

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

PRESENT: HOWARD B. LOWE, III  
ON. RICHARD B. LOWE, III Justice

PART 86m

Carnegie Associates

INDEX NO.

600109108

MOTION DATE

9/27/10

MOTION SEQ. NO.

008

MOTION CAL. NO.

\_\_\_\_\_

- v -

Eric S. Miller et al

The following papers, numbered 1 to \_\_\_\_\_ were read on this motion to/for \_\_\_\_\_

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits \_\_\_\_\_

Replying Affidavits \_\_\_\_\_

PAPERS NUMBERED


Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion

**FILED**

OCT 25 2010

COUNTY CLERK'S OFFICE  
NEW YORK

**MOTION IS DECIDED IN ACCORDANCE  
WITH ACCOMPANYING MEMORANDUM DECISION**

Dated: 10/19/10

ON. RICHARD B. LOWE, III  
J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST  REFERENCE

SUBMIT ORDER/ JUDG.

SETTLE ORDER/ JUDG.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

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

-----X  
CARNEGIE ASSOCIATES LTD.,

Plaintiff,

Index No. 600109/08

-against-

ERIC J. MILLER and THE MILLER  
CONSULTING GROUP, INC.,

Defendants.  
-----X

**FILED**  
**OCT 25 2010**  
COUNTY CLERK'S OFFICE  
NEW YORK

**Hon. Richard B. Lowe, III:**

Defendants move pursuant to CPLR 3126 and 22 NYCRR 202.26(e) for an order dismissing the complaint, striking the reply of counterclaim defendants Carnegie Associates (“Carnegie”), Sherwood Schwarz (“Schwarz”), and Kevin Daly (collectively “Plaintiffs”), and imposing sanctions upon Plaintiffs.

**Background**

The grounds for this motion is Plaintiffs’ violation of this court’s order dated March 18, 2010 directing mediation to take place. To date, the mediation has not been held.

After a conference call was held on April 2, 2010 between the mediator and the parties, a mediation session was scheduled for April 20, 2010 (Minkoff Affirmation ¶ 15). However, on April 9, 2010, Plaintiffs’ counsel advised Defendants that Schwarz would not attend the mediation (Id ¶ 17). Schwarz is the only person with true settlement authority for Carnegie, and therefore the mediator directed his appearance. Because Plaintiffs would not have someone with authority attending the session, the mediator adjourned the session (Letter from Levine to Lowe

of 10/8/10, at 3). Over the course of the next couple of months, the parties were unable to agree on a date on which all parties could attend the mediation.

On July 14, 2010, Defendant contacted the mediator to inquire as to his availability on July 26, 2010. This date was selected after Plaintiffs' counsel advised her that all relevant parties on its side would be available on that date (Order to Show Cause Ex I). After confirming his availability, the mediator directed all parties to submit confidential mediation statements no later than July 20, 2010.

On July 20, 2010, the mediator received a memorandum from Defendants. Plaintiff did not submit a memorandum. On July 22, 2010, the mediator attempted to contact Plaintiffs' counsel but was told he was in court (Letter from Levine to Lowe of 10/8/10 at 7). Thereafter Plaintiffs' counsel responded to the mediator's inquiry and advised him that he actually was on a family vacation and would not be submitting a memorandum. The mediation did not go forward.

To date, the mediation has not been held. Furthermore, the mediator has indicated to the court that in the exercise of caution, the matter should be re-assigned to another because he "formed a bias against plaintiff's lawyer, who has never even shown me the courtesy to communicate about schedule, missed deadlines, or anything else" (Id at 13). With respect to Plaintiffs' counsel's failure to submit a memorandum or to advise anyone of his inability to do so, the mediator also expressed his "annoyance at the extraordinarily cavalier attitude being shown by [Plaintiffs' counsel] toward the mediation process, the Court, and [the mediator]" (Id at 7).

Asserting that the Plaintiffs have flagrantly disregarded this court's order directing mediation, the Defendants now move to dismiss the complaint, strike the reply to the

counterclaims, and for sanctions. In support, they urge the court to consider, in addition to these recent events, that the Plaintiffs have already been sanctioned in a January 11, 2010 order which found that they engaged in “unnecessary and perhaps egregious delay[s]”.

### **Discussion**

“If the credibility of court orders and the integrity of our judicial system are to be maintained, a litigant cannot ignore court orders with impunity” (*Brill v City of New York* 2 NY3d 648, 653 [2004]). Continued non compliance with court orders gives rise to an inference of wilful and deliberate behavior (*Jones v Green* 34 AD3d 260 [1st Dept 2006]). “[M]ediation procedures were established to resolve cases expeditiously and conserve judicial resources” and a parties failure to abide by the directives of a mediator evidences willful and contumacious conduct (*Perez-Wilson v McPhee* 23 Misc3d 1053 [Sup. Ct. NY Cty 2009]).

This court has already responded to Plaintiffs repeated delays of this three and a half year litigation by issuing sanctions in its January 11, 2010 order.<sup>1</sup> This order came as a result of Plaintiffs’ repeated violation of court-imposed discovery deadlines; their refusal to schedule depositions of its principals and employees; and their disregard of two note of issue deadlines. Furthermore, this court was exasperated by Plaintiffs’ conduct whereby its counsel took the deposition of a third party witness, without notice to opposing counsel. This deposition was taken on the same day that Plaintiffs’ counsel represented to the court he would be on trial in another county (See Tr 10/29/09 11-13). Because of this conduct, the Defendants were given permission to file a motion to dismiss the complaint. In lieu of dismissal, in the January 11,

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<sup>1</sup> When doing so, this court recognized and relied upon the November 23, 2009 Affirmation of Nicole Hyland which details the Plaintiffs sanctionable conduct. Reference to the Hyland Affirmation is made herein.

2010 order the Plaintiffs were directed to pay the Defendants costs and fees incurred for the failure to appear on two separate occasions before the court and for the filing of the motion. Despite, what could be considered flagrant disregard of this court's orders in addition to misrepresentations to the court by Plaintiffs' counsel, the complaint was not dismissed as it is preferable to have the issues decided on their merits (*See Delgado v City of New York* 47 AD3d 550 [1st Dept 2008]).

The court is now faced with another dismissal motion because the Plaintiffs have again shown disregard for this court's orders by failing to proceed with mediation. First, they failed to make Schwarz available for more than three months after the mediation order was entered. Then, when a date was agreed upon, after Plaintiff confirmed Schwarz's availability, Plaintiff's ignored the mediator's instruction to submit a mediation statement. Furthermore, they did not bother to tell either the mediator or the Defendants they would not comply with the instruction until after the deadline passed. In the meantime, Defendants incurred the costs of preparing and timely submitting their own statement.

Plaintiffs' conduct in this matter has demonstrated utter disregard for the court, the appointed mediator, and for opposing counsel. The Plaintiffs were sanctioned by this court and narrowly escaped dismissal of their claims despite this court's finding of "many examples of unnecessary and perhaps egregious delay" on their part. Despite this, they have continued to proceed in this litigation in a manner which can only lead to a conclusion that their conduct is wilful and contemptuous.

Therefore, for these reasons, it is hereby

ORDERED that the motion to dismiss the complaint is granted and the complaint is

dismissed with costs and disbursements to defendant as taxed by the Clerk of the Court it is further

ORDERED that the Plaintiffs' reply to the counterclaims is stricken and it is further

ORDERED the Plaintiffs are directed to pay for the entirety of Defendant's fees and costs incurred in connection with the aborted mediation process within ten days of service of a copy of this order with notice of entry along with an appropriate bill of costs and it is further

ORDERED that Plaintiffs pay the sanctions due under the court's order entered January 25, 2010 within 10 days of service of a copy of this order with notice of entry and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

Dated: October 19, 2010

ENTER.

  
HON. RICHARD B. LOWE, III  
J.S.C.

**FILED**

OCT 25 2010

COUNTY CLERK'S OFFICE  
NEW YORK