To commence the statutory time period for appeals as of right (CPLR 5513 [a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER
PRESENT: HON. WILLIAM J. GIACOMO, J.S.C.

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WMC REALTY CORP. and T.A.C. REALTY CORP. on its own behalf and on behalf of those similarly situated,

Plaintiffs,

– against –

CITY OF YONKERS, YONKERS CITY COUNCIL and MIKE SPANO,

Defendants.

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Index No. 65933/2017

Motion Seq. Nos. 004 & 006

DECISION & ORDER

This putative class action alleges that defendants have charged plaintiffs and other Yonkers residents for State-mandated fire inspections, yet did not perform those inspections. In motion sequence 004, plaintiffs move for an order compelling defendants to comply with certain discovery requests. Plaintiffs also request for the Court impose sanctions and to appoint a discovery referee. In motion sequence 006, defendants cross-move, pursuant to CPLR 3103, for a protective order denying, limiting, conditioning or regulating plaintiffs' use of depositions. Motion sequence numbers 004 and 006 are hereby consolidated for disposition.

Papers Considered **NYSCEF DOC NO. 88-94; 115-125; 136-142; 150**

1. Notice of Motion/Affirmation in Support of Stephen A. Cerrato Esq./Exhibits A-D/Statement of Material Facts
2. Notice of Cross Motion/Affirmation in Opposition and in Support of Cross Motion of Amy Marion, Esq.(in 004 and 006)/ Exhibits 1-4
3. Affirmation in Opposition and in Further Support of Stephen A. Cerrato Esq./Exhibits 1-6
4. Reply Affirmation of Amy Marion, Esq.

FACTUAL AND PROCEDURAL BACKGROUND

The Court assumes the familiarity with the record. The pertinent background is taken from this Court's recent decision on the matter and is set forth as follows: On or about October 3, 2017, plaintiffs filed a class action complaint on their own behalf and on behalf of similarly situated plaintiffs, and a demand for declaratory judgment against defendants. The complaint alleges that the City of Yonkers created a "Yonkers Fire and Building Safety Inspection Program," in order to provide fire and safety inspections for all multi-family dwelling units within the City. The complaint alleges that, despite collecting millions of dollars from the inspection fees, only a small number of properties are actually inspected. Plaintiffs WMC Realty Corp. and T.A.C. Realty Corp. are both businesses located in Yonkers who are subject to the safety inspection fee. Plaintiffs allege that their properties have never been inspected, despite paying the fees.

Defendants moved to dismiss the complaint, and the lower court granted the motion and dismissed the complaint. On appeal, the Appellate Division, Second Department held that the lower court properly dismissed causes of action based on defendants' alleged violations of the Uniform Code and the Yonkers Fire Code because neither Code creates a private right of action. However, it modified the decision to deny dismissal of the sixth cause of action. In brief, the sixth cause of action, alleging a violation of the New York Constitution, states that the imposition of inspection fees violates procedural and substantive due process. Plaintiffs allege that if the owners do not pay the fees, they risk losing the title to their property. However, there is no mechanism to challenge the imposition of fees or to require an inspection program. The complaint also alleges that the inspection fees collected are not being put towards the Fire and Safety Inspection Program. In modifying the lower court determination, the Appellate Division concluded that the allegations sufficiently pled a cause of action for the declaratory relief requested; namely, seeking a declaration that the inspection fees were invalid as a constitutional tax.

Motion to Compel

Plaintiffs allege that defendants' counsel has stifled plaintiffs from obtaining discovery in this matter. For instance, defense counsel allegedly had arguments with plaintiffs' counsel during depositions and improperly intervened with depositions. With respect to Robert Hacaj (Hacaj), the Chief of Battalion 1 for the City's fire department, plaintiffs' counsel purportedly made eleven lengthy speaking objections, coached and questioned the witness and interrupted the flow of the deposition. Plaintiffs submit the relevant portions of the transcript with their motion.

Plaintiff now move to compel Hacaj to answer a question that defense counsel instructed him not to answer and to award plaintiffs costs and monetary sanctions due to counsel's allegedly disruptive conduct during the depositions. Plaintiffs are also requesting the appointment of a discovery referee, at defendants' expense, to oversee the continued deposition of Hacaj and for the remainder of the depositions.

In opposition, defendants claim that counsel's conduct during the depositions was appropriate. They maintain, for example, that counsel objected to those questions that asked fact witnesses to render legal conclusions and objected to questions which raised privileged communications. Defendants argue that sanctions based on interrupting the witness are unwarranted, as, for instance, defense counsel allegedly interrupted Hacaj's deposition on notice to and after no objection was made, on consent of the parties. Defendants further object to the appointment of a discovery referee, as there was allegedly no misconduct that occurred at the depositions.

Cross Motion for a Protective Order

Defendants also cross-move for a protective order enjoining plaintiffs from conducting any further depositions. Defendants argue that they have already produced five witnesses who have provided over 13 hours of testimony. As an alternative, they seek to prohibit plaintiffs' counsel from asking deposition witnesses for legal conclusions, among other things.

In opposition, plaintiffs argue that no case law mandates that a party is only entitled to only five witnesses or a cumulative testimony amount of 13 hours. According to plaintiffs, they are entitled to notice a corporate representative deposition on topics identified by them, without leave of the court. Up to date, not one witness has testified as to whether the citizens who paid the fees for fire inspections, were actually receiving the inspections, as purportedly required by the New York Constitution. Plaintiffs continue that they have demonstrated that the witnesses provided to date, did not possess sufficient knowledge to answer basic questions of the inspection program, or even whether one exists.

DISCUSSION

Motion to Compel (motion sequence 04)

"Disclosure in civil actions is generally governed by CPLR 3101 (a), which directs: [t]here shall be full disclosure of all matter material and necessary to the prosecution or defense

of an action, regardless of the burden of proof. . . . The test is one of usefulness and reason." *Forman v Henkin*, 30 NY3d 656, 661 (2018) (internal quotation marks and citations omitted). CPLR 3101 (a) "embodies the policy determination that liberal discovery encourages fair and effective resolution of disputes on the merits, minimizing the possibility for ambush and unfair surprise." *Id.* at 661 (internal quotation marks and citation omitted). "The supervision of disclosure and the setting of reasonable terms and conditions therefor rests within the sound discretion of the trial court . . . ." *Montalvo v CVS Pharm, Inc.*, 102 AD3d 842, 843 (2d Dept 2013) (internal quotation marks and citations omitted). Pursuant to CPLR 3124, "[i]f a person fails to respond to or comply with any request, notice, interrogatory, demand, question or order under this article . . . the party seeking disclosure may move to compel compliance or a response." Courts have discretion to impose various sanctions for failing to comply with outstanding discovery requests. *See* CPLR 3126.

Pursuant to 22 NYCRR 130.1.1 (a), in pertinent part, the court, in its discretion, may award costs and reasonable attorneys' fees resulting from frivolous conduct. "Conduct is frivolous within the meaning of 22 NYCRR 130-1.1, inter alia, where it is completely without merit in law or is undertaken primarily . . . to harass or maliciously injure another. In addition to or in lieu of awarding costs, the court, in its discretion may impose financial sanctions upon any party or attorney in a civil action or proceeding who engages in frivolous conduct." *Yinuo Yin v Xiao Feng Qiao*, 203 AD3d 996, 997-98 (2d Dept 2022) (internal quotation marks and citations omitted).

"When determining whether the conduct undertaken was frivolous, the court must consider the circumstances under which the conduct took place and whether or not the conduct was continued when its lack of legal or factual basis was apparent or should have been apparent." *Matter of Kover*, 134 AD3d 64, 74 (1st Dept 2015), citing 22 NYCRR 130-1.1 (c).

Here, plaintiffs have alleged that defense counsel improperly interfered with the depositions by, among other things, making speaking objections and interrupting the deposition to communicate with the witness. They are moving to compel the further deposition of Hacaj, request for the appointment of a discovery referee and seek to be awarded costs and fees. With respect to depositions, "generally, the proper procedure is to allow a witness to answer all questions subject to objections which are reserved for trial in accordance with CPLR 3115 . . ." *Walter Karl, Inc. v Wood*, 161 AD2d 704, 706 (2d Dept 1990). Pursuant to 22 NYCRR

221.1 (b), "[sp]eaking objections [are] 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 the examination persons in attendance shall not make statements or comments that interfere with the questioning." Further, pursuant to 22 NYCRR 221.2:

> "A deponent shall answer all questions at a deposition, except (i) to preserve a privilege or right of confidentiality, (ii) to enforce a limitation set forth in an order of a court, or (iii) when the question is plainly improper and would, if answered, cause significant prejudice to any person. An attorney shall not direct a deponent not to answer except as provided in CPLR Rule 3115 or this subdivision. Any refusal to answer or direction not to answer shall be accompanied by a succinct and clear statement of the basis therefor. If the deponent does not answer a question, the examining party shall have the right to complete the remainder of the deposition."

Plaintiffs are specifically seeking to compel the continued deposition of Robert Hacaj. Here, based on a review of the transcripts, including the transcript of Hacaj, defense counsel repeatedly made objections, attempted to block questions, coached the witness and interrupted the deposition to communicate with the witness. *See e.g. Parker v Ollivierre*, 60 AD3d 1023, 1023-1024 (2d Dept 2009) ("plaintiff's counsel acted improperly at the plaintiff's deposition, among other things, by making 'speaking objections,' correcting the plaintiff's testimony, and directing the plaintiff on a number of occasions not to answer certain questions. The questions were designed to elicit information which was material and necessary to the appellant's defense of this action").

Under the circumstances, plaintiffs' motion to compel is granted to the extent that defendants must produce Hacaj for a limited continued deposition. Hacaj is directed to answer all questions except those that are clearly privileged. Defense counsel is directed to review the Uniform Rules for the Conduct of Depositions. As held by the Honorable Joan Lefkowitz, "[e]ven where deposition questions do not seem reasonably calculated to lead to discoverable evidence, it is improper for deponent's counsel to block those questions." *Gordineer v Kavinoky*, 2021 NY Slip Op 33348(U), *5 (Sup Ct, Westchester County 2021).

While the Court declines to award sanctions, it is amenable to doing so in event of future frivolous conduct during a deposition. At this time, the Court also denies the request to appoint a

discovery referee. The parties are encouraged to work together with regard to the remaining discovery.

Protective Order

CPLR 3103 (a) provides, in pertinent part, that a court may enter a protective order "to prevent unreasonable annoyance, expense, embarrassment, disadvantage, or other prejudice to any person or the courts." The party seeking a protective order bears the burden of showing that such relief is warranted. *Board of Mgrs. of Fishkill Woods Condominium v Gottlieb*, 184 AD3d 792, 793 (2d Dept 2020).

Defendants seek to enjoin plaintiffs from conducting any further depositions. Defendants set forth that plaintiffs' complaint is limited to one remaining claim; that the City's collection of fire safety inspection fees is an unconstitutional tax, and its imposition violates both substantive and procedural due process. According to defendants, plaintiffs seek to depose additional witnesses to obtain information about whether inspections are performed pursuant to the statutes, which is not relevant to the remaining claim.

According to plaintiffs, no witness has yet testified as to whether or not the City, despite collecting fees, provides the inspections, and no witness has testified as to where the City schedules or documents them.

The Court agrees that plaintiffs are entitled to discovery related to the remaining cause of action; namely through deposition testimony or otherwise, to determine whether or not fire safety inspections were provided at the buildings which were charged fees for those inspections. Accordingly, defendants' cross motion for a protective order is denied. While the Court is denying defendants' request for supplemental briefing, the Court agrees that plaintiffs' remaining requests for discovery must be limited to the obtaining information on the remaining cause of action. Furthermore, defendants' request for a blanket and preemptive protective order is premature, as plaintiffs have not identified a specific witness for deposition.

All other arguments raised on these motions and evidence submitted by the parties in connection thereto have been considered by this court notwithstanding the specific absence of reference thereto.

Accordingly, it is hereby

ORDERED that plaintiffs' motion is granted to the extent that Robert Hacaj shall appear for a further limited deposition at a time convenient for plaintiffs and prior to March 1, 2024, and the motion is otherwise denied (motion sequence 004); and it is further

ORDERED that defendants' cross motion for a protective order is denied (motion sequence 006).

Dated: White Plains, New York
February 2, 2024

HON. WILLIAM J. GIACOMO, J.S.C.