

Slade & Newman LLP v Jamieson

2008 NY Slip Op 33001(U)

November 6, 2008

Supreme Court, New York County

Docket Number: 600678-2007

Judge: Carol R. Edmead

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

PRESENT: Carol Edmead
Justice

PART 35

Slade and Newman LLP

INDEX NO. 600678-07

MOTION DATE 10-30-08

- v -

MOTION SEQ. NO. 001

Linda Jamieson

MOTION CAL. NO. _____

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 _____

FILED
PAPERS NUMBER
NOV 06 2008
COUNTY CLERK'S OFFICE
NEW YORK

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

In accordance with the accompanying Memorandum Decision, it is hereby

ORDERED that the plaintiff's order to show cause is granted solely to the extent that defendant's answer, including her affirmative defense and counterclaim, is stricken, all issues as to which demands have not been responded to and particulars not furnished shall be resolved in favor of the LLP, and defendant is precluded from offering any testimony or evidence or from disputing or challenging any evidence or testimony presented or offered by or on behalf of the LLP on such issues unless defendant (1) provides a supplemental bill of particulars as to her affirmative defense and counterclaim within twenty (20) days of service of this order with notice of entry, and (2) appears for a deposition within thirty (30) days of service of this order with notice of entry, day to day until its conclusion. And it is further

ORDERED that plaintiff file the note of issue by February 27, 2009; and it is further

ORDERED that the LLP serve a copy of this order with notice of entry upon defendant within five days of entry. A copy of this order to be faxed by the Court to all parties on November 7, 2008.

This constitutes the decision and order of the Court.

Dated: 11/6/08

[Signature]
J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 35

-----X
SLADE & NEWMAN LLP,

Plaintiff,

-against-

LINDA JAMIESON,

Defendant.

-----X
HON. CAROL ROBINSON EDMEAD, J.S.C.

Index No. 600678-2007

DECISION/ORDER

FILED
NOV 06 2008
COUNTY CLERK'S OFFICE
NEW YORK

MEMORANDUM DECISION

Plaintiff, Slade & Newman LLP (the "LLP"), commenced this action for unpaid legal fees against Linda Jamieson ("defendant"), a Justice presiding over a matrimonial part in Supreme Court, Westchester County.

The LLP now moves by order to show cause for an order pursuant to CPLR 3126 (1) prohibiting defendant from supporting or opposing designated claims or defenses; (2) prohibiting defendant from producing evidence or testimony; (3) striking defendant's pleadings; and (4) upon striking defendant's pleadings, entering Judgment as to liability and setting the matter down for an inquest as to damages.

Factual Background

The LLP commenced this action for breach of contract, value of services rendered and account stated, seeking \$84,672.06 in connection with the LLP's representation of defendant of her in a divorce proceeding, which was settled in January 2006.

In her "Response" to the Verified Complaint, defendant asserted, *inter alia*, a counterclaim alleging that the invoices sent by the LLP were fraudulent in that they

“included charges for work not actually performed by” the LLP. Defendant also served a Notice of Examination Before Trial (“Notice of EBT”), dated July 10, 2007.

The LLP replied to defendant’s counterclaim, alleging, *inter alia*, that the LLP performed all of its obligations under the parties’ retainer agreement. The LLP also rejected defendant’s Notice of EBT, on the grounds that it was not issued in conformity with the CPLR and “appears to misidentify the parties.”

The LLP then served a Demand for Discovery and Inspection, Demand for Bill of Particulars, and Notice to Take Deposition Upon Oral Examination. Defendant did not produce any documents in response to the LLP’s discovery demands or appear for a deposition.

On October 23, 2007, the parties appeared for a preliminary conference (“PC”). The resulting PC Order directed that (1) depositions of all parties be conducted by December 4, 2007; (2) defendant serve her Notice for Discovery and Inspection by October 30, 2007; (3) defendant provide a “response to plaintiff’s demand for discovery and inspection” by October 30, 2007; (4) all discovery be completed by March 13, 2008; and (5) plaintiff file the note of issue by April 23, 2008.¹ The PC Order also stated that “the failure to comply with this order, absent a showing of good cause, shall result in dismissal of the complaint in the case of the plaintiff, or a striking of the answer, affirmative defenses, and counterclaims, or preclusion of evidence at trial in the case of the defendants, on notice to the Court of such noncompliance.”²

¹ The LLP claims that the PC Order also required defendant to serve her bill of particulars as to her counterclaim by October 30, 2007.

² This language is a stamp, affixed to preliminary conference orders.

On December 18, 2007 (six weeks beyond the disclosure dates set forth in the PC Order), defendant served a response to plaintiff's demand for discovery and inspection. In her response, defendant asserted general objections based on relevancy, attorney-work product and attorney-client privileges, and that the demands were overbroad or sought records already in the LLP's possession. Defendant also asserted that she was not in possession of any documents, and that she "believes that certain emails/correspondence was sent to plaintiff complaining of the work performed, the amount billed and other aspects of the representation of defendant by plaintiff" and was "unable to located such documents as of the date herein."

Defendant's response to the LLP's demand for bill of particulars contained the similar objections. Defendant also alleged that in addition to emails, there were numerous telephone conversations between the LLP and her in which she complained of the work the LLP performed. Also, defendant claimed that she could not specify which invoice constituted an inflated invoice or was inaccurate, as she was not in possession of the invoices, but that the LLP had admitted that the invoices were inflated as it was willing to reduce its total invoices to defendant.³

On March 18, 2008, the Court held a telephonic conference with counsel concerning discovery. The resulting order directed the following: (1) counsel and clients shall appear for a settlement conference on Friday, April 11, 2008 at 9:30 a.m.; (2) plaintiff file the note of issue by July 31, 2008; (3) defendant to serve a notice requesting documents within 15 days; plaintiff to provide defendants with documents within 30

³ Defendant also withdrew her affirmative defense based on the alleged failure to state a claim.

days; defendant to provide further responses to the demand for bill of particulars within 30 days of receipt of documents; (4) defendant to appear for a deposition on Monday, June 30, 2008, 9:30 a.m. at the LLP's office (the "March 18th Order").

The day before the scheduled settlement conference, defendant stated that she would "be engaged in a trial" the following day and requested that the settlement conference be rescheduled when her "schedule becomes clearer."

On April 11, 2008, defendant served her combined demands, nine days after the date set forth by the March 18th Order.

The LLP produced documents in response to defendant's demands on June 6, 2008. However, defendant did not provide a further response to the LLP's demand for bill of particulars.

The LLP's Order to Show Cause

The LLP argues that defendant's continuous refusal to comply with this Court's orders warrants sanctions, including striking her answer and counterclaim. The LLP points out that defendant's response to plaintiff's demand for bill of particulars was six weeks after the Court's initial deadline, and was so vague that the Court ordered that she supplement her response 30 days after she received discovery from the LLP, which she failed to do. Defendant also failed to appear at two depositions, one of which was ordered by the Court and did not appear at the scheduled settlement conference.

Defendant's notice for discovery was not served until April 11, 2008, after the April 2, 2008 deadline. The LLP maintains that discovery should have been completed by June 2008, pursuant to the expedited track in which it was placed. The LLP asserts that, as a lawyer for the past 25 years and judge, defendant's conduct cannot be viewed as either

accidental or the result of lack of knowledge. As a sitting Justice, defendant has been called upon to enforce discovery requests and has written decisions regarding discovery. Therefore, argues the LLP, if anyone should be charged with the knowledge of the rules regarding discovery and the consequences of failing to comply, it would be a sitting judge. The LLP contends that under the ABA Model Code of Judicial Conduct, defendant should “participate in establishing, maintaining and enforcing high standards of conduct, and shall personally observe those standards so that the integrity and independence of the judiciary will be preserved.” Thus, defendant is also not fulfilling her duties and obligations as a litigant or judge. The LLP maintains that obstructionist conduct would not be permitted from a non-judicial litigant, and defendant must be held to same standards to which she holds parties who appear before her. Nor should defendant be allowed to use her power or status to disregard this Court’s orders or to delay this case from moving to trial.

Opposition

In opposition, defendant complains that the LLP made its motion without any affirmation of good faith that it has attempted to first settle this discovery dispute with defendant. Such a gross failure on the part of the LLP is sufficient to deny its application.

Defendant responded to the LLP’s discovery requests as best she could. Due to defendant’s own court calendar, she could not attend the scheduled settlement conference.

Since receipt of the LLP’s June 6, 2008 letter, defendant’s counsel heard nothing from plaintiff’s counsel regarding the deposition of defendant or any requests for

outstanding discovery. Due to many months of inactivity in this case, defendant's counsel "came to believe that plaintiff simply was no longer interested in prosecuting this action."

Defendant also points out that the LLP sent a letter on May 13, 2008 to the LLP asking that the LLP reply to defendant's discovery requests served over a month prior thereto.

In any event, defendant has requested that plaintiff provided a list of what discovery is allegedly due and any dates defendant can appear for a deposition.

Analysis

CPLR 3216 provides that:

If any party . . . 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:

1. an order that the issues to which the information is relevant shall be deemed resolved for purposes of the action in accordance with the claims of the party obtaining the order; or
2. 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
3. an order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or any part thereof, or rendering a judgment by default against the disobedient party.

The imposition of sanctions for discovery misfeasance pursuant to CPLR 3126 is a matter within the motion court's discretion (*Rosario v New York City Housing Auth.*,

272 AD2d 105, 707 NYS2d 421 [1st Dept 2000]). The extreme sanction of dismissal is warranted only where a clear showing has been made that non-compliance with a discovery order was willful, contumacious, or due to bad faith (*id.*; *see also Chadbourne & Parke LLP v Coleman*, 281 AD2d 278, 722 NYS2d 147 [1st Dept 2001]; *see Vega v 265 West 37 Street Corp.*, 223 AD2d 385, 636 NYS2d 296 [1st Dept 1996] [holding that striking the answer was proper where record was replete with examples of defendants' willful and contumacious behavior; despite "ample opportunity and specific direction to comply with plaintiff's discovery demands, as well as explicit warning of the consequences of non-compliance," defendants continued to defy court orders without justification]).

By PC Order dated October 23, 2007, this Court directed that defendant appear for a deposition by a date certain and provide a bill of particulars. The PC Order expressly stated the consequences of a stricken answer, counterclaims, and affirmative defenses, for failing to comply with such Order, in the absence of good cause. Due to defendant's failure to comply with the PC Order, the Court again directed that defendant appear for a deposition on a date certain. Notwithstanding these two orders, defendant failed to appear for a deposition and failed to offer any reasonable excuse or good cause for failing to so appear. Although defendant provided a reasonable excuse to adjourn the settlement conference, the settlement conference is not essential to the progression of this case toward trial; defendant's deposition, however, is. Yet, nothing in defendant's opposition papers indicate an attempt to reschedule depositions prior to the filing of the instant motion. Further, defendant's opposition papers failed to provide any dates on

which she is available for a deposition, or indicate any attempts to clear her calendar to facilitate the taking of her deposition in this action.

Nor does it appear that defendant has made any good faith effort to provide a supplemental response to bill of particulars when met with the instant order to show cause. Notwithstanding this Court's March 18th Order, and although given ample opportunity, defendant failed to submit with her opposition papers (as commonly done by noncompliant litigants) a supplemental response to the LLP's demand for bill of particulars. And, defendant's opposition papers contain no assertions of any good faith efforts to so comply.

Simply stated, no reason is given for defendant's failure to serve a supplemental bill of particulars or appear for a deposition. In fact, at oral argument, counsel for defendant displayed an unfiled order to show cause to withdraw as counsel for defendant and expressed an intent to file same due to defendant's failure to cooperate with his law office. Although the Court did not accept counsel's application to withdraw as counsel, such circumstance demonstrates the likelihood of defendant's continued noncooperation with discovery in this case in the absence of an additional court order.⁴

This Court cannot ignore the fact that defendant is also a member of the bar and of the bench. "As a member of this State's judiciary governed by exacting standards of honor and propriety," defendant is obligated to "conduct herself at all times in a manner

⁴ Section 100.2 provides that a "judge shall avoid impropriety and the appearance of impropriety in all of the judge's activities." Following oral argument on this order to show, and after the Court issued its ruling to award sanctions, defendant's Clerk contacted this Court, instead of the court reporter's office, ostensibly to request a transcript of the proceedings.

that reflects [her] own personal respect for the letter and spirit of the law” (*Matter of Backal*, 87 NY2d 1[1995]). Pursuant to 22 NYCRR 100.1, the Rules Governing Judicial Conduct, defendant is also required to conduct herself in a manner which upholds the integrity of the judiciary. 22 NYCRR 100.1 provides that a “judge should participate in establishing, maintaining and enforcing high standards of conduct, and shall personally observe those standards so that the integrity and independence of the judiciary will be preserved. The provisions of this Part are to be construed and applied to further that objective.” Similarly, 22 NYCRR 100.2(A) mandates that judges respect and comply with the law and to act in a manner that promotes judicial integrity: “A judge shall respect and comply with the law and shall act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary.”

The Court recognizes that the LLP was also late in providing documents to defendant in accordance with the March 18, 2007 Order.⁵ Further, the Court notes that defendant initially served responses, albeit untimely, to plaintiff’s demand for discovery and inspection and bill of particulars. Thus, it cannot be said that defendant ignored this Court’s order in its entirety, or that her non-compliance was willful, contumacious, or due to bad faith so as to warrant the severe sanction of striking her answer at this juncture. However, if the credibility of court orders and the integrity of our judicial system are to be maintained, a litigant, including a judge, cannot ignore court orders with

⁵ Pursuant to the Court’s March 18, 2007 Order, defendant was directed to serve her notice for discovery no later than April 2, 2007. The LLP was directed to provide documents within “30 days,” or April 17, 2007 if calculated from the date of the order or May 2, 2007, if calculated from the date of defendant’s notice for discovery and inspection. Defendant served her notice for discovery and inspection untimely, on April 11, 2007, thereby requiring that the LLP serve its documents by May 11, 2007. However, the LLP did not serve its documents until June 2, 2007, 22 days late.

impunity (*Kihl v Pfeffer*, 94 NY2d 118, 123, 700 NYS2d 87 [2003]). Indeed, the Legislature, recognizing the need for courts to be able to command compliance with their disclosure directives, has specifically provided that a “court may make such orders . . . as are just,” including dismissal of a pleading (*see Kihl v Pfeffer*, 94 NY2d 118, *supra* citing CPLR 3126). Finally, compliance with a discovery order “requires both a timely response and one that evinces a good-faith effort to address the requests meaningfully” (*Kihl v Pfeffer*, 94 NY2d 118, *supra*).

Thus, having failed to provide a supplemental bill of particulars regarding her remaining affirmative defense, and failed twice to appear for a court-ordered deposition, under the circumstances presented herein, the Court declines to strike defendant’s pleadings and instead, issues a conditional order of preclusion pursuant to CPLR 3126, conditionally striking defendant’s pleadings, conditionally deeming all issues as to which demands have not been responded to and particulars not furnished to be resolved in favor of the LLP, and conditionally precluding defendant from offering any testimony or evidence or from disputing or challenging any evidence or testimony presented or offered by or on behalf of the LLP on such issues. Such order will become a final order of preclusion, without need for further application to the Court, should plaintiff fail to both serve a supplemental bill of particulars within 20 days of the date of this order, and appear to be deposed within 30 days of the date of this order at a location designated by the LLP (*see e.g., Rocco v Advantage Securities & Protection Inc.*, 283 AD2d 317, 724 NYS2d 419 [1st Dept 2001] [upholding conditional order, as defendant’s failure to appear at any of the depositions that were repeatedly adjourned and rescheduled for his

convenience constituted willful, deliberate and contumacious behavior]). The Court further directs that defendant's deposition be continued day to day until its conclusion. No adjournments of defendant's deposition shall be permitted without a Court order. Plaintiff is directed to file the note of issue on or before December 15, 2008, so that this action may expeditiously be placed on the trial calendar.

Conclusion

Based on the foregoing, it is hereby

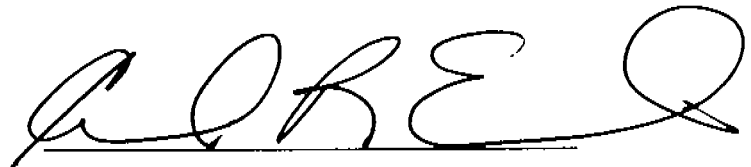
ORDERED that the LLP's order to show cause for an order pursuant to CPLR 3126 (1) prohibiting defendant from supporting or opposing designated claims or defenses; (2) prohibiting defendant from producing evidence or testimony; (3) striking defendant's pleadings; and (4) upon striking defendant's pleadings, entering Judgment as to liability and setting the matter down for an inquest as to damages, is granted solely to the extent that defendant's answer, including her remaining affirmative defense and counterclaim, is stricken, all issues as to which demands have not been responded to and particulars not furnished shall be resolved in favor of the LLP, and defendant is precluded from offering any testimony or evidence or from disputing or challenging any evidence or testimony presented or offered by or on behalf of the LLP on such issues unless defendant (1) provides a supplemental bill of particulars as to her affirmative defense and counterclaim within twenty (20) days of the date of this order, and (2) appears for a deposition within thirty (30) days of the date of this order, day to day until its conclusion. And it is further

ORDERED that plaintiff file the note of issue by December 15, 2008; and it is further

ORDERED that the LLP serve a copy of this order with notice of entry upon defendant within five days of entry. A copy of this order to be faxed by the Court to all parties on November 7, 2008.

This constitutes the decision and order of the Court.

Dated: November 6, 2008



Hon. Carol Robinson Edmead, J.S.C.

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