Short Form Order

SUPREME COURT - STATE OF NEW YORK

I.A.S. PART 7 - SUFFOLK COUNTY

PRESENT:

WILLIAM B. REBOLINI
Justice

Frank J. Vetro,

Plaintiff,

-against-

Hampton Bays Union Free School District, Superintendent Joanne Loewenthal, in her official and individual capacities; the past and present Hampton Bays Board of Education members, George Leeman, Jen Boyer, Craig Tufano, Christ Catz, Marie Mulcahy, Doug Oakland, Chris Garvey, Lisa Fotopoulos, Warren Booth, each board member named herein in their official and individual capacities,

Defendant.

Clerk of the Court

Index No.: 36023/2009

Motion Sequence No.: 005; MOT.D
Motion Date: 8/5/10
Submitted: 3/2/11

Motion Sequence No.: 006; MOT.D
Motion Date: 8/5/10
Submitted: 3/2/11

Plaintiff Pro Se:

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Attorney for Defendants:

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Upon the following papers numbered 1 to 19 read on these motions for an order, *inter alia*, pursuant to CPLR §3126 or §3124: Notice of Motion and supporting papers, 1 - 4, 5 - 8; Answering Affidavits and supporting papers, 9 - 11, 12 - 14, 15 - 16; Replying Affidavits and supporting papers, 17 - 19.

In this employment discrimination action, plaintiff seeks damages from his former employer, Hampton Bays Union Free School District and others (hereinafter referred to as

"defendants"). The record reveals that plaintiff commenced the instant action on September 23, 2009. Plaintiff served combined discovery demands upon defendants on November 19, 2009. On March 3, 2010, the parties appeared at a preliminary conference. On May 10, 2010, defendants served a motion for a protective order, which was resolved by order dated June 23, 2010 (Rebolini, J.), wherein this Court directed defendants to provide interrogatory responses by only defendant Loewenthal and defendant Leeman. On September 7, 2010, defendants served their response to plaintiff's combined demands. On September 29, 2010, defendants served additional documents upon plaintiff as well as their bill of particulars regarding affirmative defenses, defendant Loewenthal's responses to plaintiff's interrogatories and defendant Leeman's responses to plaintiff's interrogatories. On October 4, 2010, plaintiff served defendants with a list of all discovery which he believed to be outstanding. Defendants, by letter dated October 19, 2010, responded to each of plaintiff's objections regarding their discovery responses. At a compliance conference, dated February 9, 2011, plaintiff alleged that defendants failed to respond to his combined demands numbered 3, 5 (A) (2), (4), (5), 6 (B), (E), (G). In addition, plaintiff alleged that defendant Leeman failed to respond to interrogatories numbered 3 - 5, 8, 23, 26, 31, 33 and 34. Plaintiff further alleged that defendant Loewenthal failed to respond to interrogatories numbered 3, 11, 12, 14, 20 and 23 - 27.

Plaintiff now moves for an order to preclude and/or compel defendants to respond to his discovery demands and interrogatories and/or strike defendants' answers. Defendants move for an order to preclude and/or compel plaintiff to produce all audio and video recordings in his possession depicting the image or voice of any employees, agents, or representatives of defendants.

Under CPLR §3126, the movant must make a clear showing that its opponent failed to comply with discovery demands in a willful, contumacious manner or in bad faith (see, Rodriguez v. United Bronx Parents, Inc., 70 AD3d 492, 492 [1st Dept., 2010]). Courts have discretion under CPLR §3126 to strike a pleading where a party disobeys a court order and frustrates the disclosure scheme by his or her conduct (see, Frias v. Fortini, 240 AD2d 467 [2nd Dept., 1997]). The Court is satisfied that defendants made a good faith effort to respond to plaintiff's demands. Although defendants delayed for a short time in producing the requested discovery, it appears that they have since responded to plaintiff's discovery demands. Therefore, the Court finds that defendants' failure to timely comply with plaintiff's discovery demands was not willful, contumacious or in bad faith. As such, it would be inappropriate to strike their answers at this juncture. Accordingly, the branch of the motion to strike the answer is denied.

Turning to plaintiff's claim that defendants failed to adequately respond to his demands and interrogatories, although the discovery provisions of the CPLR are to be liberally construed (see, Cynthia B. v. New Rochelle Hospital Medical Center, 60 NY2d 452, 461 [1983]), the trial court possesses wide discretion in deciding whether the information sought is "material and necessary" (see, Allen v. Crowell-Collier Publ. Co., 21 NY2d 403 [1968]). "This is not to say

that carte blanche demands are to be honored, and those demands which are unduly burdensome, lack specificity, seek privileged matter, seek irrelevant information, or are otherwise improper must be denied" (Capoccia, P. C. v. Spiro, 88 AD2d 1100, 1101 [3rd Dept., 1982], app. dism. 57 NY2d 774; Scalone v. Phelps Memorial Hospital Center, 184 AD2d 65 [2nd Dept., 1992]).

The Court has reviewed the parties' submissions and concludes that defendants have sufficiently responded to plaintiff's demands and interrogatories. The Court agrees that defendants are not required to provided responses to plaintiff's combined demands which call for opinions and interpretations, irrelevant material, materials protected by the attorney-client privilege, confidential information or personal information. In addition, several of plaintiff's demands consisted of documents or evidence which were not in the defendants' possession. Accordingly, plaintiff's motion is granted solely to the extent that defendants are directed to serve upon plaintiff within 30 days of the date hereof an affidavit of a person with knowledge stating that the documents or evidence requested in numbers (of plaintiff's combined demands) 5(A)(2), 5(A)(4), 5(A)(5), 6(B), 6(E) and 6(G), do not exist and/or are not in their possession or, if defendants have any requested documents, to produce the documents.

With regard to defendants' motion, the Court agrees that inasmuch as plaintiff has placed his criminal history at issue by the commencement of the instant civil action, defendants are entitled to discovery of his criminal arrests and/or prosecutions. Accordingly, to the extent not already provided, plaintiff is directed to produce the requested documents and serve upon defendants duly executed authorizations as stated in defendant's second notice for discovery and inspection dated October 6, 2010.

With regard to defendants' Notice for Discovery and Inspection, dated January 11, 2010, the Court finds that they are entitled to review plaintiff's audio and video recordings of the defendants, et al. However, the notice requesting "all audio and video recordings . . ." is too broad. Therefore, defendants are directed to amend the notice to include a time frame within which these audio and video recordings may have been made within thirty days of this order. Plaintiff is then directed to produce said audio and video recordings within thirty days of service of the amended notice.

Based on the foregoing, it is

ORDERED that the motions (005, 006) are consolidated for the purpose of this determination; and it is further

ORDERED that the motion (005) by plaintiff for an order pursuant to CPLR §3126 to strike the answer, or, in the alternative, to preclude defendants from offering evidence at the time of trial, or, in the alternative, to compel defendants to provide responses to discovery is granted to the extent that defendants are directed to serve upon plaintiff within 30 days of the date hereof

an affidavit of a person with knowledge stating that the documents or evidence requested in numbers (of plaintiff's combined demands) 5(A)(2), 5(A)(4), 5(A)(5), 6(B), 6(E) and 6(G), do not exist and/or are not in their possession or, if defendants have any requested documents, to produce the documents; and it is further

ORDERED that the motion (006) by defendants for an order pursuant to CPLR §3126 to strike the complaint and preclude plaintiff from introducing evidence at trial for failure to comply with defendants' discovery demands, or, in the alternative, to compel plaintiff to comply with discovery demands is granted to the extent that plaintiff is directed to comply with defendants' second notice for discovery and inspection, dated October 6, 2010 within thirty days of this order; and that defendants are directed to include a time frame in item number 2 of the Notice for Discovery and Inspection, dated January 11, 2010, to serve the amended Notice upon plaintiff within thirty days of this order, and thereafter, plaintiff is directed to produce the requested discovery within thirty days of service of the amended Notice.

Dated: May 12, 2011

William B. Rebolini

HON. WILLIAM B. REBOLINI, J.S.C.

____ **FINAL DISPOSITION** __X__ **NON-FINAL DISPOSITION**