

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF NEW YORK

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JEFFREY ROTH,

Plaintiff,

v.

**13-CV-901A(F)**

2810026 CANADA LIMITED LTD.,  
2810034 CANADA LIMITED,  
FREDERICK GROUP INC.,  
SINGH AMARJIT,

Defendants  
Third-Party Plaintiffs,

v.

**DECISION  
and  
ORDER**

PAMELA J. BAUMAN,

Third-Party Defendant.

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PAMELA BAUMAN,

Plaintiff,

v.

**15-CV-374A(F)**

2810026 CANADA LIMITED,  
2810034 CANADA LIMITED,  
FREDERICK GROUP INC.,  
SINGH AMARJIT,

Defendants

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APPEARANCES:

DAVID W. POLAK, ESQ.  
Attorney for Plaintiffs  
3686 Seneca Street  
West Seneca, New York 14224

WILSON ELSER MOSKOWITZ EDELMAN & DICKER LLP  
Attorneys for Defendants  
BEATA SHAPIRO, of Counsel  
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FELDMAN KIEFFER, LLP  
Attorney for Third-Party Defendant  
ADAM C. FERRANDINO, of Counsel  
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In its Decision and Order filed July 18, 2016 (Dkt. 51, 27, respectively) (“the July 18, 2016 D&O” or “the D&O”), the court granted Plaintiffs’ motion to compel Defendants’ depositions (Dkt. 46) and directed such depositions be conducted within 45 days of the July 18, 2016 D&O. In the D&O, the court rejected Defendants’ opposition to Plaintiffs’ motion as it was based on Defendants’ belief that under New York law, specifically N.Y.C.P.L.R. § 3106(a), Defendants, by noticing Plaintiffs’ deposition before Plaintiff had noticed Defendants, had a priority of depositions and that because Plaintiffs had not fully complied with Defendants’ previously served document requests, Defendants were unable to timely complete Plaintiffs’ depositions. However, as the court pointed out, upon removal of this action, the Federal Rules of Civil Procedure displaced state law, July 18, 2016 D&O at 3 (quoting Fed.R.Civ.P. 81(c)(1)), and under Fed.R.Civ.P. 26(d)(3)(A), that absent a stipulation or court order to the contrary, “the method of discovery may be used in any sequence” by a party. *Id.* As no such stipulation or order was cited by Defendants in opposition to Plaintiffs’ motion, the court found itself required to grant Plaintiffs’ motion and directed Defendants to show cause why Plaintiffs’ expenses, including reasonable attorneys fees, pursuant to Fed.R.Civ.P. 37(a)(5)(A) (“Rule 37(a)(5)(A)”), should not be imposed. July 18, 2016 D&O at 4 (“Order to Show Cause”). In accordance with the D&O’s direction, Defendants, on July 28, 2016, filed the Affirmation of Beata Shapiro, in opposition to the order to show cause (Dkt. 29) (“Shapiro Affirmation”) (“Defendants’ Response”) contending that sanctions are not warranted because (1) Defendants, in refusing to comply with Plaintiffs’ deposition notice, had acted in “good faith,” and (2) that Plaintiffs had

not timely complied with Defendants' discovery requests thereby interfering with Defendants' ability to take Plaintiffs' deposition. Shapiro Affirmation ¶¶ 3-4. Defendants further contend that despite Plaintiffs' failure to provide full discovery, Defendant conducted Plaintiffs' deposition on June 16, 2016 and that Plaintiff acknowledged that production of Plaintiffs' medical and disability records were incomplete. Shapiro Affirmation ¶ 6. Plaintiffs have not responded to Defendants' Responses.

An award of expenses, including reasonable attorneys fees incurred by a party in connection with a successful motion to compel a party's deposition is required as a sanction under Rule 37(a)(5)(A) and Fed.R.Civ.P. 30(d)(3) ("Rule 30(d)(3)") unless failure of the responding party to provide discovery, including a refusal to schedule an oral deposition pursuant to Fed.R.Civ.P. 30(a)(1), see Fed.R.Civ.P. 37(a)(3), was substantially justified or, under the circumstances, an award would be unjust. "A party's failure to provide discovery is substantially justified if a genuine dispute exists or if there is an objectively reasonable basis for the failure." *Rosehoff, Ltd v. Truscott Terrace Holdings LLC*, 2016 WL 2640351, at \*4 (W.D.N.Y. May 10, 2016) (citing *Parsi v. Daiouleslam*, 778 F.3d 116, 126 (D.C.Cir. 2015) (citing caselaw)), "such as where a party believed caselaw supported its position," *Scott-Iverson v. Independent Health Association, Inc.*, 2016 WL 1458239, at \*2 (W.D.N.Y. Apr. 14, 2016) (citing *Pierce v. Underwood*, 487 U.S. 552, 565 (1988) (citing *Maddow v. Proctor & Gamble Co. Inc.*, 107 F.3d 846, 853 (11<sup>th</sup> Cir. 1997))). As the test for substantial justification is "determined by an 'objective standard of reasonableness and does not require that the party have acted in good faith,'" *Underdog Trucking, L.L.C. v. Verizon Services Corp.*, 273 F.R.D. 372, 377 (S.D.N.Y. 2011) (quoting *Bowne of New York City, Inc. v. AmBase Corp.*, 161 F.R.D. 258, 262 (S.D.N.Y. 1995) (citing *Pierce v. Underwood*, 487 U.S. 552, 565 (1998))), that a party refused

to participate in scheduling an oral deposition believed it was acting in good faith is irrelevant. See *Scott-Iverson*, 2016 WL 1458239, at \*3 (citing *Underdog Trucking, L.L.C.*, 273 F.R.D. at 377). See also Baicker-McKee, Janssen, Corr, FEDERAL CIVIL RULES HANDBOOK (2016 Thompson Reuters) at 970 (“Good faith generally does not equate to substantial justification; the losing party [on the motion to compel] must demonstrate some unsettled issue of law or like circumstance.” (citing *Pierce*, 487 at 565; *Parsi*, 778 F.3d at 126-27) (underlining and bracketed material added)). “An award of attorneys fees may be unjust where the party’s failure was based on factors beyond the party’s control.” *Scott-Iverson*, 2016 WL 1458239, at \*3.

Here, Defendants point neither to unsettled caselaw supporting Defendants’ failure to respond to Plaintiffs’ deposition notices nor to any circumstances showing Defendants’ refusal was based on factors beyond Defendants’ control. Indeed, Defendants’ Response fails to acknowledge under Rule 81(c)(1) that, contrary to Defendants’ continued erroneous belief, after removal the federal, not state, rules of procedure apply, July 18, 2016 D&O at 3, and that under Rule 26(d)(3)(A) Defendants were not entitled to a priority with respect to the scheduling and conduct of Plaintiffs’ depositions prior to conducting Defendants’ depositions which was the subject of Plaintiffs’ successful motion to compel. Nor do Defendants point to any circumstances beyond Defendants’ control that would, on this record, render an award of attorneys fees unjust. Defendants’ argument that Plaintiffs’ failure to provide complete document discovery relating to Plaintiffs’ damages had thwarted Defendants’ ability to effectively conduct Plaintiffs’ depositions also fails as it merely reiterates Defendants’ opposition to Plaintiffs’ motion, an argument rejected by the D&O, see July 18, 2016 D&O at 3 (explaining that court failed to see how Plaintiffs’ incomplete production could conceivably

effective deposition of Plaintiffs and that Defendants could have, but did not, move to compel prior to Plaintiffs' motion) and Defendants did not appeal the July 18, 2016 D&O. Accordingly, the court is constrained to find Defendants' refusal, under the circumstances presented, to schedule Defendants' depositions was not substantially justified and that an award of Plaintiffs' reasonable attorneys fees would not be unjust.

Further, pursuant to Rule 37(a)(5)(A), as Defendants fail to address whether responsibility for Defendants' failure to comply with Plaintiffs' deposition notices should be apportioned between Defendants, as parties, or Defendants' counsel, the court finds that only Defendants' counsel shall be required to pay the award of Plaintiffs' expenses.

### **CONCLUSION**

Based on the foregoing, pursuant to Rule 37(a)(5)(A) and Rule 37(d)(3), Defendants' counsel shall pay Plaintiffs' reasonable expenses, including attorneys fees, incurred in connection with Plaintiffs' motion. Plaintiffs shall submit Plaintiffs' attorney's affidavit detailing such expenses, based on contemporaneous time-records and Plaintiffs' attorney's billing rates, within 30 days of this Decision and Order; Defendants' opposition, if any, shall be filed within 15 days thereafter; Plaintiffs' reply, if any, shall be filed within 5 days thereafter. Oral argument shall be at the court's discretion.

SO ORDERED.

*/s/ Leslie G. Foschio*

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LESLIE G. FOSCHIO  
UNITED STATES MAGISTRATE JUDGE

Dated: October 4, 2016  
Buffalo, New York