

<b>Moore v Federated Dept. Stores</b>
2010 NY Slip Op 31899(U)
July 14, 2010
Supreme Court, New York County
Docket Number: 407020/07
Judge: Martin Shulman
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

MARTIN SHULMAN

PRESENT: J.S.C.  
Justice

PART 1

Index Number : 407020/2007  
MOORE, DWAYNE  
VS.  
FEDERATED DEPARTMENT STORES  
SEQUENCE NUMBER : 003  
STRIKE ANSWER

INDEX NO. 407020/003  
MOTION DATE \_\_\_\_\_  
MOTION SEQ. NO. 003  
MOTION CAL. NO. \_\_\_\_\_

n this motion to/for \_\_\_\_\_

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits 1-2  
Answering Affidavits — Exhibits 1-12  
Replying Affidavits 2 exhibits

PAPERS NUMBERED	
1	1
3	3
3,4	3,4

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion and cross-motion be decided in accordance with the attached decision and order.

**FILED**  
JUL 16 2010  
NEW YORK  
COUNTY CLERK'S OFFICE

Dated: July 14, 2010

MARTIN SHULMAN 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: IAS PART 1

-----x  
DWAYNE MOORE,

Plaintiff,

Index No: 407020/07

-against-

FEDERATED DEPARTMENT STORES & MACY'S,

Defendants.

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HON. MARTIN SHULMAN, J.S.C.:

**FILED**  
JUL 16 2010  
NEW YORK  
COUNTY CLERK'S OFFICE

Decision and Order

In this employment discrimination action, plaintiff Dwayne Moore ("Moore" or "plaintiff") brings the following three separate motions: 1) to strike defendants' answer pursuant to CPLR §3126 based upon defendants' alleged default in responding to Moore's written discovery demands (motion sequence 003); 2) to vacate his own note of issue filed on March 1, 2010 (motion sequence 004); and 3) to compel defendants' compliance with plaintiff's discovery demands pursuant to CPLR 3124 (motion sequence 005). Defendants oppose all three motions and bring three cross-motions for: 1) sanctions against Moore and/or his counsel (motion sequences 003 and 005); and 2) an extension of time to file dispositive motions (motion sequence 004). Motion sequences 003, 004 and 005 are consolidated for disposition.

**Motion to Vacate Note of Issue**

Defendants' counsel argues that plaintiff's motion to vacate his note of issue is untimely since it was not served within 20 days of filing the note of issue, nor has Moore demonstrated good cause to permit the motion to be brought after the 20 day period. See 22 NYCRR §202.21(e). Additionally, defendants deny that discovery is outstanding.

It cannot seriously be disputed that discovery was not complete at the time plaintiff filed the note of issue on March 1, 2010. Plaintiff's accompanying Certificate of Readiness for Trial confirms as much. See Motion at Exh. 1 (seq. 004). At a minimum, as of that date, plaintiff's deposition had commenced but was not completed and the parties anticipated that defendants would produce three witnesses to be deposed. See Saunders Aff. in Opp. at Exhs. 6 and 10 (seq. 003).

Nonetheless, defendants argue that discovery is now complete because plaintiff filed the note of issue, and in opposition to Moore's motion to strike their answer (seq. 003), defendants take the position that plaintiff has essentially waived the right to depose defendants' witnesses. Plaintiff argues that before he could proceed with defendants' depositions, he required more complete written discovery responses from defendants.<sup>1</sup>

The better and proper procedure would have been for Moore to seek an extension of time to file his note of issue. See, e.g., 22 NYCRR §202.21(d). Notwithstanding the motion's untimeliness, 22 NYCRR §202.21(e) permits the court on its own motion to vacate the note of issue at any time "if it appears that a material fact in the certificate of readiness is incorrect, or . . . fails to comply with the requirements of this section in some material respect." The instant certificate of readiness is defective since it asserts that discovery has not been completed and the case is not ready for trial.

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<sup>1</sup> Defendants' allegedly deficient discovery responses are the subject of motion sequences 003 and 005.

Accordingly, Moore's motion to vacate the note of issue (seq. 004) is granted and discovery shall be completed in accordance with the directives set forth below. Defendants' cross-motion to extend the time to file dispositive motions is also granted to the extent that such motions shall be brought within 45 days of plaintiff re-filing the note of issue.

### **Motions to Strike Answer and Compel**

In motion sequence 003, Moore requests discovery sanctions pursuant to CPLR §3126 based upon defendants' alleged default in fully responding to his document demands and interrogatories. Plaintiff served his first set of demands on December 18, 2007. Defendants served responses on or about June 19, 2008. Thereafter, plaintiff served supplemental demands on November 3, 2008. Although Moore's motion to strike (seq. 003) alleges that defendants have served no response to the supplemental demands, defendants' opposition and cross-motion include a copy of their response thereto dated May 29, 2009, and Moore's motion to compel (seq. 005) acknowledges service of this response. Saunders Reply Aff. (seq. 003); Motion at Exh. 9 (seq. 005).

In the interim, counsel for the parties exchanged correspondence related to defendants' responses. Plaintiff's counsel voiced her dissatisfaction with *inter alia* the numerous objections defendants interposed to Moore's demands.<sup>2</sup> Defendants'

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<sup>2</sup> See plaintiff's counsel's letters dated April 24, 2008, November 3, 2008, May 6, 2009 and January 19, 2010. Motion at Exh. 1 (seq. 003).

counsel answered plaintiff's counsel's objections and in several instances offered to meet and confer to resolve these disputes.<sup>3</sup>

Turning to plaintiff's motion to strike (seq. 003), CPLR §3126 provides in pertinent part as follows:

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 . . . ; or
3. an order striking out pleadings or parts thereof, . . . or dismissing the action or any part thereof, or rendering a judgment by default against the disobedient party.

Where a party disobeys a court order and by his conduct frustrates the disclosure scheme provided by the CPLR, dismissal of the party's pleadings is within the trial court's broad discretion. *Zletz v. Wetanson*, 67 N.Y.2d 711 (1986); *Berman v. Szpilzinger*, 180 A.D.2d 612 (1<sup>st</sup> Dept. 1992). While the penalty of striking a pleading for failure to comply with disclosure is extreme, the courts nonetheless have held that dismissing the pleading is the appropriate remedy where the failure to comply has been "clearly deliberate or contumacious." *Henry Rosenfeld, Inc. v. Bower & Gardner*, 161 A.D.2d 374 (1<sup>st</sup> Dept. 1990); *Kutner v. Feiden, Dweck & Sladkus*, 223 A.D.2d 488, 489

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<sup>3</sup> See letters dated December 11, 2008, May 29, 2009, January 22, 2010, March 8, 2010 and March 11, 2010. See Saunders Aff. in Opp. at Exhs. 1, 2, 3, 7 and 8 (seq. 003).

(1<sup>st</sup> Dept.), *lv. to app. den.*, 88 N.Y.2d 802 (1996)(disobedience of a series of court orders directing discovery warranted striking of pleading); *Berman v. Szpilzinger, supra.*

Initially, the court notes that the motion itself lacks copies of plaintiff's demands and defendants' allegedly deficient responses. Plaintiff's counsel only includes copies of same in her reply affirmation. More importantly, the motion lacks any explanation and analysis as to why plaintiff claims defendants' responses are improper. Further, upon a preliminary review of the parties' correspondence, Moore's demands and defendants' responses, the court makes the following general observations:

- In at least two instances, defendants properly responded that they are not in possession of documents responsive to plaintiff's demands;
- With respect to certain video tapes defendants produced, defendants provided plaintiff's counsel with the requested tape counter numbers; and
- In some instances, defendants' objections that plaintiff's demands were vague, overbroad and unduly burdensome were not unfounded.

Given all of the foregoing, the court cannot conclude that defendants have acted wilfully or deliberately and as such, the motion to strike (seq. 003) is denied in its entirety.

Moore's motion to compel (seq. 005) requests an order compelling defendants to comply with the same demands which are the subject of the motion to strike.<sup>4</sup> While this motion includes copies of the demands and responses at issue, like the motion to strike it lacks any legal analysis, stating only in a summary fashion that plaintiff's requests relate directly to the complaint. See *Frelix Aff. in Supp.* at ¶¶ 10 and 17 (seq.

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<sup>4</sup> The court can only presume plaintiff brought the motion to compel in response to defendants' argument that a motion to strike is premature since no motion to compel was made previously. See *Double Fortune Property Investors Corp. v. Gordon*, 55 A.D.3d 406, 407 (1<sup>st</sup> Dept. 2008).

005). As this motion offers the court no basis for determining the propriety of plaintiff's demands and defendants' responses, it must be denied.

### **Cross-Motions for Sanctions**

22 NYCRR § 130-1.1(a) states that "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 as defined in this Part . . ." 22 NYCRR § 130-1.1(c) provides that conduct is frivolous if:

- (1) it is completely without merit in law and cannot be supported by a reasonable argument for an extension, modification or reversal of existing law;
- (2) it is undertaken primarily to delay or prolong the resolution of the litigation, or to harass or maliciously injure another; or
- (3) it asserts material factual statements that are false.

In determining if sanctions are appropriate the court must look at the broad pattern of conduct by the offending attorneys or parties. *Levy v. Carol Mgmt. Corp.*, 260 A.D.2d 27, 33 (1<sup>st</sup> Dept. 1999).

Here, defendants argue that plaintiff's motions to strike and to compel are frivolous because they were brought for the purpose of harassing defendants and delaying this case. Defendants claim the motions lack merit since they have fully complied with their discovery obligations, plaintiff's counsel failed to meet and confer before bringing the motions and the motion to compel is duplicative of the motion to strike.

Defendants' cross-motion in response to the motion to strike (seq. 003) requests sanctions in the amount of \$2,500.00, representing \$2,000.00 in attorney's fees defendants incurred in connection with said motion plus an estimated additional \$500.00. In their reply, defendants increase the amount sought to \$4,025.00. The cross-motion in response to the motion to compel (seq. 005) requests sanctions in the amount of \$750.00, representing attorney's fees incurred in defending against that motion.<sup>5</sup>

The court agrees that the effect of Moore's motions has been to delay this action, waste judicial resources and cause defendants to needlessly incur attorney's fees. Both motions lack substantive legal arguments in support of the requested relief and the motion to compel is duplicative of the motion to strike.

The court is also troubled by plaintiff's delay in pursuing more complete written discovery responses from defendants. For example, plaintiff's counsel did not respond to defendants' counsel's December 11, 2008 letter explaining their position with respect to plaintiff's first set of demands until January 19, 2010, over a year later. Moreover, this court's independent review of the case file indicates that during the period the parties' counsel exchanged letters, the court conducted a preliminary conference on September 22, 2009. However, the preliminary conference order ("PCO") makes no reference to any need for defendants to supplement their responses. Rather, the PCO

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<sup>5</sup> Defendants' counsel calculates attorneys' fees at their billable rate per hour of \$250.00, and avers that she spent 8 hours in reviewing and responding to the motion to strike (seq. 003), an additional 6.1 hours in reviewing and responding to plaintiff's reply papers and 3 hours reviewing and responding to the motion to compel (seq. 005), for a total of \$4,275.00.

refers only to the parties' need to complete depositions and conduct non-party discovery and post-deposition discovery. With regard to the service of discovery demands and responses, the PCO states "N/A", appearing to indicate that written discovery to that point was complete.

Plaintiff's counsel's foregoing pattern of delay and general inattention to this action constitute frivolous conduct within the meaning of 22 NYCRR §130-1.1(c). The court finds that an appropriate sanction to be imposed against plaintiff's counsel is \$2,000.00. The court has considered the parties' remaining arguments and finds them lacking in merit. Accordingly, it is hereby

ORDERED that plaintiff's motion to vacate the note of issue (seq. 004) is granted, the note of issue is vacated and the case is stricken from the trial calendar; and it is further

ORDERED that defendants' depositions shall be completed within 60 days from the date hereof; and it is further

ORDERED that, within 15 days from the entry of this order, plaintiff shall serve a copy of this order with notice of entry on defendants and upon the Clerk of the Trial Support Office (Room 158), 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 the completion of discovery as herein above directed, the plaintiff shall cause the action to be placed upon the trial calendar

by the filing of a new note of issue and statement of readiness and payment of the fee therefor; and it is further

ORDERED that defendants' cross-motion to extend the time to file dispositive motions (seq. 004) is granted and such motions shall be served within 45 days of plaintiff re-filing the note of issue; and it is further

ORDERED that plaintiff's motions to strike (seq. 003) and compel (seq. 005) are denied; and it is further

ORDERED that defendants' cross-motions for sanctions (seq. 003 and 005) are granted as set forth above and plaintiff's counsel Sandra D. Frelix, Esq., without any charge to her client, is hereby sanctioned in the amount of \$2,000.00, payable to the Lawyer's Fund for Client Protection, 119 Washington Avenue, Albany, New York 12210; and it is further

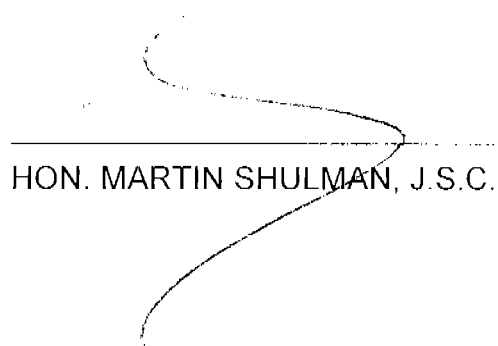
ORDERED that written proof of the payment of this sanction be provided to the Clerk of Part 1 and opposing counsel within 30 days after service of a copy of this order with notice of entry; and it is further

ORDERED that, in the event that such proof of payment is not provided in a timely manner, the Clerk of the court, upon service upon him of a copy of this order with notice of entry and an affirmation or affidavit reciting the fact of such non-payment, shall enter a judgment in favor of the Lawyer's Fund and against said counsel in the aforesaid sum; and it is further

ORDERED that, in accordance with 22 NYCRR §130-1.3, a copy of this order will be sent by the Part to the Lawyer's Fund for Client Protection.

This constitutes this court's Decision and Order. Courtesy copies of same have been provided to counsel for the parties.

Dated: New York, New York  
July 14, 2010



HON. MARTIN SHULMAN, J.S.C.

**FILED**  
JUL 16 2010  
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