

Barlow v Skroupa
2021 NY Slip Op 32339(U)
November 10, 2021
Supreme Court, New York County
Docket Number: Index No. 651739/2020
Judge: Lucy Billings
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 41

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HEATHER BARLOW, VALUE EXTRACTION
SERVICES LLC, PHILIP LOFASO, JAKE
HENDERSON, MAKEEDA PERKINS, MAURA
MURPHY, MARINA PUSHKINA, JEN DOBIES,
ROES 1-2, and all others similarly
situated and/or interested parties,

Index No. 651739/2020

Plaintiffs

- against -

DECISION AND ORDER

CHRISTOPHER SKROUPA, INSPIRE SUMMITS
LLC d/b/a SKYTOP STRATEGIES, DAVID
KATZ, JOHN STEPHEN WILSON, PAULA LUFF,
and ADVISORY BOARD MEMBERS DOES 1-5,

Defendants

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LUCY BILLINGS, J.S.C.:

Plaintiffs are financial analysts, human resources
personnel, and website specialists who claim they were not paid
for services provided to defendants, who organize business
conferences or are associated with the enterprise. Plaintiffs
move for penalties due to defendants' abject failure to respond
to any of plaintiffs' disclosure demands in compliance with
C.P.L.R. §§ 3107, 3120(2), and 3133 and repeated orders.
C.P.L.R. § 3126(3). Defendants' only excuse for their
noncompliance is that they were planning to move to dismiss the
complaint and were waiting for plaintiffs' definitive amended
complaint.

I. DEFENDANTS LACK A VIABLE EXCUSE.

Yet defendants never explain how prospective amendments to the complaint prevented defendants from responding to plaintiffs' disclosure demands that plaintiffs duly served and to which the court then ordered defendants to respond. Defendants may have been under no deadline to move to dismiss the complaint, but their deadlines to respond to plaintiff's disclosure demands, first according to C.P.L.R. §§ 3107, 3120(2), and 3133, and then according to the orders entered before defendants removed this action to the United States District Court for the Southern District of New York, never abated. While an order by this court during any period of removal might have been ineffective, 28 U.S.C. § 1446(d), the orders setting deadlines for disclosure were entered when the action was in this court and remained effective.

The federal court received the removed action in the same procedural posture as when the action was in this court and then undertook to give effect to this court's orders entered before the removal. D.H. Blair & Co., Inc. v. Gottdiener, 462 F.3d 95, 108 (2d Cir. 2006); Sun Forest Corp. v. Shvili, 152 F. Supp. 2d 367, 387 (S.D.N.Y. 2001). "Upon removal, the orders entered by the state court are treated as though they have been entered by the federal court." Nasso v. Seagal, 263 F. Supp. 2d 596, 608 (E.D.N.Y. 2002). See In re Diet Drugs, 282 F.3d 220, 231-32 (3d Cir. 2002); Resolution Trust Corp. v. Northpark Joint Venture, 958 F.2d 1313, 1316 (5th Cir. 1992); Preseau v. Prudential Ins.

Co. of America, 591 F.2d 74, 79 (9th Cir. 1979). When this action was in the federal court, if defendants sought to relieve themselves from the disclosure deadlines set by this court, defendants needed to move to extend, modify, or vacate those deadlines, D.H. Blair & Co., Inc. v. Gottdiener, 462 F.3d at 108, but never did so, there or after this action was remanded here. Gibbs v. St. Barnabas Hosp., 16 N.Y.3d 74, 81 (2010); Vandashield Ltd v. Isaacson, 146 A.D.3d 552, 556 (1st Dep't 2017).

Defendants also oppose plaintiffs' motion on the grounds that plaintiffs failed to demonstrate that they had conferred with defendants' attorney in a good faith effort to resolve their noncompliance. 22 N.Y.C.R.R. § 202.7(a) and (c). Plaintiffs' motion to compel disclosure, granted in an order entered December 17, 2020, and the Preliminary Conference, generating the Preliminary Conference Order entered February 9, 2021, demonstrate that plaintiffs did confer with defendants' attorney prefatory to those orders, and, after two orders, further efforts to resolve defendants' intransigence would be futile. Suarez v. Shapiro Family Realty Assoc., LLC, 149 A.D.3d 526, 527 (1st Dep't 2017); Loeb v. Assara N.Y. I L.P., 118 A.D.3d 457, 458 (1st Dep't 2014); Scaba v. Scaba, 99 A.D.3d 610, 611 (1st Dep't 2012); Baulieu v. Ardsley Assoc., L.P., 84 A.D.3d 666, 666 (1st Dep't 2011). Moreover, both plaintiffs and defendants present abundant email correspondence in which plaintiffs sought defendants' compliance with disclosure deadlines, but defendants responded concerning only their anticipated motion to dismiss the

complaint. Caserta v. Triborough Bridge & Tunnel Auth., 180 A.D.3d 532, 533 (1st Dep't 2020); Rodriguez v. Nevei Bais, Inc., 158 A.D.3d 597, 598 (1st Dep't 2018); Cuprill v. Citywide Towing & Auto Repair Servs., 149 A.D.3d 442, 443 (1st Dep't 2017). See Suarez v. Shapiro Family Realty Assoc., LLC, 149 A.D.3d at 527; Loeb v. Assara N.Y. I L.P., 118 A.D.3d at 458; Northern Leasing Sys., Inc. v. Estate of Turner, 82 A.D.3d 490, 491 (1st Dep't 2011).

II. PLAINTIFFS ARE ENTITLED TO PENALTIES.

Because defendants' offered excuse itself demonstrates that their noncompliance was willful, particularly when the court gave defendants repeated chances to comply, the court grants plaintiffs' motion to the following extent and imposes the following penalties. C.P.L.R. § 3126; Wyatt v. Sutton, 185 A.D.3d 422, 422 (1st Dep't 2020); Menkes v. Delikat, 148 A.D.3d 442, 442 (st Dep't 2017); Crooke v. Bonofacio, 147 A.D.3d 510, 510 (1st Dep't 2017); Ithilien Realty Corp. v. 176 Ludlow, LLC, 139 A.D.3d 582, 583 (1st Dep't 2016). See Anderson & Anderson LLP-Guangzhou v. North Am. Foreign Trading Corp., 165 A.D.3d 511, 512 (1st Dep't 2018). First, due to defendants' inordinate delay in responding to disclosure demands before moving to dismiss any claims in the complaint, the court denies them any further stay of disclosure when they do move to dismiss the complaint's claims. See C.P.L.R. § 3214(b); Crooke v. Bonofacio, 147 A.D.3d at 511; 241 Fifth Ave. Hotel, LLC v. GSY Corp., 110 A.D.3d 470, 472 (1st Dep't 2013); Allstate Ins. Co. v. Buziashvili, 71 A.D.3d

571, 572-73 (1st Dep't 2010); Weissman v. 20 E. 9th St. Corp., 48 A.D.3d 242, 243 (1st Dep't 2008).

Second, defendants shall be precluded from offering at trial or in support of or in opposition to any motion any documents that they fail to produce in compliance with the deadlines for production of documents set in the stipulated Status Conference Order dated November 9, 2021. C.P.L.R. § 3126(2); Gibbs v. St. Barnabas Hosp., 16 N.Y.3d at 82-83; Diaz v. Maygina Realty LLC, 181 A.D.3d 478, 478 (1st Dep't 2020); Henry v. Lenox Hill Hosp., 159 A.D.3d 494, 495 (1st Dep't 2018); Vandashield Ltd v. Isaacson, 146 A.D.3d at 556. See Wyatt v. Sutton, 185 A.D.3d at 422; Anderson & Anderson LLP-Guangzhou v. North Am. Foreign Trading Corp., 165 A.D.3d at 512; Mohel v. Gavriel Plaza, Inc., 123 A.D.3d 464, 465 (1st Dep't 2014); Silva v. Lakins, 118 A.D.3d 556, 556 (1st Dep't 2014). Similarly, if defendants fail to answer any interrogatory in compliance with the deadline set in that Status Conference Order, they shall be precluded from offering any evidence on the issue to which the unanswered interrogatory pertains at trial or in support of or in opposition to any motion. Finally, if any defendant fails to appear for a deposition in compliance with the deadline set in that Status Conference Order or a stipulated date, that defendant shall be precluded from testifying at trial or submitting an affidavit in support of or in opposition to any motion. See Crooke v. Bonofacio, 147 A.D.3d at 510; Mohel v. Gavriel Plaza, Inc., 123 A.D.3d at 465; Silva v. Lakins, 118 A.D.3d at 556. The court

denies plaintiffs' motion to the extent that it seeks a further penalty. C.P.L.R. § 3126(3); Crooke v. Bonofacio, 147 A.D.3d at 511; 241 Fifth Ave. Hotel, LLC v. GSY Corp., 110 A.D.3d at 472; Allstate Ins. Co. v. Buziashvili, 71 A.D.3d at 572-73; Weissman v. 20 E. 9th St. Corp., 48 A.D.3d at 243.

DATED: November 10, 2021

Lucy Billings

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