

Hindlin v Prescription Songs LLC
2022 NY Slip Op 32601(U)
July 30, 2022
Supreme Court, New York County
Docket Number: Index No. 651974/2018
Judge: Andrea Masley
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SUPREME COURT OF THE STATE OF NEW YORK
 COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 48

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<p>JACOB HINDLIN,</p> <p style="text-align: center;">Plaintiff,</p> <p style="text-align: center;">- v -</p> <p>PRESCRIPTION SONGS LLC, KASZ MONEY, INC., ADVANCED ALTERNATIVE MEDIA, INC., KING, HOLMES, PATERNO & SORIANO, LLP, MARK BEAVEN, PETER PATERNO, NONSTOP MANAGEMENT, LLC, and LUCILLE SONGS, INC.,</p> <p style="text-align: center;">Defendants.</p>	<p>INDEX NO. <u>651974/2018</u></p> <p>MOTION DATE _____</p> <p>MOTION SEQ. NO. <u>025</u></p> <p style="text-align: center;">DECISION + ORDER ON MOTION</p>
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HON. ANDREA MASLEY:

The following e-filed documents, listed by NYSCEF document number (Motion 025) 949, 950, 951, 952, 953, 954, 955, 956, 957, 958, 959, 960, 961, 962, 963, 964, 975, 976, 977, 978, 979, 980, 981, 982, 983, 984, 985, 986, 987, 988, 989, 990, 991, 992, 993, 994, 995, 1018, 1019, 1020

were read on this motion to/for SANCTIONS.

Upon the foregoing documents, it is

Defendants move by order to show cause for the following relief:

- (1) imposing sanctions, pursuant to 22 NYCRR § 130-1.1(a), in the form of an order for David Rosenberg of Marcus Rosenberg & Diamond, LLP and Andrew Goodman of Foster Garvey P.C. to: (a) reimburse defendants for the attorneys' fees that defendants have incurred and will incur in connection with the briefing and argument of this Order to Show Cause; (b) reimburse defendants for the attorneys' fees and costs (including court reporter, videographer, and transcript costs) incurred by defendants in connection with the deposition of Ms. Hindlin on May 18, 2022; and (c) pay for 100% of the costs and fees for a private referee to supervise the resumption of Ms. Hindlin's deposition on two separate days;
- (2) for a protective order under CPLR 3103 to bar further excessive and improper speaking objections and instructions by Rosenberg and Goodman; and
- (3) for a protective order under CPLR 3103 to prevent Rosenberg and Goodman from abusive and unprofessional behavior in the deposition of Ms. Hindlin.¹

¹ Despite the serious nature of this motion, the court was compelled to cancel argument on the motion when Rosenberg, an experienced and well-respected member of the
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 Motion No. 025

This motion arises from the May 18, 2022 deposition of Jaime Hindlin, the sole owner and President of Counterclaim Defendant Nonstop Management LLC (Nonstop) and spouse of plaintiff.² The claims against Nonstop include conversion of funds, equitable accounting, constructive trust, unjust enrichment, tortious interference, and aiding and abetting conversion. (NYSCEF 483, KMI's Amended Counterclaims ¶¶ 51-103³.) Ms. Hindlin's testimony is relevant as Nonstop is plaintiff's manager. (*Id.* ¶ 2.) Moreover, Ms. Hindlin worked for plaintiff Prescription where she was plaintiff's direct contact at Prescription during the relevant time. (*Id.* ¶ 6.) The deposition transcript of 175 pages speaks for itself and need not be repeated. (NYSCEF 961, Transcript.⁴) Suffice it to say that Rosenberg, counsel to the witness, interjected 187 times with improper speaking objections and/or colloquy, while Goodman, counsel for plaintiff, interjected 114 times with improper speaking objections and/or colloquy. Counsel instructed the witness not to answer 30 questions without any lawful basis.

Upon review of the transcript, the court immediately appointed Hon. Karla Moskowitz (ret.) to supervise the deposition. (NYSCEF 965, Order; *Orner v Mount Sinai Hosp.*, 305 AD2d 307, 309–310 [1st Dept 2003].) The court wishes to publicly thank Justice Moskowitz and Tyear Middleton, Esq. of the NYCLA Special Masters Program⁵ both of whom volunteered to assist the court in this matter.⁶ The court was informed by

commercial bar, allegedly could not sign on to Teams. Rosenberg's affirmation which consists of quoting the transcript without any citations is not helpful. Rather, the deposition transcript speaks for itself.

² This deposition was held in abeyance until the end of discovery based on a January 20, 2021 doctor's note from Ms. Hindlin's treating physician. (NYSCEF571, Doctor's Note.) Defendants moved to compel Ms. Hindlin's deposition, and the court granted the request, finding Ms. Hindlin's deposition necessary as she is the only person with knowledge. (NYSCEF 928, Decision and Order [Mot. Seq. No. 016].) The court ordered that the deposition take over the course of two days for limited periods of time with breaks as requested by Ms. Hindlin. (*Id.*) The court notes that a new doctor's note was not provided updating the court on Ms. Hindlin's medical status.

³ The court notes that this document is filed under temporary seal with a redacted copy filed at NYSCEF 482; however, there is no order permitting the sealing of this document. The filing party is directed to seek such relief.

⁴ This document is also filed under temporary seal without court order.

⁵<https://www.nycla.org/pdf/NYCLA%20Special%20Masters%20Sworn%20In%20Press%20Release.pdf>

⁶ The court notes that unlike the federal courts and some state courts, New York courts do not have the authority to direct the parties to pay for a special master. (See e.g. FRCP Rule 53, Masters.) This case illustrates why such authority is crucial to a well-functioning court system.

Justice Moskowitz on June 21, 2022 that the deposition had concluded. However, conclusion of the deposition does not absolve Goodman or Rosenberg of attempting to thwart this deposition.

“Society at large, and the legal community in particular, is increasingly less tolerant of sharp practices and sharp behavior that verges on harassment. It is a question of enlightened self-interest for lawyers and their clients to be tough yet civil.” (Hon. Lawrence K. Marks, Jeremy Feinberg and Laura Smith, § 86:1 Scope note, 4C NY Prac, Com Litig in New York State Courts § 86:1 [5th ed.].) During depositions, lawyers are expected to “conduct themselves with dignity and refrain from engaging in acts of rudeness and disrespect.” (*Id.* § 86:16 Discovery—Depositions.) Accordingly, the court presumes that all attorneys, including Goodman and Rosenberg, two extremely experienced attorneys⁷, are familiar with the rules governing depositions.

To review, CPLR 3113 sets forth the procedures for depositions and provides:

“(c) Examination and cross-examination. Examination and cross-examination of deponents shall proceed as permitted in the trial of actions in open court, except that a nonparty deponent's counsel may participate in the deposition and make objections on behalf of his or her client in the same manner as counsel for a party. When the deposition of a party is taken at the instance of an adverse party, the deponent may be cross-examined by his or her own attorney. Cross-examination need not be limited to the subject matter of the examination in chief.”

Section 221.1. Objections at depositions, 22 NYCRR 221.1 provides:

(a) *Objections in general.* No objections shall be made at a deposition except those which, pursuant to subdivision (b), (c) or (d) of Rule 3115 of the Civil Practice Law and Rules, would be waived if not interposed, and except in compliance with subdivision (e) of such rule. All objections made at a deposition shall be noted by the officer before whom the deposition is taken, and the answer shall be given and the deposition shall proceed subject to the objections and to the right of a person to apply for appropriate relief pursuant to article 31 of the CPLR.

(b) *Speaking objections restricted.* Every objection raised during a deposition shall be stated succinctly and framed so as not to suggest an answer to the deponent and, at the request of the questioning attorney, shall include a clear statement as to any defect in form or other basis of error or irregularity. Except to the extent permitted by CPLR Rule 3115 or by this rule, during the course of

⁷ Goodman has been practicing for over 40 years according to his firm bio. <https://www.foster.com/people-andrew-goodman>. Rosenberg has been practicing for over 40 years according to his firm bio. <http://www.realtylaw.org/attorney-profiles/david-rosenberg-esq/>

the examination persons in attendance shall not make statements or comments that interfere with the questioning.

However, even if they were unfamiliar with the rules, Goodman and Rosenberg were reminded and warned by Special Master Mark Alcott who was supervising discovery in this matter. In March 2021, Rosenberg appeared as counsel for plaintiff's business manager, Zareh Bandari. Upon review of the transcript, Special Master Mark Alcott found that Goodman and Rosenberg improperly instructed the witness not to answer, and that "Plaintiff's counsel and the Deponent's counsel collectively intervened with arguments, speeches and aggressive colloquy 325 times in a 255-page transcript. That is far too often for counsel defending a deposition." (NYSCEF 953, Twelfth Report of Special Master at 5.) Special Master Alcott directed the deposition to resume, with an opportunity for defendants' counsel to ask those questions that had been blocked and stated that "[c]ounsel objecting to a question at the resumption of this deposition or at any future depositions must confine themselves to a terse statement of objection on a particular ground. . . . The question must be answered unless a refusal to answer or an instruction not to answer is permissible within the strict parameters of the applicable Uniform Rule." (*Id.*)

This is not the first time Goodman has exhibited this type of unprofessional, bullying behavior in this action, though it was only brought to this court's attention with this motion. (See *e.g.*, NYSCEF 954, December 22, 2020 Jacob Hindlin Deposition Tr at 91:3-5 [Goodman: "You are not very good at asking questions, but you are very good at interrupting others."], 95:23 [Goodman: "You are really obnoxious"]; NYSCEF 955, December 23, 2020 Lukasz Gottwald Deposition Tr. at 79:14-15 [Goodman: "wipe that silly smile off your face"]; NYSCEF 956, February 12, 2021 Bruce Scavuzzo Deposition Tr. at 85:4-5 [Goodman: "you're a joke"], 105:10-22 [Goodman: "You have no knowledge of the law at all. You're a joke.... you're nonsense."]; NYSCEF 559, Special Master Conference Tr at 29:15-24 [Special Master: "Ok, Mr. Montclare. You are on mute sir... You've got to unmute yourself." Montclare: "I said it's nice to see you again..." Goodman: "You could have stayed on mute Paul. That would have been fine".])

"A lawyer's duty to refrain from uncivil and abusive behavior is not diminished because the site of the proceeding is a deposition room, or law office, rather than a courtroom." (*Corsini v U-Haul Intern.*, 212 AD2d 288, 291 [1st Dept. 1995] [citations omitted]; see also *Adams v Rizzo*, 13 Misc 3d 1235(A), n 27, 2006 NY Slip Op 52135[U] [Sup Ct, Onondaga County 2006] [Counsel's "conduct in interrupting defense counsel's examination and advancing self-serving questions of the witness would never be tolerated by this court *at trial* and is patently improper at a deposition."].)

The court rejects Goodman's defenses. Goodman was not the witness's attorney, and he did not protect the witness; he incited her. (See *e.g.* NYSCEF 961, Tr at 62:8-63:22.) Moreover, Albertson's question "Is Nonstop a music publisher?" is not offensive by any measure or calculated to physically harm Ms. Hindlin in any way as Goodman implied. (*Id.* at 62:5-63:2.) "At depositions, as in court, lawyers are expected

to 'advise their clients and witnesses of the proper conduct expected of them ... and make reasonable efforts to prevent clients and witnesses from causing disorder or disruption.'" (4C NY Prac, Com Litig in New York State Courts § 86:16.) Attorneys must model civility for their clients. Otherwise, the attorney will incite the witness, as occurred in this case, necessitating that the deposition be retaken. (*Orner v Mount Sinai Hosp.*, 305 AD2d 307, 309 [1st Dept. 2003] [where a lawyer's "sardonic and unprofessional" attitude toward the counsel conducting a deposition fostered "an uncooperative attitude from [the deponent].".]) Counsel are expected to intervene when a witness exhibits offensive conduct as the witness did here. (See *GMAC Bank v HTFC Corp.*, 248 FRD 182, 195 [D Pa 2008] [Court imposed \$29,000 sanction jointly and severally on attorney and client despite the "severe and repeated nature" of the client's misconduct, the attorney "persistently failed to intercede and correct" his client's "abusive, obstructive, and evasive behavior." Further, "when [the attorney] did speak, he either incorrectly directed the witness not to answer, dared opposing counsel to file a motion to compel, or even joined in [his client]'s offensive conduct."].)

As to their attacks on Jacob Albertson, Esq., who was taking the deposition on behalf of defendants, plaintiff's justification is rejected. Generally, inartful or imperfect deposition questions "[do] not give [opposing] counsel license to react impatiently nor interfere. (*Orner*, 305 AD2d at 309.) Nevertheless, Albertson's questions were neither inartful nor imperfect. Opposing counsel's constant objections otherwise do not make it so.

Rosenberg's affirmation only underscores his improper objections. Rosenberg's objections began on page 13 of the transcript, only 6 pages after Albertson's first question. Rosenberg's first objection "That's not her testimony" was incorrect. (NYSCEF 961, tr at 13:3.) Albertson asked "And so you said that you were an A&R assistant and also A&R. When did you become A&R?" (*Id.* at 12:23-25.) In fact, Ms. Hindlin testified "I worked at Warner Brother Record as an A&R assistant and then an A&R. (*Id.* at 11:18-19.) Accusations of Albertson's alleged harassment began on page 39 while accusations of abuse began on page 76. Upon review of Albertson's questions, the court finds that they were not harassing or abusive. However, the objections were.

The Spousal Privilege does not shield counsel's improper conduct. The proper procedure is to state the objection without any colloquy. (22 NYCRR 221.1.)

Improper deposition behavior not only thwarts the deposition but tarnishes the profession. Offensive and abusive language by attorneys in the guise of zealous advocacy is plainly improper, unprofessional, and unacceptable. "An attorney who demonstrates a lack of civility, good manners and common courtesy taint the image of the legal profession and, consequently, the legal system, which was created and designed to resolve differences and disputes in a civil manner." (*Laddcap Value Partners, LP v Lowenstein Sandler P.C.*, 18 Misc 3d 1130[A], 1130A, 2007 NY Slip Op 52538[U], *7-8 [Sup Ct, NY County 2007], citing *Matter of McAlevy*, 69 NJ 349, 354 [1976].) "[S]ociety's primary interest in the resolution of civil disputes is that they be

settled in a peaceful, orderly, and impartial manner.” (*People v Fagan*, 104 AD2d 252, 255 [4th Dept 1984].)

The court orders that Goodman’s and Rosenberg’s uncivil and obstructive behavior will stop now. By any measure, their repeated conduct is sanctionable. A warning by Special Master Alcott was apparently not sufficient. While dismissal, the ultimate penalty, has not been requested, the court notes that gamesmanship and dilatory tactics during discovery, such as those exhibited here, have resulted in dismissal. (*See Arts4All, Ltd. v Hancock*, 54 AD3d 286 [1st Dept 2008].)

As a result of their concerted efforts to thwart this deposition, even after a warning following a prior deposition in this case, Goodman and Rosenberg are sanctioned. First, they shall, within 10 days of receipt of defendants’ affirmation of services, reimburse defendants the attorneys’ fees and expenses defendants incurred on May 18, 2022 and for making this motion. Second, Rosenberg and Goodman shall each pay the Fund for Client Protection. Rosenberg is sanctioned \$2,000 (\$1,000 for this action which is doubled because he did not respect Special Master Alcott’s warning). Goodman, who was not representing the deponent shall pay \$10,000 as the penalty for the harm he has done to the profession after being cautioned by Special Master Alcott not to do so. The court finds Goodman’s language regarding “beating your wife” particularly reprehensible. (NYSCEF 961, Tr 55:16.) These sanctions are also appropriate because Justice Moskowitz volunteered her time; counsel were not directed to pay for her services as a penalty. (*See Oi Tai Chan v Society of Shaolin Temple*, 30 Misc 3d 244, 255-56 [Sup Ct, Queens County 2010].) To ensure this conduct is not repeated, Goodman and Rosenberg shall each attend a CLE on civility within 30 days of the date of this decision and submit to the court an affirmation attesting to their attendance and whether they complied with this court’s order that they read the standards of civility.⁸ (NYSCEF 965, May 26, 2022 [Attachment: Order with Standards of Civility].)

Accordingly, it is

ORDERED that Goodman and Rosenberg shall conduct themselves in this case in a civil manner; and it is further

ORDERED that Goodman shall pay the Lawyer's Fund for Client Protection, 119 Washington Avenue, Albany, New York, 12210, \$10,000 within 10 days of the date of this order; and it is further

ORDERED that Rosenberg shall pay the fund for client protection \$2,000 within 10 days of the date of this order; and it is further

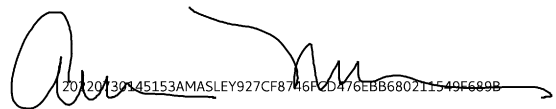
⁸ Counsel are referred to the NYS Bar Association which sponsors a regular CLE on civility taught by Vince Syracuse, Esq. The transcript in this matter, with appropriate redactions, will be shared with Mr. Syracuse for use in his seminar as an example of uncivil sanctionable behavior.

ORDERED that written proof of the payment of this sanction shall be provided to the court by e-mail (SFC-Part48@nycourts.gov) and opposing counsel within 30 days of the date of this order; and it is further

ORDERED that, in accordance with 22 NYCRR 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 Goodman and Rosenberg shall reimburse defendants' attorneys' fees and expenses in filing this motion and their costs associated with the May 18, 2022 deposition within 10 days of receipt of the affirmation of services. Rosenberg and Goodman are jointly and severally liable for this sanction; and it is further

ORDERED that Goodman and Rosenberg shall each attend a CLE on civility within 30 days of the date of this decision and submit to the court an affirmation attesting to their attendance and whether they complied with this court's order that they read the standards of civility.



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7/30/2022

DATE

ANDREA MASLEY, J.S.C.

CHECK ONE:

CASE DISPOSED
GRANTED DENIED
SETTLE ORDER
INCLUDES TRANSFER/REASSIGN

NON-FINAL DISPOSITION
GRANTED IN PART OTHER
SUBMIT ORDER
FIDUCIARY APPOINTMENT REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: