[* 1]
SCANNED ON 1/10/2014

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

PRESENT: CHAN PART 52

Justice

NANCY MOYNIHAN

- v -

CITY OF NY

INDEX NO. 108817/10

MOTION DATE

MOTION SEQ. NO. 3

MOTION CAL. NO.

The following papers, numbered 1 to 3 were read on this motion to/for Sanctions

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1
Answering Affidavits — Exhibits	2
Replying Affidavits	3

Cross-Motion: ☐ Yes ☒ No

Upon the foregoing papers, it is ordered that this motion

MOTION DETERMINED PURSUANT TO
ANNEXED DECISION AND ORDER

FILED

NOV 18 2013

COUNTY CLERK'S OFFICE
NEW YORK

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

Dated: 11/14/13

HON. MARGARET A. CHAN J.S.C.

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: Hon. Margaret A. Chan **PART 52**
Justice

NANCY MOYNIHAN,
Plaintiff,

- v -

NEW YORK HEALTH AND HOSPITALS CORPORATION, THE CITY OF NEW YORK, et al

Defendants.

INDEX NO. 108817/2010

Plaintiff commenced her Labor Law whistle-blower suit against defendants in July 2010. Plaintiff claims that, to date, discovery is still incomplete after repeated attempts to have defendants comply with discovery orders. Plaintiff now moves for contempt and sanctions against defendants, New York City Health and Hospitals Corp. (HHC) and the City of New York (collectively, the City). Defendants oppose the motion claiming that plaintiff cannot show that she was prejudiced by defendants' actions to warrant sanctions.

Plaintiff was a registered nurse who was employed as a Human Research Protection Program Regulatory Specialist in the Office of Clinical and Health Services Research (OSCHSR) at HHC. Plaintiff alleged that HHC terminated her employment soon after she raised concerns regarding compliance with patient consent forms in studies conducted at Harlem Hospital by Columbia University researchers. Nonie Pegoraro was plaintiff's supervisor and Director of OCHSR. Her employment was also terminated and she commenced an action against defendants in Federal Court, which was resolved through settlement.

A review of this case's time-line shows that plaintiff sought discovery, by way of deposition notices, first on August 27, 2010 - before defendants interposed their answer on October 21, 2010[1]. Since then, plaintiff served her first request for documents on January 12, 2011, and interrogatories on April 6, 2011. A preliminary conference was held on May 25, 2011, wherein depositions of certain defendants were to be completed by August 15, 2011 and production of documents to be done by June 30, 2011. Deposition of HHC General Counsel, Richard Levy, was held on August 4, 2011 whereupon plaintiff requested additional documents - audit reports she and Pegoraro prepared; communications to/from Columbia University employees and Electronically Stored Information (ESI) of two law firms that represented HHC. By October 15, 2011, there were no

[1]Defendants initially defaulted.

documents produced or further depositions held. On November 2, 2011, the parties entered into a stipulation wherein defendants were to produce ESI, documents and privilege logs by January 4, 2012, which deadline was extended to January 31, 2012. On February 7, 2012, plaintiff complained that the documents produced were insufficient as they were a "re-production" of documents in the Pegoraro case. On April 18, 2012, the parties entered into another stipulation to agree to certain search terms. On June 12, 2012, plaintiff moved to compel. By order dated December 21, 2012, another Justice of this court, Hon. Arthur Engoron, denied plaintiff's request for privileged documents from law firms that had represented HHC, and directed defendants to produce, by January 31, 2013, copies of plaintiff's "audit reports" and the following documents:

1. Electronically Stored Information generated by a proper electronic search using the agreed upon search terms . . . ;
2. Audits prepared by plaintiff, and/or Pegoraro, of human subject research protocols conducted by Columbia University researchers at Harlem Hospital;
3. A December 17, 2008 letter to Columbia University from the Office of Clinical and Health Services Research ("OCHSR") suspending human subject research by Columbia researchers at Harlem Hospital;
4. A March 9, 2009 e-mail from respondent Nadel to Columbia rescinding the OCHSR determination to suspend human subject research at Harlem Hospital;
5. An e-mail from Columbia researcher Wafaa El-Sadr opposing the suspension of her human subject research at Harlem Hospital;
6. An affidavit of compliance, as set forth in the parties' 4/18/12 stipulation ....

Defendants are hereby directed to produce the following persons for depositions:

A. Sal Russo or Wayne McNulty;

B. Alan Aviles. (Order dated December 21, 2012, Justice Arthur F. Engoron).

Defendants produced four pages of documents and claimed that there were no further documents that can be produced. This court by order dated March 6, 2013 gave defendants until April 3, 2013 to comply with the December 21, 2012 order. On April 3, 2013 defendants were ordered to produce audio tapes of plaintiff's interview in the Pegoraro case in Federal Court. On April 17, 2013 defendants produced fifteen audio tapes and documents with Bate Stamp HHC 0315 to HHC 0658 from the HHC's Office of the Inspector General (OIG), and submitted an affidavit by Daniel Gorayeb, Esq. averring that neither plaintiff's nor Pergoraro's accounts existed since the summer of 2009. By June 12, 2013, defendants had not produce anyone for deposition. Defendants claim that because there was a change of attorneys in this case, they were unable to be available for the deposition. On August 14, 2013, this court directed defendants to produce e-mails. By this time, plaintiff had had enough and moved for sanctions against defendants on June 28, 2013. The motion was adjourned to allow defendants one last opportunity to produce Alan Aviles for deposition by September 13, 2013.

In the instant motion, plaintiff still seeks:
"(1) overdue ESI from the email accounts of Stanley Pruszynski, Ernesto Marrero and Stacy Ann Christian, together with unproduced ESI from the email account of Richard Levy for the two month period prior to plaintiff's termination through June 30, 2009;
(2) immediate production from defendants and/or their agents, including but not limited to KMR/Peter Nadel, of ESI and other documents reflecting communications to and from Columbia University and its agents and employees, including Dr. Wafaa El-Sadr;
(3) still missing hard copy documents including the audits, OIG report and all related documents/ minutes;
(4) an appropriate affidavit of compliance from an attorney with knowledge of the production and email issues;
(5) production of Wayne McNulty for his deposition currently scheduled for September 17, 2013;
(6) production of defendant Aviles for his deposition within twenty (20) days thereafter; and
(7) continuing sanctions in the amount of $1000 a day retroactive from the date this motion was filed until such production is complete, together with such other and further relief as may be just and proper" (Supp Aff in Further Support of Plaintiff's Motion to Punish for Civil Contempt, Penalties, and Costs and Sanctions, p 10).

"Where, as here, a party seeks an adjudication of civil contempt based upon a violation of a court order, he or she must establish a willful and deliberate violation of a lawful court order expressing a clear and unequivocal mandate (internal cites omitted). The burden of proof is on the party seeking the contempt adjudication, and the facts constituting the basis of the contempt must be proved by clear and convincing evidence. The question of whether to then grant a civil contempt motion and, if so, the fixing of the appropriate remedy, is addressed to the sound discretion of the motion court upon consideration of the surrounding circumstances" (*Collins v Telcoa Intl. Corp.*, 86 AD3d 549 [2d Dept 2011]). To grant a motion for civil contempt, "the court must expressly find that the person's actions were calculated to or actually defeat, impair, impede or prejudice the rights or remedies of a party to a civil proceeding" (*Clinton Corner H.D.F.C. v LaVergne*, 279 AD2d 339, 341 [1st Dept 2001] *citing Oppenheimer v Oscar Shoes*, 111 AD2d 28, 29 [1st Dept 1985]; *Seril v Belnord Tenants Assn.*, 139 AD2d 401 [1st Dept 1988]; Judiciary Law § 753).

Plaintiff claims that defendant failed to produce a myriad of documents. The materials sought are: (1) ESI; (2) Audits; (3) OIG; and (4) depositions[2] of either McNulty or Russo. The ESI: it appears that compliance with plaintiff's request regarding the ESI was not a simple matter as the parties were instructed to agree on search terms by both Justices Cynthia Kern and Justice Arthur Engoron. The search terms to which the parties agreed pursuant to the December 12, 2012 order were: "Nancy or Moynihan or Nonie or Pegoraro or nadel or stan or stanley or pruzynski or alan or aviles or danielle or koster or "Richard Levy" or Sal or Salvatore or russo or wayne or mcnulty or "executive compliance work group" or harlem or walker or Columbia or cumc or catapano or "el-sadr" or wafaa or "human subject" or "clinical trial" or clinical trials" or "patient safety" or

[2]Plaintiff no longer wanted to depose Aviles.

"informed consent" or IRB or research or compliance or ochsr or audit or audits or suspend or suspension or "indirect cost" or "indirect costs" or "direct cost" or "indirect costs" or icr or recover or recovery or huron, or consent. According to defendants, these search terms resulted in a finding of 7,329 emails containing 12,594 attachments, which amount to 20,510 individual items or 86,000 pages or over 43 standard banker's boxes of paper (*see* Aff in Opp of Motion for Civil Contempt; Exh A Aff of Daniel Gorayeb, Esq.). Defendants' non-production of these ESI is forgivable as it is onerous and the relevance of these 20,510 items has not been shown. Because a search was diligently conducted pursuant to the December 21, 2012 order, defendants did not violate the order even if they did not print out 86,000 sheets of paper. This matter requires a further compliance conference.

The OIG's were produced on July 31, 2013. Plaintiff's issue with this production is that it is a "re-production" of documents in the Pegoraro case. Plaintiff argued that the OIG documents, and audio CD's were insufficient as they were a "re-production" of materials produced by defendants in the Pergorao case. However, it was plaintiff who pointed out at oral arguments that the materials were produced in the Pergorao case and those were the materials she sought. To the extent that plaintiff's argument is that the document trail ended two months before her termination date, it was explained in Daniel Gorayeb's affirmation that information was contained in six months cycles and then discarded. He was not able to recover the documents from June 2008 to July 2009 from the GroupWise or GWAVA systems used by HHC. Plaintiff commenced the instant suit on or about July 2, 2010 - more than six months after July 2009. Thus, no spoliation claims lies therefrom.

However, defendants are not totally absolved of a finding of contempt. There has been no reason for defendants' protracted delay in producing McNulty or Russo for a deposition. The first order regarding these witnesses was September 14, 2011. The Preliminary Conference Order of May 25, 2011 did not specifically require the depositions of McNulty or Russo, but of Levy and Aviles; and therefore, is not considered. An April 14, 2012 so-ordered stipulation followed to continue the outstanding discovery, including the deposition. There followed other orders and so-ordered stipulations extending time for defendants to comply with discovery order regarding the aforementioned deposition, which then was followed by Justice Engoron's December 12, 2012 order, and this court's April 17, 2013 order. Defendants explained that because of a change in counsel for defendants on June 7, 2013, new counsel was not prepared and could not proceed with the previously scheduled deposition on June 12, 2013, in compliance with the April 17, 2013 order[3]. This is a legitimate reason to postpone the deposition, but it does not speak to any reason for the non-compliance of the previous orders for so many months. Failure to produce either McNulty or Russo for a deposition impeded plaintiff's rights in this case. Thus, defendants are in contempt for their pattern of willful default and neglect of a court-ordered deposition of McNulty or Russo. Nor is defendants' contempt purged by finally producing Russo or McNulty on September17, 2013.

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[3] This court was informed that a deposition of one of these witnesses was commenced on September 17, 2013 - after the submission of the instant motion.

The purpose of civil contempt is to coerce compliance with a court order or to compensate a party who is injured as a result of disobedience of a court order (*see State of New York v Unique Ideas*, 44 NY2d 345 [1983]; *Department of Housing Preservation and Development v Deka Realty*, 208 AD2d 37 [2d Dept 1995]). Actual costs and expenses, including attorney's fees, are a legitimate category of recovery for a contempt citation (*see Dorio v Peekskill Common Counsel*, 13 AD3d 523 [2d Dept 2004]; *Alpert v Alpert*, 261 AD2d 247 [1st Dept 1999]). Plaintiff had expended time in this effort and should be compensated therefor. As such, defendants shall pay the cost and attorney's fees for work done in connection to plaintiff's attempt to procure depositions of either McNulty or Russo from April 14, 2012 to June 12, 2013. Settle order.

The parties are instructed to appear for a compliance conference with this court on December 4 , 2013 at 2:30 PM in room 289 at 80 Centre Street.

This constitutes the decision and order of the court.

Dated: November 14, 2013

Margaret A. Chan , *J.S.C.*