SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX IAS PART 4

GERMAN PENA,

Plaintiff(s),

-against-

Index No. 7619/1999

CHATEAU WOODMERE CORP., EAST CHATEAU CO-OP APARTMENTS & LEEBAR MANAGEMENT CORP.,

Defendant(s).

FILED
FEB 21 2006
BRONX COUNTY CLERK'S OFFICE

CHATEAU WOODMERE CORP.,

Third Party Plaintiff,

-against-

BERNINI CONSTRUCTION,

Third Party Defendant.

HON. BERTRAM KATZ:

Motion by plaintiff German Pena for an order vacating the stay of all proceedings in this matter, restoring this action to the trial calendar, and for other relief, and motion by third party defendant Bernini Construction Corp. s/h/a Bernini Construction ("Bernini") for an order vacating that portion of this Court's order entered May 28, 2002 which granted plaintiff's motion for partial summary judgment as to his Labor Law Section 240 claim, granting Bernini's cross-motion for summary judgment dismissing the plaintiff's Labor Law Section 240 and 241 (6) claims on the ground

that the plaintiff's actions were the sole proximate cause of his fall from the scaffold, in the alternative directing a further deposition and medical examination of the plaintiff on the grounds that the plaintiff's two criminal convictions constitute unanticipated circumstances justifying further discovery, and for other relief, and cross-motion by defendants Chateau Woodmere Corp. and Leebar Management Corp. [collectively "Leebar"] for an order dismissing the complaint pursuant to CPLR Section 3126 and the Court's inherent power to maintain justice [sic], vacating that portion of the Court's order entered May 28, 2002 which granted plaintiff's motion for partial summary judgment as to his Labor Law Section 240 claim, dismissing the plaintiff's Labor Law Section 240 and 241 (6) claims on the ground that the plaintiff's actions were the sole proximate cause of his fall from the scaffold, or in the alternative directing a further deposition and medical examination of the plaintiff on the grounds that the plaintiff's two criminal convictions constitute unanticipated circumstances justifying further discovery, and for other relief, are consolidated for purposes of disposition as follows.

This motion was referred to this Court pursuant to CPLR Section 2221, as the relief requested herein is in the nature of renewal or reargument. After this Court, in its order entered on May 28, 2002, granted summary judgment on the issue of liability in

favor of the plaintiff, the plaintiff was arrested on October 6, 2003, approximately two weeks before the date that this matter was scheduled for jury selection. On October 22, 2003 this Court, reasoning that the issue of proximate cause was to be presented to the jury notwithstanding the granting of summary judgment on the issue of liability in favor of plaintiff, issued an order staying the trial of this matter pending further order of the Court, since the plaintiff was alleged to have committed insurance fraud concerning his participation in 22 allegedly staged automobile accidents.

The instant motion was brought by order to show cause in the STP Part on June 14, 2005, and together with two cross-motions, all motions were submitted to the STP Part for decision on November 9, 2005. On January 10, 2006, these motions and cross-motions were referred to this Part pursuant to CPLR Section 2221.

Bernini and the defendants Leebar assert that the circumstances of the plaintiff's arrest and conviction cast doubt on the integrity of these judicial proceedings, and warrant dismissal of the complaint. The plaintiff pleaded guilty to Insurance Fraud in the 2nd Degree on May 25, 2004 and was ultimately sentenced to five years probation. He also pleaded guilty to Perjury in the 3rd degree on April 12, 2005 and was sentenced to a conditional discharge.

The felony complaint specifically accused the plaintiff of testifying "under oath at an Examination Before Trial [EBT] at the above location and time [2] that defendant testified in substance: [a] that defendant had never been in an any type of accident since November 1998 [b] that the defendant had never injuried himself since November 1998 [c] and that the defendant had never filed any claims since November 1998 [3] that the defendant intentionally lied at the Examination Before Trial [4] that the defendant has been in numerous insurance claims since November 1998 [5] that the defendant has made numerous insurance claims since November 1998 and [6] that the defendant lied because he did not want to hurt his lawsuit." [sic]

The Examination Before Trial referred to in this complaint was conducted in this action.

In his plea allocution with respect to the charge of perjury, the plaintiff was asked the following question and gave the following response:

"THE COURT: All right. By your plea of guilty do you admit that on or about May 13, 2003 at 30 Vesey Street in the County and State of New York you did testify that you had never been in any type of accident in November, 1998; is that fact true?

THE DEFENDANT: I can't hear. Yes.

THE COURT: Yes?

THE DEFENDANT: Yes."

In his deposition in the instant matter, the plaintiff falsely testified as follows:

"Q. Have you ever filed any claims or any lawsuits other than the lawsuit you have here presently pending in the Bronx as the result of any injury to your back, to your ribs, to your wrists, or to your eye?

A. No.

Q. Have you ever filed any other lawsuit or any other claim as a result of any accident other than the accident of November 13, 1998?

A. No. Never."

Bernini and the defendants Leebar assert that the integrity of these entire proceedings has been undermined by the plaintiff's perjury, citing inter alia, Miller v. Time-Warner Communications, Inc., 1999 WL 739528 [S.D.N.Y.]. In Miller the Court concluded that the only suitable sanction for the plaintiff's spoliation of evidence and perjury, which induced her attorney to give false testimony as a consequence, was dismissal of the complaint. The Court noted that although the defendants were not prejudiced by this misconduct, since enough untainted evidence vitiated the effect of plaintiff's perjury, dismissal was warranted because the plaintiff's "blatant and repeated perjury demonstrates such a total

disrespect for the Court and the process by which justice is administered" that no lesser sanction was sufficient. The Court also found it insufficient to instruct the jury as to the details of the "plaintiff's mendacity" and found it inadequate to punish the plaintiff or to deter the misconduct of others.

The issue of which sanction to impose under CPLR Section 3126 under these circumstances rests in the discretion of the Court. See e.g. 317 W. 87 Associates v. Dannenberg, 159 AD 2d 245. As with cases of spoliation of evidence, where the misconduct deprives the opposition of a full and fair opportunity to vindicate its position at trial, dismissal or striking of pleadings may be the only appropriate sanction. Neal v. Easton Aluminum Inc., 15 AD 2d 459.

In the case at bar, the picture is more mixed than that in Miller. The plaintiff in his allocution admitted that he perjured himself in this suit, which involves a fall from a scaffold, when he denied filing any prior claims, or in ever having sustained injury to certain parts of his anatomy in a prior accident. Thus, he lied about prior staged automobile accidents, under circumstances which cast doubt on his account as to the circumstances of the scaffold accident which is at issue herein. However, there is no evidence before the Court tending to undermine plaintiff's claim that he was injured in a scaffold accident on

November 13, 1998. Certainly, neither Bernini nor the defendants assert that the plaintiff was not injured; they merely contend that the accident did not occur in the manner alleged, and that the plaintiff was himself negligent or otherwise responsible for his own injuries. The perjury which has now been established is, however, more directly linked to the staged automobile accidents than it is to this scaffold accident, except to the extent that the plaintiff's credibility as to the circumstances of the scaffold accident can be now called into question, due to his criminal convictions together with his admitted lies as to the absence of prior injuries and accidents. The prior deposition testimony of the plaintiff, and his earlier medical examinations cannot be permitted to be used at trial without contradiction, and the defendants and Bernini are entitled to depositions and a medical examination de novo of the plaintiff in the light of his proven perjury, which taints the prior discovery proceedings.

Moreover, since discovery is not complete in this matter, the 120 day rule as interpreted in Brill v City of N.Y. 2NY 3rd 648 is inapplicable.

The Court, based on the foregoing, finds that the appropriate sanction, which would be most precisely calculated to afford a fair trial to the defendants and to Bernini, must include the following:

It is hereby ordered that:

The instant matter is stricken from the trial calendar and the Note of Issue and Certificate of Readiness are vacated, as this action is manifestly not ready for trial.

The plaintiff is directed to appear for a new deposition and a new medical examination de novo, without restriction, at the behest of Bernini and the defendants, all within 90 days after the date of service of this order with notice of entry thereon.

That portion of this Court's order entered May 28, 2002 which granted plaintiff's motion for partial summary judgment as to his Labor Law Section 240 claim is herewith recalled and vacated in its entirety. Leave is granted to Bernini and to the defendants to renew their motions for summary judgment on this issue upon the completion of discovery.

Beyond this, all motions are denied.

The Clerk of the Court is directed to vacate the stay in this matter, and to strike this matter from the trial calendar.

This will constitute the order of this Court.

Dated: February 6, 2006

BERTRAM KATZ, J.S.C.