Van Fleet v Micromem Tech., Inc.
2021 NY Slip Op 32009(U)
April 2, 2021
Supreme Court, Dutchess County
Docket Number: 2018-53252
Judge: Christi J. Acker
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To commence the 30-day statutory time period for appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF DUTCHESS

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STEVEN VAN FLEET,

Plaintiff,

-against-

MICROMEM TECHNOLOGIES, INC. and MICROMEM APPLIED SENSORS TECHNOLOGIES, INC.,

Defendants.

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DECISION AND ORDER

Index No.: 2018-53252

ACKER, J.S.C.

The following papers, NYSCEF Doc. #27-56 and #68-70, were read on the motion of Defendants Micromem Technologies, Inc. and Micromem Applied Sensors Technologies, Inc. (hereinafter "Micromem" and "MAST" individually and "Defendants" collectively) for the following relief: (1) an Order pursuant to CPLR §3126 to striking the pleadings of Plaintiff Steven Van Fleet (hereinafter "Plaintiff"), entering default against Plaintiff and scheduling an inquest; (2) in the alternative, issuance of a self-executing conditional Order pursuant to CPLR 3124 and §3126 directing Plaintiff to comply with his discovery obligations, or that his failure to do so would result in the striking of his pleadings and entry of default against him; and (3) an Order pursuant to CPLR §3126 and/or 22 NYCRR 130-1.1 awarding monetary sanctions against Plaintiff and his former attorneys, McCabe and Mack, LLP, jointly and severally regarding alleged discovery misconduct and frivolous actions:

Notice of Motion-Affirmation of Michael A. Freeman, Esq.-Exhibits A-Y-
Memorandum of Law in Support.....NYSCEF #27-54

Affirmation in Response of Richard R. DuVall, Esq.-Exhibit 1 .....NYSCEF #55-56
Reply Affirmation of Michael A. Freeman, Esq.-Exhibits Z-AA .....NYSCEF #68-70

Defendant Micromem is a publicly traded Canadian technology company that has developed and owns proprietary sensor technologies. Defendant MAST is Micromem's wholly owned American subsidiary. From approximately 2005 through 2018, Plaintiff was a member of Micromem's board of directors, including serving as MAST's president from approximately 2008 through 2018. Plaintiff resigned as president of MAST on August 17, 2018 and was removed as a member of Micromem's board shortly thereafter.

Plaintiff commenced the instant action against Defendants on or about October 16, 2018, asserting causes of action for breach of contract, account stated and equitable relief in the amount of $214,573.77. Defendants answered the Complaint and asserted seven counterclaims on or about December 7, 2018. Thereafter, Defendants filed an Amended Answer and Amended Counterclaims on January 24, 2019. Defendants' amended counterclaims contain causes of action for breach of fiduciary duty, breach of express contract (with monetary damages, specific performance and injunctive relief), breach of duty, fraudulent inducement, conversion and accounting. Plaintiff served a Verified Reply to Counterclaims on February 11, 2019.

Defendants filed the instant motion on or about September 25, 2020. The motion includes a timeline regarding the discovery process since April 2019. Despite the lengthy rendition of the back and forth between the attorneys that occurred during paper discovery and allegations that Plaintiff wrongfully deleted virtually all e-mails from his work account, the crux of the instant motion is Plaintiff's failure to appear for his scheduled deposition on July 31, 2020. Based upon

this failure, Defendants seek to strike Plaintiff's pleadings and ask for the imposition of monetary sanctions against Plaintiff and his attorneys.

After the instant motion was filed, Plaintiff's counsel moved to be relieved, based largely upon the relief sought by Defendants against the firm in this motion. By Order dated November 16, 2020, this Court granted the motion of McCabe & Mack to be relieved as Plaintiff's counsel. That Order also provided that the matter would be stayed until December 18, 2020 and that Plaintiff was to serve any response to the instant motion on or before January 11, 2021. McCabe and Mack, LLP filed opposition to the motion on their own behalf, however, Plaintiff has not submitted any response.

Defendants maintain that the Court should strike Plaintiff's pleadings and enter a default against him for his "willful" refusal to appear for a deposition. In support of this argument, Defendants' counsel maintains that the record supports imposing the harshest available remedy against Plaintiff. The Court does not agree.

Pursuant to CPLR §3126(3), if any party refuses to obey an order for disclosure or willfully fails to disclose information which the court finds ought to have been disclosed "the court may make such orders with regard to the failure or refusal as are just, among them:... an order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or any part thereof, or rendering a judgment by default against the disobedient party."

It is well settled that the nature and degree of the penalty to be imposed pursuant to CPLR 3126 is a matter within the sound discretion of the court. *Nationstar Mortg., LLC v. Jackson*, 2021 WL 900848, at *2 (2d Dept. Mar. 10, 2021). "Although public policy strongly favors that

actions be resolved on the merits when possible, a court may resort to the drastic remedy of striking a pleading upon a clear showing that a party's failure to comply with a disclosure order was the result of willful and contumacious conduct." *Turiano v. Schwaber*, 180 AD3d 950, 951 [2d Dept. 2020]. "Willful and contumacious conduct may be inferred from a party's repeated failure to comply with discovery, coupled with inadequate explanations for those failures, or a failure to comply with discovery over an extended period of time." *Al Maruf v. E.B. Mgmt. Properties, LLC*, 181 AD3d 670 [2d Dept. 2020].

Here, although Defendants' counsel provides a comprehensive outline of the litigation history, the sole allegation[1] upon which Defendants rely in seeking to strike Plaintiff's pleadings is his failure to appear for his Court ordered deposition on July 31, 2020. The record is otherwise devoid of any repeated failure by Plaintiff to comply with discovery or allegations that Plaintiff failed to comply with discovery over an extended period of time. Instead, Defendants maintain that the "last minute" cancellation of Plaintiff's deposition warrants the striking of Plaintiff's pleadings. However, although the short notice of the cancellation was certainly inconvenient, a review of Mr. DuVall's July 30, 2020 e-mail does not support a finding that the decision not to proceed was willful and/or contumacious sufficient to strike Plaintiff's pleadings at this time. As set forth below, the decision was a legal one that was also intended to spare Defendants' counsel unproductive time. Indeed, Defendants' counsel points to no cases in which a lawyer's

[1] In the Memorandum of Law, Defendants' counsel also argues, alternatively, that spoliation of evidence serves as an additional basis for the striking of Plaintiff's pleadings. However, the Notice of Motion and counsel's affirmation do not raise this argument. If Plaintiff's pleadings are not ultimately stricken, Defendants may revisit the spoliation argument.

considered decision to not produce his client for a deposition, prior to the expiration of the Court ordered dates, warranted the striking of a parties' pleadings.

Nevertheless, it is clear that Defendants are entitled to some relief pursuant to CPLR §3126 based upon the cancellation of the deposition and the indication that Plaintiff would not go forward with said deposition. The Court notes that at the time the instant motion was made, Plaintiff was represented by counsel and that it was his counsel who reported Plaintiff's intention not to appear for a deposition. As Plaintiff is now unrepresented, the Court declines to strike his pleadings in the first instance and, instead, orders that Plaintiff's Complaint and Reply to Counterclaims are conditionally stricken, unless Plaintiff does the following:

1. Confirms his attendance at the deposition with Defendants' counsel on or before **April 15, 2021**; and
2. Appears for a deposition on **April 29, 2021** at a location (in Dutchess County) and time to be chosen by Defendants' counsel and contained in a Notice for Deposition

The failure of Plaintiff to do either of the foregoing will result in his Complaint and Reply to Counterclaims being stricken and the Court scheduling this matter for an inquest as to Defendants' counterclaims. *See Aronov v. Shimonov*, 105 AD3d 787 [2d Dept. 2013]. The Court will consider an application for costs if Plaintiff indicates that he will appear for this deposition, but fails to do so.

Sanctions

Defendants also move for the imposition of monetary sanctions against Plaintiff and his former counsel for the "last minute" cancellation of Plaintiff's July 31, 2020 deposition. It appears that Defendants base this request for relief on both CPLR §3126 and 22 NYCRR 130–1.1. Although not expressly set forth as a sanction under CPLR §3126, the Second Department has

"held that the imposition of a monetary sanction under CPLR §3126 may be appropriate to compensate counsel or a party for the time expended and costs incurred in connection with an offending party's failure to fully and timely comply with court-ordered disclosure." *Lucas v. Lawrence Stam, Susan Gordon, Martin Clearwater & Bell, LLP*, 147 AD3d 921, 926 [2d Dept. 2017]. In addition, pursuant to 22 NYCRR 130–1.1, an award of costs, including an attorney's fee, may be imposed against a party for frivolous conduct. *RKO Properties, Ltd. v. Boymelgreen*, 77 AD3d 721 [2d Dept. 2010]. "The decision whether to impose costs or sanctions against a party for frivolous conduct, and the amount of any such costs or sanctions, is generally entrusted to the court's sound discretion." *Strunk v. New York State Bd. of Elections*, 126 AD3d 779, 781 [2d Dept. 2015].

Conduct is defined as frivolous if "(1) it is completely without merit in law and cannot be supported by a reasonable argument for an extension, modification or reversal of existing law; (2) it is undertaken primarily to delay or prolong the resolution of the litigation, or to harass or maliciously injure another; or (3) it asserts material factual statements that are false." 22 NYCRR 130–1.1(c). In making a determination whether the conduct was frivolous, "the court shall consider, among other issues the circumstances under which the conduct took place, including the time available for investigating the legal or factual basis of the conduct, and whether or not the conduct was continued when its lack of legal or factual basis was apparent, should have been apparent, or was brought to the attention of counsel or the party." *Id*.

Upon the record before this Court, Defendants have failed to demonstrate that the actions of either Attorney DuVall or Plaintiff with respect to the "last minute" cancellation of the July 31,

2020 deposition warrant the imposition of monetary sanctions under either CPLR §3126 or 22 NYCRR 130–1.1(c).

Although not communicated to Defendants' counsel until the day before the deposition, counsel's decision not to produce Plaintiff for the July 31, 2020 deposition was not willful or contumacious under CPLR §3126, nor does it meet the definition of "frivolous" set forth in 22 NYCRR 130–1.1(c). Through an e-mail, Plaintiff's counsel advised that rather than producing Plaintiff for a deposition at which he would likely invoke his Fifth Amendment rights, Plaintiff would not be produced. Counsel further stated that "we understand that he will suffer preclusion" and further "understand the consequences of his declining to appear for a deposition." Rather than showing willful or contumacious conduct, these assertions demonstrate that counsel's decision had a good faith basis, which is sufficient to avoid sanctions. *See Dank v. Sears Holding Mgmt. Corp.*, 69 AD3d 557, 558 [2d Dept. 2010]. Moreover, the Court notes that all of the cases upon which Defendants rely in seeking monetary sanctions deal with behavior that is much more egregious then the facts before this Court.

Nevertheless, the Court hereby directs that Plaintiff shall pay the late cancellation fee for the July 31, 2020 deposition, which is $150.00 based upon the invoice annexed to the motion. All other requests for monetary sanctions are denied.[2]

The Court has considered the additional contentions of the parties not specifically addressed herein. To the extent any relief requested by either party was not addressed by the Court, it is hereby denied. Accordingly, it is hereby

[2] Significantly, should Plaintiff's pleadings be stricken, Defendants will be entitled to an inquest on their counterclaims, which seeks monetary damages of close to $3,000,000.00.

ORDERED that Defendants' motion to strike Plaintiff's pleadings is conditionally granted as indicated herein; and it is further

ORDERED that Plaintiff shall reimburse Defendants' counsel $150.00 for the late cancellation fee for the July 31, 2020 deposition within 30 days and that Defendants' motion for monetary sanctions is otherwise denied; and it is further

ORDERED that Defendants' counsel shall serve a copy of this Decision and Order, as well as a separate Notice for Deposition, upon Plaintiff via electronic mail at svanfleet@frontiernet.net and via overnight delivery; and it is further

ORDERED that Defendants' counsel shall apprise the Court on or before April 16, 2021 as to whether Plaintiff confirmed his appearance for the April 29, 2021 deposition. Should Plaintiff fail to do so, or thereafter fails to appear for the April 29, 2021 deposition, Defendants' counsel shall submit a proposed Order striking Plaintiff's pleadings and scheduling this matter for an inquest on Defendants' counterclaims.

The foregoing constitutes the Decision and Order of the Court.

Dated: Poughkeepsie, New York
April 2, 2021

Christi J Acker

Digitally signed by Christi J Acker
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CHRISTI J. ACKER, J.S.C.

To: All Counsel Via NYSCEF

Via Regular Mail and
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