

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

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TANYA MAYNOR,

Plaintiff(s), Index No. 35483/2019E

- against -

Hon. **FIDEL E. GOMEZ**
 Justice

**MILLENNIUM MEDICAL STAFFING, ANTHONY RICCOBONO,
 MARIA RICCOBONO, AND JOSEPH RICCOBONO,**

Defendant(s).

The following papers numbered 1 to 3, Read on this motion noticed on 3/11/22, and duly submitted as no. 3 on the Motion Calendar of 4/6/22.

	<u>PAPERS NUMBERED</u>	
Notice of Motion - Order to Show Cause - Exhibits and Affidavits Annexed	1	
Answering Affidavit and Exhibits		
Replying Affidavit and Exhibits		
Notice of Cross-Motion - Affidavits and Exhibits		
Pleadings - Exhibit		
Stipulation(s) - Referee's Report - Minutes		
Filed Papers-Order of Reference		
Memorandum of Law		

Plaintiff's motion is decided in accordance with the Decision and Order annexed hereto.

Dated: 4/6/2022

Hon. 

FIDEL E. GOMEZ, AJSC

- | | | |
|---------------------------|--|---|
| 1. CHECK ONE | <input type="checkbox"/> CASE DISPOSED | <input checked="" type="checkbox"/> NON-FINAL DISPOSITION |
| 2. MOTION/CROSS-MOTION IS | <input checked="" type="checkbox"/> GRANTED (MOTION) | |
| | <input type="checkbox"/> DENIED | |
| 3. CHECK IF APPROPRIATE. | <input type="checkbox"/> GRANTED IN PART | |
| | <input type="checkbox"/> OTHER | |
| | <input type="checkbox"/> SETTLE ORDER | |
| | <input type="checkbox"/> SUBMIT ORDER | |
| | <input type="checkbox"/> DO NOT POST | |
| | <input type="checkbox"/> FIDUCIARY APPOINTMENT | |
| | <input type="checkbox"/> REFEREE APPOINTMENT | |
| | <input checked="" type="checkbox"/> NEXT APPEARANCE DATE: September 26, 2022 | |

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX

-----x

TANYA MAYNOR,

Plaintiff(s),

DECISION AND ORDER

Index No: 35483/2019E

- against -

MILLENNIUM MEDICAL STAFFING, ANTHONY
RICCOBONO, MARIA RICCOBONO, AND JOSEPH
RICCOBONO,

Defendant(s).

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In this action for the alleged failure to pay commissions in violation of the New York Labor Law, plaintiff moves seeking an order pursuant to CPLR § 3126, striking defendants' answer for failing to provide discovery. Plaintiff avers that despite serving defendants with several discovery demands and despite several court orders requiring responses thereto, defendants have not responded to or complied with the foregoing demands. The instant motion is unopposed.

For the reasons that follow hereinafter, plaintiff's motion is granted, in part.

The instant action is for the alleged failure to pay commissions in violation of the New York Labor Law. The complaint alleges that plaintiff was employed as the Director of Operations for defendant MILLENNIUM MEDICAL STAFFING

(Millennium), a staffing company which provided consultants such as registered nurses, licensed practical nurses, and administrative personnel to its clients, namely doctor's offices, nursing homes, and hospitals. It is alleged that defendants ANTHONY RICCOBONO (AR), MARIA RICCOBONO (MR), and JOSEPH RICCOBONO (JR) are Millennium's principals. AR calculated plaintiff's commissions, MR managed Millennium's payroll, and JR was Millennium's Vice President, who provided plaintiff with her review and directed her actions in order to achieve defendants' goals. In 2003, plaintiff was hired by Millennium as a recruiter tasked with placing consultants with Millennium. In 2016, plaintiff became the Director of Operations tasked with the supervision of other recruiters and consultants. Defendants agreed to pay plaintiff a salary based on commissions, which would be calculated based on the net profit from any placements she made, as well as the placements made by other Millennium employees. It is alleged that defendants improperly calculated plaintiff's commissions and further unlawfully deducted commissions, bonus, and other payments in violation of the relevant commission agreement. Based on the foregoing, plaintiff asserts four causes of action pursuant to the New York Labor Law and a cause of action for breach of contract.

Plaintiff's motion to strike defendants' answer for their failure to respond to and comply with her discovery demands is granted to the extent of conditionally striking defendants' answer if they fail to comply with the relevant discovery demands. Significantly, on this record, plaintiff establishes that defendants' failure to respond to and comply with her discovery demands was willful and contumacious.

Pursuant to CPLR § 3126,

[i]f any party, or a person . . . refuses to obey an order for disclosure or wilfully 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, among them . . . an order prohibiting the disobedient party from supporting or opposing designated claims or defenses, from producing in evidence designated things or items of testimony, or from introducing any evidence of the physical, mental or blood condition sought to be determined, or from using certain witnesses; or . . . an order striking out pleadings or parts thereof.

It is well settled that "[t]he nature and degree of a penalty to be imposed under CPLR 3126 for discovery violations is addressed to the court's discretion" (*Zakhidov v Boulevard Tenants Corp.*, 96 AD3d 737, 738 [2d Dept 2012]). Striking a party's pleading for failure to provide discovery, however, is an extreme sanction, and warranted only when the failure to disclose

is willful and contumacious (*Bako v V.T. Trucking Co.*, 143 AD2d 561, 561 [1st Dept 1999]). Similarly, since the discovery sanction imposed must be commensurate with the disobedience it is designed to punish, the less drastic sanction of preclusion is also only appropriate when there is a clear showing that a party has willfully and contumaciously failed to comply with court-ordered discovery (*Zakhido* at 739; *Assael v Metropolitan Transit Authority*, 4 AD3d 443, 444 [2d Dept 2004]; *Pryzant v City of New York*, 300 AD2d 383, 383 [2d Dept 2002]). Willful and contumacious behavior can be readily inferred upon a party's repeated non-compliance with court orders mandating discovery (*Pryzant* at 383). When a party adopts a pattern of willful non-compliance with discovery demands (*Gutierrez v Bernard*, 267 AD2d 65, 66 [1st Dept 1999]) and repeatedly violates discovery orders, thereby delaying the discovery process, the striking of pleadings is warranted (*Moog v City of New York*, 30 AD3d 490, 491 [2d Dept 2006]; *Helms v Gangemi*, 265 AD2d 203, 204 [1st Dept 1999]). Stated differently, discovery sanctions should ensue when there is a willful failure to "disclose information that the court has found should have been disclosed" (*Byam v City of New York*, 68 AD3d 798, 801 [2d Dept 2009]).

Where the failure to disclose is neither willful nor contumacious, and instead constitutes a single instance of non-

compliance for which a reasonable excuse is proffered, the extreme sanction of striking of a party's pleading is unwarranted (*Palmenta v Columbia University*, 266 AD2d 90, 91 [1st Dept 1999]). Nor is the striking of a party's pleading warranted merely by virtue of "imperfect compliance with discovery demands" (*Commerce & Industry Insurance Company v Lib-Com, Ltd*, 266 AD2d 142, 144 [1st Dept 1999]).

Significantly, since CPLR § 3126 allows a court to craft sanctions that are just, "CPLR 3126 therefore broadly empowers a trial court to craft a conditional order—an order that grants the motion and imposes the sanction unless within a specified time the resisting party submits to the disclosure" (*Gibbs v St. Barnabas Hosp.*, 16 NY3d 74, 79 [2010] [internal quotation marks omitted]; *Mehler v Jones*, 181 AD3d 535, 535 [1st Dept 2020]; *Legarreta v Neal*, 108 AD3d 1067, 1068 [4th Dept 2013]).

The Uniform Rules for the New York Trial Courts states that "with respect to a motion relating to disclosure" (22 NYCRR 202.7), it shall not be filed absent "an affirmation that [moving] counsel has conferred with counsel for the opposing party in a good faith effort to resolve the issues raised by the motion" (*id.*). It is well settled that the failure to file the aforementioned affirmation warrants denial of any motion seeking disclosure or sanctions related thereto (*Hernandez v City of New*

York, 100 AD3d 433, 434 [1st Dept 2012]; *Molyneaux v City of New York*, 64 AD3d 406, 407 [1st Dept 2009]; *Vasquez v G.A.P.L.W. Realty, Inc.*, 236 AD2d 311, 312 [1st Dept 1997]). Moreover, denial of a motion seeking disclosure is also warranted when the affirmation of good faith submitted nevertheless fails to indicate that the proponent of disclosure actually conferred with counsel for the party from whom discovery is sought (*Gonzalez v Intl. Bus. Machines Corp.*, 236 AD2d 363 [2d Dept 1997] ["Furthermore, the court did not err in summarily denying the appellant's motion to strike the complaint since counsel for the appellant failed to confer with counsel for the plaintiffs in a good faith effort to resolve the issues raised by the motion."]; *Koelbl v Harvey*, 176 AD2d 1040, 1040 [3d Dept 1991] ["Contrary to the position taken by defendants that it was not their obligation to make a further request for a bill of particulars or to serve reminders upon plaintiffs, they were required to communicate with plaintiffs in a good-faith effort to obtain the requested particulars without filing a motion with Supreme Court." (internal quotation marks omitted)]).

In support of the instant motion, plaintiff submits a good faith affirmation dated February 18, 2022, wherein plaintiff details her attempt to procure discovery from defendants.

Plaintiff also submits the Court's Preliminary Conference Order, dated April 6, 2021, which required that the parties serve discovery demands on or before June 28, 2021. Pursuant to the aforementioned order, responses to the foregoing demands were due by July 27, 2021.

Plaintiff submits a so-ordered stipulation dated August 26, 2021, wherein defendants agreed to provide responses and produce discovery compliant with plaintiff's discovery demands by October 12, 2021.

Plaintiff submits the Court's Compliance Conference Order, dated November 9, 2021, wherein defendants were ordered to produce all paper discovery by January 10, 2022.

Plaintiff also submits four email messages sent to defendants seeking compliance with and responses to plaintiff's discovery demands.

Lastly, plaintiff avers that it served the discovery demands in question upon defendants on July 5, 2021, and that to date defendants have not provided responses or documents responsive thereto.

Based on the foregoing, plaintiff's motion is granted to the extent of conditionally striking defendants' answer should they fail to provide the discovery requested within 30 days hereof. As noted above, the striking of pleadings is only warranted when

the failure to disclose is willful and contumacious (*Bako v V.T. Trucking Co.* at 561). Willful and contumacious behavior can be readily inferred upon a party's repeated non-compliance with court orders mandating discovery (*Pryzant* at 383). Thus, when a party adopts a pattern of willful non-compliance with discovery demands (*Gutierrez* at 66) and repeatedly violates discovery orders, thereby delaying the discovery process, the striking of pleadings is warranted (*Moog* at 491; *Helms* at 204). Here, despite two court orders, one requiring responses to plaintiff's discovery demands, the other requiring production of the discovery requested by plaintiff, and a so-ordered stipulation requiring production of the discovery requested by plaintiff, defendants have neither responded to plaintiff's discovery demands nor produced the discovery requested therein.

Insofar as the instant motion is unopposed, the record is bereft of any mitigating evidence and this Court concludes that defendants have intentionally refused to respond and/or comply with plaintiff's demands. In turn, the Court concludes that defendants have also willfully violated the Court's two prior orders and the so-ordered stipulation between the parties, such that it is inferable that defendants' conduct has been willful and contumacious (*Pryzant* at 383). Notwithstanding the foregoing, in the exercise of its discretion, this Court will not

strike defendants' answer outright and will instead issue a self-executing conditional order requiring the production of the discovery requested by plaintiff under threat of sanction, specifically, that if defendants fail to comply, their answer shall be automatically stricken (*Gibbs* at 79; *Mehler* at 535; *Legarreta* at 1068). Accordingly, it is hereby

ORDERED that defendants provide responses¹ and comply with plaintiff's discovery notices and interrogatories, served upon them on July 5, 2021, within 30 days hereof. It is further

ORDERED that if defendants fail to comply with this Court's order, their answer shall be automatically stricken, without further leave of this Court. It is further

ORDERED that the discovery deadlines previously ordered by the Court are extended as follows: (1) all depositions to be completed by June 30, 2022; (2) all post-deposition discovery to be completed by August 30, 2022; (3) all expert discovery to be completed by September 30, 2022; and (4) the Note of Issue shall be filed by October 3, 2022. It is further

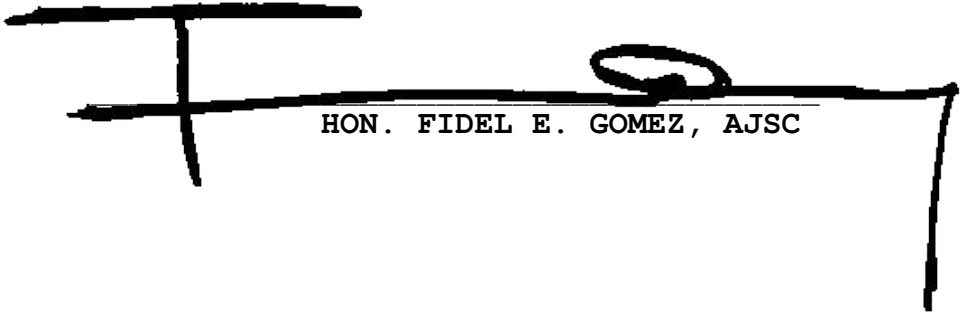
ORDERED that all parties appear for a Settlement Conference on September 26, 2022 at 10am. It is further

¹ During Oral argument, this Court indicated its reluctance to compel compliance with plaintiff's discovery demands and only compel responses. However, upon further review, it is clear that the Court (McShan, J.) already ordered that defendants produce the discovery requested, first in the so-ordered stipulation between the parties and then again in the Compliance Conference Order.

ORDERED that plaintiff serve a copy of this Decision and Order with Notice of Entry upon defendants within 30 days hereof.

This constitutes this Court's decision and Order.

Dated : April 6, 2022
Bronx, New York



HON. FIDEL E. GOMEZ, AJSC