Weinberg v March for Science, Inc.
2021 NY Slip Op 32598(U)
December 6, 2021
Supreme Court, New York County
Docket Number: Index No. 657335/2019
Judge: Frank P. Nervo

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. FRANK NERVO** **PART** **04**

Justice

----------X

C. WEINBERG,

Plaintiff,

- v -

MARCH FOR SCIENCE, INC.,VALORIE AQUINO, RUFUS COCHRAN, JUSTIN SHAIFER, LUCKY TRAN, MATT TRANCHIN, ASTRID WILLIS-COUNTEE

Defendant.

----------X

INDEX NO. 657335/2019

MOTION DATE 11/10/2021

MOTION SEQ. NO. 002

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 002) 25, 26 were read on this motion to/for EXTEND - TIME.

Plaintiff moves to compel the deposition of defendants Valorie Aquino and Astrid Willis-Countee, and plaintiff moves for further extension of the NOI deadline until two months after the completion of the aforementioned depositions. Plaintiff advises that it is believed defendants Valorie Aquino and Astrid Willis-Countee will not appear for deposition absent Court order.

CPLR § 3126 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 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]).

As the Court of Appeals has repeatedly underscored, "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" (*Gibbs v. St. Barnabas Hosp.*, 16 NY3d 74 [2010]). Disregard of discovery deadlines will

not be tolerated (*Andrea v. Arnone, Hedin, Casker, Kennedy & Drake, Architects & Landscape Architects, P.C*, 5 NY3d 514, 521 [2005]; *see also Arpino v. F.J.F. & Sons Elec. Co., Inc.*, 102 AD3d 201, 208 [2d Dept 2012]). "[U]pon learning that a party has repeatedly failed to comply with discovery orders, [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]).

As an initial matter, the Court has twice ordered defendants depositions be completed, and has already extended the NOI deadline following the parties' failure to comply with the Court's initial order scheduling same (NYSCEF Doc. Nos. 23 & 24).

In opposition, which the Court is constrained to note comprises fewer than 100 words and does not comply with Uniform Rule 202.8-b, defendants contend that defendant Astrid Willis-Countee was deposed on November 18, 2021 and defendant Valorie Aquino was scheduled to appear for deposition on November 22, 2021 (NYSCEF Doc. No. 26). Defendants therefore contend the motion is moot.

This Court does not so find. Whether defendant Valorie Aquino appeared for a deposition is unknown. Furthermore, defendants Valorie Aquino and Astrid Willis-Countee failed to comply with two valid orders of this Court and have offered no excuse for same, instead unilaterally dictating when they would appear. Notably, defense counsel's paltry opposition offers no explanation for the repeated failure of its clients to appear for court-ordered depositions. Such failures assume "an ability to comply and a decision not to comply" (*Dauria v. City of New York*, 127 AD2d 459, 460 [1st Dept 1987]).

Accordingly, the Court finds defendants Valorie Aquino's and Astrid Willis-Countee's failure to appear for deposition, on the dates ordered, amounts to willful contumacious noncompliance. The Court further finds that this noncompliance was designed to delay resolution of this matter and increase litigation costs. Their willful and contumacious non-compliance has resulted in substantial waste of this Court's resources, as well as those of opposing counsel, to enforce the most routine of discovery orders. Defense counsel offers no explanation or excuse for its clients' behavior. Furthermore, defense counsel's papers do not comply with the Uniform Rules and are, at best, dismissive towards the judiciary and its resources. The Court, therefore, finds defense counsel has engaged in frivolous behavior under 22 NYCRR § 130-1.1.

Accordingly, it is

ORDERED that the motion to compel the depositions of Valorie Aquino and Astrid Willis-Countee is granted as below; and it is further

ORDERED that defendants Valorie Aquino and Astrid Willis-Countee have engaged in willful contumacious non-compliance having twice failed to appear for depositions, as ordered by this Court, and such failure has resulted in the substantial waste of judicial resources; and it is further

ORDERED that should defendants Valorie Aquino's and Astrid Willis-Countee's deposition remain outstanding, they shall appear for deposition, either in-person or via electronic means, on January 13, 2022 beginning at 10:00am and continuing day-to-day until completion, in accordance with the Uniform Rules; and it is further

ORDERED that post-deposition demands related to defendants Valorie Aquino's and Astrid Willis-Countee's depositions shall be served within 20 days of this order, or date of deposition, whichever is later; all responses thereto shall be served within 20 days of receipt of demand. Failure to timely serve post-deposition demands constitutes waiver of same. Failure to timely respond

to a post-deposition demand shall result in the striking of defendants' answer, without further order of the Court; and it is further

ORDERED that the full costs of defendants Valorie Aquino's and Astrid Willis-Countee's depositions, including plaintiff's attorney's fees related to same, shall be borne by defendants Valorie Aquino and Astrid Willis-Countee, respectively; and it is further

ORDERED that by February 4, 2022 plaintiff's counsel shall file, via NYSCEF with courtesy hard-copy via First Class mail to chambers, a detailed recitation of the fees and costs of deposing defendants Valorie Aquino and Astrid Willis-Countee. Failure to timely submit same shall constitute waiver of recompense for such costs and fees; and it is further

ORDERED that by February 11, 2022 counsel for defendants Valorie Aquino and Astrid Willis-Countee shall file opposition, if any, via NYSCEF with courtesy hard-copy via First Class mail to chambers, as to the *amount* of fees and costs only. Failure to timely submit opposition shall constitute consent to the amount of fees and costs submitted by plaintiff's counsel; and it is further

ORDERED that the answers of defendants Valorie Aquino and Astrid Willis-Countee are conditionally stricken, should they fail to appear for depositions, if not already held; and it is further

ORDERED that the Court finds the instant sanctions necessary to ensure defendants Valorie Aquino's and Astrid Willis-Countee's compliance, given their refusal, twice, to comply with prior orders of this Court and appear for deposition; and it is further

ORDERED that counsel for defendants, Menken Simpson & Rozger LLP, has engaged in frivolous and entirely avoidable motion practice, as outlined above, and is therefore sanctioned in the amount of $500.00, without any charge to its client, payable to the Lawyer's Fund for Client Protection, 119 Washington Avenue, Albany, New York 12210; and it is further

ORDERED that written proof of the payment of this sanction be provided to the Clerk of Part IV and opposing counsel within 30 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 upon him 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 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 the address www.nycourts.gov/supctmanh); 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 note of issue is extended to March 18, 2022; and it is further

ORDERED that the dates set forth herein may not be adjourned or modified absent further Court order and any stipulation purporting to adjourn or modify same shall be a nullity.

THIS CONSTITUTES THE DECISION AND ORDER OF THE COURT.

12/06/2021
DATE

FRANK NERVO, J.S.C.

CHECK ONE:		CASE DISPOSED		X	NON-FINAL DISPOSITION		
	X	GRANTED	DENIED		GRANTED IN PART		OTHER
APPLICATION:		SETTLE ORDER			SUBMIT ORDER		
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN			FIDUCIARY APPOINTMENT		REFERENCE