 20, 2019 order due to the current COVID-19 pandemic.

While the court has the power to sanction a party for failure to comply with a discovery order (*see* CPLR 3126), the striking of a pleading is a drastic remedy that is only warranted in narrow circumstances (*see Michaluk v New York City Health & Hosps. Corp.*, 169 AD3d 496 [1st Dept 2019]). Moreover, any relief afforded under CPLR 3126 must be commensurate with the particular disobedience it is designed to punish (*see Merrill Lynch, Pierce, Fenner & Smith, Inc. v Global Strat Inc.*, 22 NY3d 877 [2013]).

In light of the McLean defendants' failure to comply with multiple court orders requiring defendant McLean's deposition, the conditional-order relief specified below is the appropriate, commensurate relief under the circumstances. The court notes that under the controlling

Administrative Order (AO/120/20) and emerging caselaw (*see, e.g., Jones v Memorial Slo w Kettering Cancer Ctr.*, - AD3d -, 2020 NY Slip Op 05104 [3d Dept 2020]), remote depositions should generally be employed while the State continues to deal with the COVID-19 pandemic.

Given defendant McLean's pre-pandemic failure to appear for deposition, and that we are now six months into the pandemic, the court will not provide defendant McLean with a dispensation from being deposed remotely. However, should the parties agree to an in-person deposition (with all necessary precautions observed or taken), defendant McLean may be deposed in the traditional manner.

Defendant Beckford appeared for deposition on February 25, 2020. Therefore, that aspect of plaintiff's motion seeking to strike the Beckford defendants' answer is denied as moot.

With respect to plaintiff's motion for summary judgment on the issue of defendants' liability, plaintiff failed to satisfy his prima facie burden of establishing his entitlement to judgment as a matter of law. Plaintiff failed to provide evidence in admissible form, relying on the police accident report and the complaint (*see Alvarez v Prospect Hosp.*, 68 NY2d 320 [1986]; *Zuckerman v City of New York*, 49 NY2d 557 [1980]). The complaint was verified by an attorney who does not have personal knowledge of the facts and is of no probative value for purposes of summary judgment (*see Taub v Art Students League of N.Y.*, 63 AD3d 630 [1st Dept 2009]). Additionally, the police accident report is hearsay and insufficient to establish, prima facie, plaintiff's entitlement to judgment as a matter of law (*see Silva v Lakins*, 118 AD3d 556 [1st Dept 2014]; *see Rue v Stokes*, 191 AD2d 245 [1st Dept 1993]). Because plaintiff failed to submit admissible evidence to demonstrate his entitlement to judgment as a matter of law, plaintiff's motion is denied.

Accordingly, it is

ORDERED, that the aspect of plaintiff's motion for an order striking the McLean defendants' answer, or precluding the McLean defendants from offering evidence at trial for their failure to appear for deposition is granted solely to the extent that defendant McLean shall be precluded from testifying at trial with respect to his liability and from submitting affidavits with respect to his liability on a dispositive motion unless, within 60 days after service of a copy of this order with written notice of entry, defendant McLean appears for deposition; and it is further

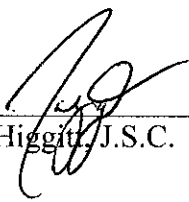
ORDERED, that the taking of defendant McLean's deposition shall be by remote means, subject to any application for a protective order, unless all parties to agree to an in-person deposition¹; and it is further

ORDERED, that if defendant McLean fails to comply with this conditional order, plaintiff shall file an affirmation attesting to his non-compliance with this order, which affirmation must be accompanied by proof of service of a copy of this order with written notice of entry thereof and shall be filed within ten (10) days after the expiration of the time for defendant McLean to comply; and it is further

ORDERED, that plaintiff's motion is otherwise denied

This constitutes the decision and order of the court.

Dated: October 1, 2020



John R. Higgins, J.S.C.

¹ The parties are reminded that the party taking the deposition bears the expense thereof (*see* CPLR 3116[b]), and the cost of videotaping or audio recording is borne by the party requiring the recorded deposition (*see* 22 NYCRR 202.15).