

Manhattan Telecom. Corp. v Coburn & Meredith, Inc.

2023 NY Slip Op 31556(U)

May 3, 2023

Supreme Court, New York County

Docket Number: Index No. 155211/2019

Judge: Louis L. Nock

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This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

<p>PRESENT: <u>HON. LOUIS L. NOCK</u></p> <p align="center"><i>Justice</i></p> <p>-----X</p> <p>MANHATTAN TELECOMMUNICATIONS CORPORATION,</p> <p align="center">Plaintiff,</p> <p align="center">- v -</p> <p>COBURN & MEREDITH, INC.,</p> <p align="center">Defendant.</p> <p>-----X</p>	<p>PART 38M</p> <p>INDEX NO. <u>155211/2019</u></p> <p>MOTION DATE <u>10/10/2022, 11/11/2022</u></p> <p>MOTION SEQ. NO. <u>003 004</u></p> <p align="center">DECISION + ORDER ON MOTION</p>
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The following e-filed documents, listed by NYSCEF document numbers (Motion 003) 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 94, 105, and 106 were read on this motion to DISMISS.

The following e-filed documents, listed by NYSCEF document numbers (Motion 004) 89, 90, 91, 92, 93, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, and 107 were read on this motion for SANCTIONS.

Upon the foregoing documents, defendant’s motion to dismiss the complaint pursuant to CPLR 3126 or, in the alternative, strike the note of issue (Mot. Seq. No. 003), and plaintiff’s motion for sanctions (Mot. Seq. No. 004), are consolidated for disposition. Defendant’s motion is granted in part for the reasons set forth in the moving and reply papers (NYSCEF Doc. Nos. 69-70, 105), and the exhibits attached thereto, in which the court concurs, as summarized herein. Plaintiff’s motion for sanctions is denied.

Plaintiff, a provider of telecommunications services, commenced this action seeking to recover unpaid bills to defendant for such services. Defendant, as part of its defense, asserts that the bills are not accurate, and reflect that plaintiff billed defendant for more telecommunications circuits than defendant was actually using (Castelli affirmation, NYSCEF Doc. No. 69, ¶ 4). Following the deposition of plaintiff’s first witness, a compliance conference was held, after which the court ordered, *inter alia*, that plaintiff “will produce a new witness with knowledge of

services and equipment provided to [defendant]” (compliance conference order dated February 2, 2020, NYSCEF Doc. No. 77). For various reasons the deposition was not held until April 26, 2022, at which time plaintiff produced Ian Goldin, plaintiff’s former national account manager and current director of inside channel sales (Goldin EBT tr, NYSCEF Doc. No. 81 at 10). At various points of his deposition, Goldin testified that he did not have knowledge of the process by which the telecommunications circuits used by defendant were connected and disconnected, and how defendant was billed accordingly, which facts are central to defendant’s asserted challenge to plaintiff’s bills (*id.* at 111-112, 119-120, 121-123, 136-139). Subsequently, defendant made several attempts to take the deposition of a witness from plaintiff with knowledge of these issues, including motion practice (affirmation of good faith, NYSCEF Doc. No. 70, ¶¶ 4-10). By orders dated July 27, 2022, and September 2, 2022, the court directed that plaintiff produce such a witness on or before the close of discovery on September 26, 2022 (orders, NYSCEF Doc. Nos. 84-85). At no time did plaintiff seek a protective order barring such a deposition, and in fact informed defendant twice that it was attempting to schedule a witness for deposition but was having difficulty finding availability to do so (emails, NYSCEF Doc. Nos. 83, 86). Ultimately, plaintiff failed to produce a witness, and instead filed a note of issue in which it asserted that all necessary discovery was complete (note of issue, NYSCEF Doc. No. 106).

Where a party “refuses to obey an order for disclosure or willfully fails to disclose information which the court finds ought to have been disclosed pursuant to this article, the court may make such orders with regard to the failure or refusal as are just” (CPLR 3126). “A complete failure to disclose is not a prerequisite to the imposition of sanctions pursuant to CPLR 3126, the relevant factor being whether the failure to disclose relevant documents at issue was

willful and contumacious” (*Waltzer v Tradescape & Co., L.L.C.*, 31 AD3d 302, 303 [1st Dept 2006]). Willful and contumacious behavior may be inferred from repeated disregard of the court’s discovery orders without reasonable excuse (*Rosengarten v Born*, 161 AD3d 515, 515 [1st Dept 2018]). “A determination of sanctions pursuant to CPLR 3126 lies in the trial court’s discretion” (*Board of Mgrs. v Leardon Boiler Works, Inc.*, 178 AD3d 462, 462 [1st Dept 2019]). Here, the court declines to apply the “drastic sanction” of dismissing the complaint, as the record indicates that plaintiff was at one point attempting to comply with the court’s directives to produce a witness with knowledge of the issues described above (*CEMD El. Corp. v Metrotech LLC I*, 141 AD3d 451, 453 [1st Dept 2016] [“Striking a party’s pleadings is a drastic sanction, and will generally be made only upon a clear showing that the party’s conduct was willful and contumacious”]).

In light of the necessity for such a witness, however, and plaintiff’s dilatory efforts to produce same, the court will grant so much of the motion as seeks to strike the note of issue and compel such a deposition. When discovery is not completed or waived, the note of issue is properly vacated under 22 NYCRR 202.21 (*Cromer v Yellen*, 268 AD2d 381 [1st Dept 2000]). Moreover, courts have held that, where witness testimony is necessary to the defense of an action, “granting defendant’s motion to vacate note of issue and, in effect, to compel deposition of nonparty witness [is] warranted.” (*Jacobs v Johnston*, 97 AD3d 538 [2d Dept 2012]). The necessity of the deposition is established through the court’s prior orders as set forth above, and the court therefore vacates the note of issue and reopens discovery to the limited extent of allowing defendant to take the deposition of plaintiff’s new witness. Failure to provide said witness for deposition may be subject to further discovery sanctions upon defendant’s application for same.

The court notes plaintiff's request that, if the court were so inclined to reopen discovery that it be allowed to take a subsequent deposition of defendant (Bachrach affirmation, NYSCEF Doc. No. 94, ¶¶ 21-22). However, plaintiff offers only a brief unsupported assertion that defendant's deposed witness Elizabeth Derway lacked sufficient knowledge of the issues leading to the instant action. Moreover, as plaintiff stated in the note of issue that all necessary discovery was complete, plaintiff has waived the right to a subsequent deposition (*Abbott v Memorial Sloan Kettering Cancer Ctr.*, 295 AD2d 136 [1st Dept 2002] ["By filing a note of issue, in which he certified that all discovery had been completed, plaintiff waived his right to conduct further depositions"]).

Finally, plaintiff's motion for sanctions is denied. Uniform Rules for Trial Courts (22 NYCRR) § 130-1.1 provides that a court may award costs and attorneys' fees or impose financial sanctions on a party who engages in frivolous conduct. Frivolous conduct is defined as conduct "completely without merit in law . . . undertaken primarily to delay or prolong resolution of the litigation, or to harass or maliciously injure another: or [that] asserts material factual statements that are false" (22 NYCRR 130-1.1[c]). The record before the court does not reflect that defendant has engaged in frivolous conduct.

Accordingly, it is

ORDERED that defendant's motion is granted in part to the extent of vacating the note of issue, and the note of issue is vacated, and the case is stricken from the trial calendar; and it is further

ORDERED that the deposition of a third witness for plaintiff who possesses specific knowledge and information related to the services and equipment provided to defendant shall be completed within 60 days from the date of filing hereof; and it is further

ORDERED that the parties shall appear for a conference in Room 1166, 111 Centre Street, New York, New York, on June 21, 2023, at 2:00 PM; and it is further

ORDERED that, within 15 days from the date of filing hereof, movant shall serve a copy of this order with notice of entry on all parties and upon the Clerk of the General Clerk’s Office, who is hereby directed to strike the case from the trial calendar and make all required notations thereof in the records of the court; and it is further

ORDERED that, within 15 days from completion of discovery as hereinabove directed, the plaintiff shall cause the action to be placed upon the trial calendar by the filing of a new note of issue and certificate of readiness (for which no fee shall be imposed), to which shall be attached a copy of this order;¹ and it is further

ORDERED that such service upon the Clerk of the General Clerk’s Office shall 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)]; and it is further

ORDERED that plaintiff’s motion for sanctions is denied.

This constitutes the decision and order of the court.



<u>5/3/2023</u>			<u>LOUIS L. NOCK, J.S.C.</u>	
DATE				
CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION
	<input type="checkbox"/>	GRANTED	<input type="checkbox"/>	GRANTED IN PART
	<input type="checkbox"/>	DENIED	<input checked="" type="checkbox"/>	OTHER
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>	SUBMIT ORDER
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	FIDUCIARY APPOINTMENT
			<input type="checkbox"/>	REFERENCE

¹ The 60-day time period in which to file dispositive motions shall run from the filing of the new note of issue.