2001 WL 286771
Only the Westlaw citation is currently available.
United States District Court, S.D. New York.

Matthew B. DELLEFAVE, Plaintiff,
v.
ACCESS TEMPORARIES, INC., Steven Weinstein, a/k/a Steven Weber, Michael Weinstein, Mark Paul, Lawrence Paul, Ronald Axelrod, Karen P. Druziako, John Does, 1-100 (being as yet unidentified employees, representatives, or agents of Access Temporaries, Access Personnel and/or other companies owned in whole or part by Steven Weinstein and/or Michael Weinstein), Jane Roes, 1-100 (being as yet unidentified persons, organizations of persons, or business entities that hold any ownership interest in Access Temporaries, Inc.), Peter Poes, 1-100 (being as yet unidentified persons, organizations of persons, or business entities that are officers and/or directors of or are in any way involved in managing any of the activities of Access Temporaries, Inc.), and Michael Moes, 1-100 (being as yet unidentified persons, organizations of persons, or business entities that have received assets from Access Temporaries, Inc., within the last six months), Defendants.

No. 99 CIV. 6098(RWS).
|
March 22, 2001.

Attorneys and Law Firms

Di Rienzo & Wallerstein, Fanwood, NJ, By Joseph Di Rienzo, Esq., Of Counsel, for Plaintiff.

Jackson, Lewis, Schnitzler & Krupman, New York, By Penny Ann Lieberman, Esq., Of Counsel, for Defendant Access Temporaries, Inc.

Jackson, Lewis, Schnitzler & Krupman, Morristown, NJ, By Terri L. Freeman, Esq., Of Counsel, for Defendant Access Temporaries, Inc.

Berger Stern & Webb, New York, By Steven A. Berger, Esq., John R. Cahill, Esq., Kenneth J. Applebaum, Esq., Of Counsel, for Defendant Karen P. Druziako.

OPINION

SWEET, D.J.

***1** On January 10, 2001, this Court granted judgment on the pleadings for the defendants, ordered DelleFave to pay Rule 11 attorneys' fees for defendant Karen Druzakio ("Druzakio"), and denied DelleFave's motions to amend and to compel discovery. *See Dellefave v. Access Temporaries, Inc.,* 99 Civ. 6098(RWS), 2001 WL 25745 (S.D.N.Y. Jan. 10, 2001) ("the January 10, 2001 opinion"). Plaintiff Matthew B. DelleFave ("DelleFave") has moved for reconsideration or reargument pursuant to Local Civil Rule 6.3, to amend pursuant to Fed.R.Civ.P. 52(b) and 59(e), or for relief pursuant to Fed.R.Civ.P. 60(b)(1) and (6). Druzakio and the remaining defendants have opposed the motion in separate briefs. For the reasons set forth below, the motions are denied.

Discussion

I. *The Applicable Legal Standards for Reargument, Reconsideration, Amendment, or Relief*

Local Rule 6.3 provides in pertinent part: "There shall be served with the notice of motion a memorandum setting forth concisely the matters or controlling decisions which counsel believes the court has overlooked." Thus, to be entitled to reargument and reconsideration, the movant must demonstrate that the Court overlooked controlling decisions or factual matters that were put before it on the underlying motion. *See Ameritrust Co. Nat'l Ass'n v. Dew,* 151 F.R.D. 237, 238 (S.D.N.Y.1993); *East Coast Novelty Co. v. City of New York,* 141 F.R.D. 245, 245 (S.D.N.Y.1992).

Local Rule 6.3 is to be narrowly construed and strictly applied so as to avoid repetitive arguments on issues that have been considered fully by the Court. In deciding a reconsideration and reargument motion, the Court must not allow a party to use the motion as a substitute for appealing from a final judgment. *See Morser v. AT & T Info. Sys.,* 715 F.Supp. 516, 517 (S.D.N.Y.1989); *Korwek v. Hunt,* 649 F.Supp. 1547, 1548 (S.D.N.Y.1986), *aff'd,* 827 F.2d 874 (2d Cir.1987). Therefore, a party may not "advance new facts, issues or arguments not previously presented to the Court." *Morse/Diesel, Inc. v. Fidelity & Deposit Co. of Md.,* 768 F.Supp. 115, 116 (S.D.N.Y.1991).

The decision to grant or deny the motion is within the sound discretion of the district court. *See Schaffer v. Soros,* No. 92 Civ. 1233, 1994 WL 592891, at *1 (S.D.N.Y. Oct. 31, 1994).

Upon receiving such a motion, a court may do any of the following. First, the motion may be denied, thereby leaving the original decision unaltered. *See Lehmuller v. Incorporated Village of Sag Harbor,* 982 F.Supp. 132, 135 (E.D.N.Y.1997). Alternatively, "the Court can grant a motion to reargue for the limited purposes of considering the effect of an overlooked matter," and after doing so may affirm and/or clarify the original decision. *Lehmuller,* 982 F.Supp. at 135-36; *see In re First American Corp.,* No. M8-85, 1998 WL 148421, at *3 (S.D.N.Y. Mar. 27, 1998), *aff'd,* 154 F .3d 16 (2d Cir.1998); *Violette v. Armonk Assocs., L.P.,* 823 F.Supp. 224, 226-27, 231 (S.D.N.Y.1993); *Brignoli v. Balch Hardy & Scheinman, Inc.,* 735 F.Supp. 100, 102-03 (S.D.N.Y.1990). Finally, having granted a motion to reconsider, the Court may vacate the original decision. *See Morin v. Trupin,* 823 F.Supp. 201, 203 (S.D.N.Y.1993); *Travelers Ins. Co. v. Buffalo Reins. Co.,* 739 F.Supp. 209, 211-13 (S.D.N.Y.1990).

***2** Motions for reargument in accordance with Rule 59(e) are governed by the same standards as those governing motions under Local Rule 6.3. *See Candelaria v. Coughlin,* 155 F.R.D. 486, 491 (S.D.N.Y.1994); *Morser,* 715 F.Supp. at 517.

Rule 60(b)(1) provides in relevant part that "upon such terms as are just, the court may relieve a party ... from a final judgment, order, or proceeding for ... (1) mistake, inadvertence, surprise, or excusable neglect." Rule 60(b)(6) provides relief "for any other reason justifying [that] relief." However, the Second Circuit has held that "Rule 60(b)(1) and 60(b)(6) are mutually exclusive, so that any conduct which generally falls under the former cannot stand as a ground for relief under the latter." *United States v. Cirami,* 535 F.2d 736, 740 (2d Cir.1976) (*quoting United States v. Erdoss,* 440 F.2d 1221, 1223 (2d Cir.)). Since Dellefave seeks relief on the basis of alleged mistakes of law, which is a ground for relief under Rule 60(b)(1), Rule 60(b)(6) is inapplicable.

Our Court of Appeals has instructed that Rule 60(b) is "extraordinary judicial relief" and can be granted "only upon a showing of exceptional circumstances." *Nemaizer v. Baker,* 793 F .2d 58, 61 (2d Cir.1986); *accord United States v. Bank of N.Y.,* 14 F.3d 756, 759 (2d Cir.1994). Like a motion under Rule 59(e), a Rule 60(b) motion is not a substitute for an appeal. *See Browder v. Director, Dep't of Corrections,* 434 U.S. 257, 263 & n. 7, 98 S.Ct. 556, 54 L.Ed.2d 521 (1978); *Hood v. Hood,* 59 F.3d 40, 42 (6th Cir.1995). "Mere dissatisfaction in hindsight with choices deliberately made ... is not grounds for finding the mistake, inadvertence, surprise or excusable neglect necessary to justify Rule 60(b)(1) relief." *Nemaizer,* 793 F.2d at 62.

II. *Dellefave Has Failed to Meet the Legal Standards Required for the Court to Reconsider, Amend, or Relieve Him from the Effect of the January 10, 2001 Opinion*

A. *Judgment on the Pleadings and Discovery*

Dellefave seeks relief from that portion of the January 10, 2001 opinion which granted Druzakio's Rule 12(c) motion for judgment on the pleadings on the grounds that (1) the Court overlooked facts that he presented; and (2) the Court erred in failing to convert the motion to a Rule 56 summary judgment motion in consideration of those additional materials.

First, as set forth above, a movant must show that the Court overlooked facts that had been presented in the underlying motion in order to warrant relief. *See Dietrich v. Bauer,* 76 F.Supp.2d 312, 327 (S.D.N.Y.1999). However, the additional materials that Dellefave suggests were overlooked-the proposed amended complaint and the DiRienzo Certification-were filed on October 17, 2000, and November 7, 2000, respectively, *after* the 12(c) motion was fully submitted upon oral argument on October 11, 2000. Therefore, these materials were not properly before the Court in deciding the Rule 12(c) motion, and their existence is not cause to reconsider or amend the January 10, 2001 opinion.

***3** Even if these materials had been submitted in opposition to the Rule 12(c) motion and that motion converted to one for summary judgment, they would have been disregarded as insufficient under the relevant evidentiary standards. The proposed amended complaint was unsigned, and therefore subject to being stricken pursuant to Rule 11. *See* Fed.R.Civ.P. 11 ("If a pleading, motion, or other paper is not signed, it shall be stricken unless it is signed promptly after the omission is called

to the attention of the pleader or movant.."); *Wrenn v. New York City Health and Hospitals Corp.,* 104 F.R.D. 553, 556 (S.D.N.Y.1985) (stating that failure to sign a proposed amended complaint "may constitute grounds for striking the pleading."). Moreover, rather than submitting the certified transcription of the deposition, Dellefave's counsel offered proof of that testimony in the form of a "certification," a summary based upon his notes. (Reconsideration Mtn. Ex. B ¶ 2.) Affidavits submitted pursuant to a summary judgment motion "shall be on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein." Fed.R.Civ.P. 56(e). DiRienzo's certification recounted his notes of a witness's testimony about her recollection of others' statements, and as such constituted inadmissible double or triple hearsay. *See* Fed.R.Evid. 801(c).

Second, Dellefave never argued that the Rule 12(c) motion should be converted to a summary judgment motion until the instant filing. As such, he may not argue for reconsideration, amendment, or relief on that basis here. *See Dietrich,* 76 F.Supp.2d at 327 ("a party may not advance new facts, issues or arguments not previously presented to the court."); *U.S. Titan v. Guangzhou Zhen Hua Shipping,* 182 F.R.D. 97, 100 (S.D.N.Y.1998) (same).

In any event, the fact that these materials were submitted pursuant to a motion to amend does not dictate that they should have been considered and treated as evidence in opposition to a motion for summary judgment. Whether to consider additional materials and thereby convert a Rule 12 motion into a summary judgment motion is within the sound discretion of the Court. *See Hayden v. County of Nassau,* 180 F.3d 42, 54 (2d Cir.1999) ("If a judge looks to additional materials, the motion should be converted into a motion for summary judgment"); *Diezcabeza v. Lynch,* 75 F.Supp.2d 250, 256 (S.D.N.Y.1999) ("The Court may, at its discretion, consider the affidavits attached to the motion and thereby treat the instant motion as one for summary judgment"); *Pisello v. Town of Brookhaven,* 933 F.Supp. 202 (E.D.N.Y.1996) ("In its discretion and upon notice to the parties, the motion for judgment on the pleadings is treated for one for summary judgment."). Dellefave has introduced no controlling authority for the proposition that the Court had an obligation to consider these additional materials in the motion to dismiss under the circumstances. [1]

1 The fact that the proposed amended complaint was considered pursuant to the motion to amend the complaint does not dictate that the Court was required to consider it as a part of the motion to dismiss. First, as set forth above, the two motions were submitted separately, and addressed in the same opinion for reasons of judicial economy. Moreover, the standard for considering materials submitted in a motion to dismiss differs from that in a motion to amend. In a motion to amend, it is appropriate to consider the proposed amended complaint in order to determine exactly which changes were sought. *See Smith v. Planas,* 151 F.R.D. 547, 550 (S .D.N.Y.1993). On the other hand, a court must consider only the pleadings, attached exhibits, and materials incorporated by reference in addressing a motion for judgment on the pleadings. Consideration of additional materials is discretionary. *See Royal Ins. Co. of America v. Sportswear Group, LLC,* 85 F.Supp.2d 275, 278 (S.D.N.Y.2000).

***4** As the Court acted within its discretion in declining to treat the motion to dismiss as a summary judgment motion, the fact that discovery had not yet finished is irrelevant to the disposition. *See, e.g., Excalibur Systems, Inc. v. Aerotech World Trade, Ltd.,* No. 98-CV-1931, (JG), 1999 WL 1281496, *1 n. 1 (finding that Rule 12(c) motion brought more than five months before the close of discovery was timely and appropriate).

No matters of fact or law having been overlooked, and the plaintiff having advanced no claim that exceptional circumstances exist justifying relief from the operation of the opinion, the motion to reconsider or amend the Rule 12(c) dismissal of the complaint against all defendants is hereby denied. [2]

2 In his reply brief, DelleFave alleges that "the court may have been influenced by ex parte communications" with the defendants in the form of a letter submitted between June 19, 2000 and June 26, 2000 that are not in plaintiff counsel's files. (Pltf. Reply Br. at 1, 4-5.) This assertion is groundless. First, the letter at issue was received and filed on June 21, 2000, and not considered at any time after June 23, 2000, the date it was treated as a motion and denied. Second, the letter was drafted by Druzakio's attorneys at Berger Stern & Webb, who asked the court to reconsider a May 23, 2000 granting Druzakio's former counsel's motion to withdraw. It

> addressed only Druzakio's representation and raised no substantive or procedural issue pertaining to DelleFave's claims. Finally, the letter was docketed as Document # 16 in the public court clerk's file for this case on June 27, 2000, a fact that DelleFave could have discovered with minimal effort.

In light of this result, and no additional matters of fact or law having been overlooked, the motion to reconsider the decision to deny the discovery motion is also denied.

B. *Motion to Amend*

Dellefave next seeks reconsideration, amendment or relief from that portion of the January 10, 2001 opinion which denied leave to amend the complaint, on the grounds that (1) the motion to amend the complaint to replead causes of action against defendants other than Druzakio could not have been filed in anticipation of an adverse ruling because only Druzakio had filed a Rule 12 motion; and (2) the alternative jurisdictional grounds for the Court's refusal to grant leave to amend the complaint contravenes Supreme Court precedent directing district courts to exercise supplemental jurisdiction. These contentions will be addressed in turn.

As set forth in the opinion, leave to amend was denied due to undue delay, dilatory motive, futility, and the fact that the amended complaint, if allowed, would be the subject of a successful motion to dismiss on jurisdictional grounds. *See* 2001 WL 25745, *9. Therefore, even if Dellefave did not have a dilatory motive in seeking to amend the complaint as to non-moving defendants, several adequate alternative grounds exist-including futility-on which to deny the motion to replead as to them.

Second, the Supreme Court precedent Dellefave cites on the alternative jurisdictional ground was not presented in the original motion, and therefore is not a basis on which to reconsider the opinion under the relevant standards cited above. In any case, these cases do not establish that a district court must either remand or exercise jurisdiction over a proposed amended complaint that raises no grounds for exercising federal jurisdiction. Instead, the cases cited address the exercise of federal jurisdiction in cases where the federal claim providing the basis for removal jurisdiction has been dismissed in nondiversity cases where no amended complaint has been proposed. Under those circumstances, district courts have discretion whether to exercise jurisdiction over the remaining state law claims. *See Wisconsin Dept. of Corrections v. Schacht,* 524 U .S. 381, 390-91, 118 S.Ct. 2047, 2053, 141 L.Ed. 364 (1998) (noting that district courts may exercise supplemental jurisdiction over state law claims after federal claims providing removal jurisdiction are dismissed); *Carnegie Mellon University v. Cohill,* 484 U.S. 343, 357 & n. 7, 108 S.Ct. 614, 622 & n. 7, 98 L.Ed.2d 720 (1988) (recognizing nonmandatory rule that where all federal claims are dismissed, district court should dismiss all state claims as well) (*citing Mine Workers v. Gibbs,* 383 U.S. 715, 726, 86 S.Ct. 1130, 1139, 16 L.Ed.2d 218 (1966) ("*pendent jurisdiction is a doctrine of discretion, not of plaintiff's right* ") (emphasis added); 28 U.S.C. § 1367(c)(3) ("The district courts may decline to exercise supplemental jurisdiction over a claim ... if ... (3) the district court has dismissed all claims over which it has original jurisdiction").

***5** Here, in contrast, the filing of a new complaint "supersedes the original, and renders it of no legal effect," *Shields v. Citytrust Bancorp, Inc.,* 25 F.3d 1124, 1128 (2d Cir.1994). Therefore, the existence of a basis on which to exercise pendent jurisdiction under the original complaint provides no justification for the court to exercise jurisdiction over an amended complaint that sets forth no basis for federal jurisdiction. It would be futile to allow a plaintiff to file an amended complaint that would be the subject of a successful motion to dismiss on jurisdictional grounds. *See Chan v. Reno,* 916 F.Supp. 1289, 1308 (S.D.N.Y.1996). Therefore, the procedural posture of the case, the fact that the proposed amended complaint failed to state causes of action or assert a basis for the exercise of federal jurisdiction, and considerations of judicial economy all weighed in favor of dismissing the action rather than remanding. *See, e.g., Moore v. State of Indiana,* 999 F.2d 1125, 1128 (7th Cir.1993) (affirming district court's refusal to grant leave to amend and dismissal of the case where proposed amended complaint would be subject to successful motions to dismiss for failure to state a cause of action and lack of federal jurisdiction).

The motion to reconsider the ruling on the proposed amended complaint is therefore denied.

C. *Rule 11*

Dellefave seeks reconsideration of the imposition of attorneys' fees pursuant to Rule 11 because (1) Rule 11 does not apply to a complaint filed in state court because the complaint is not signed with the certification required

to impose sanctions; and (2) the proposed amended complaint and documents attached and incorporated by reference thereto stated claims for hostile work environment discrimination and tortious interference with contract claims.

First, as above, Dellefave never before raised the first ground for reconsideration of the sanctions award. Therefore, it would not be properly considered by the Court at this time under the relevant legal standards set forth above.

However, a brief discussion of this argument is warranted to highlight a change in the law. Dellefave cites *Mareno v. Jet Aviation of America, Inc.,* 970 F.2d 1126, 1128 (2d Cir.1992), *cert. denied,* 507 U.S. 966, 113 S.Ct. 1401 (1992), and prior Second Circuit cases for the proposition that complaints filed in state court may not be the subject of Rule 11 sanctions. However, Rule 11 was amended in 1993 to allow a district court to impose sanctions not only for a party's "signing" a paper filed with the district court, but for "presenting to the court (whether by signing, filing, submitting, or later advocating)" a document that is otherwise sanctionable. Fed.R.Civ.P. 11(b) (December 1, 1993 amendment). The Advisory Committee Notes explain that "if after a notice of removal is filed, a party urges in federal court the allegations of a pleading filed in state court (whether as claims, defenses, or in disputes regarding removal or remand), it would be viewed as 'presenting' - and hence certifying to the district court under Rule 11-those allegations." *See Buster v. Greisen,* 104 F.3d 1186, 1190 n. 4 (9th Cir.1997) (affirming imposition of sanctions by federal removal court for pursuing allegations in complaint first filed in state court), *cert. denied,* 522 U.S. 981, 118 S.Ct. 441, 139 L .Ed.2d 378 (1997).

***6** By advocating the allegations in the original complaint in his written and oral opposition to Druzakio's dismissal and sanctions motions (Pltf. Rule 11 Br. at 2), and in support of his motion to amend (Pltf. Amd. Br. at 3, DiRienzo Cert. at 2), Dellefave has "presented" the claims of the original complaint to this Court. *See, e.g., Loving v. Pirelli Cable Corp.,* 11 F.Supp.2d 480, 493 (D.Del.1998) (granting Rule 11 sanctions on the basis of complaint originally filed in state court that was defended at oral argument in federal court). Therefore, he may properly be sanctioned for presenting frivolous claims pursuant to Rule 11.

The second argument Dellefave advances in support of the motion to reconsider the award of sanctions does not suggest that this Court overlooked a matter of fact or law, but rather that the Court misapplied the law. As such, the motion in effect seeks to appeal the prior decision rather than to ask the Court to reconsider it under the proper standard.

No appropriate grounds having been advanced for reconsideration of the sanction award, the imposition of attorneys' fees will stand.

III. *Druzakio's Motion for Fees and Costs*

Within the discretion of the Court, Druzakio's motion for attorneys' fees and costs associated with opposing the instant motion is denied.

Conclusion

For the foregoing reasons, the motions are denied in full.

It is so ordered.

All Citations

Not Reported in F.Supp.2d, 2001 WL 286771

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2014 WL 1355622
Only the Westlaw citation is currently available.
United States District Court,
S.D. New York.

Edward PETERSON, Plaintiff,
v.
HOME DEPOT U.S.A., INC., Defendant.

No. 11 Civ. 5747(ER).
|
Signed April 4, 2014.

OPINION AND ORDER

RAMOS, District Judge.

***1** Plaintiff Edward Peterson moves pursuant to Local Rule 6.3 for reconsideration of this Court's Order (Doc. 18) denying Plaintiff's application for a further extension of the discovery period (the "October 3 Order," or the "Order"). [1] Doc. 19. The motion is DENIED.

1 The procedural history of this case is discussed in the October 3 Order, familiarity with which is presumed.

I. Legal Standard

Rule 6.3 of the Local Civil Rules for this District provides for reconsideration or reargument of a court's order on a motion only where "the court has overlooked 'controlling decisions or factual matters that were put before it on the underlying motion ... and which, had they been considered, might have reasonably altered the result before the court.' " *Mikol v. Barnhart,* 554 F.Supp.2d 498, 500 (S.D.N.Y.2008) (alteration in original) (quoting *Greenwald v. Orb Commc'ns & Mktg., Inc.,* No. 00 Civ.1939(LTS) (HBP), 2003 WL 660844, at *1 (S.D.N.Y. Feb. 27, 2003)); *see also* Local R. 6.3. "Reconsideration of a court's previous order is an 'extraordinary remedy to be employed sparingly in the interests of finality and conservation of scarce judicial resources.' " *Parrish v. Sollecito,* 253 F.Supp.2d 713, 715 (S.D.N.Y.2003) (quoting *In re Health Mgmt. Sys., Inc. Sec. Litig.,* 113 F.Supp.2d 613, 614 (S.D.N.Y.2000)). Local Rule 6.3 is "narrowly construed and strictly applied so as to avoid repetitive arguments on issues that have been considered fully by the Court." *Mikol,* 554 F.Supp.2d at 500 (quoting *Dellefave v. Access Temps., Inc.,* No. 99 Civ. 6098(RWS), 2001 WL 286771, at *1 (S.D.N.Y. Mar.22, 2001)) (internal quotation mark omitted). "Where the movant fails to show that any controlling authority or facts have actually been overlooked, and merely offers substantially the same arguments he offered on the original motion or attempts to advance new facts, the motion for reconsideration must be denied." *Id.*

A motion for reconsideration under Local Rule 6.3 is not a substitute for appeal, *Boart Longyear Ltd. v. Alliance Indus., Inc. .,* 869 F.Supp.2d 407, 418 (S.D.N.Y.2012), nor is it a vehicle for a party dissatisfied with the Court's ruling to voice its disagreement with the decision. *R.F.M.A.S., Inc. v. Mimi So,* 640 F.Supp.2d 506, 512–13 (S.D.N.Y.2009). "Courts have repeatedly been forced to warn litigants that such motions should not be made reflexively to reargue 'those issues already considered when a party does not like the way the original motion was resolved.' " *Boart Longyear,* 869 F.Supp.2d at 418 (quoting *Makas v. Orlando,* No. 06 Civ. 14305(DAB), 2008 WL 2139131, at *1 (S.D.N.Y. May 19, 2008)); *see, e.g., Anwar v. Fairfield Greenwich Ltd.,* 884 F.Supp.2d 92, 96 (S.D.N.Y.2012) ("The provision for reargument is not designed to allow wasteful repetition of arguments already briefed, considered and decided." (quoting *Schonberger v. Serchuk,* 742 F.Supp. 108, 119 (S.D.N.Y.1990) (internal quotation marks omitted)); *see also Associated Press v. U.S. Dep't of Def.,* 395 F.Supp.2d 17, 19 (S.D.N.Y.2005) (noting that a motion for reconsideration is not "an occasion for repeating old arguments previously rejected").

***2** Whether to grant or deny a motion for reconsideration is "within 'the sound discretion of the district court.' " *Premium Sports Inc.,* No. 10 Civ. 3752(KBP), 2012 WL 2878085, at *1 (S.D.N.Y. June 11, 2012) (quoting *Aczel v. Labonia,* 584 F.3d 52, 61 (2d Cir.2009)). Under the strict standard applied by courts in this Circuit, "reconsideration will generally be denied." *In re Health Mgmt. Sys., Inc. Sec. Litig.,* 113 F.Supp.2d at 614.

II. Plaintiff's Motion

In moving for reconsideration, Plaintiff first argues that the October 3 Order will result in "manifest injustice," as Plaintiff's inability to conduct metallurgical testing will preclude him from introducing the scientific evidence needed to prove his case. *See* Pl.'s Mem. in Supp. at

6. Plaintiff raised this argument in his initial motion. *See* Doc. 16 ("Letter Brief"), at 5 ("The metallurgical testing sought by Plaintiff with either prove (or disprove) [Plaintiff's expert's] preliminary opinions and, without such testing, Plaintiff will be unable to meet his burden of proof."). The Court did not overlook this argument in denying Plaintiff's request to extend discovery, but rather expressly considered it as a factor demonstrating Plaintiff's *lack* of diligence in complying with the existing discovery schedule. *See* Order at 5 ("[N]otwithstanding Plaintiff's claim that he will be unable to satisfy his burden of proof in the absence of this crucial information, Plaintiff failed to conduct metallurgical testing during the five months that followed [between the issuance of Plaintiff's expert report and the discovery deadline]."). This argument having been raised and rejected on the initial motion, it cannot be raised a second time as a basis for reconsideration.

Plaintiff also argues that the Court overlooked "controlling law on excusable neglect that ..., more likely than not, would have altered" the Court's decision. Pl.'s Reply at 2; *see* Pl.'s Mem. in Supp. at 7–10. This argument fails for multiple reasons. First, despite Plaintiff's assertions to the contrary, *see* Pl.'s Reply at 1–2, Plaintiff's "excusable neglect" argument represents a new legal theory improperly raised for the first time on motion for reconsideration. *See Albury v. J.P. Morgan Chase,* No. 03 CIV.2007(HBP), 2005 WL 1653939 (S.D.N.Y. July 14, 2005), at *3 ("Except where a movant is relying on new facts that could not have been previously discovered or newly promulgated law, additional facts or new legal theories cannot be asserted by way of a motion for reconsideration."); *see also* Letter Motion (arguing in terms of Rule 26 as opposed to Rule 6, which now forms the basis of Plaintiff's objection). Plaintiff's original application failed to argue excusable neglect, and it was not incumbent on the Court to raise that argument *sua sponte* in order to make Plaintiff's case for him. Excusable neglect is therefore improperly raised, and Plaintiff's motion fails for that reason alone.

***3** Even if Plaintiff had raised excusable neglect in its prior application, the instant motion would still fail because the law to which Plaintiff now directs the Court is not "controlling." Since Plaintiff sought a modification of the parties' discovery plan, Rule 16(b)(4), and not Rule 6(b)(1), governs the application. *See* Fed.R.Civ.P. 16(b)(4) (providing that a Rule 16 scheduling order "may be modified only for good cause and with the judge's consent"); *see also Corkrey v. Internal Revenue Serv.,* 192 F.R.D. 66, 67 (N.D.N.Y.2000) ("Because the rule which authorized the scheduling order contains a specific provision governing the relief sought here, it is that rule which governs the motion ... rather than Rule 6(b)."). The October 3 Order specifically quoted Rule 16 and noted that, "[t]o demonstrate good cause, a party seeking an extension must show that the relevant deadline could not reasonably be met despite that party's diligence." Order at 3–4. Thus, the Court did not overlook, but rather expressly applied, the controlling law for purposes of Plaintiff's application.

Finally, even if Rule 6 did provide the applicable standard in this case, the substance of Plaintiff's excusable neglect argument is itself meritless. The Second Circuit has indicated that the relevant factors in evaluating such an argument include "(1) the danger of prejudice to the non-moving party, (2) the length of delay and impact on judicial proceedings, (3) the reason for the delay, including whether it was within the reasonable control of the moving party, and (4) whether the moving party acted in good faith." *Williams v. KFC Nat. Mgmt. Co.,* 391 F.3d 411, 415 (2d Cir.2004) (citing *Pioneer Inv. Servs. Co. v. Brunswick Associates Ltd. P'ship,* 507 U.S. 380, 395, 113 S.Ct. 1489, 123 L.Ed.2d 74 (1993)). Here, Plaintiff has failed to establish any justifiable basis for the delay. He first repeats his previous argument that he was attempting to "avoid a spoliation claim." Pl.'s Mem. in Supp. at 8; *see also* Letter Motion at 2 ("In order to avoid a claim by Defendant of evidence spoliation, the Plaintiff has refrained from conducting destructive testing on the Ladder without Defendant's consent or participation."). The Court did not overlook this argument in its October 3 Order. *See* Order at 6 (noting that a spoliation concern explains neither Plaintiff's delay in seeking an extension from the Court nor his failure to timely alert the Court to Defendant's apparent unwillingness to cooperate with the request for metallurgical testing). Although Plaintiff indicates that the March 23, 2012 status conference was the first time Plaintiff "realized Defendant was expressly unwilling to consent and/or participate in such testing," Pl.'s Mem. in Supp. at 9, the Court implicitly considered and rejected this argument when it held that "two emails [from Plaintiff to Defendant] over a four-month time period ... fail to demonstrate diligence" on Plaintiff's part. Order at 6.

***4** Finally, Plaintiff offers the following explanation for his eleventh-hour request:

> The Plaintiff ... avoided unilateral testing of the Ladder because he was under a good faith assumption that the Court would be amenable to granting additional time for metallurgical testing of the Ladder because of the cooperative course of dealings between the parties throughout discovery and the perceived flexibility that had been established through the Court's multiple endorsement [sic] of previous requests for extensions of time, which were never followed by an admonishment that a certain discovery cutoff date was "final."

Pl.'s Mem. in Supp. at 8–9 (citation omitted). Plaintiff is essentially indicating that he was operating under the assumption that, since the Court had granted previous requests to extend the discovery period, the parties were no longer under an obligation to comply with Court-imposed deadlines. Viewed differently, Plaintiff's position implies that, once the Court waived the earlier deadlines, it was effectively estopped from enforcing future deadlines unless it put the parties on notice that a new date was "final." But all deadlines are "final" unless and until the Court grants an extension. Any assumption to the contrary was unreasonable, regardless of whether it was made in good faith. In any event, Plaintiff's misguided assumption still fails to explain why he did not request the extension, or alert the Court to Defendant's noncooperation, in advance of the deadline. [2] Plaintiff's attempt to deflect responsibility from himself and onto the Court is unavailing.

2 The cases to which Defendant cites are distinguishable on that basis. See PL's Mem. in Supp. at 10. *In Cedar Petrochemicals, Inc. v. Dongbu Hannong Chemical Co., Ltd.,* 769 F.Supp.2d 269, 281 (S.D.N.Y.2011), there was "at least some merit" to the plaintiff's claim that circumstances outside its control had contributed to the delay; the plaintiff had merely failed to "plan ahead" and anticipate those circumstances. *In Bahrami v. Ketabchi,* No. 05 CIV. 3829(RMB)(KNF), 2010 WL 1948599 (S.D.N.Y. May 13, 2010), counsel misread the date on the court's order, leading to a late filing. *In Martinez v. Barasch,* No. 01 CIV. 2289(MBM), 2004 WL 1555191 (S.D.N.Y. July 12, 2004), the key facts underlying the defendants' jurisdictional challenge were belatedly disclosed, thus excusing the defendants' delay in raising them. Here, Plaintiff was aware of the need for metallurgical testing and of the impending deadline but simply failed to act prior to the close of discovery.

III. Conclusion

For the reasons set forth above, Plaintiff's motion for reconsideration is DENIED. The Clerk of Court is respectfully directed to terminate the motion (Doc. 19).

It is SO ORDERED.

All Citations

Not Reported in F.Supp.3d, 2014 WL 1355622

2004 WL 1943099
United States District Court,
S.D. New York.

METROPOLITAN OPERA ASSOCIATION, INC., Plaintiff,
v.
LOCAL 100, HOTEL EMPLOYEES AND RESTAURANT EMPLOYEES INTERNATIONAL UNION, et al., Defendants.

No. 00 Civ. 3613(LAP).
|
Aug. 27, 2004.

Attorneys and Law Firms

Cohen Lans LLP, New York, NY, Deborah E. Lans, for Plaintiff Metropolitan Opera Association, Inc., of counsel.

Stillman & Freidman, PC, New York, NY, Charles A. Stillman, Catharine Easterly, and Sharon E. Grubin, General Counsel, Metropolitan Opera, New York, NY, for Plaintiff Metropolitan Opera Association, Inc., of counsel.

Morvillo, Abramowitz, Grand, Iason & Silberberg, P.C., New York, New York, Elkan Abramowitz, Jonathan S. Sack, Elizabeth Small, for the firm of Herrick, Feinstein LLP, of counsel.

Levy, Ratner & Behroozi, P.C., New York, New York, Daniel Engelstein, Adam Rynard, for Defendant Local 100, Here International Union and the firm of Davis, Cowell & Bowe, LLP, of counsel.

Hogan & Hartson, LLP, New York, NY, Steven M. Edwards, for Davis, Cowell & Bowe, LLP, of counsel.

Herrick, Feinstein LLP, New York, New York, James A. Moss, Marianne Yen, for Defendants Henry Tamarin and Dennis Diaz, of counsel.

OPINION

PRESKA, J.

***1** In an Opinion dated January 28, 2003, and reported at 212 F.R.D. 178 (the "Opinion"), the motion of plaintiff, the Metropolitan Opera Association, Inc. (the "Met"), for judgment as to liability against defendants Local 100, H.E.R.E. ("Local 100" or the "Union"), and Henry Tamarin and Dennis Diaz ("Tamarin" and "Diaz"; collectively, the "individual defendants") and for sanctions against defendants and their counsel was granted. Herrick Feinstein, LLP ("Herrick"), Davis, Cowell & Bowe ("Davis"), [1] the Union and the individual defendants now move for reconsideration of the Opinion. The facts pertinent to the instant motions have been set forth in extensive detail in the Opinion, familiarity with which is assumed.

1 Although the notice of motion dated March 3, 2003 states that both the Union and Davis move for reconsideration, and the opening line of the Levi, Ratner & Behroozi brief notes that the firm represents both the Union and Davis, the text of the briefs and the conclusions do not mention Davis other than to state in a footnote that Davis joins the arguments made on behalf of all other defendants. Thus, Davis will not be treated separately. Because movants have joined in each other's motions, all arguments that were made are considered as to all movants.

I. Standard for Reconsideration

Rule 59(e) motions for reconsideration in the Southern District of New York are governed by Local Rule 6.3. The decision whether to grant such a motion is within the district court's sound discretion. *Ursa Minor Ltd. v. Aon Fin. Prods., Inc.,* No. 00 Civ. 2474, 2000 U.S. Dist. LEXIS 12968, at *1 (S.D.N.Y. Sept.8, 2000), *aff'd,* 7 Fed. Appx. 129 (2d Cir.2001); *see also Wallingford Shopping, L.L.C. v. Lowe's Home Centers, Inc.,* 171 F.Supp.2d 152, 153 (S.D.N.Y.2001). In this Circuit, "[t]he standard for granting such a motion is strict, and reconsideration will generally be denied...." *Shrader v. CSX Transp., Inc.,* 70 F.3d 255, 257 (2d Cir.1995); *see also Ursa Minor,* 2000 U.S. Dist. LEXIS 12968, at *1; *Wallingford,* 171 F.Supp.2d at 153. "[R]econsideration of a previous order is an extraordinary remedy to be employed sparingly in the interests of finality and conservation of scarce judicial resources." *In re Health Mgmt. Sys., Inc. Sec. Litig.,* 113 F.Supp.2d 613, 614 (S.D.N.Y.2000) (internal quotation marks and citations omitted).

Local Rule 6.3 provides that the motion shall "set[ ] forth concisely the matters or controlling decisions which counsel believes the court has overlooked." New assertions cannot be raised in a motion for reconsideration. *See Bueno v. Gill,* 237 F.Supp.2d 447, 449 n. 1 (S.D.N.Y.2002) (citing *National Union Fire Ins. Co. of Pittsburgh, PA v. Stroh Cos.,* No. 98 Civ. 8428, 2000 U .S. Dist. LEXIS 2581, at *17-18 (S.D.N.Y. Mar. 9, 2000), *aff'd,* 265 F.3d 97 (2d Cir.2001)); *Litton Indus., Inc. v. Lehman Bros. Kuhn Loeb Inc.,* No. 86 Civ. 6447, 1989 U.S. Dist. LEXIS 9145, at *9-10 (S.D.N.Y. Aug. 4, 1989). Rather, a motion for reconsideration "is limited to bringing to the Court's attention controlling authority or factual matters presented to the Court in the underlying motion and overlooked." *Bueno,* 237 F.Supp.2d at 449.

I have already noted, and sanctions counsel to Herrick has acknowledged, that a motion for reconsideration does not mean the parties get a "do over." (Lans III, [2] Ex. 22 (Transcript of February 10, 2003 Conference ("2/10/03 Tr.") at 9).) As former Judge Martin has so aptly commented:

2 Reference is to the Declaration of Deborah E. Lans in Opposition to Motions for Reconsideration sworn to May 5, 2003.

***2** The purpose of a motion to reargue is [neither] to start a new round of arguments ... [n]or should the Court be expected to wade through lengthy papers that simply reiterate in slightly different form the arguments already made in the party's original papers.
Forsyth v. Fed'n Employ. & Guidance Serv., No. 97 Civ. 3399, 2003 U.S. Dist. LEXIS 3314, at *1-2 (S.D.N.Y. Mar. 6.2003).

Further, reconsideration will be denied unless the decisions or data relied upon might reasonably be expected to alter the conclusion reached by the court. *Shrader,* 70 F.3d at 257; *see also Anglo Am. Ins. Grp., P.L.C. v. CalFed, Inc.,* 940 F.Supp. 554, 557 (S.D.N.Y.1996) (successful motion for reconsideration "must present 'matters or controlling decisions the court overlooked that might materially have influenced its earlier decision" ') (quoting *Morser v. AT & T Info. Sys.,* 715 F.Supp. 516, 517 (S.D.N.Y.1989)); *Adams v. United States,* 686 F.Supp. 417, 419 (S.D.N.Y.1988) (motion for reconsideration denied where Government failed to point to law which was overlooked and "evidence of agency interpretation which the court is said to have overlooked lends no support to the Government's case").

II. Herrick's Motion

As mentioned above, at the February 10, 2003 conference, I raised my concern that Herrick was merely looking for a chance to have a "do over" on the issues that were raised or could have been raised in sanctions motion. In response, Herrick's newly-retained distinguished sanctions counsel, Elkan Abramowitz, gave assurances that Herrick would move only on issues that were "the proper subject of a motion to reconsider" and that any new issues would concern arguments that were not "waivable." (2/10/03 Tr. at 9.) After more discussion of the matter, Mr. Abramowitz stated: "[i]f there are no grounds for [a] motion to reconsider, I represent as an officer of the court I will not burden the record further...." (*Id.* at 14.) Despite this representation, no arguments were raised on reconsideration that were not raised or could not have been raised on the underlying motion, and, thus, the motion is denied on that basis alone. Nevertheless, given the serious nature of the misconduct detailed in the Opinion, in the alternative, Herrick's motion for reconsideration is granted. Upon reconsideration, however, I adhere to my previous decision with respect to Herrick.

On this motion, Herrick lawyers James A. Moss and Marianne Yen have both submitted declarations which purport to refute the factual findings made in the Opinion. A statement in each one, however, reveals the true substance of Herrick's motion for reconsideration. Moss says: "In this case we strongly disagree with the Court's criticism of our handling of this case." (Moss Decl. [3] ¶ 6.) Yen says: "I respectfully request that the Court accept and consider this Declaration so as to allow me to provide *a more complete response* to what the Court has determined to be an incomplete explanation of my actions." (Yen Decl. [4] ¶ 1 (emphasis added).) Needless to say, these are not proper grounds for reconsideration. In any event, the supposed factual issues raised (more accurately, half raised) by the Moss and Yen Declarations are wholly insufficient to affect the result. (*See, e.g.,* Lans III ¶ 42.)

3 Reference is to the Declaration of James A. Moss sworn to March 3, 2003.

4 Reference is to the Declaration of Marianne Yen sworn to March 3, 2003.

***3** In its motion, Herrick continues the approach utilized on the sanctions motion-it selects a few points to quibble over while ignoring numerous larger, more serious issues raised concerning its conduct in the process of discovery in this action. For example, Moss, the Herrick supervising partner on this matter during most of the time period upon which the Opinion is based, primarily addresses two isolated failings by Herrick lawyers found in the Opinion-counsel's response that no documents responsive to the Met's Third Document Request existed and the misrepresentations surrounding the Peter Ward deposition-and remains silent on the numerous other failings found. (*See* Lans III ¶ 8.)

Similarly, as part of his explanation of why he did not submit an affidavit in opposition to the sanctions motion, Moss states that "[i]n fact prior to the full briefing on the sanctions motion, I did submit a seven-page letter to the Court dated April 12, 2002 [hereinafter the "April 12 letter"], addressing many of the legal and factual issues the plaintiff had indicated it wanted to raise in its motion papers." (Moss Decl. ¶ 4.) Moss then complains that the Opinion cited some "observations made by Sharon Grubin [, counsel to the Met,] in her letter to the Court of April 25, 2002, but made no mention at all of the [April 12 letter]; instead [the Opinion found Moss'] silence was 'deafening." ' (*Id.*) First, some two weeks *after* the sanctions motion was served, Grubin's April 25 letter brief "(1) follow[ed] up on [the Met's] December 17 [, 2001] application for sanctions, including attorneys' fees, regarding the subpoenaed depositions of the Met Directors, and (2) supplement[ed] that application to request similar relief with regard to defendant's counsel's behavior concerning the deposition of Peter Ward." 212 F.R.D. at 183, 216. Thus, the April 25 Grubin letter was a stand-alone supplement to the April 11, 2002 sanctions motion (in the informal manner utilized by all parties without objection throughout the case, *see infra* note 15), and was considered only on the two items noted therein. Moss' April 12 letter discussed neither and, indeed, noted that, because of time constraints, "we have not endeavored ... to prepare a substantive response to [Met] counsel's many arguments." (Moss Decl., Ex. A at 3; *see also id.* at 7 ("If your Honor is inclined to permit the Met at this late stage to interpose this silly motion, we will certainly respond to it at length.").) Moss nowhere explains, however, how the unsworn letter, by its terms not a "substantive response" or a response "at length," should have been considered as part of the record on the sanctions motion or, more importantly, on what issues it should have been considered.

Then, in an apparent attempt to come within the rubric of reconsideration and to point out matters overlooked in the sanctions motion, Moss notes that he is attaching a copy of the April 12 letter to his declaration and then "ask[s] th [e] Court to review it, *particularly if the Court did not do so before deciding to grant the plaintiff's motion."* (*Id.* (emphasis added).) The implication that the April 12 letter had not been read prior to issuance of the Opinion either represents massive (and incredible) memory loss or is wholly disingenuous. When, on the eve of trial, the Met asked permission to file its sanctions motion, I was reluctant to adjourn the trial without gauging whether the motion was serious or frivolous. Thus, the Met was instructed to serve the motion the next day so that it could be reviewed. After reviewing the motion, Moss wrote the April 12 letter discussing the motion. In the April 12 teleconference that followed in which Moss participated, the motion and the April 12 letter were discussed at length. Moss' suggestion now that the April 12 letter might not have been read prior to the Opinion represents more of the type of conduct on which the Opinion was based. Moreover, during the April 12 teleconference, I noted that, even assuming the various quibbles raised in the April 12 letter were correct, the letter was entirely silent on the numerous serious allegations of discovery failure detailed in the motion. (*See* Lans III ¶¶ 9-12.) Precisely the same approach has been utilized by Herrick on the reconsideration motion. A few factual matters are picked apart-mostly unsuccessfully (*see* Lans III ¶¶ 13-36)-while numerous major findings about Herrick's conduct over the course of the discovery process are left unaddressed.

A. Factual Issues

***4** As an initial ground for reconsideration, Herrick argues that numerous facts relating to the discovery process in this case were overlooked and misconstrued. (Herrick Br. [5] at 2.) Herrick contends that "[m]any of the crucial findings of fact by the Court are not supported by the record as a whole, because the Court apparently relied solely on the Met's representations and accepted them as true." (*Id.* at 3.) The fact that the Opinion cites to the Met's submissions-which were extraordinarily detailed and well-supported by documentary evidence-does not

render the findings incorrect or unsupported. Indeed, the statements of Deborah Lans, counsel for the Met, in her moving declaration submitted on the motion for sanctions were made under penalty of perjury and stood, for the most part, unrebutted by defendants. (*See* Lans II, [6] Ex. 60 (Lans' moving declaration marked as a marked pleading and indicating that most of the factual statements in the moving declaration were unrebutted).) The non-substantive footnote in Herrick's reply brief does not in any way change the fact that the factual allegations in the Lans Declaration remain largely unrebutted. (*See* Herrick Reply Br. [7] at 3 n.2 ("We dispute many of the assertions contained in the latest 75-page Lans Declaration and the accompanying legal memorandum, as we do many of the statements in the Met's declarations submitted in connection with its motion for judgment and this motion, totaling 236 pages. Given the length of the Met's submissions and present space limitations, we reject the notion that each of those allegations is admitted if not specifically denied.").) For the record, there are no page limits, or "space limitations," on affidavits, and no request was made by Herrick for additional briefing pages. In addition, some of the findings in the Opinion are based on my own independent recollection of the facts and events during the discovery process. *E.g.,* 212 F.R.D. at 217 (Yen's representation in the December 18 teleconference that Ward would be "getting on a plane.")

5 Reference is to the Memorandum of Law in Support of Herrick, Feinstein LLP's Motion for Reconsideration dated March 3, 2003.

6 Reference is to the Reply Declaration of Deborah E. Lans, sworn to May 15, 2002.

7 Reference is to the Reply Memorandum of Law in Support of Herrick, Feinstein LLP's Motion for Reconsideration dated May 30, 2003.

Supposedly overlooked facts that Herrick does deign to discuss do not aid its cause. For example, Herrick argues that the finding in the Opinion that "[t]he Union had initially objected to a walk-through [of its offices by Met counsel], and, in a effort to avoid it, Yen produced a floor plan of the Union's offices," 212 F.R.D. at 209 n. 18, overlooked the fact that the floor plan had been produced *prior to* the request for a walk-through, not *in response to* the request. Although Herrick is correct as to the narrow fact of when the floor plan was produced, that fact in no way diminishes the finding that the Union argued that Met counsel's request for a walk-through of Union offices should be denied *because* a floor plan, drawn by a Herrick lawyer and now admitted to be inaccurate, had been produced. (*See* Lans III ¶ 42(b).) Thus, the fact that the floor plan was produced prior to the request for a walk through would not reasonably be expected to alter the conclusion in the Opinion. *See Shrader,* 70 F.3d at 257.

***5** Similarly, Herrick argues that the finding that the "Met's Fourth Document Request dated October 31, 2001 was never responded to," 212 F.R.D. at 193, was incorrect because "documents were produced in response thereto." (Herrick Br. at 4.) Although the wording of the Opinion could have been more precise, the context of the finding and the citation following it make clear that, as admitted in Ms. Yen's May 22, 2002 letter, a written response [8] to the Met's Fourth Document Request had never been served "because one associate was transitioning out of the case and another transitioning in." 212 F.R.D. at 193. [9]

8 *See* Fed.R.Civ.P. 34(b) ("The party upon whom the [Rule 34] request is served shall serve a written response within 30 days after the service of the request.... The response shall state, with respect to each item or category, that inspection and related activities will be permitted, as requested, unless the request is objected to, in which event the reasons for the objection shall be stated.").

9 The entire finding that Herrick complains of reads: "The Met's Fourth Document Request dated October 23, 2001 was never responded to because one associate was transitioning out of the case and another transitioning in. (*See* Letter from Yen to the Court dated May 22, 2002 ("Yen 5/22/02 Ltr.") at 5.) Moss, the partner in charge during that period, is silent." 212 F.R.D. at 193.

Similarly, Herrick contests the finding that "counsel lied to the Court about a witness' vacation schedule," 212 F.R.D. at 182; *see also id.* at 216-18, 226-27. (Herrick Br. at 4.) Even on reconsideration, however, neither Moss nor Yen denies representing-falsely, according to Ward's testimony under oath-that Ward would be out of town for three weeks on vacation. Moss and Yen's wordy dancing around in their declarations on reconsideration in no way contradicts or otherwise calls into question the finding that Yen represented to Met counsel and the Court that Ward would be getting "on a plane" on a certain date and that both Yen and Moss represented repeatedly to Met

counsel and the Court that Ward would be out of town (not in the New York area) on vacation. (*See* Lans III ¶¶ 20-36.) [10]

10 The Moss and Yen Declarations are, of course, silent as to the other machinations surrounding the Ward deposition. *See* 212 F.R.D. 216-18, 226-27.

Presumably intending to discuss a factual matter, Herrick's brief contains a heading stating, "The Union Produced All Relevant Documents." (Herrick's Br. at 10.) The discussion recites the Union's responses to plaintiff's various document requests, including productions of documents, Rule 34 responses [11] and the Bates numbers of some of the documents produced: After noting these responses, the section concludes: "We respectfully submit that the Court should have taken into account this record of actual compliance by defendants and their counsel, which we believe refutes a finding of wholesale abdication of responsibility by all defense counsel involved." (Herrick Br. at 11.)

11 Herrick's recitation makes clear that, contrary to the implication in its discussion of the finding in the Opinion that "the Met's Fourth Document Request ... was never responded to," Herrick Br. at 4, it well knows the difference between producing documents in response to a Rule 34 request and serving a written response to a Rule 34 request. *Compare* "[d]ocuments responsive to the Fourth Document Demand were timely produced on November 21, 2001 ...," Herrick Br. at 11, *with* "Ms. Yen submitted a Rule 34 response to the 32 separately-numbered document requests comprising the Met's Fifth Document Request ...," *id.*

First, that various productions were made and responses served in no way supports the proposition that "[t]he Union Produced All Relevant Documents." At the very least, and aside from the documents the Opinion finds were not produced, the admitted deletion of scores of electronic documents precludes anyone's ever knowing whether *all* relevant documents were produced. The text is a non-sequitur to the heading.

Second, as to Herrick's request that the record of compliance by defendants and their counsel be taken into account, I would have thought that it was clear that a lengthy opinion devoting some thirty-one pages in Federal Rules Decisions to "The Course of Discovery" would be seen as taking into account all of the conduct involved in the discovery process, including the productions made by the Union (and, indeed, conduct by the Met's counsel). *See* 212 F.R.D. at 182. To the extent that there is any ambiguity, however, I state unequivocally that all of the Union's productions were taken into account in the underlying sanctions motion and in this reconsideration motion as well. Herrick's oft-cited reprise that the Union produced a large number of documents is, however, insufficient to overcome the numerous serious abuses of the discovery process by the Union and its counsel. These and the other factual matters raised by Herrick do not merit a change in the underlying sanctions decision. (*See* Lans III ¶ 42.)

B. Legal Matters

***6** In arguing that "controlling precedents were overlooked or misconstrued by the Court," Herrick Br. at 15, Herrick argues principally that, as to Rule 37, Second Circuit precedent required proof of prejudice before such sanctions may be imposed, *id.* at 15-17, and, as to Rule 37, Rule 26(g) and 28 U.S.C. § 1927, sanctions may not be imposed without proof of relevance of the documents in question, *id.* at 17. Herrick does not address the Court's inherent power. Both of these arguments were raised, and rejected, in the underlying sanctions decision.

1. Rule 37

Herrick argues that prejudice must be shown under Rule 37 as a predicate to sanctions. As noted, this argument was fully presented in Herrick's original opposition papers and rejected in the Opinion. *See* 212 F.R.D. at 229 ("the Union's assertion that the Met must show prejudice before a sanction may be ordered under Rule 37 is without merit"). Thus, this argument is, in fact, a do over. Perhaps worse, however, this argument ignores the very next two paragraphs of the Opinion where prejudice was expressly found. *See* 212 F.R.D. at 229 ("[I]t is beyond peradventure that many documents have been destroyed that related directly to events taking place during the most critical time period in this action, that is, when the Union planned its campaign against the Met, decided what its leaflets, letters and other public statements would say and on what basis"; "the documents that have been produced were often produced in an untimely, disorganized fashion, after numerous letters and telephone calls were exchanged and court conferences held and after the depositions of relevant witnesses. The Met was not only denied the opportunity to prove its case, but was denied the opportunity to plan its strategy in an organized fashion

as the case proceeded"; "documents that were produced were not produced as required by Rule 34, that is, in the manner in which they were maintained or according to request number, *see* Fed.R.Civ.P. 34(b), and many important documents were produced after the depositions of key witnesses. All of these obstructions prevented the Met from adequately planning and preparing its case; it was forced to proceed with depositions before relevant documents were produced, it was no doubt hampered in opposing summary judgment and, ultimately, in preparing for trial."). Herrick's argument that sanctions under Rule 37 should be reconsidered because prejudice is required for such sanctions when prejudice was found is, charitably, somewhat below the standard required on reconsideration.

Even in arguing that prejudice is required before sanctions may be imposed under Rule 37, Herrick has not now pointed to any law the Court overlooked, but rather attempts to distinguish two cases cited in the Opinion on this point, *Miller v. Time-Warner Communications,* No. 97 Civ. 7286, 1999 U.S. Dist. LEXIS 14512, at *5 (S.D.N.Y. Sept. 22, 1999), and *Skywark v. Isaacson,* No. 96 Civ. 2815, 1999 U.S. Dist. LEXIS 23184, at *20 (S.D.N.Y Oct. 15, 1999), on the basis that the documents withheld or tampered with in those cases were relevant whereas, Herrick claims, those withheld or destroyed in this case were not. (*See* Herrick Br. at 15-16.) Again, that attempted distinction is without merit because the Opinion found as a factual matter that the documents at issue were relevant. For example, it found that "Union counsel's position that the Weekly Reports were not ... relevant is wholly without merit," 212 F.R.D. 197 n. 14, and goes on to note that those documents report Union members' daily activities, including campaign planning and meetings regarding campaigns, such as the Union's campaign against the Met. Herrick argues that such information is not relevant because it "would not advance the Met's secondary boycott claim because it would not contain any evidence of violence or threats that are necessary to the pleading of an unlawful secondary boycott claim...." (Herrick Br. at 12.) Such an argument reflects an overly narrow reading of the Met's complaint and of the meaning of relevance.

***7** As to the former, the Met's complaint contains several claims in addition to its secondary boycott claim. For example, as to the Met's trespass claim, as noted in Lans III ¶ 63(c), a Weekly Report that *was* produced demonstrated a trespass by documenting a Union member's presence inside the Opera House distributing leaflets on a date complained of by the Met. The information called for by the Weekly Reports might also have established the extent of the dissemination of defamatory materials, demonstrated ratification of Union management's activities in its campaign against the Met and proved the dates when leafletting occurred (relevant to the Union's statute of limitations defense).

As to the latter, relevance, the Weekly Reports could well have led to other admissible evidence, *e.g.,* testimony of individuals involved in the activities at issue, documents not theretofore produced, such as House Visit reports. (*See* Lans III ¶ 63(c).) The suggestion that documents ordered produced, such as the Weekly Reports, were not relevant is without merit.

Even assuming that the documents requested were not relevant, the law does not support Herrick's view that a party or its counsel may ignore a court order to produce materials because it considers them irrelevant. [12] In *Van Pier v. Long Island Sav. Bank,* No. 97 Civ. 6295, 1998 U.S. Dist. LEXIS 15170, at *2 (S.D.N.Y. Sept. 29, 1998), the magistrate judge granted sanctions pursuant to Rule 37 in connection with plaintiff's failure to comply with an order to produce certain documents. Plaintiff filed objections with the district court, claiming that he did not produce the documents because he believed either that they were not relevant or that they were already in the defendant's possession, but Judge Rakoff affirmed the imposition of sanctions because "these objections became irrelevant once the Magistrate Judge ordered the parties to produce all documents in their possession ... and plaintiff, rather than complying with the order or appealing from it, chose to ignore it." *Van Pier,* 1998 U.S. Dist. LEXIS 15170, at *3; *see also McDonald v. Head Criminal Court Supervisor Officer,* 850 F.2d 121, 124 (2d Cir.1988) (affirming district court's dismissal of *pro se* plaintiff's action for failure to comply with court order concerning discovery because "[a]n order issued by a court must be obeyed, even if it is later shown to be erroneous"); *Davidson v. Dean,* 204 F.R.D. 251, 258 (S.D.N.Y.2001) ("Once the discovery Orders in this case were issued, plaintiff had two choices-to comply with the Orders or to appeal. Plaintiff did appeal the Orders and lost. Plaintiff's only choice at that point was to comply with the Orders, and only the Court ... could excuse him from that obligation."); *Worldcom Network Servs., Inc. v. Metro Access, Inc. .,* 205 F.R.D. 136, 143 (S.D.N.Y.2002)

("sanctions are permissible under Rule 37(b)(2) when a party fails to comply with a court order, regardless of the reasons").

12 The one case from this Circuit that Herrick relies on for a contrary view is wholly inapposite. In *Fonseca v. Regan,* 734 F.2d 944 (2d Cir.1984), the Government, by means of what the Court of Appeals called a "cosmic interpleader," sought information from the plaintiff in the guise of discovery that was, in fact, only relevant to a potential criminal prosecution of him and others and had nothing whatsoever to do with the pending civil case. The far different factual setting in *Fonseca* makes its holding inapplicable here.

***8** As the Opinion noted, counsel on more than one occasion ignored document requests (even after the Court ordered them to produce the documents at issue) because, in their view, the documents called for were irrelevant. *See, e.g.,* 212 F.R.D. at 200-01 (during a teleconference with the Court, Yen "said the [Weekly] [R]eports did not matter because the employees' calendars showed the same information" and defendants never fully complied with Court order that reports be produced); *id.* at 205-07 (during a conference the Court overruled Yen's belated relevance objection and Moss' objection to a document request as "blunderbuss" and ordered defendants to respond to the request). In sum, the issues raised on reconsideration do not alter the Opinion's findings as to Rule 37.

2. Rule 26 and 28 U.S.C. § 1927

As noted above, Herrick's argument that sanctions are inappropriate because the discovery sought by the Met was irrelevant is not supported by case law and is factually incorrect. Beyond the documents that were the subject of court orders (and thus relevant under Rule 37), whole categories of unproduced documents are undeniably relevant. For example, as noted in the discussion of prejudice, many of the documents that were destroyed "related directly to events taking place during the most critical time period in this action, that is, when the Union planned its campaign against the Met, decided what its leaflets, letters and other public statements would say and on what basis." 212 F.R.D. at 229. To suggest that these documents are irrelevant is, charitably, incorrect.

More importantly, however, any argument as to relevance completely misses the point. Sanctions under Rule 26(g) are imposed when a paper signed and filed has been interposed for an improper purpose or where a competent attorney could not have reasonably believed that the paper was well grounded in fact and warranted by existing law. *See* Fed.R.Civ.P. 26(g) Advisory Committee Notes to 1983 Amendment (Rule "provides a deterrent to both excessive discovery and evasion by imposing a certification requirement that obliges each attorney to stop and think about the legitimacy of a discovery request, a response thereto, or an objection"). Here, where counsel's certifications were not even modified by some sort of reservation that all "relevant" documents had been produced, the Opinion found that counsel's repeated certifications that all responsive documents had been produced to the Met, or that there were no responsive documents, "were made without any real reflection or concern for their obligations under the rules governing discovery and, in the absence of an adequate search for responsive documents, without a reasonable basis." 212 F.R.D. at 221-22. Indeed, the Opinion held that the knowing and egregious nature of the certifications led to the conclusion that they could only have been interposed for an improper purpose. *Id.* at 222. Herrick has shown no reason why the imposition of sanctions under Rule 26 was inappropriate.

***9** Sanctions under 28 U.S.C. § 1927 are appropriate where an attorney unreasonably and vexatiously multiplies the proceedings and needlessly increases the cost of discovery. *See United States v. Int'l Bhd. of Teamsters, Chauffeurs, Warehousemen and Helpers of America,* 948 F.2d 1338, 1345 (2d Cir.1991). Herrick's argument that sanctions under § 1927 were improper because its only discovery misconduct related to non-production or belated production of irrelevant documents fails because, even had the documents been irrelevant, (1) the law is clear that § 1927 has to do with vexatious conduct, and (2) the record here is replete with evidence-nowhere discussed by Herrick-of bad faith delay and obstruction by Herrick.[13] The cases indicate that the relevance of the material or the "appropriateness" of the ultimate response to discovery requests does not necessarily bear on the decision to impose sanctions under this statute. Rather, the basis for the sanction is the vexatious manner in which the attorneys acted in responding to the discovery requests. For example, in *Wine Mkts. Int'l, Inc. v. Bass,* 977 F.Supp. 601, 605-06 (E.D.N.Y.1997), the court found that the imposition of sanctions for counsel's refusal to produce witnesses for deposition and other dilatory tactics was appropriate,

even though depositions eventually occurred within the time period directed by the court. In *Apex Oil Co. v. Belcher Co. of New York, Inc.,* 855 F.2d 1009, 1020 (2d Cir.1988), the Court of Appeals affirmed the district court's imposition of sanctions under § 1927 where defendant's counsel had refused to comply with plaintiff's discovery requests until plaintiff's counsel made a motion to compel. By focusing on the strawman of relevance and ignoring the conduct on which the § 1927 sanction were based, Herrick has provided no reason why such sanctions were inappropriate.

13 As noted, Herrick does not even mention the Court's imposition of sanctions as part of its inherent powers. That imposition here, of course, had to do with defendants' and counsel's overall and overwhelming pattern of bad faith misconduct having to do only in part with the withholding of relevant documents.

C. Notice

Herrick argues, astonishingly, that it had no notice that it might be subject to sanctions, because "the first indication *from the Court* that attorneys may have engaged in sanctionable conduct ... was the issuance of the January 30, 2003 Opinion." (Herrick Br. at 17-19 (emphasis added).) Specifically, Herrick argues that the Met's repeated comments about seeking sanctions, its request for and taking of discovery into defendants' and their counsel's compliance with their respective discovery obligations, its request to file a motion seeking sanctions against defendants and their counsel and its formal motion seeking sanctions against defendants and their counsel were not enough and that the Court was required to give Herrick some more explicit order and warning. This argument, charitably, is hogwash. [14]

14 This argument as to notice is also a do-over because it was made in the underlying sanctions motion and rejected in the Opinion. *See* 212 F.R.D. at 183 n. 4.

First, as a factual matter, from the May 2000 contempt and injunction hearings forward, the record shows more than ample notice to defendants and their counsel that their compliance with their respective discovery obligations was a matter of scrutiny and that sanctions could be awarded. [15] Indeed, as the "referee on the ground in this engagement," 212 F.R.D. at 182, it is fair to say that "Met counsel's continuing high-decibel allegations of [Union counsel's] failure to make adequate inquiry and repeated demonstrations of incomplete compliance and non-compliance with discovery requests," *id.* at 222, constituted warnings early and often to Herrick that its conduct of discovery was alleged to be blameworthy. As noted in the Opinion, for example, Met counsel warned the Union on several occasions that if appropriate responses to the Met's discovery requests were not forthcoming, sanctions would be sought. *See id.* at 230. When the Met did propose sanctions in its December 18, 2001 letter to the Court, it asked first for the benefit of discovery on the defendants' and their *counsel's* discovery compliance, which I granted. [16] *Id.* at 203. On March 13, 2002, I issued a written order overruling defendants' objections to the depositions of two Herrick lawyers (Yen and Lynett) on the issue of their actions pertaining to discovery. Furthermore, I directed that the depositions proceed, making it plain, again, that the lawyers' conduct was under scrutiny. Another written order was issued on March 21, 2002, directing "inquiry of the listed witnesses [including Herrick attorneys Lynett and Yen,] concerning discovery compliance without restriction as to time" and referring to "the serious questions raised about defendants' discovery compliance." (Lans III, Ex. 13.)

15 The fact that formally-styled motions to compel were not made is of no import. Defendants and their counsel not only participated without objection in numerous conferences about discovery but they also repeatedly solicited the Court's informal rulings by letters and telephone calls. Indeed, I made numerous discovery rulings throughout the case upon letter applications, informal conferences and telephone calls, some from depositions. *See* 212 F.R.D. at 218. Herrick and its counsel well know that oral orders and orders made without the need for formal writings are as obligatory as any other order.

16 As the transcript of a conference with the Court on January 7, 2002 (quoted in the Opinion) makes clear, *counsel's* conduct during the discovery process was squarely in issue and was to be investigated during compliance discovery. *See* 212 F.R.D. at 207.

***10** Finally, on April 12, 2002, having reviewed the Met's motion for sanctions against defendants and their counsel, including Herrick, and Moss' April 12 letter and having conferred with all counsel, I issued yet another written order adjourning the trial and rejecting defendants' and Herrick's contention that the Met's motion for sanctions was "silly." (*See* Moss Decl., Ex. A (Moss April 12, 2002 letter) at 7).) The order stated that the Met's motion was

not frivolous but rather presented issues of serious concern and directed the defendants and their lawyers to respond in full. (Lans III, Ex. 4.) The opposition papers submitted by Herrick addressed counsel's own conduct and, indeed, contained more defense of Herrick's conduct than of its clients' conduct.

Even without the strength of the record on the issue of notice in this case, the law in this Circuit does not support Herrick's argument. *See Daval Steel Products v. M/V Fakredine,* 951 F.2d 1357, 1366 (2d Cir.1991) ("Parties and counsel have no absolute entitlement to be 'warned' that they disobey court orders at their peril."). Moreover, when any notice requirement does exist, it is satisfied when a notice of a motion has been served seeking the particular sanctions which ultimately are awarded. *See Peters-Turnbull v. Bd. of Educ.,* No. 96 Civ. 4914, 1999 U.S. Dist. LEXIS 16079, at *11 (S.D.N.Y. Oct. 20, 1999) ("[P]laintiff was given notice of the consequences of her failure to respond to discovery ... when this Court ordered the plaintiff to show cause why this case should not be dismissed under Rule 37. Plaintiff was given further notice when the Court ordered the defendants to move for dismissal ...."), *aff'd,* 7 Fed. Appx. 107 (2d Cir.2001). Here, the Met expressly moved for "judgment, attorneys' fees and further relief" under, *inter alia,* Rules 26 and 37, 28 U.S.C. § 1927 and the Court's inherent power against Herrick as well as against the defendants. Indeed, under § 1927, *only* a lawyer can be sanctioned, as the Met discussed in its memorandum of law on the motion. Herrick's briefing in response, in which it argued the lawyers' lack of culpability, demonstrates beyond cavil that Herrick had notice that sanctions were being sought against that firm.

D. Orders

Finally, Herrick argues that no orders were violated, (*see* Herrick Br. at 20), but again is wrong on the facts. Although Herrick continues to nitpick, it is crystal clear that, for example, (1) Weekly Reports for all Union employees who "participated in any way in Local 100's effort ... at the Met" were not produced as ordered (or their non-production properly explained), *see* Lans III at ¶¶ 44-49; (2) admitted deficiencies in the Union's retention and production of electronic documents were never addressed as ordered, including contacting *all* the Union's ISPs to attempt to retrieve deleted documents, *see id.* at ¶¶ 50-53; and (3) Ward's deposition did not proceed as ordered, *see* 212 F.R.D. at 216-218, 225 n. 32, 226-27. In any event, there is no requirement that the Court find that orders were violated to permit sanctions under Rules 26(g), 28 U.S.C. § 1927 or as part of the Court's inherent authority, three of the bases on which the sanctions were levied in this case.

E. Conclusion

***11** Accordingly, for the reasons set forth above and because none of the matters raised is sufficient to change the result, having reconsidered the sanctions motion as to Herrick, I adhere to my prior decision in the Opinion.

III. The Union's Motion

The two arguments made by the Union that are not duplicative of those made by Herrick are that (1) the First Amendment precludes the Court from directing entry of judgment for liability on the Met's defamation claim without the Court's first making detailed factual findings as to which statements are defamatory and which were uttered with malice, and (2) judgment was improper because certain of the Met's claims were legally insufficient on their face.

As Judge Leisure has so aptly summarized the law:

> A party seeking reconsideration is not supposed to treat the court's initial decision as the opening of a dialogue in which that party may then use such motion to advance new theories or adduce new evidence in response to the court's rulings.... The Court cannot overlook legal arguments it was not presented with in the motion papers.... It is well established that [a] motion for reconsideration is [also] not a vehicle for plugging the gaps of the lost motion with additional matters.

Wechsler v. Hunt Health Sys., Ltd., 186 F.Supp.2d 402, 410-11 (S.D.N.Y.2002) (internal quotation marks and citations omitted). It is clear that a party has no more right to have new theories heard on reconsideration than on appeal. *Chitkara v. N.Y. Tel. Co.,* 45 Fed. Appx. 53, 55 (2d Cir.2002); *Forsyth,* 2003 U .S. Dist. LEXIS 3314, at *1 (losing party may not advance new arguments on a motion for reconsideration); *In re Oil Spill by the "Amoco Cadiz",* 794 F.Supp. 261, 267 (N.D.Ill.1992) (motions to

reconsider may not be used to "raise legal argumentation which could have been heard during the pendency of the previous motion"), *aff'd,* 4 F.3d 997 (7th Cir.1993).

Here, the Union raises only arguments that could have been but were not raised initially, without any explanation for the failure to raise them the first time around. I noted this problem initially at the February 10, 2003 conference in discussing the Union's failure to raise the First Amendment issue in the underlying motion:
Can I ask why we didn't brief this in connection with the motion where counsel sought liability for discovery abuse? Where were they on that? Why wasn't that briefed then?

If you say that the sanction of liability may not be imposed in a defamation, for example, case, where was that in the briefing? Never mentioned, correctamento?

(2/10/03 Tr. at 8.)

The Union has not cited any authority suggesting a special exception to the standards governing reconsideration motions when purported First Amendment concerns are raised, and the law in fact suggests that First Amendment arguments are every bit as "waivable" as any others. *See, e.g., Word v. Croce,* No. 00 Civ. 6496, 2001 U.S. Dist. LEXIS 9071, at *14 (S.D.N.Y. July 6, 2001) (denying reconsideration where the issue raised was retaliation for the exercise of First Amendment rights); *Costello v. McEnery,* No. 91 Civ. 3475, 1994 U.S. Dist. LEXIS 13619, at *3-6 (S.D.N.Y. Sept. 26, 1994) (denying reconsideration where the claim was of a discharge in retaliation for the exercise of First Amendment rights); *Creek v. Village of Westhaven,* No. 83 C 1851, 1993 U.S. Dist. LEXIS 10634, at *8-10 (N.D.Ill. Aug. 2, 1993) (denying reconsideration where defendants raised the issue of First Amendment protection for their actions for the first time on reconsideration and defendants failed to offer any reason why the First Amendment argument could not have been briefed initially). As discussed below, there is, in fact, no First Amendment issue raised by the sanctions decision in any event.

***12** Furthermore, aside from the First Amendment argument that could have been raised on the sanctions motion, most of the quibbles the Union now raises concerning the legal sufficiency of the Met's claims were previously advanced and have already been rejected, establishing the law of the case. For that further reason, the Union's arguments are barred now. For example, defendants argued lack of ratification in opposition to the Met's motion for contempt and preliminary injunctive relief, *see* Lans III, Ex. 3 (excerpt from Local 100's pre-hearing brief), but I ruled in the Met's favor, finding a likelihood of success on the Met's claims. Defendants unsuccessfully challenged the Met's prima facie tort claim in their summary judgment motion on the same grounds asserted again now. (*Id.,* Ex. 2.) Defendants also unsuccessfully challenged in their summary judgment motion the Met's secondary boycott claim on the same preemption and substantive grounds as they now do now. (*Id.*) The Union is precluded from presenting these legal arguments yet again by, among other principles, the doctrine of law of the case. *See In re Crazy Eddie Sec. Litig.,* 948 F.Supp. 1154, 1161 (E.D.N.Y.1996) (citing *In re Joint Eastern District and Southern District Asbestos Litig.,* 18 F.3d 126, 129 (2d Cir.1994) (citations omitted)). [17]

17 Defendants did not move for summary judgment against the Met's defamation or tortious interference claims, and one assumes they would have if they believed the claims to be so deficient as they now claim. Their not moving (especially in light of the wide-ranging nature of that motion) suggests a recognition that the Met's claims were, at the very least, facially sufficient.

In sum, the Union's motion is patently improper, both because it raises issues for "reconsideration" that could have been raised in opposition to the sanctions motion but were not and because it raises issues that were disposed of by earlier rulings in this case. Accordingly, the Union's motion for reconsideration is denied. Nevertheless, in the alternative, because of the serious nature of the misconduct detailed in the Opinion and the high place the first Amendment occupies in our pantheon of rights, the Union's motion for reconsideration is granted. Upon reconsideration, however, I adhere to my previous decision with respect to the Union.

A. First Amendment Issues

Research has disclosed no case law holding that a judgment on liability cannot be entered on a defamation claim either generally or specifically as a sanction for misconduct under Rules 26 and 37, 28 U.S.C. § 1927 or the Court's inherent power. Indeed, the Union cites no case to support its argument that special rules apply

to defamation cases which preclude the award of those sanctions otherwise available except after the defamation claims are, in effect, tried on the merits and findings made as to each allegation. To the contrary, a number of cases have directed the entry of judgment against defendants on defamation claims as a discovery sanction or for failure to answer. *See, e.g., Lothschuetz v. Carpenter,* 898 F.2d 1200 (6th Cir.1990) (sustaining the entry of a default judgment as to liability on a libel claim as a sanction for defendants' discovery misconduct); *Adolph Coors Co. v. Movement Against Racism and the Klan,* 777 F.2d 1538 (11th Cir.1985) (affirming the district court's entry of judgment on a defamation claim as a discovery sanction. Defendants had declined to produce documents on the basis that they were constitutionally privileged to withhold disclosure where the disclosure requested would put their members at risk of harm from Klan groups and impair defendants' and their members' First Amendment rights. The district court ruled that the disclosure was proper and did not create such a risk. Plaintiff was granted judgment on its defamation claims as a sanction for defendants' refusal to make disclosure); *Professional Seminar Consultants, Inc. v. Sino Am. Tech. Exch. Council, Inc.,* 727 F.2d 1470 (9th Cir.1984) (affirming a default judgment as to liability on plaintiff's libel and conversion claims as a sanction for the proffer of false documents); *see also Israel Travel Advisory Serv., Inc. v. Israel Identity Tours, Inc.,* 61 F.3d 1250 (7th Cir.1995) (upholding the district court's dismissal of defendant's counterclaims for discovery abuse and noting that the district court could also properly have entered judgment for plaintiff on its defamation (and other) claims); *Walia v. Vivek Purmasir & Associates,* 160 F.Supp.2d 380 (E.D.N.Y.2000) (entry of a default judgment for failure to answer a defamation claim was proper).

***13** Further, the logic of the cases dictates that no special First Amendment exception be created. It has long been the law that there is no due process bar to default or dismissal where, as here, a party disregards its discovery obligations with willfulness and in bad faith. [18] *See Hammond Packing Co. v. State of Arkansas,* 212 U.S. 322, 350-54, 29 S.Ct. 370, 53 L.Ed. 530 (1909); *Societe Internationale Pour Participations Industrielles Et Commerciales, S.A. v. Rogers,* 357 U.S. 197, 209-12, 78 S.Ct. 1087, 2 L.Ed.2d 1255 (1958). The law holds, and logic dictates, that by virtue of the non-complying defendant's obstruction of discovery, it is deemed to have waived its rights, and the court is permitted to infer that the evidence withheld by defendants and the legal conclusions to be drawn from that evidence would be adverse to the defendants. Indeed, such a presumption is viewed as *necessary* to preserve the constitutional right of due process. As the Supreme Court explained in *Hammond Packing,* it is

> the undoubted right of the lawmaking power to create a presumption of fact as to the bad faith and untruth of an answer to be gotten from the suppression or failure to produce the proof ordered, when such proof concerned the rightful decision of the cause.... [T]he preservation of due process [i]s secured by the presumption that the refusal to produce evidence material to the administration of due process was but an admission of the want of merit in the asserted defense.

Hammond, 212 U.S. at 350-51; *see also Societe Internationale,* 357 U.S. at 210 (quoting *Hammond*).

Both in *Hammond Packing* and later in *Insurance Corp. of Ireland Ltd. v. Compagnie des Bauxites de Guinee,* 456 U.S. 694, 102 S.Ct. 2099, 72 L.Ed.2d 492 (1982), the Supreme Court emphasized that the rights of litigants in our civil justice system are conditioned on compliance with procedural rules. *Hammond Packing,* 212 U.S. at 351 (noting that there are "many other presumptions attached by the law to the failure of a party to a cause to specially set up or assert his supposed rights in the mode described by law."); *Insurance Corp. of Ireland,* 456 U.S. at 705 ("The expression of legal rights is often subject to certain procedural rules. The failure to follow those rules may well result in a curtailment of the rights."). In both decisions the Court equated the sanction of default to a waiver by the malefactor of the opportunity to contest the factual or legal basis for the adverse ruling or judgment imposed as a sanction. *Hammond Packing* 212 U.S. at 351 (analogizing a default based on discovery non-compliance to a default because of a failure to answer "based on a presumption that the material facts alleged or pleaded were admitted by not answering"); *Insurance Corp. of Ireland,* 456 U.S. at 706 ("the sanction is nothing more than the invocation of a legal presumption or, what is the same thing, the finding of a constructive waiver"). Finally, the Court in

18 The Court of Appeals has held that the requisite showing of fault for the valid entry of default or dismissal is also satisfied by a showing of gross negligence. *See Cine Forty-Second Street Theatre Corp. v. Allied Artists Pictures Corp.,* 602 F.2d at 1066-68 (2d Cir.1979).

Insurance Corp. of Ireland made clear that the nature of the underlying right waived had no effect on the validity of the sanction, which turns solely on whether the trial court has abused its discretion. *Id.* at 707.

***14** Pursuant to *Hammond* and *Insurance Corp.,* as well as the court of appeals decisions from various circuits cited above specifically affirming the entry of judgment as a sanction in defamation cases, it was certainly well within my discretion to enter judgment against defendants. Defendants were afforded a full and fair opportunity to litigate their defenses but they chose instead to obstruct discovery. [19] By virtue of their malfeasance, defendants have in effect conceded the validity of the Met's claims and waived their defenses. In other words, as the Supreme Court stated in *Insurance Corp.,* "[t]he sanction took as established the facts"-here, *inter alia,* the false and defamatory nature of the pleaded statements and the actual malice of defendants-"that [the plaintiff] was seeking to establish through discovery. That a particular legal consequence ... follows from this, does not in any way affect the appropriateness of the sanction ." *Id.* at 709.

19 Indeed, because many of the documents requested by the Met were lost, destroyed or simply never produced, the Met was entitled to a presumption that these documents would have been material to its case. *See Hammond Packing,* 212 U.S. at 380 (court "must assume" that items that defendants failed to produce were "material").

The Union discusses *none* of the foregoing authority. Further, none of those cases it does cite has anything to do with a situation where defendants were deemed to have abandoned their right to litigate as a sanction for misconduct. *New York Times v. Sullivan,* 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964), and its progeny-*Hustler Magazine v. Falwell,* 485 U.S. 46, 108 S.Ct. 876, 99 L.Ed.2d 41 (1988); *Bose Corp. v. Consumers Union of U.S., Inc.,* 466 U.S. 485, 104 S.Ct. 1949, 80 L.Ed.2d 502 (1984); *Old Dominion Branch No. 496, Nat. Ass'n of Letter Carriers, AFL-CIO v. Austin,* 418 U.S. 264, 94 S.Ct. 2770, 41 L.Ed.2d 745 (1974); *Linn v. United Plant Guard Workers of America,* 383 U.S. 53, 86 S.Ct. 657, 15 L.Ed.2d 582 (1966); and *Edwards v. South Carolina,* 372 U.S. 229, 83 S.Ct. 680, 9 L.Ed.2d 697 (1963)-all concern the burden of proof in defamation cases where, unlike here, the parties had properly litigated within the Federal Rules of Civil Procedure. Moreover, the application of the *New York Times v. Sullivan* standards in labor cases, under *Linn,* is a matter of analogy, *not* constitutional mandate. *See* Robert D. Sack, *Sack on Defamation* § 5.7 (3d ed.2004).

Commodity Futures Trading Commission v. Vartuli, 228 F.3d 94 (2d Cir.2000), and *United States v. Various Articles of Obscene Merchandise, Schedule No. 1769,* 600 F.2d 394 (2d Cir.1979), are equally inapposite. First, the claim upon which default judgment was granted in *Vartuli* sounded in fraud-not defamation-so there was no discussion of the trial court's supposed obligation to hear evidence on the standards set forth in *New York Times v. Sullivan* before imposing default judgment. Second, Local 100 incorrectly asserts that the Court of Appeals vacated the trial court's imposition of default judgment. In fact, the Court of Appeals upheld the default judgment entered against one of the co-defendants, but remanded the case for reconsideration *of the relief* granted to the plaintiff-namely an injunction. *Vartuli,* 228 F.3d at 112. Thus, the actual holding of *Vartuli* has nothing to do with this case, where the Court has only entered judgment, and consideration of the appropriate relief will be assessed separately. [20] Similarly, *Various Articles of Obscene Merchandise* has no application here. A default judgment was issued in that case against allegedly obscene materials where recipients of the materials had either acquiesced to forfeiture or had failed to file answers. The Court of Appeals held that the First Amendment prohibited such a default because it was highly unlikely that the intended recipients of allegedly obscene materials would contest forfeiture and hence the resulting "destruction of books, magazines and films [would] become an unreviewed act of censorship." *Id.* at 399. By contrast, the judgment here raises no concern of censorship where defendants answered the complaint and vigorously litigated the Met's claims, including on a motion for summary judgment, but ultimately waived their right to defend by failing in their discovery and other obligations.

20 To the extent that the Union is attempting to assert that default judgment constitutes an impermissible prior restraint in violation of the First Amendment prohibition, *see* Memorandum in Support of the Motion of Defendant Local 100 to Reconsider and to Vacate the Court's January 28, 2003 Order dated March 3, 2003 ("Union Br.") at 4 (discussing the Court of Appeals' decision vacating the preliminary injunction entered earlier in this case and complaining that this Court has not "set[ ] forth the exact statements ... held to be unlawful"), the Union is incorrect. As noted above, the Opinion only spoke to

> liability, not relief, and, moreover, included no order restraining any future speech by the Union (*see infra*). In any event, there is no confusion about the nature of conduct for which defendants have been held liable in this case-it is clearly spelled out in the complaint. *See In re Crazy Eddie Sec. Litig.,* 948 F.Supp. 1154, 1160 (1996) ("[A] default effectively constitutes an admission that ... the acts pleaded in a complaint violated the laws upon which a claim is based and caused injuries as alleged.").

***15** Finally, the Union's censorship or "chilling" argument is entirely erroneous because the First Amendment is not implicated by the entry of judgment as to liability in this case. The Union presumes that the Opinion has a precedential and therefore potentially *in terrorem* effect on future expression. However, a judgment entered as a discovery sanction is not an adjudication on the merits and has no collateral estoppel effect outside the case in question. *See Willy v. Coastal Corporation,* 503 U.S. 131, 112 S.Ct. 1076, 117 L.Ed.2d 280 (1992) (Rule 11 sanctions were properly imposed in the case even though the district court was later determined to lack subject-matter jurisdiction because the sanctions order was "collateral to the merits," *id.* at 137; further: "there is no constitutional infirmity under Article III in requiring those practicing before the courts to conduct themselves in compliance with the applicable procedural rules ...," *id.* at 139); *cf . Amato v. City of Saratoga Springs,* 170 F.3d 311, 323 (2d Cir.1999) (noting that "of course a default judgment lacks preclusive effect in other litigation"); *Abrams v. Interco, Inc.,* 719 F.3d 23, 39 n. 9 (2d Cir.1983) (noting that "the decision of issues not actually litigation, e.g., a default judgment, has no preclusive effect in other litigation"); *Talib v. Garcia,* No. 98 Civ. 3318, 2000 U.S. Dist. LEXIS 9752, at *12-13 (S.D.N.Y. July 12, 2000) (reviewing law in various circuits and noting that the majority of courts, including those in New York, hold that a default judgment does not support issue preclusion). Here, while the judgment entitles the Met to relief for defamation as a procedural matter, it does not stand as an adjudication on the merits that would bar any future expression (except against the Met) of those statements alleged by the Met to have been defamatory.

B. Sufficiency Issues

Citing the undisputed principle that a default judgment may only be granted upon a well-pleaded complaint, the Union incorrectly asserts that judgment must be vacated here because the Met's claims against the Union are "all ... meritless on their face." (Union Br. at 6.) The Union not only twists the meaning of a "well-pleaded complaint"-a term of art at this stage of the proceedings which, in any event, affords the non-defaulting party significant leeway in its pleading-but also ignores the fact that the sufficiency of the Met's pleading has already been upheld against defendants' challenges on the motions for contempt and injunctive relief and the defendants' motion for summary judgment.

After the entry of a default judgment, the assessment of the "well-pleaded" nature of a complaint is subject to "considerable latitude," *Levesque v. Kelly Communications, Inc.,* No. 91 Civ. 7045, 1993 U.S. Dist. LEXIS 791, at *19 (S.D.N.Y. Jan. 25, 1993), and "[o]nly 'in very narrow exceptional circumstances' may a court find an allegation not 'well pleaded." ' *In re Crazy Eddie Sec. Litig.,* 948 F.Supp. 1154, 1160 (E.D.N.Y.1996) (quoting *Trans World Airlines, Inc. v. Hughes,* 449 F.2d 51, 63 (2d Cir.1971), *rev'd on other grounds,* 409 U.S. 363, 93 S.Ct. 647, 34 L.Ed.2d 577 (1973)). Moreover, so long as the facts alleged in the complaint *"might* ... have been the case," they cannot successfully be controverted by the defendant. *Thomson v. Wooster,* 114 U.S. 104, 115, 5 S.Ct. 788, 29 L.Ed. 105 (1885) (emphasis added); *see also Hughes,* 449 F.2d at 63 (endorsing district court's list of the narrow circumstances in which a complaint is not well-pleaded: (1) allegations in the complaint are internally inconsistent, (2) allegations are "contrary to uncontroverted material in the file of the case," or (3) allegations are contrary to "indisputable" facts judicially noticed by the court) (internal quotations and citation omitted); *In re Crazy Eddie Sec. Litig.,* 948 F.Supp. at 1160 ("Although a court has discretion to determine whether the facts alleged in a complaint state a valid cause of action, a defaulting party ordinarily cannot contest the merits of the plaintiff's claim absent 'indisputable' contradictory evidence") (citations omitted). Here, the Union has shown nothing that "renders inconceivable the likelihood" that the Met could have proved that its challenged claims are all proper as a matter of law and the law of the case. *Hughes,* 449 F.2d at 64.

***16** The Union has waived its right to a full hearing on the merits by virtue of its misconduct and must live with the consequences:

> It would usher in a new era in the dynamics of litigation if a party could suffer a default judgment to

> be entered against it and then go about its business as if the judgment did not exist and as though, despite the opportunities to comply with the court's orders and to defend on the merits which had been ignored, the slate was wiped clean and a new day had dawned. To state the proposition is to expose the folly of it.

Hughes, 449 F.2d at 63-64.

As noted above, the well-pleaded nature of the Met's complaint has already been found by my review and rejection of defendants' previous challenges to the sufficiency of many of the Met's claims. Those prior rulings are the law of the case, which I decline to disturb. *See In re Crazy Eddie Sec. Litig.,* 948 F.Supp. 1154 at 1161 (previous "decisions [on the sufficiency of claims] establish the law of the case, from which no departure is warranted absent 'weighty reasons." ') (citing *In re Joint E.D. & S.D. Asbestos Litig.,* 18 F.3d 126, 130 (2d Cir.1994) (citing *United States v. Adegbite,* 877 F.2d 174, 178 (2d Cir.), *cert. denied,* 493 U.S. 956, 110 S.Ct. 370, 107 L.Ed.2d 356 (1989))). By granting the Met's motion for injunctive relief and ruling that the Met was likely to succeed on the merits of its claims, including reviewing the elements of each of those claims and the Met's pleading of them in the face of the same arguments the Union now makes again about, *inter alia,* lack of ratification, and in denying defendants' motion for summary judgment (docket no. 56), I held that the Met had properly pleaded both the legal elements and the facts to support its claims of ratification, defamation, trade libel, interference, trespass, unlawful secondary boycotting and prima facie tort and, indeed, had offered substantial evidence to support those claims.

1. Pleadings under *Martin v. Curran*

In asserting that the Met failed properly to plead the Union's liability pursuant to *Martin v. Curran,* 303 N.Y. 276, 101 N.E.2d 683 (1951), the Union ignores the Met's detailed pleading concerning membership participation, authorization and ratification. *Compare* Union Br. at 7-8 (citing only ¶ 90 of the Met's Amended Complaint) *with* Am. Compl. ¶¶ 85-90 (entitled "Local 100 Members' Knowledge of, Actual Participation in, Authorization of, and Ratification of Defendants' Tortious Acts"). When read in its entirety, the Met's Amended Complaint fully satisfies the requirements of *Martin v. Curran,* particularly in light of the "considerable latitude" that must be permitted in assessing whether the Met's complaint is well-pleaded. *Levesque,* 1993 U.S. Dist. LEXIS 791, at *19.

The Union argues that the Met has failed to plead that Union membership had full knowledge of the Union's specific tortious activities, Union Br. at 7, but, in fact, that is precisely what the Met did. Having detailed in preceding paragraphs the exact nature of defendants' tortious activities, Am. Compl. ¶ ¶ 1-7, 23-84 (activities which the Met referred to collectively as the Union's "campaign"), the Met alleged that "Local 100 members have had *full knowledge* of defendants' campaign as described herein," *id.* ¶ 85 (emphasis added); *see also id.* ¶ 89 ("Not only have the rank and file of Local 100 had *full knowledge* of defendants' tortious campaign against the Met ...") (emphasis added). The Met further specifically alleged that Local 100 members (1) had been briefed by defendant and now ex-President Henry Tamarin at quarterly meetings about the Union's campaign against the Met and had full access to Tamarin's correspondence (a primary source of statements defaming the Met), *id.* ¶ 86, (2) were "kept informed ... of defendants' tortious activities" by Local 100's research director, Brooks Bitterman, as well as by other internal union communications, popular and Union press coverage and the Internet, *id.* ¶ 88, and (3) attended "regular meetings" to "strategize about the campaign against the Met" and were assigned "responsibilities" related to the campaign against the Met, *id.* ¶ 87. Moreover, the Met specifically pleaded that the Union had held meetings "before every major demonstration or attack against the Met both to keep the membership informed of the latest developments in the campaign and to enlist membership assistance in executing future offensives against the Met." (*Id.* ¶ 87.) Finally, the Met alleged: "Local 100's membership has ratified defendants' efforts to defame, harass, intimidate and coerce the Met ... with full knowledge of the nature and scope of the campaign...." (*Id.* ¶ 90.)

***17** The Union's assertion that the Met failed to plead ratification adequately is simply wrong; the Met's Amended Complaint, in satisfaction of *Martin v. Curran,* alternatively pleaded that the Local 100 membership participated in, authorized beforehand and/or ratified after the fact the tortious activities specifically detailed in the Met's complaint. *See Giffords Oil Co., Inc. v. Boss,* 54 A.D.2d 555, 556, 387 N.Y.S.2d 51, 52 (2d Dep't

1976) (liability under *Martin v. Curran* established by proof of participation in, authorization of or ratification of a union's tortious conduct); *Saint v. Pope,* 12 A.D.2d 168, 176, 211 N.Y.S.2d 9, 16 (4th Dep't 1961) (same). The Met specifically pleaded, Am. Compl. ¶ 89, that the membership had "actually participated in defendants' numerous acts of defamation, harassment, intimidation and trespass," specified that the Union issued instructions to the membership regarding "how to act and what to say when leafleting and demonstrating against the Met," and quoted ex-President Tamarin's saying that Union rallies against the Met were the "best place" to see the membership. *See Westchester County v. Westchester County Federation of Labor,* 129 N.Y.S.2d 211, 215 (N.Y.Sup.Ct.1953) (participation of union membership in tortious activity at direction of union officers satisfied requirement of *Martin v. Curran*). The Met also specifically pleaded that the membership "authorized defendants as their agents to pursue these tortious activities," Am. Compl. ¶ 85, and asserted that "defendants have held 'union meetings' before every major demonstration or attack against the Met" *id.* ¶ 87, 101 N.E.2d 683. *See Martin v. Curran,* 303 N.Y. at 282, 101 N.E.2d 683 (liability established where union members "expressly *or impliedly" authorize* or ratify the union's tortious acts) (emphasis added).

In any event, the Met also adequately alleged that, with "full knowledge" of the Union's conduct, the membership of Local 100 ratified each of the tortious activities of their union detailed in the Met's Amended Complaint. " 'Ratification' is a form of subsequent authorization by which the principal, with knowledge of the material facts, accepts responsibility for the agent's act whether it was originally approved or not." *A. Terzi Productions, Inc. v. Theatrical Protective Union,* 2 F.Supp.2d 485, 492 n. 3 (S.D.N.Y.1998). Formal ratification is not required under *Martin v. Curran* and may be "implied from the members' conduct." *Soloway v. Delit,* No. 90 Civ. 2273, 1992 U.S. Dist. LEXIS 14232, at *12 (S .D.N.Y. Sept. 21, 1992) (citing *Martin v. Curran,* 303 N.Y. at 282, 101 N.E.2d 683). Here, the Met specifically pleaded that the Local 100 membership ratified "defendants' efforts to defame harass, intimidate and coerce the Met"-fully described in the preceding paragraphs of the Amended Complaint-"both by continuing to confer actual and apparent authority on defendants to wage this tortious campaign against the Met on their behalf, and, with full knowledge of the nature and scope of the campaign, by not protesting or making any attempt to discontinue or alter these attacks," Am. Compl. ¶ 90. *See Browne v. International Brotherhood of Teamsters,* 203 A.D.2d 13, 15, 609 N.Y.S.2d 237, 239 (1st Dep't 1994) ("a union may 'ratify' or 'authorize' without going so far as to openly encourage or embrace the tactics of its official representative") (internal quotations and citation omitted). The Met also specifically pleaded that the Local 100 membership had "full knowledge" of the Union's conduct through "regular meetings with union officers and membership to strategize about the campaign against the Met," Am. Compl. ¶ 86, additional meetings "before every major demonstration or attack against the Met both to keep the membership informed of the latest developments in the campaign and to enlist membership assistance in executing future offensives against the Met," *id.* ¶ 87, 609 N.Y.S.2d 237 and "the constant coverage over the past three years of [the] campaign against the Met in the popular and union press and over the internet (spurred on by the press released issued by Local 100's 'research director' Brooks Bitterman)," *id.* ¶ 88, 609 N.Y.S.2d 237. *See Westchester,* 129 N.Y.S.2d at 215 (membership ratified tortious activity "[b]y their silence" after "actions of [union] officers were reported to the membership at a duly called meeting").

***18** Thus, the Union's argument appears to boil down to the semantic quibble that the Met did not modify each mention 'of the Local 100 membership and of defendants' tortious acts with the words "each and every." The law does not support such a petty argument. Taken in context, it is clear that by "members" and "membership," the Met was referring to the entire membership of Local 100. It is likewise clear that when the Met referred to the tortious acts of defendants, it was referring back to all the acts previously specified in the Amended Complaint as "Factual Allegations Common to All Claims." (Am. Compl. at 5.) Finally, the Met is, of course, entitled to enjoy the benefit of any doubt as to the meaning of its pleadings (1) where it has clearly made the effort to satisfy the requirements of *Martin v. Curran* (unlike the cases to which defendants cite), [21] (2) where, again unlike the cases to which defendants cite, [22] in the present posture, the Met's pleadings must be liberally construed, *see Hughes,* 449 F.2d at 63; *Levesque,* 1993 U.S. Dist. LEXIS 791, at *19, and (3) in light of defendants' spoliation and non-production of relevant documents as to member activities and ratification.

21 Defendants cite to a number of cases where (1) plaintiffs failed to plead participation, authorization or ratification *at all,* and/or (2) plaintiffs conceded the inadequacy of their pleadings. *See, e.g., Building Industry Fund v. Local Union No. 3,* 992 F.Supp. 162, 195 (E.D.N.Y. May 29, 1996) (plaintiffs failed to allege authorization or ratification), *aff'd w/o opinion,* 141 F.3d 1151 (2d Cir.1998); *Modeste v. Local 1199, Drug, Hosp. and Health Care Employees Union, RWDSU, AFL-CIO,* 850 F.Supp. 1156, 1160 (S.D.N.Y.) (plaintiff conceded claims were invalidated under *Martin v. Curran*), *aff'd w/o opinion,* 38 F.3d 626 (2d Cir.1994); *R.M. Perlman Inc. v. New York Coat, Suit, Dresses, Rainwear & Allied Workers' Union Local 89-22-1,* 789 F.Supp. 127, 131 (S.D.N.Y.1992) (plaintiffs conceded that they had not adequately pleaded liability); *Mounteer v. Bayly,* 86 A.D.2d 942, 943 448 N.Y.S.2d 582, 583 (3d Dep't 1982) (*no* allegations of liability on part of membership were made).

22 None of the cases to which the Union cites concerns the review of a complaint for compliance with the requirements of *Martin v. Curran* preliminary to the entry of default judgment as a sanction for defendants' egregious abuse of discovery which abuse relates (among other things) to withheld disclosures bearing on ratification.

2. Evidentiary showing under *Martin v. Curran*

The Union's assertions about the evidentiary difficulties of satisfying the requirements of *Martin v. Curran,* (Union Br. at 7), are irrelevant at this point. [23] Now that judgment on liability has been ordered against the defendants based on discovery abuse, the question is not what the Met can now prove or could have proven-defendants having withheld and destroyed an unknown number of the documents that the Met could have used in satisfying its burden of proof. [24] *See Hughes,* 449 F.2d at 66; *see also Thomson,* 114 U.S. at 114 (question is whether allegations are "[ ]susceptible" of proof).

23 Moreover, the suggestion that the requirements of *Martin v. Curran* are impossible to satisfy is simply untrue. *See, e.g., Westchester,* 129 N.Y.S.2d at 215.

24 The many Weekly Reports, minutes and notes of meetings, Housecalling Sheets, and meeting sign-in sheets, for example, never produced by defendants would surely have been relevant.

B. Merits Issues

Without acknowledging its current procedural position, the Union asserts that the Met has failed to *prove* the falsity or defamatory content of defendants' speech, and/or that the Court had some obligation to assess individually the false and defamatory nature of these statements and defendants' malice in making each statement. (*See, e.g.,* Union Br. at 14.) All of these arguments are, in fact, backdoor attempts to attack the merits of the Met's claim. But, in the words of the Court of Appeals, "[t]here was a time for that and [, defendants] cannot elect to default and then defend on the merits. [They] cannot have [their] cake and eat it too ." *Hughes,* 449 F.2d at 64; *see also Bambu Sales, Inc. v. Ozak Trading Inc.,* 58 F.3d 849, 853 (2d Cir.1995) (where "[d]efendants rolled the dice on the district court's tolerance for deliberate obstruction, and they lost," court refused to allow them to "return to the table").

1. Defamation

As discussed above, by its destruction of evidence and willful refusal to cooperate with discovery, the defendants lost their right to contest the sufficiency of the Met's proof, to raise defenses to the Met's claims or to seek review by the Court of the same. Nevertheless, the Union asserts that the Met bears an "affirmative" "burden of showing that each defamatory statement is false," that the Met has failed to prove the defamatory nature of speech that defendants characterize as merely "negative or harassing," and that the Met has failed to prove the falsity of the Union's statements that the Met was party to a labor dispute. (Union Br. at 12-15.) Similarly, in a repetition of the argument made in Point I of its brief, Local 100 argues that this Court must "specifically rule on each alleged defamatory statement" before entering judgment. (Union Br. at 10.) On all points, the Union is wrong.

***19** As *Hughes* makes clear, because the complaint adequately pleads defamation and its factual assertions are not incontrovertibly disproven by the case file or facts of which the Court has judicial notice, judgment may be entered. The Union's contrary argument was explicitly rejected by the Court of Appeals in *Hughes.* The defendant in *Hughes,* having suffered a default, nonetheless asserted that the plaintiff had to prove its claims on the merits at the damages inquest. Rejecting this assertion, the court held that this argument "stands the matter on its head and implies that it was [the plaintiff's] responsibility to defend

the allegations of its complaint.... [The plaintiff] had no obligation to introduce any evidence whatever in support of the allegations of its complaint." The Met properly pleaded defamation in this case, *e.g.,* Am. Compl. ¶¶ 3-5, 23-44, 94-99, alleging that defendants made false and defamatory statements about the Met with malice, *see Linn,* 383 U.S. at 65, and the Union's arguments do not "render inconceivable the likelihood" that the Met could have made out its claim of defamation, *Hughes,* 449 F.2d at 64.

The decision of the Court of Appeals vacating as vague the preliminary injunction in this case also does not constitute the necessary indisputable evidence that each of the Union's statements alleged to be defamatory in the Met's Amended Complaint was merely "negative" and "harassing" and hence not actionable. (Union Br. at 15.) Given that the Met's Amended Complaint had not yet been filed, the Court of Appeals could not have passed on all, or indeed most of, the Met's allegations of defamation. In any event, the Court of Appeals did not rule on the merits of the Met's defamation claim as originally drafted but held only that the preliminary injunction initially issued was unduly vague. *Metropolitan Opera Ass'n v. Local 100, Hotel Employees and Restaurant Employees International Union,* 239 F.3d 172, 174, 175-76 (2d Cir.2001) ("We do not reach the merits of the Union's other argument"; and "[w]e agree that the injunction presents serious questions under First Amendment and libel law, but find it unnecessary to ultimately determine these issues because we hold that the injunction must be vacated as its scope and meaning are unclear"). [25]

25 The Union also quotes the Court of Appeals' opinion to suggest that the Court conferred blanket protection on "harassing" speech, but, read in its proper context, the passage only addresses the propriety of injunctive relief to support the Court's conclusion, in *dicta,* that equity will not generally *enjoin* a libel even where the libel is harassing. In short, in no way does this passage affect the imposition of liability upon the Union's default.

Finally, as this Court has already ruled, and hence as is the law of this case, the Norris LaGuardia Act and the National Labor Relations Act do not constitute indisputable evidence that the Met was party to a labor dispute such that defendants' public statements were true. [26] In any event, the Met's allegations of defamation do not turn on the existence of a labor dispute, but on the defendants' statement falsely linking the Met to that dispute.

26 Of course, the term "labor dispute" as understood by lay people, not labor lawyers, is what would have been relevant at a trial on this point. In any event, even under the hypertechnical definition of federal labor law, there was no "labor dispute" here. The dispute between the Union and RA-regarding the means by which Local 100 would seek to recognize the RA workers at the Met, election or card check-did not concern "the terms or conditions of employment or ... the association of or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment." *Burlington Northern R. Co. v. Brotherhood of Maintenance of Way Employees,* 481 U.S. 429, 107 S.Ct. 1841, 95 L.Ed.2d 381 (1987), cited by the Union, Union Br. at 13, concerned a dispute between a company and a union regarding the *employment* of union members by the company's subcontractor and, as such, is wholly distinguishable.

2. "Commonplace Labor Rhetoric"

Nor does the Union's claim of privilege to engage in so-called "commonplace labor rhetoric" or to defame the Met to government officials affect the sanctions decision. With respect to the statements the Union benignly characterizes as "commonplace labor rhetoric," it selects certain phrases from the Met's Amended Complaint, lists them out of context, and argues that they are non-actionable, non-factual statements. (Union Br. at 11.) As the basis for such a characterization, the Union suggests that there is a definitive list of permissible invectives and degrading words and phrases that may used with impunity in a labor dispute. Assuming *arguendo* this Court were free to examine the merits of the Met's claims, the cases to which the Union cites would not be found to *establish conclusively* (as *Hughes* requires) the existence of such a categorical list.

***20** Indeed, in *Steinhilber v. Alphonse,* 68 N.Y.2d 283, 508 N.Y.S.2d 901, 501 N.E.2d 550 (1986), cited by the Union (Union Br. at 10), the New York Court of Appeals explicitly stated:

> We eschew any attempt here to reduce the problem of distinguishing fact from opinion to a rigid set of criteria which can be universally applied. The infinite variety of meanings conveyed

> by words-depending on the words themselves and their purpose, the circumstances surrounding their use, and the manner, tone and style with which they are used-rules out, in our view, a formulistic approach.

Id. at 68 N.Y.2d at 291, 508 N.Y.S.2d at 905, 501 N.E.2d 550; *see also Milkovitch v. Lorain Journal Co.,* 497 U.S. 1, 18, 110 S.Ct. 2695, 111 L.Ed.2d 1 (1990) (rejecting a "wholesale defamation exemption for anything that might be labeled 'opinion' "). In fact, determining whether particular statements are "non-actionable rhetoric or opinion" is "a difficult task" and is based on a multi-factor, totality of the circumstances test which includes an evaluation of (1) whether the specific language in issue has a precise meaning which is readily understood; (2) whether the statements are capable of being proven true or false; and (3) whether either the full context of the communication in which the statement appears or the broader social context and surrounding circumstances are such as to signal ... readers or listeners that what is being read or heard is likely to be opinion, not fact" (internal quotations and citations omitted). *Brian v. Richardson,* 87 N.Y.2d 46, 51, 637 N.Y.S.2d 347, 350, 660 N.E.2d 1126 (1995); *see also Milkovitch,* 497 U.S. at 9; *Gross v. New York Times Co.,* 82 N.Y.2d 146, 155, 603 N.Y.S.2d 813, 819, 623 N.E.2d 1163 (1993); *Steinhilber,* 68 N.Y.2d at 292, 508 N.Y.S.2d 905. Even when union speech is at issue, this contextual review is employed. *See Old Dominion,* 418 U.S. 264 at 284, 94 S.Ct. 2770, 41 L.Ed.2d 745 (holding that the alleged defamatory words "were obviously used *here* in a loose, figurative sense" but noting that "[t]his is not to say that there might not be situations where the use of this writing or other similar rhetoric in a labor dispute could be actionable") (emphasis added). Consideration of the totality of the circumstances and overall context, however, does not go to "the face" of the Met's complaint but rather requires an evidentiary evaluation that is foreclosed. *See Hughes,* 449 F.2d at 68 ("the question is not whether one inference or another is stronger but whether [defendants'] evidence-in light of default and thus the absence of trial-absolutely forecloses the possibility" of the plaintiff's claims).

Likewise, the Union had no absolute privilege as a matter of law to defame the Met to the Members of the New York City Council under the *Noerr-Pennington* doctrine. "The essence of the Noerr-Pennington Doctrine is that parties who petition the government for governmental action favorable to them cannot be prosecuted under antitrust laws even though their petitions are motivated by anticompetitive intent." *Video Int'l Production, Inc. v. Warner-Amex Cable Communications, Inc.,* 858 F.2d 1075, 1082 (5th Cir.1988). Although some courts, like the Fifth Circuit, have extended the doctrine to state tort actions *analogous to anti-trust claims,* the Union provides no authority for the proposition that the *Noerr-Pennington* doctrine applies to defamation claims. Indeed, the only authority located holds that it does not. *In re IBP Confidential Business Documents Litigation,* 755 F.2d 1300, 1313 (8th Cir.1985) (the "Noerr-Pennington Doctrine does not necessarily and absolutely preclude liability for damages resulting from defamatory statements made in the course of petitioning the government").

3. Tortious Interference

***21** The Union argues that the Met's tortious interference claim is preempted, Union Br. at 16-17, but that argument was rejected on the preliminary injunction motion. The Union also argues that the claim is deficient because an "inducement of breach of contract" claim must recite the contract(s) breached. (*Id.* at 17). The problem with this argument, however, is that the Met pleaded interference with its "business relations and economic advantage," not contract. (Am. Compl. at p. 58 (title of claim) & ¶ 123.) No contract need be identified to sustain such a claim, and the Union cites no cases suggesting otherwise.[27] *See NBT Bancorp Inc. v. Fleet/Norstar Financial Group, Inc.,* 87 N.Y.2d 614, 623, 641 N.Y.S.2d 581, 586, 664 N.E.2d 492 (1996).

27 The Union also says that at the February 10, 2003 conference, the Met committed that it would offer no proof of effect on donor relations. (Union Br. at 17 n.11.) In fact, the Met said, in response to defendants' suggestion that it answer their earlier interrogatories as to damages: "The requests were, as you may recall, for all the contribution records and all of the ticket sales and so forth, and it is not our intention to rely on that kind of data...." (2/10/03 Tr. at 19-20.)

4. Prima Facie Tort

As part of their summary judgment motion, defendants argued the Met's prima facie tort claim should be dismissed "Because the Met Has Not Alleged and Cannot

Prove 'Disinterested Malevolence." ' (Lans III, Ex. 2 at Table of Contents, Point VI.) This aspect of the defendants' motion was denied upon a finding that there were questions of fact requiring trial. The Union's argument now to the same effect accordingly is foreclosed. *See In re Crazy Eddie Sec. Litig.,* 948 F.Supp. 1154 (E.D.N.Y.1996).

5. Secondary Boycott

The Union argues that the secondary boycott claim is preempted. This argument has been rejected twice: once at the injunction stage and later on defendants' motion for summary judgment, and I decline to disturb that law of the case.

C. Conclusion

In sum, having reconsidered the sanctions decision as to the Union and having found nothing that would change the result, I adhere to my prior sanctions decision as to the Union.

IV. The Individual Defendants' Motion

Tamarin and Diaz move to clarify whether the judgment of liability based on the Opinion applies to them, to correct it so as not to impose such liability or, in the alternative, to reconsider. The motions to clarify and reconsider are granted, and, for the reasons set out below, I adhere to my prior decision granting judgment on liability against Tamarin and Diaz.

First, the finding of liability indeed applies to Tamarin and Diaz, as I intended and as the Opinion markes clear. The Opinion differentiates between "the Union" and "defendants" as appropriate, and, as all defendants were aware, the Met's motion was expressly made against all defendants, not only the Union. Because I found that Tamarin and Diaz willingly participated in the discovery misconduct, I ultimately granted the Met's motion for sanctions as against all defendants. Thus, the findings of liability and sanctions set out in the Opinion apply to the individual defendants.

Tamarin and Diaz also move for reconsideration on the ground that the Opinion made no findings of bad faith or misconduct by either of them. They quibble with the significance of the Opinion's recitation of the facts relating to them, arguing that such findings are insufficient to support judgment and sanctions against them. While I believe the Opinion's findings are sufficient to support my decision, I grant Tamarin and Diaz's motion for reconsideration to clarify the factual and legal findings as to Tamarin and Diaz's misconduct.

A. The Facts

1. Tamarin

***22** Tamarin, although an individually-named defendant with the same obligations as the Union, appears never once to have searched his own files for documents responsive to the Met's document requests, even though many requests were directed specifically to him. *See, e.g.,* 212 F.R.D. at 228 n. 35 ("Tamarin, the then-outgoing Union president, was also grossly inadequate in his own document search. For example, he never even looked at the documents in his Chicago office."). In his deposition, Tamarin testified that sometime after May 2000-around the time that the Met sent out its First Document Request-either Brooks Bitterman or Joseph Lynett gave him "a list of files to look for and documents" and that he looked for some documents "personally and some [he] delegated to other people on [his] staff." (Lans I,[28] Ex. 48 (Deposition of Henry Jonathan Tamarin dated Dec. 11, 2001) at 65.) However, the Met served four other Document Requests-the Second in May 2001, the Third and Fourth in October 2001-to which Tamarin, as Local 100's leader, undoubtedly had responsive materials. Yet Tamarin testified that he could not recollect whether he ever looked through his files again after this first occasion in 2000 until the night before his deposition in December of 2001. (*Id.* at 67-69.)

28 Reference is to the Declaration of Deborah E. Lans, sworn to April 11, 2002.

Compliance discovery revealed that Tamarin, the Union's member of the board of the benefit trust plans, participated in communications about subsidies and Union member benefits at committee meetings, with Union personnel and otherwise, many of which communications went unproduced. *See, e.g.,* 212 F.R.D. at 192 (Margaret Rimmelin, the Union's Office Manager, testified at her deposition that from time to time Tamarin received member inquiries regarding benefits and sometimes responded by letter); *id.* at 199-200 (Tamarin questioned at deposition about letters he wrote concerning subsidies and when asked if he had copies of

those documents, answered, "Well, I don't know. We're looking."); *id.* at 224 (Executive Board Minutes and Membership Meeting Minutes referenced the existence of reports on such topics yet Moss' signed response to the Met's Third Document Request stated that there were no documents concerning benefits to its members and their families). Tamarin sent numerous letters out about the campaign which also went unproduced. *See id.* at 194 (noting that Tamarin sent letters to members of the New York City Council's Parks, Cultural Affairs, Finance and Labor committees, but no copies of these letters were made); *id.* at 200 (noting that Tamarin did not believe he had looked at any files in his office in Chicago which he had occupied since November 1999 and from which he dealt with the Union's campaign against the Met).

In addition, Tamarin participated in numerous rallies and meetings, yet Tamarin's Weekly Reports, when finally produced, were produced only in part. *See id.* at 212 n. 23 (noting that the reports were produced three days before the close of discovery and that "[t]here were significant gaps" in the production). Although Herrick (not Tamarin) now claims (in an unsworn submission) that the non-produced reports were for times when Tamarin was uninvolved in the campagin at the Met, there is documentary evidence disproving this last-minute excuse. (*See* Lans III, Ex. 15 (memorandum and letters written by Tamarin).)

***23** Tamarin himself, as an individual defendant to whom the document requests were addressed, bore part of the burden to ensure that responsive documents were produced. However, as set out in the Opinion, documents that should have been produced either were produced at the last minute or not at all. When Tamarin was questioned at his deposition with respect to Weekly Reports, for example, he responded as follows:

Q: *Have your counsel in this case asked you to provide them with copies of those reports?*

A: *Yesterday evening.*

Q: Yesterday evening?

A: Yes.

Q: *Have your counsel in this case ever asked you to provide them with your files relating to Restaurant Associates, the Metropolitan Opera, card check neutrality agreements or the like?*

A: *Not prior to yesterday evening.*

Q: Did you ever provide your files so far as they relate [to] the Met, R.A., the activities at the Met, card check agreements?

A: I believe I was asked last year and provided whatever I had at that time.

Q: Asked by whom?

A: It was either Joe Lynett or Brooks Bitterman.

Q: You stated last year, so you're talking about some time in 2000?

A: I believe so....

Q: ... [B]etween last year and last night were you asked for anything?

A: I don't have a recollection.

Q: Last night were you asked for anything other than your [W]eekly [R]eports?

A: No.

212 F.R.D. at 199 (emphasis added). The Opinion found that counsel's failure to produce, or even inquire about, the Weekly Reports in a timely manner constituted "conduct [that] is wholly inconsistent with counsel's obligation to conduct discovery in good faith." *Id.* For the record, Tamarin's own failure to make any effort to ensure that a document request directed to him personally as an individual defendant (which he nowhere denies receiving) had been complied with also constitutes discovery misconduct. *See id.* at 138 n. 35 ("Tamerin, the then-outgoing Union President, was also grossly inadequate in his own document search. For example, he never even looked at the documents in his Chicago office.").

2. Diaz

Dennis Diaz was the lead organizer assigned by Local 100 to the Met campaign. He was involved in many relevant activities, including near-daily communications with RA workers at the Met for at least a two-year period, numerous house visits to the workers to solicit participation and persuade them to sign "cards," travelling with an RA worker from the Met to a conference in Puerto Rico to discuss organizing tactics, and participating in numerous leaflet "actions" and visits to Met directors and affiliates.

Because Diaz was named as an individual defendant in this case, the Met's document requests were directed to him personally, and he nowhere denies receiving them. As noted in the Opinion, Joseph Lynett gave a copy of the Met's First Document Request to Diaz in May 2000, *see* 212 F.R.D. at 185, yet neither the Weekly Reports nor any other of a multitude of documents in Diaz' custody, possession, or control was obtained by the Met until some 15-18 months later (if at all). Searching of Diaz's files, to the extent done, was performed by Bitterman and Yen. However, Bitterman testified at his deposition that he only searched the file drawer that Diaz himself designated, Lans I, Ex. 42 (Deposition of Brooks Bitterman dated Oct. 25; 2001 ("Bitterman Dep.")) at 496-497, meaning that numerous boxes in Diaz's office and all but the one file drawer went uninspected, Lans I ¶ 88-89. Never produced (with two exceptions, *see* Lans I, Ex. 51) were any records of his house visits to RA workers. (Lans I ¶ 90.) Again, like Tamarin, Diaz bore a responsibility to ensure compliance with his discovery obligations, yet the record reveals that he did not fulfill this responsibility.

***24** Counsel for both sides expend much ink arguing about what to make of Diaz's testimony in a related NLRB proceeding that he did not keep a log of his activities on behalf of Local 100 and the citation to that testimony in footnote 34 of the Opinion. Diaz's testimony before the NLRB was as follows:
Q: Do you keep a diary?

A: No.

Q: Do you keep a calendar of your appointments?

A: A calendar of what's going on, yes. But I don't save them.

Q: *Do you log what you do on a day-to-day basis? Your activities on behalf of Local 100.*

A: *No.*

212 F.R.D. at 195 (emphasis added).

In his deposition on November 15, 2001, however, Diaz testified as follows:
Q: Do you see to the left of where it says cafeteria it says report?

A: Yes.

Q: What does it mean?

A: Could be, had to do with my reports, my daily reports. I can't remember -

Q: *What are your daily reports?*

A: *Office reports that we fill in at each week we fill out reports.*

Q: *What are those reports about?*

A: *The weekly work that was done.*

Id. (emphasis added). Diaz's NLRB testimony was cited in the Opinion in the section discussing wilfulness and bad faith, specifically "falsehoods uttered by individual defendants." *Id.* at 225-26. There, it was noted that Granfield originally denied providing any "written reports ... to the International with respect to [his] activities," a statement later shown to be undeniably false. *Id.* Following the recitation of that testimony, a foonote in the Opinion states: "Similarly, in his testimony in a related NLRB proceeding, Diaz denied that he 'log[ged] what [he did] on a day-to-day basis ... [, his] activities on behalf of Local 100." ' 212 F.R.D. at 226 n. 34. Although the testimony appears to be false, because it was not given in this case-and thus was not relied on as a basis for sanctions-it was relegated to a footnote. Thus, it is without import on reconsideration.

B. Conduct as Individuals

Tamarin and Diaz attempt to obfuscate the real issue-a pervasive pattern of discovery misconduct over an extended period of time-by arguing that their conduct in not producing, for example, the Weekly Reports does not warrant sanctions because, *inter alia,* "a party may be substantially justified in not disclosing evidence if the party could not have been expected to foresee its relevance." (Individual Defs' Reply Br.[29] at 5 (citing 7 Moore's Federal Practice § 37.62 at 37-126.1-127 (3d ed.2003)).) This argument is of no moment in the face of the record in this case. All five of the Met's Document Requests were addresed to Local 100 *and* Tamarin *and* Diaz. Neither of the individual defendants has denied receiving copies of these requests addressed personally to them. Neither Tamarin nor Diaz ever himself searched any of his own files for documents or took any steps to ensure that a competent search was made by others, even after their depositions were taken on the topic of their search for documents and their possession of documents and even after they had been asked by Met counsel to produce documents directed to them personally. Although Bitterman searched one of Diaz's file drawers for documents responsive to the Met's First, Second and Third Requests, no one, Diaz included, searched for documents responsive to the Fourth and Fifth Requests. (Lans I, Ex. 54 at Responses of Dennis Diaz to Compliance Interrogatories ("Diaz's Responses") ¶ 3.) As set out in part above, the Opinion found that categories of documents were not produced-indeed were not even searched for-by Tamarin and Diaz, and documents likely to be in each defendant's files were withheld during discovery. In addition, although Diaz uses email, (Bitterman Dep. at 26-27), not one email to or from Diaz was produced or the absence of email explained. Nor were the files and computer used by Tamarin's New York secretary (Tamarin's secretaries do all his typing) ever searched for responsive documents. *See* 212 F.R.D. at 192.

29 Reference is to Reply Memorandum of Law on Behalf of Defendants Henry Tamarin and Dennis Diaz dated May 30, 2003.

***25** As the foregoing record and the Opinion make clear, Tamarin and Diaz utterly failed in their discovery obligations as individuals to whom each and every document request by the Met was directed. They had a duty to assure that such requests were complied with, at least on behalf of themselves, and they did not do so. For these reasons and the reasons set out in the Opinion, judgment of liability and sanctions against Tamarin and Diaz is appropriate based on their individual misconduct.

C. Coordinated Conduct with Counsel

Tamarin and Diaz may also properly be sanctioned for the misconduct of their counsel. It has long been the law in this Circuit that a client may be sanctioned for his lawyer's misconduct. As the Court of Appeals wrote in *Cine Forty-Second Street Theatre,* "[a] litigant chooses counsel at his peril, and here, as in countless other contexts, counsel's disregard of his professional responsibilities can lead to extinction of his client's claim." 602 F.2d at 1068 (citing *Link v. Wabash Railroad Co.,* 370 U.S. 626, 82 S.Ct. 1386, 8 L.Ed.2d 734 (1962)). The Court went on to note that the "acts and omissions of counsel are normally wholly attributable to the client." *Id.* Moreover, where, as here, the sanctionable conduct is a "coordinated effort" of counsel and party, joint and several liability is appropriate. *See Estate of Calloway v. Marvel Entm't Group,* 9 F.3d 237, 239-240 (2d Cir.1993), *cert. denied,* 511 U.S. 1081, 114 S.Ct. 1829, 128 L.Ed.2d 459 (1994).

As high-ranking members of the Union's staff and individually-named defendants in this action, Tamarin and Diaz must be assumed to have had familiarity with the many documents called for by the Met's document requests, whether in their possession or in the possession of others at the Union. Tamarin and Diaz bore the responsibility of coordinating with counsel-particularly as individuals to whom the requests were addressed-to assure that the Union's and their own discovery obligations were complied with. The record in this case demonstrates willful disregard of that responsibility on the part of Tamarin and Diaz. While Tamarin and Diaz initially might have relied on Bitterman to gather responsive documents and their counsel to supervise Bitterman, they were not free to forget about their obligations merely upon turning over some portion of their files. As outlined above, neither defendant knew, or made an effort to learn, whether his files had been reviewed by a lawyer. (*See, e.g.,* Diaz's Responses ¶ 6 ("I do not know if any lawyers searched my files which I turned over to Brooks Bitterman."); Lans I, Ex. 54 at Tamarin's Responses to Compliance Interrogatories ¶ 4 ("I delegated responsibility for searching and producing responsive documents to Brooks Bitterman and other staff members of Local 100").)

D. Conclusion

In sum, the individual defendants and their counsel may not engage in parallel know-nothing, do-nothing, head-in-the-sand behavior in an effort consciously to avoid knowledge of or responsbility for their discovery obligations and to obstruct plaintiff's wholly appropriate efforts to prepare its case. Accordingly, the individual defendants are properly sanctioned for the misconduct of their counsel, independently, and for their participation with the Union and counsel in coordinated, multiple acts of willful misconduct. Upon reconsideration, I adhere to my previous decision with respect to Tamarin and Diaz.

CONCLUSION

***26** Because Herrick, Davis and the Union motions do not raise matters appropriate on reconsideration, their motions for reconsideration (docket nos. 64 and 71) are denied.

In the alternative, the motions for reconsideration by Herrick, Davis and the Union (docket nos. 64 and 71) are granted and, upon reconsideration, I adhere to my prior decision.

The motion for clarification and reconsideration by the individual defendants Tamarin and Diaz (docket no. 62) is granted. The Opinion is clarified such that the Opinion applies to Tamarin and Diaz in granting judgment on liability against them. Upon reconsideration, I adhere to my prior decision granting judgment on liability against Tamarin and Diaz.

Counsel shall confer and inform the Court by letter no later than September 13, 2004 how they would propose to proceed.

SO ORDERED

All Citations

Not Reported in F.Supp.2d, 2004 WL 1943099, 175 L.R.R.M. (BNA) 2870

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2015 WL 1069270
Only the Westlaw citation is currently available.
United States District Court,
S.D. New York.

SEIFTS, et al., Plaintiffs,
v.
CONSUMER HEALTH SOLUTIONS LLC, et al., Defendants.

No. 05 Civ. 9355(ER)(LMS).
|
Signed March 10, 2015.
|
Filed March 11, 2015.

OPINION AND ORDER

RAMOS, District Judge.

***1** Before the Court is the Report and Recommendation ("R & R") dated August 5, 2013 of Magistrate Judge Lisa Margaret Smith, addressing two motions for reconsideration of an entry of default judgment. Doc. 151. Magistrate Judge Smith concludes and recommends that this Court conclude that both motions be denied. *Id.* at 2–3. For the reasons stated herein, the Court ADOPTS the R & R and directs the entry of judgment as recommended.

I. Background

Plaintiffs Jeffrey C. Seifts, Ellen Manfredo, Charles Hargreaves, Selma Denmark, Peter Audet, Carolyn Demichelle, Susan E. Hoyt, Maryann Pulvirenti, Joseph French, Linford Snyder, Diane Berman, John Bastone, and John Gerson, individually and on behalf of the participants of the Fleetcare CU 1000P Medical Program, John and Jane Does 1–300, Jeffrey C. Seifts & Co., Inc., and Consumer Advocates Group, Ltd. ("CAG") (collectively, "Plaintiffs"), commenced this action on November 3, 2005 against Consumer Health Solutions LLC d/b/a Palmetto Administrators ("CHS"), Fleetcare Group, LLC, Fleet Care Corporation, Bart Posey, TIG Premier Insurance Company, William M. Worthy, II, Angela Posey, Obed Kirkpatrick, Jollene Priester, Jack Henson Hawkins, and New Source Benefits, LLC, individually and jointly and severally (collectively, "Defendants").[1] Plaintiffs assert claims for breach of fiduciary duty and disclosure obligations under ERISA, claims for recovery of the value of wrongly denied benefits, and a series of claims under New York law.

1 TIG Premier Insurance Company was terminated as a defendant, Doc. 147, based on the Court's grant of its motion to dismiss and/or for summary judgment. Doc. 81. Jollene Priester was terminated as a defendant following the Parties' stipulation of voluntary dismissal pursuant to Federal Rule of Civil Procedure 41(a)(1)(A)(ii). Doc. 167.

Initially assigned to the Honorable Stephen C. Robinson, the case was transferred to the Honorable Richard J. Holwell on November 12, 2010, Doc. 62, to the Honorable J. Paul Oetken on October 20, 2011, Doc. 83, and to the undersigned on July 22, 2013. Doc. 148. The case was referred to the Honorable Lisa Margaret Smith, United States Magistrate Judge, on November 14, 2011. Doc. 84. On May 6, 2011, Judge Holwell entered a default judgment in favor of Plaintiffs Ellen Manfredo, Charles Hargreaves, Selma Denmark, Peter Audet, Carolyn DeMichelle, Susan E. Hoyt, Maryann Pulvirenti, Joseph French, Linford Snyder, Diane Berman, John Bastone, and John Gerson (the "Individual Plaintiffs") and against Defendants CHS, Fleetcare Group, LLC, Fleet Care Corporation, Bart Posey, William M. Worthy, II, Angela Posey, Obed Kirkpatrick, Jollene Priester, Jack Henson Hawkins, and New Source Benefits, LLC. Doc. 80. On March 15, 2012, Judge Oetken entered a default judgment in favor of Plaintiffs Jeffrey C. Seifts, Jeffrey C. Seifts & Co., Inc., and CAG (the "Seifts Plaintiffs") and against Defendants CHS, Fleetcare Group, LLC, Fleet Care Corporation, Bart Posey, William M. Worthy, II, Angela Posey, Obed Kirkpatrick, Jack Henson Hawkins, and New Source Benefits, LLC, jointly and severally. Doc. 102.

Defendants Jollene Priester ("Priester") and Jack Hawkins ("Hawkins") filed separate motions to vacate the default judgment on April 6, 2012 and May 18, 2012. Docs. 118, 135. On April 4, 2012 and April 24, 2012, Defendant Obed Kirkpatrick ("Kirkpatrick") submitted two letters that he styled as a "motion to set aside default judgments." Docs. 127, 132. On July 31, 2012, Judge Oetken, to whom the case was then assigned, denied the motions filed by Priester and Hawkins but did not address the letter motion submitted by Kirkpatrick. Doc. 142. On August 25, 2012, Hawkins sent a letter to the

Court seemingly renewing his motion to vacate the default judgment, construed by Magistrate Judge Smith as a motion for reconsideration of Judge Oetken's July 31, 2012 Order. Doc. 146. Magistrate Judge Smith, in her August 5, 2013 R & R, concludes and recommends that this Court conclude that both Kirkpatrick's motion and Hawkins' motion for reconsideration be denied. Doc. 151 at 2–3. [2]

2 In a separate R & R, dated March 6, 2014, Magistrate Judge Smith made a recommendation regarding damages in this case, which this Court adopted in its entirety on November 21, 2014. Docs. 166, 168.

***2** The R & R noted that objections, if any, would be due within seventeen days and that failure to timely object would preclude later appellate review of any order of judgment entered. *Id.* at 10. Neither Kirkpatrick nor Hawkins filed objections. Both have therefore waived their right to object to the R & R. *See Dow Jones & Co. v. Real–Time Analysis & News, Ltd.,* No. 14 Civ. 131(JMF) (GWG), 2014 WL 5002092, at *1 (S.D.N.Y. Oct. 7, 2014) (citing *Frank v. Johnson,* 968 F.2d 298, 300 (2d Cir.1992); *Caidor v. Onondaga County,* 517 F.3d 601, 604 (2d Cir.2008)).

II. Standard of Review

A district court reviewing a magistrate judge's report and recommendation "may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate judge." 28 U.S.C. § 636(b)(1)(C). Parties may raise "specific," "written" objections to the report and recommendation "[w]ithin fourteen days after being served with a copy." *Id.; see also* Fed.R.Civ.P. 72(b)(2). A district court reviews *de novo* those portions of the report and recommendation to which timely and specific objections are made. 28 U.S.C. § 636(b)(1)(C); *see also United States v. Male Juvenile (95–CR–1074),* 121 F.3d 34, 38 (2d Cir.1997). The district court may adopt those parts of the report and recommendation to which no party has timely objected, provided no clear error is apparent from the face of the record. *Lewis v. Zon,* 573 F.Supp.2d 804, 811 (S.D.N.Y.2008). The district court will also review the report and recommendation for clear error where a party's objections are "merely perfunctory responses" argued in an attempt to "engage the district court in a rehashing of the same arguments set forth in the original petition." *Ortiz v. Barkley,* 558 F.Supp.2d 444, 451 (S.D.N.Y.2008) (citations and internal quotation marks omitted).

III. Conclusion

No party has objected to the R & R. The Court has reviewed Judge Smith's thorough R & R and finds no error, clear or otherwise. Judge Smith reached her determination after a careful review of the parties' submissions. R & R 2–10. The Court therefore ADOPTS Judge Smith's recommended judgment for the reasons stated in the R & R. Furthermore, the parties' failure to file written objections precludes appellate review of this decision. *PSG Poker, LLC v. DeRosa–Grund,* No. 06 CIV. 1104(DLC), 2008 WL 3852051, at *3 (S.D.N.Y. Aug. 15, 2008) (citing *United States v. Male Juvenile,* 121 F.3d 34, 38 (2d Cir.1997)).

The Clerk of Court is respectfully directed to enter judgment and close this case.

It is SO ORDERED.

REPORT AND RECOMMENDATION

LISA MARGARET SMITH, United States Magistrate Judge.

To: The Honorable Edgardo Ramos, U.S.D.J.

Plaintiffs Jeffrey C. Seifts, Ellen Manfredo, Charles Hargreaves, Selma Denmark, Peter Audet, Carolyn Demichelle, Susan E. Hoyt, Maiyann Pulvirenti, Joseph French, Linford Snyder, Diane Berman, John Bastone, John Gerson, individually and on behalf of the participants of the Fleetcare CU 1000P Medical Program, John and Jane Does 1–300, and Jeffrey C. Seifts & Co., Inc. and Consumer Advocates Group, Ltd. bring this action against Defendants Consumer Health Solutions LLC d/b/a Palmetto Administrators, Fleetcare Group, LLC, Fleet Care Corporation, Bart Posey, TIG Premier Insurance Company [1], William M. Worthy, II, Angela Posey, Obed Kirkpatrick, Jollene Priester, Jack Henson Hawkins, and New Source Benefits, LLC, individually and jointly and severally, asserting claims for breach of their fiduciary duties and their disclosure obligations under ERISA and to recover the value of benefits wrongly denied by Defendants. Plaintiffs also assert claims under New York law for breach of contract, breach of implied

contract, quantum meruit, unjust enrichment, conversion, fraud and intentional misrepresentation, negligence and negligent misrepresentation, breach of the covenant of good faith and fair dealing, breach of fiduciary duty, intentional infliction of emotional distress, and violations of New York Insurance Law and New York General Business Law provisions.

1 TIG has been dismissed from the case. *See* Docket # 147.

***3** Default judgments were entered in the action on May 6, 2011, and March 15, 2012. Docket80, 102. Defendants Jollene Priester and Jack Hawkins filed separate motions to vacate the default judgment, Docket118, 135, and on July 31, 2012, the Honorable J. Paul Oetken, to whom the matter was then assigned, denied the motions to vacate the default judgment. Docket # 142. In addition to the submissions from Defendants Priester and Hawkins, Defendant Obed Kirkpatrick submitted a one-page undated letter to the Court, received by the undersigned on April 4, 2012, referring to "this matter of dismissing me from these charges." Docket # 127. This letter was followed up by a very brief undated letter to the *Pro Se* Clerk, filed on April 24, 2012, which Kirkpatrick stated was a "motion to set aside default Judgments, pursuant to Rule 55(c) of the Federal Rules of Civil Procedure," and again referred to "this matter of dismissing me from these charges." Docket # 132. Although Judge Oetken accepted for filing Kirkpatrick's letter to the *Pro Se* Clerk, he did not address Kirkpatrick's motion to vacate the default judgments in his July 31, 2012, Order. Thereafter, Defendant Hawkins sent a letter to the Court dated August 25, 2012, which, despite being called an opposition to the Seifts Plaintiffs' and the Individual Plaintiffs' requests for damages, is a submission addressed to the issue of liability—in essence, a renewed motion to vacate the default judgment or, more precisely, a motion for reconsideration of Judge Oetken's July 31, 2012, Order. Docket # 146. [2]

2 Defendant Hawkins' submission was initially not accepted for filing due to his failure to provide proof of service upon the other parties in the action. On September 14, 2012, however, Hawkins provided some affirmations of service of his papers. Although the Court has docketed these papers, it notes that Hawkins did not provide proof of service upon Defendants Bart and Angela Posey, Obed Kirkpatrick, and New Source Benefits, LLC. **Hawkins is hereby ordered to provide proof of such service on those parties, and to effect service if necessary.**

For the reasons that follow, I conclude, and respectfully recommend that Your Honor should conclude, that both Kirkpatrick's motion and Hawkins' motion for reconsideration should be denied.

Defendant Kirkpatrick's Motion to Vacate the Default Judgments

Defendant Kirkpatrick's initial letter to the Court states, in its entirety, as follows:

> I have not played any part in Consumer Health Solutions, Palmetto Administrators, or TIG Premier Insurance Company[.] William Worthy was a participant in all of those.
>
> I did work for Bart Posey as a salesman, who at the time was owner of Fleet Care Corporation and met with Mr. Seifts on Mr. Posey's behalf even taking him to lunch when he came to Franklin, TN.
>
> On one occasion I did travel with Mr. Posey and William Worthy to New York [h]owever, but I did not have anything to do with the sale of insurance to Mr. Seifts.
>
> I plead for your mercy in this wrongful law suit. Due to circumstances beyond my control, I filed for bankruptcy in December of 2010. I do not own any property and do not have any money in a savings account; CD's or stocks and bonds.
>
> As you can tell, I am not an attorney and I cannot afford to hire one to contact you. I hope you will not hold that against me.
>
> Thank you for your prompt attention to this matter of dismissing me from these charges.

Docket # 127. In response to this letter, as well as a March 24, 2012, letter from Defendant Hawkins (Docket # 126), the Court advised Kirkpatrick and Hawkins, in a letter dated April 12, 2012, "At this point in time, your options are to either (1) file a formal motion to set aside the Default Judgments, pursuant to Rule 55(c) and/or Rule 60(b) of the Federal Rules of Civil Procedure, ... or (2) file a sworn affidavit opposing the amount of money damages and attorneys' fees sought by the plaintiffs." Docket # 125.

***4** Kirkpatrick's letter to the *Pro Se* Clerk was submitted thereafter. The letter reads in its entirety as follows:

> I have never been part of Consumer Health Solutions, Palmetto Administrators, Fleet Care Group or TIG Premier Insurance Company[.]
>
> I did work for Bart Posey as a real estate salesman with Springfield Realty.
>
> I have never sold insurance in the state of New York.
>
> I plead for your mercy in this wrongful law suit and file this motion to set aside default Judgments, pursuant to Rule 55(c) of the Federal Rules of Civil Procedure.
>
> Thank you for your prompt attention to this matter of dismissing me from these charges.

Docket # 132.

As the Second Circuit has explained,

> Rule 55(c) permits a party to be relieved of default "for good cause," whereas a default judgment may only be set aside in accordance with Rule 60(b). Fed.R.Civ.P. 55(c).[3] While Rule 55(c) does not define "good cause," this Court has advised district courts to consider three criteria in deciding a Rule 55(c) motion: (1) whether the default was willful; (2) whether setting aside the default would prejudice the party for whom default was awarded; and (3) whether the moving party has presented a meritorious defense. *Enron Oil Corp. v. Diakuhara,* 10 F.3d 90, 96 (2d Cir.1993). The same factors are applied in the context of a Rule 60(b) motion to set aside a default judgment, although they are applied more rigorously, and the district court must resolve any doubts in the defaulting party's favor. *Id.*

3 The precise wording of the rule is as follows: "The court may set aside an entry of default for good cause, and it may set aside a default judgment under Rule 60(b)." Fed.R.Civ.P. 55(c).

Peterson v. Syracuse Police Dep't, 467 F. App'x 31, 33 (2d Cir.2012). Although default judgments have already been entered against Kirkpatrick, because an inquest on damages has been ordered but has not yet been completed, the Court applies the more lenient "good cause" standard of Rule 55(c) in evaluating his motion. *Murray Eng'g, P.C. v. Windermere Props. LLC,* No. 12 Civ. 0052, 2013 WL 1809637, at *3 (S.D.N.Y. Apr. 30, 2013).

A "default is deemed willful where a defendant simply ignores the complaint without action." *United Bank of Kuwait PLC v. Enventure Energy Enhanced Oil Recovery Assocs.—Charco Redondo Butane,* 755 F.Supp. 1195, 1205 (S.D.N.Y.1989) (citations omitted). In his letters, Kirkpatrick nowhere denies having been served with the Supplemental Summons and First Amended Complaint, *see* Docket # 22 (Affidavit of Service), or being aware of the existence of this ongoing litigation, nor does he deny receiving any of the documents which were served on him or sent to him at the very same address that he listed as his return address on his correspondence to the Court and the *Pro Se* Clerk. *See, e.g.,* Docket35, 63, 77, 85, 89, 97, 105. Rather, Kirkpatrick made no effort to contact the Court throughout this protracted litigation until after both entry of the second default judgment and Plaintiffs' filing of their papers in support of the award of damages upon inquest. Thus, the Court finds that his default was willful.

***5** "Prejudice to the nondefaulting party is 'the single most persuasive reason for denying a Rule 55(c) motion ....' 10A Charles Allen Wright, Arthur R. Miller & Mary Kay Kane, Federal Practice and Procedure § 2699 (3d ed.2010)." *Murray Eng'g, P.C.,* 2013 WL 1809637, at *5. "In order to show the requisite level prejudice, the plaintiff must demonstrate that any prejudice resulting from the defendant's default cannot be rectified in the Court in another manner were the default to be vacated." *Id.* (citing 10A Charles Allen Wright, Arthur R. Miller & Mary Kay Kane, Federal Practice and Procedure § 2699 (3d ed. 2010) ("Indeed, in most instances, the finding of no substantial prejudice reflects the ability of the court to impose terms and conditions on the granting of relief in order to compensate or otherwise protect the party not in default.")). "[D]elay alone is not a sufficient basis for establishing prejudice. Rather, it must be shown that delay will result in the loss of evidence, create increased difficulties of discovery, or provide greater opportunity

for fraud and collusion." *Id.* (internal quotation marks and citation omitted).

Because Kirkpatrick's letters were not considered alongside the other motions to vacate the default judgments, neither the Seifts Plaintiffs nor the Individual Plaintiffs addressed Kirkpatrick's motion. Thus, the Court does not have the benefit of their position regarding prejudice were the Court to vacate the default judgments against Kirkpatrick. However, the Court finds instructive the Individual Plaintiffs' submission in response to Hawkins' motion to vacate, in which they state as follows with respect to the issue of prejudice:

> A vacatur of the Default Judgment would result in extreme prejudice to the Plaintiffs. The underlying litigation was commenced in 2005 and amended to name Mr. Hawkins as a Defendant in 2006. For the bulk of the tortured history of this litigation, the Plaintiffs have been diligently trying to obtain discovery and prosecute this matter. Despite actual knowledge of the underlying litigation, Mr. Hawkins opted to ignore the Plaintiffs['] attempts in order to make it impossible to prosecute their case against him or obtain discovery from him. At the time the motion for a default judgment was filed, Mr. Hawkins had an opportunity to contest it but, for reasons unknown, failed to do so. Instead, Mr. Hawkins unreasonably delayed the filing of the instant motion until the Plaintiffs sought recovery of their damages by inquest.
>
> By vacating the Default Judgment, the Plaintiffs would be placed in a precarious position. As a significant amount of time has passed, not only from the commencement of this action but from the securing of the default judgment, it will be expensive and difficult for Plaintiffs to now conduct discovery. As Mr. Hawkins demonstrates no interest in the underlying litigation until now, there is no indication he will cooperate with any discovery. By vacating the default judgment, the Plaintiffs would not be able to commence their action in another jurisdiction or file against Mr. Hawkins as the statute of limitations has expired. By vacating the default judgment, the individually named Plaintiffs will not be able to recoup their likely damages from Mr. Hawkins. As such, the instant motion should be denied.

***6** Docket # 139 (Mem. of Law in Opp.) at 12–13; *see also* Docket # 140 (Culnan Affirmation) ¶ 15 (submission of the Seifts Plaintiffs in opposition to Hawkins' motion, making virtually the same argument). The same arguments apply to Kirkpatrick's conduct throughout the pendency of this litigation. Therefore, the Court concludes that all Plaintiffs would suffer prejudice were the Court to vacate the default judgments against Kirkpatrick.

Finally, only the remaining criterion—the existence of a meritorious defense—was arguably addressed by Kirkpatrick through his assertions that he "did not have anything to do with the sale of insurance to Mr. Seifts," Docket # 127, and has "never sold insurance in the state of New York." Docket # 132. "In order to make a sufficient showing of a meritorious defense in connection with a motion to vacate a default judgment, the defendant need not establish his [or her] defense conclusively, but he [or she] must present credible evidence of facts that would constitute a complete defense." *Travelers Indem. Co. v. Kabir,* 368 F. App'x 209, 210 (2d Cir.2010) (citation omitted). Kirkpatrick has provided no evidence of a defense. His unsworn letters, which do not constitute evidence, include only conclusory denials of liability and contradictory statements regarding his relationship with co-defendant Bart Posey. Thus, the earlier letter states that Kirkpatrick "did work for Bart Posey as a salesman, who at the time was owner of Fleet Care Corporation and met with Mr. Seifts on Mr. Posey's behalf even taking him to lunch when he came to Franklin, TN. On one occasion I did travel with Mr. Posey and William Worthy to New York ...," Docket # 127, but the later letter states only that Kirkpatrick "did work for Bart Posey as a real estate salesman with Springfield Realty." Docket # 132. It makes no sense, however, that Kirkpatrick, by his own admission, would have met with Seifts and would have traveled to New York with Posey and Worthy if all he did was work as a real estate salesman. In any event, "a defendant must present more than conclusory denials when attempting to show the existence of a meritorious defense." *State Farm Mut. Auto. Ins. Co. v. Cohan,* 409 F. App'x 453, 456 (2d Cir.2011) (internal quotation marks and citation omitted). Kirkpatrick's letters fail to demonstrate that he has a meritorious defense.

Because Kirkpatrick cannot satisfy Rule 55(c)'s "good cause" standard, I conclude, and respectfully recommend that Your Honor should conclude, that Kirkpatrick's motion to vacate the default judgments should be denied.

Defendant Hawkins' Motion for Reconsideration

Defendant Hawkins' August 25, 2012, letter to the Court, although labeled an opposition to the Seifts Plaintiffs' and the Individual Plaintiffs' requests for damages, is more properly considered a motion for reconsideration of Judge Oetken's decision denying Hawkins' motion to vacate the default judgment. As such, I conclude, and respectfully recommend that Your Honor should conclude, that the motion for reconsideration should be denied as untimely.

***7** The Order denying Hawkins' motion to vacate the default judgment was entered on August 2, 2012. Docket # 142. Local Civil Rule 6.3 provides that "a notice of motion for reconsideration or reargument of a court order determining a motion shall be served within fourteen (14) days after the entry of the Court's determination of the original motion[.]" Thus, Hawkins had until August 16, 2012, or, at the latest, until August 20, 2012, if the additional three days provided by Fed.R.Civ.P. 6(d) are taken into account,[4] to serve his motion papers. Hawkins' letter was dated August 25, 2012, and was not served on any of the other parties until September 14, 2012. *See* Docket # 146. Untimeliness alone is a proper basis to deny Hawkins' motion for reconsideration. *See DeVos v. Lee,* No. 07–CV–804, 2010 WL 277070, at *1 (E.D.N.Y. Jan. 19, 2010) (*"[P]ro se* defendants' motion for reconsideration is untimely and, on that ground alone, the Court would be justified in denying their application. *See, e.g., Cyrus v. City of New York,* No. 06 CV 4685(ARR)(RLM), 2010 WL 148078, at *1 (E.D.N.Y. Jan. 14, 2010) (collecting cases).") (footnote omitted).

4 August 19, 2012, was a Sunday, so Hawkins would have had until the following day. *See* Fed.R.Civ.P. 6(a)(1)(C).

Even if the Court were to consider Hawkins' motion for reconsideration on the merits, I would still conclude, and respectfully recommend that Your Honor should conclude, that it should be denied. Reconsideration motions "will generally be denied unless the moving party can point to controlling decisions or data that the court overlooked—matters, in other words, that might reasonably be expected to alter the conclusion reached by the court." *Shrader v. CSX Transp., Inc.,* 70 F.3d 255, 257 (2d Cir.1995) (citations omitted). A moving party may not, however, "advance new facts, issues or arguments not previously presented to the Court, or reargue those issues already considered." *Hayles v. Advanced Travel Mgmt. Corp.,* No. 01 Civ. 10017, 2004 WL 117597, at *1 (S.D.N.Y. Jan. 26, 2004) (citation omitted). "This strict standard seeks to discourage litigants from making repetitive arguments on issues that already have been considered by the court or from offering new arguments on a motion the court has already decided," *Id.* (citations omitted). Hawkins' submission is simply a reiteration of arguments previously made. Aside from attaching Hawkins' previous submissions to the Court, the August 25, 2012, letter states, "As stated in the copies attached, I simply had nothing what so ever to do with any misdirection of funds sent to the Worthy office," and then asks the Court to contact "two individuals who investigated and prosecuted Mr. Worthy in a similar case" and who can "confirm that [Hawkins] had no involvement with any wrong doing or misdirection of funds." Docket # 146. Hawkins had mentioned these same two individuals' names during the July 31, 2012, court conference at which Judge Oetken denied Hawkins' motion to vacate the default judgment. Docket # 149 (Transcript of 7/31/12 court conference) at 10.

***8** Accordingly, I conclude, and respectfully recommend that Your Honor should conclude, that Hawkins' motion for reconsideration should be denied.

CONCLUSION

For the foregoing reasons, I conclude, and respectfully recommend that Your Honor should conclude, that (1) Kirkpatrick's motion to vacate the default judgments should be denied, and (2) Hawkins' motion for reconsideration of the denial of his motion to vacate the default judgment should be denied.

NOTICE

Pursuant to 28 U.S.C. § 636(b)(1), as amended, and Fed.R.Civ.P. 72(b), the parties shall have fourteen (14) days, plus an additional three (3) days, pursuant to Fed.R.Civ.P. 6(d), or a total of seventeen (17) days, *see* Fed.R.Civ.P. 6(a), from the date hereof, to file written objections to this Report and Recommendation. Such objections, if any, shall be filed with the Clerk of the Court with extra copies delivered to the chambers of The Honorable Edgardo Ramos, United States District Judge, at the United States Courthouse, 40 Foley Square,

New York, New York 10007, and to the chambers of the undersigned at the United States Courthouse, 300 Quarropas Street, White Plains, New York 10601.

Failure to file timely objections to this Report and Recommendation will preclude later appellate review of any order of judgment that will be entered.

Requests for extensions of time to file objections must be made to Judge Ramos and should not be made to the undersigned.

Dated: August *5,* 2013.

All Citations

Not Reported in F.Supp.3d, 2015 WL 1069270

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2013 WL 6145749
Only the Westlaw citation is currently available.
NOT FOR ELECTRONIC OR PRINT PUBLICATION
United States District Court,
E.D. New York.

Corey DAVIS, Plaintiff,
v.
UNITED STATES DEPARTMENT OF HOMELAND SECURITY, Transportation Security Administration; United States Department of Justice, Federal Bureau of Prisons; and Federal Bureau of Investigations, Defendants.

No. 11–CV–203 (ARR)(VMS).
|
Nov. 20, 2013.

Attorneys and Law Firms

Corey Davis, Tucson, AZ, pro se.

Ameet B. Kabrawala, United States Attorney's Office, Brooklyn, NY, for Defendants.

OPINION & ORDER

ROSS, District Judge.

***1** Plaintiff, *pro se,* has moved for reconsideration of this Court's Opinion and Order, dated June 27, 2013, which found, in relevant part, that the Federal Bureau of Investigation ("FBI") had properly closed plaintiff's Freedom of Information Act ("FOIA") request after plaintiff failed to pay outstanding fees and granted the FBI's motion for summary judgment. Dkt. # 79 ("June 27 Order"), at 29–30. For the reasons stated below, the motion is denied.

DISCUSSION

I. ***Local Rule 6.3***

Local Rule 6.3 requires motions for reconsideration to "be served within fourteen (14) days after the entry of the Court's determination of the original motion." E.D.N.Y. R. 6.3. The order granting summary judgment to the FBI was docketed on June 27, 2013. The Court granted plaintiff, at his request, an extension of time in which to file his motion until August 10, 2013. Dkt. # 83. Plaintiff's motion, dated September 11, 2013, was not docketed until October 1, 2013 well over a month after it was due. Plaintiff's motion is therefore untimely.

"A party's failure to make a motion for reconsideration in a timely manner is by itself a sufficient basis for denial of the motion." *Grand River Enters. Six Nations, Ltd. v. King,* No. 02 Civ. 5068(JFK), 2009 WL 1739893, *1 (S.D.N.Y. June 16, 2009); *see also Otto v. Town of Washington,* 71 F. App'x 91, 92 (2d Cir.2003) (affirming denial of motion for reconsideration because untimely); *Gibson v. Wise,* 331 F.Supp.2d 168, 169 (E.D.N.Y.2004) (denying motion for reconsideration because untimely). "Plaintiff's pro se status does not insulate him from complying with the relevant procedural rules." *Gibson,* 331 F.Supp.2d at 169. Plaintiff asks the Court to excuse his out-of-time filing because, several weeks prior to filing his motion, he was placed in a Special Housing Unit and was separated from his legal materials. Dkt. # 84 at ECF 7. However, plaintiff fails to explain how this caused a more than month-long delay or why he did not request an extension of time as he had done previously. For this reason, plaintiff has failed to establish "excusable neglect" counseling in favor of an extension of time pursuant to Federal Rule of Civil Procedure 6(b)(1)(B), and plaintiff's motion should be denied as untimely.

II. ***Reconsideration***

Even were the Court to consider plaintiff's untimely motion, the motion would nonetheless fail to meet the strict standard applied to requests for reconsideration. "Reconsideration is an extraordinary remedy to be employed sparingly in the interests of finality and conservation of scarce juridical resources." *Richards v. N. Shore Long Island Jewish Health Sys.,* No. CV 10–4544(LDW)(ETB), 2013 WL 950625, at *1 (E.D.N.Y. Mar. 12, 2013) (internal quotation marks omitted). "[R]econsideration will generally be denied unless the moving party can point to controlling decisions or data that the court overlooked-matters, in other words, that might reasonably be expected to alter the conclusion reached by the court." *Shrader v. CSX Transp., Inc.,* 70 F.2d 255, 257 (2d Cir.1995). Such a motion "should not be granted where the moving party seeks to relitigate an issue already decided," *Shrader,* 70 F.2d at 257, or seeks "to advance new issues or theories of relief that were not

previously presented to the court," *Mahadeo v. N.Y. City Campaign Finance Bd.,* 514 F. App'x 53, 55 (2d Cir.2013).

***2** Nothing in plaintiff's motion for reconsideration alters the outcome in this case. Plaintiff first argues that, because the FBI allegedly failed to respond to the plaintiff's FOIA requests, it forfeited its authority to terminate his request pursuant to 5 U.S.C. § 552(a)(6)(C)(i). In making this argument, plaintiff interprets 5 U.S.C. § 552(a)(6)(C)(i) as preventing the FBI from taking any action on his FOIA requests, in the absence of a court order, once it has been sued because of an allegedly inadequate response to those requests. [1] However, contrary to plaintiff's assertion, this language in the FOIA statute simply allows a FOIA requestor who has not received a response within the time limits described under the statute to be deemed to have exhausted his administrative remedies such that he may proceed to bring suit. *See N.Y. Times Co. v. U.S. Dep't of Defense,* 499 F.Supp.2d 501, 506 (S.D.N.Y.2007) (plaintiff brought suit after having been deemed to have exhausted his administrative remedies under FOIA). Furthermore, this provision of FOIA grants courts the discretion to retain jurisdiction over a case while allowing a government agency more time to conduct a records review and comply with its FOIA requirements, and thus avoid a ruling against it requiring it to make those disclosures. *See Bloomberg, L.P. v. U.S. Food & Drug Admin.,* 500 F.Supp.2d 371 (S.D.N.Y.2007) (considering whether to grant government agency a stay of proceedings under this provision). Thus, nothing in the provision would require the FBI to get a court order before it could close out plaintiff's FOIA request for failure to remit fees. What is more, in its order, the Court considered the FBI's response to plaintiff's requests and found that the FBI had properly followed its own procedures as well as FOIA in assessing fees and closing his file. *See* June 27 Order, at 29.

1 5 U.S.C. § 552(a)(6)(C)(i) states in relevant part: "Any person making a request to any agency for records under paragraph (1), (2), or (3) of this subsection shall be deemed to have exhausted his administrative remedies with respect to such request if the agency fails to comply with the applicable time limit provisions of this paragraph. If the Government can show exceptional circumstances exist and that the agency is exercising due diligence in responding to the request, the court may retain jurisdiction and allow the agency additional time to complete its review of the records...."

Second, plaintiff challenges the Court's ruling because, he argues, he was improperly assessed with search fees which were prohibited by 5 U.S.C. § 552(a)(4)(A) (viii). That section of FOIA states: "An agency shall not assess search fees ... if the agency fails to comply with any time limit under paragraph (6), if no unusual or exceptional circumstances ... apply to the processing of the request." 5 U.S.C. § 552(a)(4)(A) (viii). This provision is inapplicable because it is clear from the record that the $1,815.00 assessed in connection with plaintiff's request consisted of duplication fees, not search fees. *See* Decl. of David Hardy ("Hardy Decl."), Dkt. # 69, ¶ 16; *id.,* Ex. K. What is more, even were the provision to apply, there were "unusual circumstances" present sufficient to exclude a delay here, where plaintiff made multiple FOIL requests to multiple FBI offices yielding sixteen thousand pages and fifteen CDs of potentially responsive material that the FBI would need to comb through. *See* June 28 Order, at 9–10. Under FOIA, "unusual circumstances" include "the need to search for and collect the requested records from field facilities or other establishments that are separate from the office processing the request" and "the need to search for, collect, and appropriately examine a voluminous amount of separate and distinct records which are demanded in a single request." 5 U.S.C. § 552(a)(6)(B)(iii)(D)(II).

***3** Plaintiff has introduced no facts or controlling authority that would "reasonably be expected to alter the conclusion reached by the court," *Shrader,* 70 F.2d at 257, and has therefore not met the stringent standard required for reconsideration.

CONCLUSION

For the foregoing reasons, plaintiff's motion for reconsideration is denied.

SO ORDERED.

All Citations

Not Reported in F.Supp.2d, 2013 WL 6145749

2012 WL 2588888
Only the Westlaw citation is currently available.
United States District Court,
S.D. New York.

R.B., on behalf of his minor child A.B., Plaintiff,
v.
The DEPARTMENT OF EDUCATION OF the CITY OF NEW YORK, et uno, Defendants.

No. 10 Civ. 6684(RJS).
|
July 2, 2012.

MEMORANDUM AND ORDER

RICHARD J. SULLIVAN, District Judge.

***1** Plaintiff, proceeding *pro se* and on behalf of his minor child, A.B., brings this action pursuant to the Individuals with Disabiiities Education Act ("IDEA") against the New York City Department of Education and the Board of Education (collectively, "Defendants" or "DOE"). [1] Now before the Court is Plaintiff's motion for reconsideration, pursuant to Local Civil Rule 6.3, of the Court's September 16, 2011 Memorandum and Order ("September 16 Order") granting Defendants' motion for summary judgment. *See R.B. v. Dep't of Educ. of City of N. Y.,* No. 10 Civ. 6684(RJS), 2011 WL 4375694 (S.D.N.Y. Sept. 16, 2011). For the reasons that follow, the Court DENIES Plaintiff's motion.

1 Consistent with the Court's September 16, 2011 Memorandum and Order, the Court refers to the amended statute—the Individuals with Disabilities Education Improvement Act, *see* Pub.L. No. 108–446, 118 Stat. 2647 (Dec. 3, 2004), effective July 1, 2005—as "IDEA."

I. BACKGROUND [2]

2 The Court assumes the parties' full familiarity with both the facts of this case, *see R.B.,* 2011 WL 4375694, at *2–3, and the September 16 Order itself.

On June 26, 2006, the DOE convened a Committee on Special Education ("CSE") team to formulate an Individualized Education Program ("IEP") for Plaintiff's daughter, A.B., who is a student with a disability and was twelve years old at the time relevant to this action. *R.B.,* 2011 WL 4375694, at *2. The CSE team recommended that A.B. be placed in a residential program at an approved non-public school, although the DOE did not provide a specific placement at that time. *Id.* Without notifying the DOE, on July 5, 2006, Plaintiff remitted a non-refundable deposit to The Vanguard School ("Vanguard"), a private school in Florida with a residential program, and enrolled A.B. at Vanguard, which she attended for the entire 2006–07 school year. *Id.* On March 19, 2009—more than two years after Plaintiff unilaterally withdrew A.B. from the New York City school system and enrolled her at Vanguard—Plaintiff filed a due process complaint, which alleged that Defendants had failed to provide A.B. with a free appropriate public education ("FAPE") for the 2006–07 school year and sought reimbursement of the tuition and fees that he paid to Vanguard. *Id* . at *3.

After conducting an administrative hearing, the Impartial Hearing Officer ("IHO") granted Plaintiff's request for tuition reimbursement on January 6, 2010. *Id.* DOE appealed to the State Review Office ("SRO"), which reversed the IHO decision and found, in relevant part, "that (i) Plaintiff's claim accrued no later than September 2006, when Plaintiff had committed to sending A.B. to Vanguard for the school year; (ii) the DOE's failure to file a response to the due process complaint did not constitute a waiver of the statue of limitations defense; and (iii) no exception to IDEA'S statute of limitations applied. *Id.* at *3 (citing SRO Op. at 11).

On September 8, 2010, Plaintiff appealed to this Court, seeking review of the SRO's decision, and on September 16, 2011, the Court granted Defendants' motion for summary judgment. In its September 16 Order, the Court held, *inter alia,* that: (1) "Plaintiff's cause of action accrued no later than September 2006 and, therefore, is untimely," *id.* at *4; (2) "Defendants did not waive the statute of limitations defense by failing to file a response to the due process complaint," *id.* at *6; and (3) "the [IDEA's] statute of limitations was not tolled by Defendants' alleged failure to provide Plaintiff with a notice of procedural safeguards," *id.* at *7.

***2** On October 13, 2011, the Court received a letter from Plaintiff requesting leave to file a motion for

reconsideration of the Court's September 16 Order. Thereafter, on October 19, 2011, the Court received a letter from Defendants opposing Plaintiff's request and asserting that Plaintiff's request was untimely and "fail[ed] to set forth any points of controlling law or fact that ... might have caused the Court to reach a different result." By Order dated October 20, 2011, the Court set a briefing schedule for Plaintiffs motion and directed Plaintiff to "address the procedural and substantive challenges raised in Defendants' letter." On November 14, 2011, Plaintiff filed his motion for reconsideration. The motion was fully submitted as of December 30,2011.

II. DISCUSSION

A. Plaintiff's Motion is Procedurally Deficient

As a preliminary matter, the Court has little difficulty concluding that Plaintiff's motion is untimely under Rule 6.3 of the Local Civil Rules ("Rule 6.3"). Pursuant Rule 6.3, "a notice of motion for reconsideration ... of a court order determining a motion shall be served within fourteen (14) days after the entry of the Court's determination of the original motion." Failure to timely submit a motion for reconsideration is sufficient grounds for denying it. *See, e.g., Pietrisch v. JP Morgan Chase,* 789 F.Supp.2d 437, 457 (S.D.N.Y.2011) (denying a motion for reconsideration as untimely); *Siemens Westinghouse Power Corp. v. Dick Corp.,* 219 F.R.D. 552, 554 (S.D.N.Y.2004) (same). Moreover, a plaintiff's *pro se* status "does not insulate him from complying with the relevant procedural rules." *Gibson v. Wise,* 331 F.Supp.2d 168, 169 (E.D.N.Y.2004) (denying as untimely a *pro se* plaintiff's motion for reconsideration).

Here, the Court's Order was filed on September 16, 2011, so any motion for reconsideration was due no later than September 30, 2011. Although Plaintiff argues that he should be excused from his late filing "[a]s a matter of equity" because he was only "three or four business days" late, the record belies Plaintiff's point. Plaintiff did not file his motion for reconsideration until November 14, 2011 and did not even write to the Court requesting leave to file a motion for reconsideration until October 13, 2011 (the "October 13 Letter"). Indeed, in his October 13 Letter, Plaintiff informed the Court that he was "follow[ing] up" on his call to chambers "earlier this week" (Doc. No. 24), indicating that Plaintiff did not even contact the Court regarding a possible motion for reconsideration until October 10, 2011 *at the earliest.* Therefore, even liberally construing the record, Plaintiff still missed the deadline to file a motion for reconsideration by at least ten days. Accordingly, because the Court finds that Plaintiff's motion is untimely and that Plaintiff has failed to offer a convincing explanation as to why he did not comply with Rule 6.3, the Court denies Plaintiff's motion as procedurally deficient. *See Otto v. Town of Washington,* 71 F. App'x 91, 92 (2d Cir.2003) (upholding a district court's denial of motion for reconsideration where the motion was filed ten days after the judgment was docketed); *Darby v. Societe Des Hotels Meridien,* No. 88 Civ. 7604(RWS), 1999 WL 642877, at *2 (S.D.N.Y. Aug. 24 1999) (explaining that Rule 6.3 deadlines will be strictly enforced absent "sufficient justification" for failing to comply (citing *Algie v. RCA Global Commc'ns, Inc.,* 891 F.Supp. 875, 882 (S.D.N.Y.1994)).

B. Plaintiff's Motion is Also Deficient on the Merits

***3** Even if Plaintiff's motion *were* timely, which it is not, the Court would nevertheless deny it on the merits. "A motion for reconsideration under ... Rule 6.3 'will generally be denied unless the moving party can point to controlling decisions or data that the court overlooked —matters, in other words, that might reasonably be expected to alter the conclusion reached by the court.' " *Alt. Recording Corp. v. BCD Music Grp., Inc.,* No. 08 Civ. 5201(WHP), 2009 WL 2046036, at *1 (S.D.N.Y. July 15, 2009) (quoting *Shrader v. CSX Tramp., Inc.,* 70 F.3d 255, 257 (2d Cir.1995)). "Alternatively, a motion for reconsideration may be granted to 'correct a clear error or prevent manifest injustice.' " *Banco de Seguros Del Estado v. Mutual Marine Offices, Inc.,* 230 F.Supp.2d 427, 428 (S.D.N.Y.2002) (quoting *Griffin Indus., Inc. v. Petroiam, Ltd.,* 72 F.Supp.2d 365, 368 (S.D.N.Y.1999)). "The standard for reconsideration is strict and the decision is 'within the sound discretion of the district court.' " *Atl. Recording,* 2009 WL 2046036, at *1 (quoting *Colodney v. Continuum Health Partners, Inc.,* No. 03 Civ. 7276(DLC), 2004 WL 185768, at *1 (S.D.N.Y. Aug. 18, 2004)). Moreover, importantly, a motion for reconsideration "may not be used to advance new facts, issues[,] or arguments not previously presented to the Court, nor may it be used as a vehicle for re-litigating issues already decided by the Court." *Am. ORT, Inc. v. ORT Israel,* No. 07 Civ. 2332(RJS), 2009 WL 233950,

at *3 (S.D.N.Y. Jan. 22, 2009) (internal quotation marks omitted); *accord Kahala Corp. v. Holtzman,* No. 10 Civ. 4259(DLC), 2011 WL 1118679, at *1 (S.D.N.Y. Mar. 24, 2011) (citing *Nat'l Union Fire Ins. Co. of Pittsburgh v. Stroh Cos., Inc.,* 265 F.3d 97, 115 (2d Cir.2001)).

Here, Plaintiff fails to identify *any* controlling decisions or facts that the Court overlooked and that, if properly considered, "might reasonably be expected to alter" the Court's September 16 Order. *See Alt. Recording Corp.,* 2009 WL 2046036, at *1. Instead, Plaintiff largely makes the same arguments that he made in his briefing on the motion for summary judgment-arguments that the Court considered and rejected in its September 16 Order. For instance, Plaintiff argues that his cause of action did not accrue in September 2006 but rather at the close of the 2006–07 school year—the alleged "earliest date one could negotiate, petition[, and/or] collect from the district." (Mem. at 5.) However, the Court specifically considered such an argument and rejected it in explaining that, as a matter of law, his cause of action accrued no later than September 2006, when he unilaterally withdrew his daughter from the public school district and enrolled her at Vanguard. *R.B.,* 2011 WL 4375694, at *4 (citing *M.D. v. Southington Bd. of Educ.,* 334 F.3d 217, 221 (2d Cir.2003)).

Moreover, Plaintiff repeats, without any new factual or legal support, that Defendants waived their ability to assert a statue of limitations defense under the IDEA by allegedly violating the Federal Rules of Civil Procedure, the New York Code, and the IHO's directive that DOE should plead the defense in a formal answer to Plaintiff's due process complaint. (Mem. at 5–6.) However, again, the Court considered and rejected these arguments in its September 16 Order. *R.B.,* 2011 WL 4375694, at *4–6. Specifically, the Court held that the "SRO[, in reversing the IHO decision,] correctly concluded that Defendants did not waive the statute of limitations defense by failing to file a response to the due process complaint[s]" because: (1) affirmative defenses to due process complaints are "qualitatively different than a federal or state court pleading" that would be governed by the Federal Rules of Civil Procedure or the New York Code, respectively; and, (2) in any event, "A.B.'s substantive rights ... were not impacted by Defendants' failure to file a response to the due process complaint." *Id.* Therefore, Plaintiff's argument does alter the Court's conclusion that Defendants did not waive the statue of limitations defense.

***4** Plaintiff likewise advanced no controlling decisions or facts that the Court overlooked in holding that Plaintiff failed to establish that the statute of limitations should be tolled by Defendants' alleged failure to provide Plaintiff with a notice of procedural safeguards. *Id.* at *7. In its September 16 Order, the Court rejected Plaintiff's argument that the DOE " 'fail[ed] to provide the notice of procedural safeguards at the [2006] CSE meeting,' " *id.* at *6 (citing Pl.'s Opp'n to Mot. for Summ. J), concluding that, so long as parents receive a copy of the procedural safeguards notice once per year, neither the IDEA nor its implementing regulations require the school district "to provide parents with a copy of the procedural safeguards at every CSE meeting." *Id.* Rather than contesting this point directly, Plaintiff now claims that he *never* received a notice of procedural safeguards, whether at the 2006 CSE meeting or anytime thereafter. (Mem. at 2–4.) However, Plaintiff's claim, even if true, is insufficient to establish that the statute of limitations should be tolled pursuant to 20 U.S.C. § 1415(f)(3)(D)(ii). As the Court explained in its September 16 Order, "[b]ecause Plaintiff did not raise this argument before the IHO, there is no evidence in the record that would permit this Court to make a finding as to whether Defendants violated the regulation." *R.B.,* 2011 WL 4375694, at *7; *see Hope v. Cortines,* 872 F.Supp. 14, 19 (E.D.N .Y.1995), *aff'd 69* F.3d 687 (2d Cir.1995). Although Plaintiff now asserts that "[i]t is undisputed in the record that the district failed to adhere to [its] obligations by failing to provide [him] with [his] procedural safeguards notice" (Mem. at 9), the record is in fact bare one way or the other. Accordingly, because Plaintiff has failed to put forward any controlling decisions or facts that alter the Court's conclusion, the Court declines to revisit its finding that Plaintiff has waived his argument regarding notice of procedural safeguards. [3]

3 Plaintiff argues that the Court overlooked two cases in issuing its September 16 Order: *Board of Education of Hendrick Hudson School District Westchester County v. Rowley,* 458 U.S. 176 (1982), and *Union School District v. Smith,* 15 F.3d 1519 (9th Cir.1994). (Mem. at 4; Reply at 2.) As an initial matter, Union School District is not controlling; however, even if it were, neither it nor *Rowley* alter the Court's conclusion because neither case was decided before Congress even incorporated a statute of limitations into the IDEA. Therefore, it goes without saying that the cases could not have addressed whether to toll a

> statute of limitations that did not yet exist. In any event, Plaintiff cites these cases only for their broad policy pronouncements (Mem. at 4), which do not alter the conclusion that Plaintiff's claims are time barred under the IDEA.

Furthermore, in its September 16 Order, the Court found that even *if* Plaintiff's argument regarding procedural safeguards notice were *not* waived, the statute of limitations should still not be tolled because "there is no evidence in the record that Plaintiff was denied meaningful participation in the development of A.B.'s IEP ." *R.B.,* 2011 WL 4375694, at *7; *see C.M. v. Bd. of Educ.,* 128 F. App'x 876, 881 (3d Cir.2005) (per curiam). The Court based its conclusion on record evidence that Plaintiff "attended the [2006] CSE meeting with an attorney who specializes in education law" and who had "represented Plaintiff in the filing of 'more than five' prior due process complaint notices in connection with A.B.'s education." *R.B.,* 2011 WL 4375694, at *7 (citing Tr. at 121–22 and DX–2 at 2).

In an attempt to now rebut the Court's conclusion, Plaintiff attaches new evidence to his motion for reconsideration, including: (1) an affidavit of an educational advocate who assisted Plaintiff at impartial hearings and with A.B.'s IEB educational development from 1998 to 2005 (Aff. of Miguel L. Salazar ("Salazar Aff."), dated Nov. 10, 2011); (2) signature pages from IEP meetings from 1999 to 2005; and (3) Plaintiffs reply brief previously submitted to the IHO. However, each of these documents is inadmissible for purposes of Plaintiff's motion for reconsideration. Indeed, "[t]he law in this Circuit is clear: a party is not permitted to put forth new facts, issues or arguments that were not presented to the court on [the original] motion." *Cohen v. Fed. Express Corp.,* No. 06 Civ. 00482 (RJH/THK), 07 Civ. 01288 (RJH/THK), 2007 WL 1573918, at *4 (S.D.N.Y. May 24, 2007) (internal quotation marks omitted) (collecting cases); *cf. In re Palermo,* No. 08 Civ. 7421(RPP), 2011 WL 446209, at *8 n. 4 (S.D.N.Y. Feb. 7, 2011) (explaining that "[r]econsideration under ... Rule 6.3 is not an invitation for the parties to treat the court's initial decision as the opening of a dialogue in which that party may then use such a motion to advance new theories or adduce new evidence in response to the court's ruling" (internal quotation marks omitted)); *Scott v. City of New York,* No. 02 Civ. 9530(SAS), 2009 WL 3010593, at *1 (S.D.N.Y. Sept. 21, 2009) (explaining that the purpose of ... Rule 6.3 is to "ensure the finality of decisions and to prevent the practice of a losing party examining a decision and then plugging the gaps of a lost motion with additional matters" (internal quotation marks omitted)).

***5** Particularly here, where Plaintiff has not even attempted to demonstrate that the new evidence could not have been discovered with reasonable diligence before the Court's ruling, the Court will not consider such evidence. *See Webb v. City of New York,* No. 08 Civ. 5145(CBA), 2011 WL 5824690, at *1 (S.D.N.Y. Nov. 17, 2011) ("[T]o the extent that a motion for reconsideration relies on new evidence, the movant must demonstrate that the newly discovered evidence could not have been discovered 'with reasonable diligence' prior to the court's ruling" (internal quotation marks omitted)); *cf. Tatum v. City of New York,* No. 06 Civ. 4290(BSJ)(GWG), 2009 WL 976840, at *1 (S.D.N.Y. Apr. 9, 2009) ("To obtain relief from judgment based on newly discovered evidence, the movant must demonstrate that the newly discovered evidence could not have been discovered 'with reasonable diligence' prior to the court's ruling." (citing Fed.R.Civ.P. 60(b)(2)). [4]

4 Even if the new evidence *were* admissible for purposes of Plaintiff s motion for reconsideration, it would not alter the Court's conclusion that there is "no evidence in the record that Plaintiff was denied meaningful participation in the development of A.B.'s IEP." *R.B.,* 2011 WL 4375694, at *7. Indeed, the Affidavit of Mr. Salazar only bolsters the Court's prior conclusion because it demonstrates that, in addition to being accompanied by an attorney at the 2006 CSE meeting, Plaintiff was accompanying by an educational advocate at IEP meetings from 1999 to 2005. (*See* Salazar Aff. ¶ 4.) Moreover, although Plaintiff includes signature pages from IEP meetings from 1999 to 2005, he did not attach the signature page from the 2006 IEP meeting. Therefore, these signature pages do not alter the Court's conclusion, based on a careful examination of the record, that Plaintiff was represented at the 2006 IEP meeting by an attorney specializing in education law. *See R.B.,* 2011 WL 4375694, at *7 (citing Tr. at 119–20; DX–2 at 2).

Accordingly, because Plaintiff has failed to set forth controlling law or facts that the Court overlooked in deciding the September 16 Order, Plaintiff's motion for reconsideration fails on the merits.

III. CONCLUSION

As noted in the September 16 Order, DOE's failure to provide placement for A.B. undoubtedly put Plaintiff in a difficult position. Indeed, the Court is sympathetic to Plaintiff's decision to expend substantial sums of his own money to ensure that his daughter received an education tailored to her unique circumstances. However, the "IDEA'S two-year statute of limitations is intended to protect other interests that Congress has deemed important, such as the timely and fair resolution of disputes arising under the statute." *R.B.,* 2011 WL 4375694, at *7. Thus, in light of the reasons set forth above and in the Court's September 16 Order, as well as the important interest in the finality of decisions, *see Scott,* 2009 WL 3010593, at *1, the Court denies Plaintiff's motion for reconsideration of the September 16 Order.

SO ORDERED.

All Citations

Not Reported in F.Supp.2d, 2012 WL 2588888

2002 WL 548745
Only the Westlaw citation is currently available.
United States District Court, S.D. New York.

Raymond A. LEONARD, Plaintiff,
v.
LOWE'S HOME CENTERS, INC., Defendant.

No. 00 CIV. 9585(RWS).
|
April 12, 2002.

Attorneys and Law Firms

Raymond A. Leonard, Poughkeepsie, Plaintiff Pro Se.

Littler Mendelson, New York, By Regina Del Priore, Esq., Rich Weinerman, Esq., Of Counsel, for Defendant.

OPINION

SWEET, D.J.

***1** Plaintiff Raymond A. Leonard ("Leonard"), a *pro se* litigant, has moved pursuant to Local Rule for the Southern District of New York 6.3 and Rules 59 and 60 of the Federal Rules of Civil Procedure for this Court to reconsider its order dismissing Leonard's complaint, alleging discrimination and retaliation, against defendant Lowe's Home Centers ("Lowe's").

For the following reasons, Leonard's motion is denied.

Facts

Leonard commenced this action in October 2000, by filing his complaint. The complaint alleged that Lowe's discriminated against Leonard based on his gender, national origin, age and disability, and that Lowe's retaliated against him. The complaint was filed on December 18, 2000, and Leonard was granted an additional 60 days from April 18, 2001, to serve the summons and complaint on Lowe's. Lowe's acknowledged receipt by mail of the summons and complaint on July 11, 2001.

Lowe's filed a motion to dismiss the complaint in its entirety on August 14, 2001. Pursuant to Fed.R.Civ.P. 6(e) and Local Civil Rule 6.1(b) for the Southern District of New York, Leonard had until August 30, 2001 to serve any opposing affidavits. Leonard did not file opposition papers by that date, or any time thereafter.

A court-ordered pretrial hearing was scheduled for September 11, 2001. The hearing was cancelled due to the attack on the World Trade Center.

On September 26, 2001, Lowe's was notified that the motion to dismiss was scheduled to be heard "on the papers" on October 3, 2001 and that Leonard had not timely filed his opposition papers. Lowe's documented the conversation and sent a copy to Leonard and the Court. After receiving this notification, Leonard did not submit opposition papers or seek an extension of time to do so.

On November 30, 2001, Leonard wrote to the Court to determine when the Court would reschedule a new hearing on the motion to dismiss.

By letter dated December 4, 2001, the Court advised Leonard that the motion to dismiss was handled on submission and was *sub judice* . Leonard received the letter on December 13, 2001.

On December 6, 2001, the Court granted Lowe's motion to dismiss because there was no opposition. Lowe's submitted an order of dismissal on December 18, 2001.

By letter dated December 15, 2001, Leonard filed the motion to reconsider. The Court received the letter on December 19, 2001.

On December 28, 2001, the Court issued a judgment granting Lowe's motion to dismiss "for the reasons stated in the Court's Memo endorsed Order dated 12/6/01." That order was entered on the docket on January 4, 2002.

Lowe's filed an opposition to Leonard's motion to consider on January 30, 2002. The motion was fully briefed and heard on submission on February 13, 2002.

Discussion

In addressing the present motion, the Court is mindful that the plaintiff is proceeding *pro se* and that his submissions should be held "to less stringent standards than formal pleadings drafted by lawyers ...." " *Hughes v. Rowe,* 449 U.S. 5, 9, 101 S.Ct. 173, 176 (1980) (per curiam) (*quoting Haines v. Kerner,* 404 U.S. 519, 520, 92 S.Ct. 594,

595 (1972)); *see also Ferran v. Town of Nassau,* 11 F.3d 21, 22 (2d Cir.1993). The Court recognizes that it must make reasonable allowances so that a *pro se* plaintiff does not forfeit rights by virtue of lack of legal training. *Traguth v. Zuck,* 710 F.2d 90, 94 (2d Cir.1983). Indeed, district courts should "read the pleadings of a *pro se* plaintiff liberally and interpret them to raise the strongest arguments they suggest." *McPherson v. Coombe,* 174 F.3d 276, 280 (2d Cir.1999) (*quoting Burgos v. Hopkins,* 14 F.3d 787, 790 (2d Cir.1994). Nevertheless, the Court is also aware that *pro se* statute "does not exempt a party from compliance with relevant rules of procedural and substantive law." *Traguth,* 710 F.2d at 95 (quotations omitted).

I. *Reconsideration of Issues of Fact and Law*

***2** A motion for reconsideration "shall be served within ten days after the docketing of the court's determination of the original motion" and shall set forth "the matters or controlling decisions which counsel believes the court has overlooked." Local Civ. R. 6.3. ("Rule 6.3"). The Order was docketed on December 10, 2001. The Court received Leonard's motion on December 19, 2001. It is not clear whether the motion was served within the ten day window.

Even if Leonard's motion had been timely served, he fails to identify any material issues of fact or law overlooked by this Court that might reasonably be expected to alter the Court's decision. *Dotson v. Griesa,* 2001 WL 812227, at *1 (S.D.N.Y. March 22, 2001); *AT & T Corp. v. Community Network Servs., Inc.,* 2000 WL 1174992, at *1 (S.D.N.Y. Aug. 18, 2000) (*quoting Interactive Gift Express, Inc. v. Compuserve,* 1999 WL 49360, at *1 (S.D.N.Y. Feb. 2, 1999).

Rule 6.3 is intended to "ensure the finality of decisions and to prevent the practice of a losing party examining a decision and then plugging the gaps of a lost motion with additional matters." *Carolco Pictures, Inc. v. Sirota,* 700 F.Supp. 169, 170 (S.D.N.Y.1988) (citation omitted). The parties may not present new facts or theories at this stage. *Ralph Oldsmobile Inc. v. General Motors Corp.,* 2001 WL 55729, at *2 (S.D.N.Y. Jan. 23, 2001); *Familienstifung v. Askin,* 137 F.Supp.2d 438, 442 (S.D.N.Y.2001).

Rule 6.3 must be narrowly construed and strictly applied so as to avoid duplicative rulings on previously considered issues, and may not be employed as a substitute for appealing a final judgment. *Shamis v. Ambassador Factors,* 187 F.R.D. 148, 151 (S.D.N.Y.1999). The decision to grant or deny the motion rests in the discretion of the district court. *AT & T Corp,* 2000 WL 1174992, at *1.

Leonard alleges neither that the Court's decision overlooked controlling precedent nor missed important factual matters. Leonard contends that the disruption caused by the September 11, 2001 attacks prevented Leonard's timely response. Leonard's response was due on August 30, 2001. Leonard should have contacted the Court at that time to request an extension. He was also notified by an October 4, 2001 letter that his opposition papers had not been received. Again, Leonard did not seek at that time an extension from this Court.

Leonard also submitted a brief on various employment discrimination cases. However, he offered no controlling case law that the Court overlooked and that could reasonably alter the Court's opinion.

II. *Fed.R.Civ.P. 60*

Rule 60 provides in relevant part that "on motion and upon such terms as are just, the court may relieve a party ... from a final judgment, order, or proceeding for the following reasons:

(1) Mistake, inadvertence, surprise, or excusable neglect;

(2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b);

***3** (3) fraud ... misrepresentation, or other misconduct of an adverse party;

(4) the judgment is void;

(5) the judgment has been satisfied, released, or discharged, or a prior judgment on which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or

(6) any other reason justifying relief from the operation of the judgment."

Fed.R.Civ.P. 60(b).

Properly applied, Rule 60(b) strikes a balance between serving the ends of justice and preserving the finality of judgments. *House v. Secretary of Health and Human Services,* 688 F.2d 7, 9 (2d Cir.1982). "Since 60(b) allows extraordinary judicial relief, it is invoked only upon a showing of exceptional circumstances." *Nemaizer v. Baker,* 793 F.2d 58, 61 (2d Cir.1986); *see also United States v. Bank of New York,* 14 F.3d 756, 759 (2d Cir.1994); *Mendell v. Gollust,* 909 F.2d 724, 731 (2d Cir.1990). A motion seeking such relief is "addressed to the sound discretion of the district court." *Id.*

Pro se litigants "should not be impaired by the harsh application of technical rules." *Traguth v. Zuck,* 710 F.2d 90, 95 (2d Cir.1983). Yet they are not excused from producing "highly convincing" evidence in support of motions to vacate a final judgment. *Gwynn v. Deleo,* 1991 WL 125185, at *3–*4 (S.D.N.Y. July 3, 1991). A court should find that the movant possesses a meritorious claim in order to grant relief. *Cobos v. Adelphi Univ.,* 179 F.R.D. 381, 385 (E.D.N.Y.1998) (citing cases); *Babigian v. Association of the Bar of the City of New York,* 144 F.R.D. 30, 33 (S.D.N.Y.1992).

Leonard did not specify under which subsections of Rule 60(b) he sought relief. This Court will assume that he intended the only potentially applicable provisions, subsections (1), (4) and (6).

A. *Rule 60(b)(1): Mistake, inadvertence, surprise, or excusable neglect*

Excusable neglect encompasses "inadvertence, carelessness, and mistake," and may be found where a party's failure to comply with filing deadlines is attributable to negligence. *Canfield v. Van Atta Buick/GMC Truck, Inc.,* 127 F.3d 248, 250 (2d Cir.1997) (*citing Pioneer Investment Services Co. v. Brunswick Assoc. Ltd. Partnership,* 507 U.S. 380, 388 (1993)). Excusable neglect will not be found, however, where there has been abuse by a party. *Id.* In determining whether excusable neglect exists, a court should take account of all relevant circumstances surrounding the party's omission. *Id.* Those circumstances include prejudice to the adversary, the length of the delay, the reason for the error, the potential impact on the judicial proceedings, whether it was within the "reasonable control of the movant," and whether the movant acted in good faith. *Pioneer,* 507 U.S. at 395.

As discussed above, Leonard claims that the events of September 11, 2001, prevented his response to the motion to dismiss.

***4** In *Ishay v. City of New York,* 178 F.Supp.2d 314 (E.D.N.Y.2001), defense counsel's inability to access their office, which was in close proximity to the World Trade Center, for one month following the attacks on September 11, 2001, constituted good cause to extend the time for the defendants to file a notice of appeal of judgment. *Id.* at 317. Although the circumstances did not fit into the previous, narrow factual scenarios of Supreme Court precedent, the court recognized that "the events of September 11, 2001 were 'unique' in every sense of the word, and clearly beyond any court could previously have anticipated." *Id.*

The events of September 11, 2001, certainly could constitute reason for excusable neglect, given a scenario such as the defense counsel in *Ishay* faced. However, Leonard fails to explain why his circumstances following the attack should do so. In addition, Leonard was capable of pursuing some aspects of this lawsuit less than a week after September 11, 2001. In a letter dated September 17, 2001, Leonard requested discovery responses from Lowe's. He could just as easily have sent a letter [1] to this Court seeking an extension.

1 Leonard may have had difficulty in telephoning the Court due to interruptions in service caused by the events of September 11, 2001. The mail continued to get through, however. In any case, Leonard does not aver that he attempted either to telephone or to mail such a request to the Court.

In any case, opposition papers were due prior to the attack, on August 30, 2001. Leonard did not seek an extension at any point in the process, and still has failed to explain why he did not timely file, or timely seek an extension. Such failure is inexcusable. *Fetik v. New York Law School,* 1999 WL 459805 at *4 & n. 4 (S.D.N.Y. June 29, 1999) (finding no excusable neglect under Rule 60(b)(1) where plaintiff did not explain why her excuse for not filing opposition papers left her unable to request a further extension to oppose the motion to dismiss); *Long v. Carberry,* 151 F.R.D. at 243 (S.D.N.Y.1993) (finding no excusable neglect or manifest error under Rule 60(b)(1) because "if Plaintiff required additional time to respond to defendants' motion to dismiss, he should have

employed the proper procedures to file an application for an extension of time ....").

B. *Rule 60(b)(4): judgment is void*

A judgment is void under Rule 60(b)(4) where the court deciding the issue did not have jurisdiction over the person or the subject matter, or has "acted in a manner inconsistent with due process of law." *Beller & Keller v. Tyler,* 120 F.3d 21, 23 (2d Cir.1997) (internal quotation omitted).

This Circuit has established that district courts must inform a *pro se* litigant of the results of not responding to a motion for summary judgment or a motion to dismiss that is being considered as a motion for summary judgment. *E.g., Irby v. New York City Transit Authority,* 262 F.3d 412, 413–14 (2d Cir.2001). Because Leonard is appealing a motion to dismiss, which was not treated as a summary judgment motion, these precedents do not apply.

In addition, having reviewed the complaint and the motion to dismiss, there is no basis on which this claim could have survived.

C. *Rule 60(b)(6): Any other reason justifying relief*

***5** Presumably the reason here is also that the events of September 11, 2001, prevented Leonard from responding. This argument is unavailable, however, as Rule 60(b)(6) is only applicable where no other subsection is available. *Nemaizer v. Baker,* 793 F.2d 58, 63 (2d Cir.1986); *Delacruz v. Stern,* 166 F.3d 1200 (2d Cir.1998) (unpublished). Leonard's mistake falls under Rule 60(b)(1) and thus cannot also fit within this subsection.

Conclusion

For the foregoing reasons, Leonard's motion to reconsider is denied.

It is so ordered.

All Citations

Not Reported in F.Supp.2d, 2002 WL 548745

2007 WL 776752
Only the Westlaw citation is currently available.
United States District Court,
E.D. New York.

Dwayne GAUSE, Plaintiff,
v.
SUFFOLK COUNTY, et al., Defendants.

No. 02–CV–4600 (SJF)(WDW).
|
March 7, 2007.

Attorneys and Law Firms

Dwayne Gause, Stromville, NY, pro se.

Robert A. Caccese, Suffolk County Attorney's Office, Hauppauge, NY, for Defendants.

OPINION & ORDER

FEUERSTEIN, J.

I. Introduction

***1** On August 14, 2002, *pro se* plaintiff Dwayne Gause ("Plaintiff") commenced this action with the filing of three (3) complaints, alleging violations of his civil rights under 42 U.S.C. § 1983. [1] Plaintiff filed an Amended Complaint on December 19, 2005. On January 25, 2007, the Court denied Plaintiff's motion for leave to further amend his Complaint. By letter dated February 14, 2007, Plaintiff seeks reconsideration of that decision and/or permission to appeal the decision. Plaintiff also seeks appointment of counsel. For the reasons set forth below, Plaintiff's motion for reconsideration and request for permission to appeal are denied. Plaintiff's application for appointment of counsel is respectfully referred to Magistrate Judge William Wall for an opinion and order.

1 By Order dated May 16, 2005, the Court consolidated the three (3) cases into lead case number 02–CV–4600.

II. Analysis

A. Motion for Reconsideration

Local Rule 6.3 sets a ten (10) day filing requirement for motions for reconsideration and rehearing. Local Rule of the United States District Courts for the Southern and Eastern Districts of New York 6 .3. Plaintiff filed his letter motion on February 14, 2007, twenty (20) days after the date of the Court's Order. Therefore, Plaintiff's motion for reconsideration is untimely. Nevertheless, given Plaintiff's *pro se* incarcerated status, and the date that he received a copy of the Court's Order is unclear, the Court will consider Plaintiff's motion on the merits.

Motions for reconsideration are generally "denied unless the moving party can point to controlling decisions or data that the court overlooked...." *Shrader v. CSX Transp., Inc.,* 70 F.3d 255, 256–57 (2d Cir.1995) (citations omitted). A motion for reconsideration is not a proper tool to relitigate arguments and issues already considered by the Court in deciding the original motion, *see United States v. Gross,* No. 98–CR–0159, 2002 WL 32096592, at *4 (E.D.N.Y. Dec. 5, 2002), nor is it proper to raise new arguments and issues in a motion for reconsideration. *See Lehmuller v. Incorporated Village of Sag Harbor,* 982 F.Supp. 132, 135 (E.D.N.Y.1997). The standard for a motion for reconsideration is demanding, and should be "narrowly construed and strictly applied so as to avoid repetitive arguments on issues that have been considered fully by the Court." *Wechsler v. Hunt Health Sys., Ltd.,* 186 F.Supp.2d 402, 410 (S.D.N.Y.2002) (quoting *Dellefave v. Access Temps., Inc.,* No. 99 Civ. 6098, 2001 WL 286771, at *1 (S .D.N.Y. Mar. 22, 2001)).

Plaintiff has not pointed to any controlling decisions or data that the Court overlooked. Plaintiff claims that the incidents alleged in his proposed Second Amended Complaint happened on different days, months, and years than those alleged in his original Complaint. However, this contention is directly contradicted by Plaintiff's Complaint and proposed Second Amended Complaint both of which refer to only May 17, 2000 and June 28, 2000, as the dates of the alleged violations of Plaintiff s protective custody rights. *See* Complaint, Page 15; Proposed Second Amended Complaint, Page 1. Further, contrary to Plaintiff's contentions, "it is within the sound discretion of the court whether to grant leave to amend." *John Hancock Mutual Life Insurance Co. v. Amerford International Corp.,* 22 F.3d 458, 462 (2d Cir.1994). Here, the Court denied Plaintiff leave to further amend his Complaint. The Court declines to reconsider that decision.

B. Interlocutory Appeal

***2** A party seeking leave to appeal a district court's interlocutory order must first obtain certification from that court. The district court must find: (1) that its order "involves a controlling question of law;" (2) "as to which there is a substantial ground for difference of opinion;" and that (3) appeal from the order may "materially advance the ultimate termination of the litigation." 28 U.S.C. § 1292(b). The determination of certification for a Section 1292(b) interlocutory appeal lies within the discretion of the district judge. *See Ferraro v. Secretary of the U.S. Dept. of Health and Human Services,* 780 F.Supp. 978, 979 (E.D.N.Y.1992).

Plaintiff has not satisfied any of these three (3) prerequisites, but will have an opportunity to appeal all decisions of this Court at the conclusion of the litigation.

C. Appointment of Counsel

On September 6, 2003, Judge Arthur Spatt, then assigned to this case, denied Plaintiff's application for appointment of counsel. On November 16, 2004, this Court again denied Plaintiff's application for appointment of counsel. Plaintiff now seeks appointment of counsel for a third time.

Since discovery is complete and the case will soon be ready for trial, Plaintiff's application for appointment of counsel is respectfully referred to Magistrate Judge Wall.

III. Conclusion

For the reasons set forth above, Plaintiff's motion for reconsideration is DENIED. Plaintiff's request that the Court certify its January 25, 2007 Order for interlocutory appeal is also DENIED. Plaintiff's application for appointment of counsel is respectfully referred to Magistrate Judge William Wall for an opinion and order.

IT IS SO ORDERED.

All Citations

Not Reported in F.Supp.2d, 2007 WL 776752

2016 WL 7351895
Only the Westlaw citation is currently available.
United States District Court,
S.D. New York.

Avery Whittle, Plaintiff,
v.
Dr. Ulloa, N.P. Uszynski, Warden Volmer, Grievance Coordinator Smiley, Defendants.

15 CV 8875 (VB)
|
Signed 12/19/2016

Attorneys and Law Firms

Avery Whittle, Collins, NY, pro se.

James Christopher Freeman, Kent Hazzard, LLP, Syma B. Funt, White Plains, NY, for Defendants.

OPINION AND ORDER

Briccetti, United States District Judge

***1** Plaintiff Avery Whittle, proceeding pro se, brings this Section 1983 prisoner civil rights action alleging defendants N.P. Uszynski, Dr. Raul Ulloa, Captain W. Smiley, and Warden Volmer (the last two of whom will be collectively referred to herein as the "County defendants") were deliberately indifferent to plaintiff's medical needs in both their personal and official capacities. Liberally construed, the amended complaint (Doc. #17) also asserts state law claims for medical malpractice and negligence against all defendants.

Now pending are defendants' motions to dismiss the amended complaint. (Docs. ##27, 43). For the following reasons, the County defendants' motion and Dr. Ulloa's motion are GRANTED in their entireties. N.P. Uszynski's motion is GRANTED in part and DENIED in part.

The Court has subject matter jurisdiction under 28 U.S.C. § 1331.

BACKGROUND

In deciding the pending motions, the Court accepts as true all well-pleaded allegations in the amended complaint and draws all reasonable inferences in plaintiff's favor. The following facts are taken from the amended complaint and the document attached thereto, [1] plaintiff's opposition to defendants' motions to dismiss, [2] and Parts I and II of the grievance form. [3]

1 Plaintiff filed his original complaint on November 10, 2015, asserting claims against a Jane Doe defendant, as well as Dr. Ulloa, Capt. Smiley, and Warden Volmer. (Doc. #1). After being informed of the identity of the John Doe defendant, plaintiff filed an amended complaint on April 4, 2016, replacing the Jane Doe defendant with N.P. Uszynski. (Doc. #17). The amended complaint is filed as one eleven-page document containing a completed Complaint form and a three-page summary of plaintiff's allegations. For ease of reference, the Court will cite to the page number as stamped by the ECF filing system at the top of each page.

2 In liberally construing a pro se plaintiff's complaint, it is generally appropriate to consider allegations made in plaintiff's opposition papers. See Samuels v. Fischer, 168 F. Supp. 3d 625, 645 n.11 (S.D.N.Y. 2016).

3 Along with their motions to dismiss, defendants submitted plaintiff's grievance form, which includes plaintiff's grievance (Part I) and the written denial of his grievance (Part II). (Docs. ##29-3, 45-2). Defendants notified plaintiff that in light of the additional materials, the Court may convert the instant motion to dismiss into a motion for summary judgment. (Docs. ##30, 39). However, in deciding a motion to dismiss, this Court may consider documents external to the complaint without converting the motion into one for summary judgment when "there [is] undisputed notice to [plaintiff] of [the documents'] contents and [the documents] were integral to [plaintiff's] claim." Cortec Indus., Inc. v. Sum Holding L.P., 949 F.2d 42, 48 (2d Cir. 1991). Here, plaintiff signed both Part I and Part II and referenced both his own grievance and the denial of the grievance several times throughout his amended complaint. Accordingly, the Court may consider these documents in deciding the instant motion. For the same reasons, the necessity of translating this motion to dismiss into a motion for summary judgment on the basis that defendants rely on documents other than the amended complaint is

"largely dissipated," and the Court will not do so. See id.

***2** Plaintiff was detained at Westchester County Jail ("WCJ") at all relevant times. According to the amended complaint, on or about December 14, 2014, Dr. Aaron Roth, who is not a party to this lawsuit, surgically removed a cyst from the left side of plaintiff's neck at Montefiore Mt. Vernon Hospital in Mount Vernon, New York. Dr. Roth closed the surgical incision with thirty-six staples, and provided written instructions for WCJ staff to change plaintiff's bandages daily and to give plaintiff antibiotics and pain medication.

Upon returning to WCJ, N.P. Uszynski, a nurse at WCJ, read Dr. Roth's instructions and removed plaintiff's bandages. However, N.P. Uszynski allegedly failed to replace plaintiff's bandages, leaving plaintiff's stapled incision exposed to open air. Plaintiff alleges that from December 14, 2014, through January 6, 2015, he was seen only twice by WCJ medical staff, and that his bandages were not changed during this period because the medical department claimed to be short-staffed due to the holidays. Plaintiff alleges the failure to properly treat his incision caused it to become infected and severely swollen, resulting in severe pain.

On January 3, 2015, plaintiff filed an administrative grievance alleging the medical department did not provide him with proper treatment or create an adequate post-surgery treatment plan. In response to this grievance, plaintiff states he was seen by Dr. Ulloa, the medical director of WCJ, who ordered that plaintiff's dressing be changed and plaintiff be given more effective medication. Plaintiff further alleges that Capt. Smiley, the grievance coordinator, denied plaintiff's grievance, and Warden Volmer, the warden of WCJ, denied plaintiff's appeal of Capt. Smiley's denial.

DISCUSSION

I. Standard of Review

In deciding a Rule 12(b)(6) motion, the Court evaluates the sufficiency of the operative complaint under the "two-pronged approach" articulated by the Supreme Court in Ashcroft v. Iqbal, 556 U.S. 662, 679 (2009). First, plaintiff's legal conclusions and "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements," are not entitled to the assumption of truth and are thus not sufficient to withstand a motion to dismiss. Id. at 678; Hayden v. Paterson, 594 F.3d 150, 161 (2d Cir. 2010). Second, "[w]hen there are well-pleaded factual allegations, a court should assume their veracity and then determine whether they plausibly give rise to an entitlement to relief." Ashcroft v. Iqbal, 556 U.S. at 679.

To survive a Rule 12(b)(6) motion, the allegations in the complaint must meet a standard of "plausibility." Ashcroft v. Iqbal, 556 U.S. at 678; Bell Atl. Corp. v. Twombly, 550 U.S. 544, 564 (2007). A claim is facially plausible "when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." Ashcroft v. Iqbal, 556 U.S. at 678. "The plausibility standard is not akin to a 'probability requirement,' but it asks for more than a sheer possibility that a defendant has acted unlawfully." Id.

The Court must liberally construe submissions of pro se litigants, and interpret them "to raise the strongest arguments that they suggest." Triestman v. Fed. Bureau of Prisons, 470 F.3d 471, 474 (2d Cir. 2006) (per curiam) (internal quotation marks and citation omitted). Applying the pleading rules permissively is particularly appropriate when, as here, a pro se plaintiff alleges civil rights violations. See Sealed Plaintiff v. Sealed Defendant, 537 F.3d 185, 191 (2d Cir. 2008). "Even in a pro se case, however ... threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." Chavis v. Chappius, 618 F.3d 162, 170 (2d Cir. 2010) (internal quotation marks and citation omitted). Nor may the Court "invent factual allegations" plaintiff has not pleaded. Id.

II. Deliberate Indifference to Medical Needs Claim

***3** Plaintiff alleges N.P. Uszynski was deliberately indifferent to his medical needs in violation of his constitutional rights. To assert a claim for constitutionally inadequate medical care, plaintiff must allege "acts or omissions sufficiently harmful to evidence deliberate indifference to serious medical needs." Estelle v. Gamble, 429 U.S. 97, 106 (1976). This test has both an objective and a subjective component: plaintiff must plead facts showing (i) the alleged deprivation of medical care is "sufficiently serious," and (ii) the officials in question acted with a "sufficiently culpable state of mind." Salahuddin v. Goord, 467 F.3d 263, 279-80 (2d Cir. 2006).

A. Objective Component

The objective component has two subparts. "The first inquiry is whether the prisoner was actually deprived of adequate medical care," keeping in mind that only "reasonable care" is required. Salahuddin v. Goord, 467 F.3d at 279 (citing Farmer v. Brennan, 511 U.S. 825, 839-40 (1970)). "Second, the objective [inquiry] asks whether the inadequacy in medical care is sufficiently serious" by examining "how the offending conduct is inadequate and what harm, if any, the inadequacy has caused or will likely cause the prisoner." Salahuddin v. Goord, 467 F.3d at 280 (citing Helling v. McKinney, 509 U.S. 25, 32-33 (1993)). "A serious medical need arises where the failure to treat a prisoner's condition could result in further significant injury or the unnecessary and wanton infliction of pain." Woods v. Goord, 2002 WL 731691, at *4 (S.D.N.Y. April 23, 2002) (quoting Chance v Armstrong, 143 F.3d 698, 702 (2d Cir. 1998)) (internal quotation marks omitted). [4]

4 Plaintiff will be provided with copies of all unpublished opinions cited in this ruling. See Lebron v. Sanders, 557 F.3d 76, 79 (2d Cir. 2009).

Regarding the first subpart, plaintiff has sufficiently alleged he was "actually deprived of adequate medical care." Of course, medical care is not inadequate simply because a plaintiff disagrees with the treating official's medical judgment. See Bolden v. Cnty. of Sullivan, 523 Fed. Appx. 832, 834 (2d Cir. 2013). Here, however, plaintiff does not simply disagree with the medical treatment rendered. According to the amended complaint, Dr. Roth provided specific written instructions for plaintiff's post-operative care, and N.P. Uszynski's treatment was allegedly blatantly deficient. Dr. Roth ordered that plaintiff be provided "antibiotics, pain relievers, and the daily changing of the bandages" to cover the "thirty-six staples to close the wound" left from the removal of a "large cyst lodged on the left side of his neck." (Am. Compl. at 8). Instead of following Dr. Roth's orders, N.P. Uszynski allegedly removed plaintiff's bandages and did not apply a new bandage, "leaving the plaintiff's recently stapled wound exposed." (Am. Compl. at 8). Whether N.P. Uszynski provided antibiotics at this time is also unclear. Accordingly, plaintiff has sufficiently alleged that N.P. Uszynski's failure to replace his bandages deprived him of "reasonable care." See Salahuddin v. Goord, 476 F.3d at 279.

Regarding the second subpart, "[t]he failure to provide treatment for an otherwise insignificant wound may violate the Eighth Amendment if the wound develops signs of infection, creating a substantial risk of injury in the absence of appropriate medical treatment." Smith v. Carpenter, 316 F.3d 178, 186 (2d Cir. 2003); see also Odom v. Kerns, 2008 WL 2463890, at *7 (S.D.N.Y. June 18, 2008) (holding a nurse's failure to adequately treat cuts that later became infected was sufficiently serious to satisfy the objective prong).

***4** Plaintiff alleges N.P. Uszynski's deficient treatment caused his "wound to become infected and severely swollen with puss oozing out of the wound," which was so painful that it was difficult or impossible for plaintiff to sleep during the three weeks he was not treated according to Dr. Roth's orders. (Am. Compl. at 9). Moreover, the location of the infection on plaintiff's neck further supports the inference that the infection resulted in significant risk of further injury and pain for plaintiff. Cf. Laguna v. Kwan, 2015 WL 872366, at *5 (S.D.N.Y. Jan. 28, 2015) ("The type of pain associated with a broken finger, and an infection in that finger, is not sufficiently serious."). As such, plaintiff has plausibly alleged he experienced a serious medical need sufficient to satisfy the second subpart.

Accordingly, plaintiff has satisfied both subparts of the objective prong.

B. Subjective Component

"[A] deliberate indifference claim can lie where prison officials deliberately ignore the medical recommendations of a prisoner's treating physicians." Johnson v. Wright, 412 F.3d 398, 404 (2d Cir. 2005) (citing Gill v. Mooney, 824 F.2d 192, 196 (2d Cir. 1987)). Moreover, "a physician may be deliberately indifferent if he or she consciously chooses an easier and less efficacious treatment plan." Chance v. Armstrong, 143 F.3d at 703 (internal quotation marks and citation omitted).

Plaintiff has sufficiently alleged N.P. Uszynski was deliberately indifferent to his medical needs. Plaintiff alleges N.P. Uszynski disregarded Dr. Roth's instructions to change his bandages, and plaintiff's amended complaint indicates no medical justification for doing so. Moreover, although defendants argue N.P. Uszynski disregarded Dr. Roth's instructions based on her medical judgment, this argument is contrary to plaintiff's allegation that,

after plaintiff complained about his deficient treatment, plaintiff was told that he could not receive the ordered treatment because "it was the holidays and there was only a skeleton crew on, also that the doctor was not [at the jail]." (Am. Compl. at 9). Thus, according to the amended complaint, N.P. Uszynski diverged from Dr. Roth's instructions because doing so was easier than implementing the instructions as written. Liberally construed, plaintiff has alleged N.P. Uszynski was deliberately indifferent by choosing an "easier and less efficacious treatment plan." Chance v. Armstrong, 143 F.3d at 703 (internal quotation marks and citation omitted).

Accordingly, plaintiff has sufficiently pleaded facts that, if proven true, could satisfy both prongs of the deliberate indifference to medical needs standard.

III. Personal Involvement of Dr. Ulloa, Capt. Smiley, and Warden Volmer

To state a claim under Section 1983, plaintiff "must plead that each Government-official defendant, through the official's own individual actions, has violated the Constitution." Ashcroft v. Iqbal, 556 U.S. at 676.

Prior to Ashcroft v. Iqbal, a supervisor's personal involvement in a claimed constitutional violation could have been established by providing evidence of any one or more of the following five methods:

> (1) the defendant participated directly in the alleged constitutional violation, (2) the defendant, after being informed of the violation through a report or appeal, failed to remedy the wrong, (3) the defendant created a policy or custom under which unconstitutional practices occurred, or allowed the continuance of such a policy or custom, (4) the defendant was grossly negligent in supervising subordinates who committed the wrongful acts, or (5) the defendant exhibited deliberate indifference to the rights of inmates by failing to act on information indicating that unconstitutional acts were occurring.

***5** Colon v. Coughlin, 58 F.3d 865, 873 (2d Cir. 1995) (citations omitted). After Ashcroft v. Iqbal, however, district courts within this circuit have been divided as to whether claims alleging personal involvement under the second, fourth, and fifth of these methods remain viable. See Marom v. City of N.Y., 2016 WL 916424, at *15 (S.D.N.Y. Mar. 7, 2016) (collecting cases). The Second Circuit has yet to resolve this dispute. Id.

Nevertheless, even assuming the validity of all five Colon methods, plaintiff's allegations fail adequately to plead the personal involvement of Dr. Ulloa, Capt. Smiley, and Warden Volmer for the following reasons.

A. Dr. Ulloa

Plaintiff alleges that, as "head medical Doctor at Valhalla Dept. of Corrections," Dr. Ulloa "had an obligation to accommodate the plaintiff with proper medical attention post-surgery or delegate one of his subordinate[s] to do so." (Am. Compl. at 9). Plaintiff appears to seek the imposition of supervisory liability based on "[t]he bare fact that [Dr. Ulloa] occupies a high position" at WCJ, which is insufficient to plead Dr. Ulloa's personal involvement. Colon v. Coughlin, 58 F.3d at 873-74.

Moreover, plaintiff asserts Dr. Ulloa "intentionally delayed access to medical care by deliberately delaying treatment that was prescribed by Dr. Roth." (Am. Compl. at 9). However, plaintiff does not describe any specific actions or statements to support this allegation. Accordingly, this conclusory assertion is not entitled to the presumption of truth afforded well-pleaded allegations, Ashcroft v. Iqbal, 556 U.S. at 678, and thus fails to establish Dr. Ulloa's personal involvement under any of the five Colon methods.

In his opposition to defendants' motions to dismiss, plaintiff also alleges Dr. Ulloa personally treated him on January 3, 2015. However, plaintiff acknowledges that Dr. Ulloa ordered plaintiff's dressing to be changed and provided him more effective pain medication after treating him. Plaintiff does not claim this treatment was inadequate. Plaintiff has therefore failed to allege that these actions deprived him of a constitutional right.

Accordingly, plaintiff has failed to allege Dr. Ulloa's personal involvement in any inadequate medical care under any of the Colon methods.

B. County Defendants

Liberally construed, plaintiff alleges Capt. Smiley and Warden Volmer personally deprived plaintiff of his constitutional rights by denying plaintiff's administrative grievance, which "informed [them] of the violation through a report or appeal, [but] failed to remedy the wrong." Colon v. Coughlin, 58 F.3d at 873. These allegations fail to state sufficient personal involvement.

Courts in this circuit disagree over whether an allegation that a prison official received and denied an inmate's administrative grievance, without more, is sufficient to establish personal involvement. Sharma v. D'Silva, 157 F. Supp. 3d 293, 304 (S.D.N.Y. 2016) (collecting cases). Nevertheless, in determining whether such a denial establishes a defendant's personal involvement in a claim of deliberate indifference to medical needs, many courts have considered "(i) the precise nature of a defendant's response to a grievance letter and (ii) the nature of the defendant's employment (including the degree of oversight over the patient associated with the defendant's position)." Id. As such, a non-medical administrator's pro forma denial of a grievance based on deference to the opinions of medical staff does not establish that non-medical administrator's personal involvement. See Joyner v. Greiner, 195 F. Supp. 2d 500, 506 (S.D.N.Y. 2002). Conversely, "[a] supervisor's detailed, specific response to a plaintiff's complaint suggests that the supervisor has considered the plaintiff's allegations and evaluated possible responses," and may therefore establish personal involvement. Mateo v. Fischer, 682 F. Supp. 2d 423, 430-31 (S.D.N.Y. 2010). The Court finds this reasoning persuasive.

***6** Applying this reasoning, plaintiff's allegations fail to establish the County defendants' personal involvement. Plaintiff does not allege the County defendants provided a detailed or specific response. Instead, plaintiff claims the County defendants "in cahoots chose to deny the plaintiff's grievance without due diligence" and "without proper and an impartial investigation." (Am. Compl. at 9). This purported lack of investigation suggests the County defendants' denials were pro forma, and not sufficiently detailed or specific to establish personal involvement. Moreover, Part II of the grievance form, incorporated by reference in plaintiff's amended complaint, plainly indicates that a medical staff member was delegated to investigate plaintiff's grievance. The only indication either County defendant participated in this denial is Capt. Smiley's signature at the bottom of the form. This further shows that the County defendants' involvement, as non-medical personnel, was pro forma and deferential to the opinions of medical staff.

Accordingly, plaintiff has failed to allege the County defendants' personal involvement.

IV. Claims Against Defendants in Their Official Capacities

Plaintiff asserts that he wishes to sue each defendant "in his or her official capacity." (Am. Compl. at 8). In Hafer v. Melo, 502 U.S. 21, 25 (1991), the Supreme Court specified two types of lawsuits in which government officials are named as defendants. The first type, "official-capacity suits[,] generally represent only another way of pleading an action against an entity of which an officer is an agent." Id. at 25 (internal quotation marks and citations omitted). "Personal-capacity suits, on the other hand, seek to impose individual liability upon a government officer for actions taken under color of state law." Id. Plaintiff's attempt to sue defendants in their official capacities appears to be claims of the former type.

Nevertheless, plaintiff has not named Westchester County as a defendant. Moreover, a municipality such as the County may be held liable under Section 1983 only "when execution of [its] policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury." Monell v. Dep't of Soc. Servs., 436 U.S. 658, 694 (1978). Plaintiff has not alleged his injury was in any way related to the execution of a policy or custom. Accordingly, this Court will not construe plaintiff's amended complaint as raising a claim against Westchester County because plaintiff does not appear to have even attempted to state such a claim, despite suing defendants in their official capacities.

V. State Law Claims

Liberally construed, plaintiff's amended complaint contains state law tort claims for negligence and medical malpractice. However, this Court does not have subject matter jurisdiction over these claims because plaintiff has failed to allege he served a notice of claim in compliance with N.Y. Gen. Mun. Law § 50-e(1), as required by id. § 50-i. See Nieblas-Love v. N.Y.C. Hous. Auth., 165 F. Supp. 3d. 51, 76 (E.D.N.Y. 2016) (finding the failure to

comply with N.Y. Gen. Mun. Law § 50-e(1) with respect to state law claims requires dismissal of the state law claims for lack of subject matter jurisdiction). Accordingly, the Court dismisses these claims sua sponte.

VI. Leave to Amend

The Court should freely grant leave to amend a complaint "when justice so requires." Fed. R. Civ. P. 15(a). Moreover, when a pro se plaintiff fails to state a cause of action, the Court "should not dismiss without granting leave to amend at least once when a liberal reading of the complaint gives any indication that a valid claim might be stated." Cuoco v. Moritsugu, 222 F.3d 99, 112 (2d Cir. 2000) (internal quotation marks and citation omitted).

However, even upon a liberal reading of the amended complaint, this Court finds no indication that a valid claim might be stated against Capt. Smiley, Warden Volmer, or Dr. Ulloa. Accordingly, plaintiff is not granted leave to amend his claims against these defendants.

CONCLUSION

***7** The motions of defendants Ulloa, Smiley, and Volmer to dismiss are GRANTED in their entireties.

The motion of defendant N.P. Usznyski to dismiss is GRANTED as to the state law claims, and DENIED as to the Section 1983 claim.

The Clerk is instructed to terminate the motions (Docs. ##27, 43) and to terminate defendants Ulloa, Smiley, and Volmer.

The Court certifies pursuant to 28 U.S.C. § 1915(a)(3) that any appeal from this order would not be taken in good faith, and therefore in forma pauperis status is denied for the purpose of an appeal. See Coppedge v. United States, 369 U.S. 438, 444-45 (1962).

SO ORDERED.

All Citations

Slip Copy, 2016 WL 7351895