

**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK**

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ADAM WIERCINSKI,
Plaintiff,

- against -

MANGIA 57, INC., et al.,
Defendants.

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MEMORANDUM AND ORDER

09-CV-4413 (ILG) (JO)

JAMES ORENSTEIN, Magistrate Judge:

On May 17, 2011, I ordered plaintiff Adam Wiercinski ("Wiercinski") to show cause in writing why his case should not be dismissed for failure to obey court orders. Docket Entry ("DE") 54. Specifically, Wiercinski failed to comply with two orders, dated April 13 and 21, 2011, requiring him to certify on the docket that he had notified non-party subpoena recipients that the subpoenas had been quashed. Wiercinski also failed to comply with my order of April 21, 2011, requiring the payment of past discovery costs in the amount of \$3,253.00. Finally, he failed to comply with my order of April 26, 2011, requiring him to appear in person at the May 17, 2011, pre-trial conference.

On May 20, 2011, Wiercinski responded to my order to show cause. DE 55. With respect to his failure to pay past discovery costs, he argues in part that he should be "excused pursuant to [the in] forma pauperis statute 28 U.S.C. § 1915(a)(1)" because he "has no financial means to pay" the costs. *Id.* at 5. Specifically, he claims that he has been unemployed since early 2008, and that aside from public assistance has "no other income or assets." DE 55-2 (Affidavit of Adam Wiercinski) ("Aff.") ¶¶ 11, 13.

The defendants question the credibility of these statements, noting that on prior occasions Wiercinski has refused to answer questions about his employment status. DE 56 (Response in

Opposition) ("Opp.") at 2-3. They also argue that he has previously lied about his employment status and submitted false documents in order to defraud the federal government. *Id.* at 3-5. Specifically, at his first deposition in this case, invoking the Fifth Amendment, Wiercinski refused to answer the following questions: "Were you employed in any capacity in 2008?" and "Have you been employed at any point since 2007?" *Id.* at 2; DE 56-1, 19-24 (Opp. Ex. D, Transcript of Deposition of Wiercinski, dated December 21, 2010) ("Transcript") at 22, 24. Further, during a hearing before the New York State Division of Human Rights ("NYSDHR") in 2009, Wiercinski admitted to having received public assistance between 2002 and 2004 while also working and being paid under a different name. Opp. at 4; DE 56-1, 31-39 (Opp. Ex. F, Transcript of NYSDHR Hearing, dated May 13, 2009) at 34-35.

I agree with the defendants that Wiercinski's prior conduct calls into doubt his claimed inability to pay the discovery costs in this case and conclude that I require further information to determine whether he should be excused for his failure to comply with my order to pay costs based on his allegedly indigent status. I also note that Wiercinski's sworn affidavit, in which he voluntarily provides information in this litigation on a subject on which he previously refused to answer questions at his deposition on the basis of his privilege against self-incrimination, appears to waive that privilege on that subject. *Compare* Transcript at 22, 24 *with* Aff. ¶ 11. In light of that waiver of privilege, I reconsider my previous decision, *see* DE 38 (Ruling 4), and order Wiercinski to submit to a further deposition to answer questions relating to his employment status since January 2008.

The parties shall complete Wiercinski's continued deposition no later than June 17, 2011; however, if the parties are unable to agree on a time and place to conduct the deposition by that

deadline, I will take testimony on the matter in Courtroom 11D South of the United States Courthouse, 225 Cadman Plaza East, Brooklyn, New York, on June 21, 2011, at 2:30 p.m. I will review the transcript of Wiercinski's supplemental testimony before deciding whether his failure to comply with my order should be excused on the ground that he is unable to pay the amount awarded and before addressing the remaining aspects of his response to the order to show cause. Under the circumstances, I caution Wiercinski that if he again invokes his Fifth Amendment privilege in refusing to answer questions about his employment or financial status, I will draw the adverse inference that he can indeed afford to pay the amount I have ordered him to pay and that his failure to do so was therefore willful.

SO ORDERED.

Dated: Brooklyn, New York
June 8, 2011

/s/ James Orenstein
JAMES ORENSTEIN
U.S. Magistrate Judge