

Uwechia v City of New York

2011 NY Slip Op 30734(U)

March 25, 2011

Supreme Court, New York County

Docket Number: 106289/08

Judge: Barbara Jaffe

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

PRESENT: JAFFE BARBARA JAFFE
J.S.C.

PART 5

Index Number : 106289/2008

UWECHIA, CHUKWUMA K.

vs

CITY OF NEW YORK

Sequence Number : 003

STRIKE ANSWER

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

CAL #131

The following papers, numbered 1 to 2 were read on this motion to/for strike

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

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

1

2

Cross-Motion: Yes No

Upon the foregoing papers, It is ordered that this motion

DECIDED IN ACCORDANCE WITH
ACCOMPANYING DECISION / ORDER

FILED

MAR 30 2011

NEW YORK
COUNTY CLERK'S OFFICE

Dated: 3/25/11
MAR 25 2011

[Signature]
BARBARA JAFFE 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 5

-----X
CHUKWUMA K. UWECHIA,

Plaintiffs,

-against-

THE CITY OF NEW YORK, NEW YORK CITY
DEPARTMENT OF JUVENILE JUSTICE, NEIL
HERNANDEZ, JUDITH PINCUS, CARLOS A. SERRANO,
and JACQUELINE JAMES,

Defendants.
-----X

BARBARA JAFFE, J.:

For plaintiff:
Samuel O. Maduegbuna, Esq.
Maduegbuna Cooper LLP
110 Wall St., 11th Fl.
New York, NY 10005
212-232-0155

Index No. 106289/08

Argued: 2/1/11
Mot. Seq. No.: 003
Cal. No.: 131

DECISION AND ORDER

FILED

MAR 30 2011

NEW YORK
COUNTY CLERK'S OFFICE

For defendants:
Cindy E. Switzer, ACC
Michael A. Cardozo
Corporation Counsel
100 Church St., Room 2-117
New York, NY 10007
212-788-0956

By notice of motion dated September 27, 2010, plaintiff moves pursuant to CPLR 3126 for an order striking defendants' answers for their repeated failure to respond to plaintiff's discovery demands and comply with discovery orders or, in the alternative, precluding defendants from offering evidence at trial. Defendants oppose the motion.

I. BACKGROUND

On or about May 5, 2008, plaintiff commenced the instant action against defendants, alleging that they discriminated against him in violation of the New York City Human Rights Law during his employment with defendant New York City Department of Juvenile Justice (DJJ). (Affidavit of Samuel O. Maduegbuna, Esq., dated Sept. 27, 2010 [Maduegbuna Aff.], Exh.

1). On or about July 15, 2008, defendants served their amended answer. (*Id.*, Exh. 2).

On or about July 30, 2008, plaintiff served defendants with a First Set of Interrogatories and First Document Requests (First Requests), and a notice of deposition. (*Id.*, Exhs. 3, 4, 5). By compliance conference order dated October 16, 2008, defendants were directed to respond to plaintiff's First Requests by November 21, 2008, and the depositions of all parties were to be completed by December 23, 2008. (*Id.*, Exh. 6). On or about December 17, 2008, defendants served a response to the First Document Requests. (*Id.*; Affirmation of Cindy E. Switzer, ACC, dated Nov. 5, 2010 [Switzer Aff.], Exh. A). By letter dated January 21, 2009, plaintiff advised defendants that their response was inadequate. (Maduegbuna Aff., Exh. 7).

By compliance conference order dated February 17, 2009, defendants were directed to respond to plaintiff's First Set of Interrogatories and to supplement their response to the First Document Requests by addressing the issues raised in plaintiff's January 2009 letter, both within 30 days and no later than March 16, 2009, and the parties were directed to commence depositions within 14 days and to finish them by April 30, 2009. (*Id.*, Exh. 9). Defendants did not serve any responses by the deadline set forth in the order and depositions were not commenced. (*Id.*).

On or about April 21, 2009, plaintiff filed a motion to strike defendants' answer based on their discovery failures. (*Id.*). By compliance conference order dated May 12, 2009, plaintiff agreed to withdraw his motion without prejudice, and defendants were directed to respond to plaintiff's First Set of Interrogatories and supplement their response to plaintiff's First Document Requests within 30 days, and to respond to plaintiff's January 2009 letter within two weeks. It was also agreed that defendants' failure to comply would be deemed willful and contumacious. (*Id.*, Exh. 11). The parties were directed to conduct depositions by July 31, 2009. (*Id.*). On May

26, 2009, June 9, 2009, and June 17, 2009, defendants served on plaintiff their responses as required by the May 2009 order. (Switzer Aff., Exhs. C, D, E, F, G).

By compliance conference order dated June 23, 2009, plaintiff was directed to respond by June 26, 2009 to defendants' May 26, 2009 letter in which they supplemented their responses to plaintiff's First Document Requests, plaintiff was directed to serve by June 26, 2009 a deficiency letter related to defendants' non-responsiveness to plaintiff's First Set of Interrogatories, and depositions of the four individually-named defendants were scheduled for August 2009 with the remaining depositions to be completed by September 30, 2009. (Maduegbuna Aff., Exh. 12). On July 31, 2009, defendants responded to plaintiff's June 2009 deficiency letters. (Switzer Aff., Exhs. K, L).

On or about August 14, 2009, plaintiff filed a second motion to strike, which was denied by another justice of this court by decision and order dated November 6, 2009. The court found that "while defendants have been untimely in responding to a number of plaintiff's discovery requests, the court cannot conclude based on the record before it that defendants' delays were the product of willful or contumacious behavior," observing that defendants had provided responses and produced documents. (Maduegbuna Aff., Exh. 13). It nonetheless directed defendants, within 90 days of receipt of a copy of the order with notice of entry, to produce certain documents. On December 24, 2009, defendants timely provided plaintiff with the documents identified in the November 6 order. (Switzer Aff., Exh. O).

On December 3, 2009, plaintiff's letter wrote to defendants' counsel about counsel's failure to provide dates for defendants' depositions. (Maduegbuna Aff., Exh. 14). That same day, defendants' counsel advised that she would provide deposition dates in January and February

2010. (*Id.*, Exh. 15). After counsel failed to provide the dates, plaintiff's counsel wrote a letter on January 14, 2010, to which defendants' counsel failed to respond. (*Id.*, Exh. 16).

By compliance conference order dated February 9, 2010, defendants were directed to respond within 30 days to plaintiff's January 2010 letter, the depositions of defendants' witnesses were scheduled for March and April 2010, and plaintiff's deposition was scheduled for April 14, 2010. (*Id.*, Exh. 17). During March, April, May and June, the depositions of Margaret Tullai (a non-party witness), Michael Joseph (another non-party witness), Pincus, and Serrano were taken. At each deposition, the witness discussed certain documents related to his or her testimony, experience and qualifications, and following the depositions, plaintiff's counsel requested that defendants produce the documents. (*Id.*). By letter dated June 7, 2010, defendants' counsel responded to plaintiff's request for the production of Tullai's and Joseph's documents. (*Id.*, Exh. 24; Switzer Aff., Exhs. X, Y, Z).

By compliance conference order dated June 8, 2010, it was ordered that any remaining depositions be completed by September 10, 2010, that outstanding documents be produced by July 30, 2010, and that plaintiff file his note of issue by September 17, 2010. (Maduegbuna Aff., Exh. 26). By letters dated July 19, 2010 and July 29, 2010, defendants' counsel responded to plaintiff's requests for the production of Serrano's and Pincus's documents. (*Id.*, Exhs. 26, 27).

On July 20, 2010, DJJ's Equal Employment Opportunity Officer, Tonia Haynes, was deposed, and on July 29, 2010, plaintiff's counsel requested documents identified by Haynes. (*Id.*, Exh. 28). On August 4, 2010, defendants' counsel forwarded plaintiff's request to DJJ and advised that she needed the documents by August 18, 2010. (Switzer Aff.). However, the documents were not received by that date. (*Id.*).

On September 20, 2010, defendants' counsel proposed dates for the completion of defendant Hernandez's deposition, which had commenced in April 2010. (Maduegbuna Aff., Exh. 31). Plaintiff's counsel responded that day and advised that he could take Hernandez's deposition on October 22, 2010, and that plaintiff would be produced for his deposition on October 25, 2010. (*Id.*, Exh. 25). Neither deposition has yet taken place. (*Id.*).

II. CONTENTIONS

Plaintiff contends that defendants have ignored court orders without explanation for the last two years, demonstrating that their repeated failures to comply with their discovery obligations are willful, contumacious, and in bad faith. (Maduegbuna Aff.).

Defendants maintain that they have complied fully with all of plaintiff's discovery requests and court orders and produced many documents, thus showing that their actions have neither been willful nor contumacious. They annex to their motion the only documents that they found which are responsive to plaintiff's request for documents identified by Haynes and advise that they are ready to produce Hernandez for the completion of his deposition. Defendants also observe that plaintiff failed to submit an affirmation of good faith as required by 22 NYCRR 202. (Switzer Aff.).

III. ANALYSIS

Pursuant to CPLR 3126(3), the court may issue an order striking a party's pleading if the party refuses to obey a discovery order or willfully fails to disclose information. The party moving to strike a pleading must establish that the other party's failure to comply with a discovery order was willful, contumacious, or in bad faith. (*Rodriguez v United Bronx Parents, Inc.*, 70 AD3d 492 [1st Dept 2010]).

As plaintiff already raised some of these issues in his first motion to strike, and it has already been determined that defendants' conduct up to November 6, 2009 was neither willful nor contumacious, anything that occurred before November 6, 2009 is not properly before me. Consequently, the only issue to be determined is whether defendants' conduct after November 6, 2009 was willful and contumacious.

As defendants have now responded to plaintiff's request for the production of Haynes's documents, the only requests to which defendants allegedly failed to respond, and as defendants have agreed to schedule the completion of Hernandez's deposition, plaintiff has failed to show that defendants failed to comply with their discovery obligations or court orders. While plaintiff may believe that defendants' discovery responses were inadequate or insufficient, that issue is properly addressed in a motion to compel, not in a motion to strike. (*See Double Fortune Prop. Invs. Corp. v Gordon*, 55 AD3d 406 [1st Dept 2008] [as plaintiff responded to discovery requests, proper course for defendant was to move to compel further discovery rather than moving to strike]; *Barber v Ford Motor Co.*, 250 AD2d 552 [1st Dept 1998] [plaintiff's resort to motion to strike was not proper procedure to address deficiencies in responses; if parties unable to resolve differences, proper procedure is to move to compel]; *see also Zletz v Wetanson*, 67 NY2d 711 [1986] [dismissal of complaint was abuse of discretion as defendants never sought order compelling disclosure]; *Charter One Bank, FSB v Houston*, 300 AD2d 429 [2d Dept 2002], *lv denied* 99 NY2d 651 [2003] [movant not entitled to sanctions pursuant to CPLR 3216 without first moving to compel discovery]).

Consequently, plaintiff has not demonstrated that defendants' delay in responding to discovery has been willful or contumacious. (*See Glaser v City of New York*, 79 AD3d 600 [1st

Dept 2010] [motion court properly found that City's failure to produce repair records was not willful and contumacious as City responded adequately to discovery demands "albeit in response to several orders calling for production, as well as motions to strike"]; *Mironer v City of New York*, 79 AD3d 1106 [2d Dept 2010] [court should not have stricken defendant's answer as record shows that it "substantially, albeit tardily, complied with court-ordered discovery"]; *Mendoza v City of New York*, 68 AD3d 482 [1st Dept 2009] [striking of defendant's answer was properly denied as plaintiff failed to show that defendant's delays in responding to discovery requests were willful or contumacious]).

In any event, plaintiff failed to file an affirmation of good faith as required by 22 NYCRR 202.7. (*Walter B. Melvin, Architects, LLC v 24 Aqueduct Lane Condominium*, 51 AD3d 784 [2d Dept 2008] [court erred in striking answer as plaintiff's motion was unsupported by affirmation of good faith]; *Dunlop Dev. Corp. v Spitzer*, 26 AD3d 180 [1st Dept 2006] [court properly denied discovery motion as plaintiff failed to include affirmation of good faith]; *Dennis v City of New York*, 304 AD2d 611 [2d Dept 2003] [motion to strike properly denied as plaintiff failed to provide affirmation of good faith]).

IV. CONCLUSION

Accordingly, it is hereby

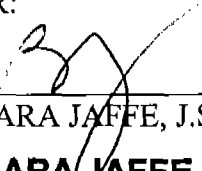
ORDERED, that plaintiff's motion to strike is denied.

FILED

MAR 30 2011

**NEW YORK
COUNTY CLERK'S OFFICE**

ENTER:



 BARBARA JAFFE, J.S.C.
BARBARA JAFFE
J.S.C.

Dated: March 25, 2011
 New York, New York

MAR 25 2011