

Layne v Best

2021 NY Slip Op 30263(U)

January 27, 2021

Supreme Court, New York County

Docket Number: 650250/2018

Judge: Frank P. Nervo

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK, PART IV

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MARVA M. LAYNE individually and as a shareholder
of NEGRIL VILLAGE, INC., suing in the Right of
NEGRIL VILLAGE INC., and as in individual and
CARLTON L. HAYLE, individually and as a shareholder
of NEGRIL VILLAGE INC., suing in the Right of
NEGRIL VILLAGE INC., and as an individual,

DECISION AND ORDER

Index No.
650250/2018

Mot. Seq. 006

Plaintiffs,

-against-

PETER BEST, LILLY BEST A/K/A LILLIAN TRUONG
and KANETTA BAPTISTE A/K/A KANETTA JOSEPH

Defendants.

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NERVO, J.:

In this fourth motion related to routine discovery, defendants seek sanctions against plaintiffs for their alleged failure to comply with this Court’s prior discovery orders and a protective order suspending defendants’ depositions until plaintiff complies with this Court’s orders. Plaintiffs oppose contending they have substantially complied with the Court’s order, defendants’ have contributed to the delays in this matter, and defendants have brought this motion in bad faith.

By resettled decision addressing motion sequences 002, 003, and 004, the Court, inter alia, ordered: plaintiffs provide material sought in defendants’ December 27, 2019 demand; non-party David Dukoff comply with defendants’ subpoena, plaintiffs provide discovery in defendants’ October 25, 2019 demand, and create a privilege log for material, as necessary; defendants respond to plaintiff’s February 14, 2020 demand, and set October 30, 2020 as the deadline to complete depositions (*see* Decision and Order,

October 26, 2020 mot. seq. 005). The Court further advised the parties that the Court of Appeals has repeatedly affirmed “our court system is dependent on all parties engaged in litigation abiding by the rules of proper practice. The failure to comply with deadlines not only impairs the efficient functioning of the courts and adjudication of claims, but it places jurists unnecessarily in the position of having to order enforcement remedies to respond to the delinquent conducts of members of the bar, often to the detriment of the litigants they represent. Chronic noncompliance with deadlines breeds disrespect for the dictates of the Civil Practice law and Rules and a culture in which cases can linger for years without resolution” (*id.* quoting *Gibbs v. St. Barnabas Hosp.*, 16 NY3d 74 [2010]). Accordingly, the Court ordered that failure to comply with its decision and order would be grounds for sanctions, including striking of pleadings, in the Court’s discretion (*id.*).

CPLR § 3216 subsection three provides that the Court may strike a pleading when it finds, inter alia, that a party has refused to obey an order for disclosure or willfully fails to disclose information that ought to have been disclosed. This remedy is drastic and should only be imposed when the movant has “clearly shown that its opponent’s nondisclosure was willful, contumacious or due to bad faith” (*Commerce & Indus. Ins. Co. v. Lib-Com Ltd.*, 266 AD2d 142 [1st Dept 1999]). A pattern of default, lateness and failure to comply with court orders, can give rise to an inference of willful and contumacious conduct (*see Merchants T & F, Inc. v. Kase & Druker*, 19 AD3d 134 [1st Dept 2005]); *see also Shah v. Oral Cancer Prevention Intl., Inc.*, 138 AD3d 722 [2d Dept 2016]). A CPLR § 3216 motion brought in bad-faith provides a basis for sanctions against the movant (22 NYCRR § 130-1.1 et seq.).

“A party that permits discovery to ‘trickl[e] in [with a] cavalier attitude should not escape adverse consequence” (*Henderson-Jones v. City of New York*, 87 AD3d 498, 504 [1st Dept 2011] quoting *Figdor v. City of New York*, 33 AD3d 560, 561 [1st Dept 2006]). “[U]pon learning that a party has repeatedly failed to comply with discovery order, [trial courts] have an affirmative obligation to take such additional steps as are necessary to ensure future compliance” (*Figdor v. City of New York*, 33 AD3d 560, 561 [1st Dept 2006]).

This action has a history of discovery delays and noncompliance (*see* Decision and Order, October 26, 2020, *supra*). To the extent that the plaintiffs argue they have taken steps to comply with the Court’s order, and thus sanctions are unwarranted, they have repeatedly proffered this excuse in prior motions and each time it has been rejected as devoid of merit. The Court’s prior decision was unequivocal, it required *complete* compliance by specific dates in order to address the parties’ inability to complete straightforward discovery (*id.*).

To the extent defendants contend they have complied with the Court’s prior orders, and were permitted to unilaterally ignore plaintiffs’ notice of deposition until plaintiffs provided document discovery, such claim is likewise devoid of merit. The Court ordered depositions be completed by October 30, 2020. Defendants brought this motion seeking to suspend their depositions nearly a month after the deadline to complete depositions, and nearly two months since plaintiffs first served a notice of deposition upon defendants. Defendants failed to timely move for relief affecting the Court’s prior decision and order setting forth a discovery schedule, instead choosing to

make themselves unavailable to plaintiff for deposition. The Court finds such failure to be willful and designed to frustrate the completion of discovery in this matter.

Finally, the Court further notes plaintiff has failed to timely file a note of issue (NOI), as ordered, nor have plaintiffs sought to extend the deadline to file the NOI.¹

The parties' foregoing failures to timely complete discovery – or move for appropriate relief adjourning, suspending, or modifying compliance with same – is in keeping with the parties' cavalier approach to their discovery obligations and orders of this Court. The Court finds all parties' behavior to be willful, contumacious, in bad-faith, and designed to frustrate the opposing parties' ability to complete discovery, intensify litigation, and delay resolution of this matter. Such behavior supports striking the matter entirely. Notwithstanding, the Court, in its discretion, will impose financial sanctions, for failure to comply with the Court's prior order, at this time in lieu of striking all pleadings.

The Court further finds that as a significant portion of the parties' submissions are dedicated to claims of frivolity by opposing counsel, counsel have been afforded an opportunity to be heard on the issue of sanctions under 22 NYCRR § 130 for frivolous conduct in addition to sanctions imposed under CPLR § 3126. The Court finds the below sanction appropriate in light of the parties' failure to comply with prior orders of

¹ The parties do not address the failure to timely file the NOI or seek extension of the deadline to file same. The Court finds the failure to file the NOI, or seek extension to file, a further basis supporting sanctions.

the Court, and the needlessness of the instant motion. Given the parties' demonstrated inability to complete basic discovery in this matter, the Court also orders the below final discovery schedule.

Accordingly, it is

ORDERED defendants' motion seeking a protective order is denied; and it is further

ORDERED that defendants' motion seeking sanctions is granted to the extent of sanctioning counsel for plaintiffs, Adrian A. Ellis, LLC, and defendant, The Janey Law Firm, LLP, each in the amount of \$350, payable to the Lawyer's Fund for Client Protection, 119 Washington Avenue Albany, New York 12210; and it is further

ORDERED that the aforementioned sanction shall not be billed to counsels' clients; and it further

ORDERED that written proof of the payment of this sanction be provided to the Clerk of Part 4 via letter or fax and to opposing counsel within 20 days after service of a copy of this order with notice of entry; and it is further

ORDERED that in the event that such proof of payment is not provided in a timely manner, the Clerk of the Court, upon service of a copy of this order with notice of entry and an affirmation or affidavit reciting the fact of such non-payment, shall enter a

judgment in favor of the Lawyer’s Fund and against said counsel in the aforesaid sum;
and it is further

ORDERED that failure to provide payment as directed herein shall form a basis for the
Court’s own motion for contempt; and it is further

ORDERED that such service upon the Clerk of the Court and the Clerk of the Part be
made in accordance with the procedures set forth in the Protocol on Courthouse and
County Clerk Procedures for Electronically Filed cases (accessible at the “E-Filing” page
on the Court’s website at: www.nycourts.gov/supctmanh), unless otherwise specified
above; and it is further

ORDERED that, in accordance with Section 130-1.3, a copy of this order will be sent by
the Part to the Lawyer’s Fund for Client Protection; and it is further

ORDERED that the Court’s September 4, 2020 decision and order, as resettled in its
decision dated October 26, 2020, shall be complied with as follows:

ORDERED all parties shall exchange outstanding document discovery - including the
October 25, 2019, December 27, 2019, and February 14, 2020 demands - within 45 days
of notice of entry of this decision and order; and it is further

ORDERED all parties shall, within 45 days of notice of entry of this decision and order, provide a *Jackson* affidavit for all material requested which is not in their position; and it is further

ORDERED all parties shall, within 45 days of notice of entry of this decision and order, provide a particularized privilege log stating the date of the communication/document, the parties thereto, and the subject matter of the communication sufficient to establish the nature of the privilege including the period of the attorney-client relationship, if applicable, for all material requested which is believed to be privileged; and it is further

ORDERED that non-party David Dukoff shall fully comply with the subpoena within 45 days of notice of entry of this decision and order; and it is further

ORDERED that the failure to comply with a duly authorized subpoena shall result in sanctions, including fines and attorney fees, as provided by Article 31 of the CPLR and the New York Administrative Code; and it is further

ORDERED that defendant Peter Best shall appear for a deposition on April 5, 2021 beginning at 10:00am; and it is further

ORDERED that defendant Lilly Best shall appear for a deposition on April 6, 2021 beginning at 10:00am; and it is further

ORDERED that defendant Kanetta Baptiste a/k/a Kanetta Joseph shall appear for a deposition on April 7, 2021 beginning at 10:00am; and it is further

ORDERED that depositions shall occur either in-person or by electronic means and deposition dates shall not be adjourned absent further order of this Court, upon the parties' joint written request; and it is further

ORDERED that post-deposition demands shall be served within 20 days of deposition and responses thereto shall be served within 20 days of receipt of demand; and it is further

ORDERED that failure to appear for a deposition, as above, shall result in the striking of pleadings, absent extraordinary circumstances as found by the Court; and it is further

ORDERED that failure to timely serve post-deposition demands shall be deemed waiver of same and failure to timely serve responses to a timely issued demand shall result in striking of pleadings, absent extraordinary circumstances as found by the Court; and it is further

ORDERED that the note of issue deadline is extended to May 31, 2021; and this extension is **FINAL**, absent extraordinary circumstances as found by the Court; and it is further

ORDERED the parties are reminded post-note of issue discovery is prohibited; and it is further

ORDERED that extension of the note of issue deadline shall be made as soon as practicable, and in no event after the deadline; and it is further

ORDERED that failure to timely file a note of issue may result in dismissal of the action, in the Court's discretion, upon further application.

THIS CONSTITUTES THE DECISION AND ORDER OF THE COURT

Dated: January 27, 2021

Enter:



Hon. Frank P. Nervo, J.S.C.