

Uwechia v City of New York

2014 NY Slip Op 30765(U)

March 26, 2014

Sup Ct, New York County

Docket Number: 106289/2008

Judge: Kathryn E. Freed

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

HON. KATHRYN FREED
JUSTICE OF SUPREME COURT

Index Number : 106289/2008

UWECHIA, CHUKWUMA K.

vs

CITY OF NEW YORK

Sequence Number : 004

COMPEL DISCLOSURE

PART 5

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

CALL # 67

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

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). _____

Answering Affidavits — Exhibits _____ | No(s). _____

Replying Affidavits _____ | No(s). _____

Upon the foregoing papers, it is ordered that this motion is

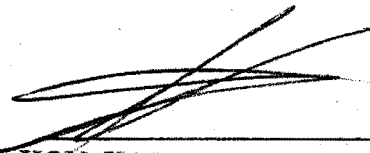
DECIDED IN ACCORDANCE WITH
ACCOMPANYING DECISION / ORDER

FILED

MAR 28 2014

COUNTY CLERK'S OFFICE
NEW YORK

Dated: 3-26-14
MAR 26 2014


_____, J.S.C.
HON. KATHRYN FREED
JUSTICE OF SUPREME COURT

- 1. CHECK ONE: CASE DISPOSED NON-FINAL DISPOSITION
- 2. CHECK AS APPROPRIATE:MOTION IS: GRANTED DENIED GRANTED IN PART OTHER
- 3. CHECK IF APPROPRIATE: SETTLE ORDER SUBMIT ORDER
 DO NOT POST FIDUCIARY APPOINTMENT 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,

Plaintiff,

-against-

DECISION/ORDER
Index No. 106289/2008
Seq. No. 004

PRESENT:
Hon. Kathryn E. Freed
J.S.C.

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

Defendants.

-----X
HON. KATHRYN E. FREED:

RECITATION, AS REQUIRED BY CPLR 2219 (a), OF THE PAPERS CONSIDERED IN THE REVIEW OF
THIS MOTION.

PAPERS	NUMBERED
NOTICE OF MOTION AND AFFIDAVITS ANNEXED.....	1-2(Exs.1-18)
ORDER TO SHOW CAUSE AND AFFIDAVITS ANNEXED.....
ANSWERING AFFIDAVITS.....
REPLYING AFFIDAVITS.....
EXHIBITS.....
OTHER.....

FILED

MAR 28 2014

COUNTY CLERK'S OFFICE
NEW YORK

UPON THE FOREGOING CITED PAPERS, THIS DECISION/ORDER ON THE MOTION IS AS FOLLOWS:

Plaintiff moves for an order, pursuant to CPLR 3126, striking defendants' answer due to their failure to comply with discovery demands and to provide court-ordered discovery. In the alternative, plaintiff moves pursuant to CPLR 3124 to compel defendants to provide outstanding discovery. Defendants do not oppose the motion. After a review of the papers presented, all relevant statutes and case law, the Court **grants** the motion to the extent of directing defendants to provide the discovery outstanding by April 1, 2014 or have their answer stricken.

Factual and Procedural Background:

On May 5, 2008, plaintiff, an attorney licensed to practice in New York State, and employed for several years with the New York City Department of Juvenile Justice (“DJJ”), commenced the instant employment discrimination action pursuant to the New York Human Rights Law. Defendants’ served their answer on June 27, 2008 and their amended Answer on July 15, 2008. Plaintiff alleges that, for several years, defendants discriminated against him by, inter alia, denying him a promotion to the position of Agency Chief Contracting Officer, and by failing to consider him for the position of Deputy Agency Chief Contracting Officer, based on the fact that he is a black man from Nigeria. Plaintiff seeks compensatory and punitive damages.

Plaintiff asserts that, for almost four years, defendants have consistently, willfully and deliberately refused to fully comply with his legitimate discovery demands. He argues that their “outright refusal to produce a significant number of responsive documents has profoundly delayed and stymied [his] overall prosecution of his claims and prolonged the conclusion of this matter. More importantly, defendants have failed and refused to produce documents identified and claimed to exist by their own witnesses.” (See Aff. in Support, at ¶ 6).

The exhibits annexed to plaintiff’s motion establish a long and tortured history of disclosure in this matter, including several discovery motions by plaintiff. An initial motion by plaintiff seeking discovery sanctions was resolved by so-ordered stipulation dated May 12, 2009. Ex. 3.¹ That order directed the defendants to provide document discovery and warned that their “failure to comply...will be deemed willful and contumacious.” *Id.*

¹All references are to the exhibits annexed to plaintiff’s motion.

After the defendants failed to comply with the compliance conference order, plaintiff moved to strike their answer. By order dated September 6, 2009, this Court (Rakower, J.) denied the motion, finding that the defendants' discovery responses were sufficient. Ex. 4. In September of 2010, plaintiff moved once again to strike the defendants' answer. Ex. 5. This Court (Jaffe, J.) denied the motion on the ground that plaintiff did not demonstrate that defendants' delay in responding to discovery was willful or contumacious and that, in any event, plaintiff failed to submit an affirmation of good faith in support of the motion. Ex. 5.

On December 6, 2011, plaintiff's counsel wrote to defendants' attorney requesting discovery arising from the deposition of defendant Hernandez. Ex. 7. On February 20, 2012, plaintiff's counsel wrote to counsel for defendants to request additional discovery. Ex. 8. Responses to the 12/6/11 and 2/20/12 letters were not forthcoming and, on February 21, 2012, the parties entered into a so-ordered stipulation (Jaffe, J.) directing defendants to provide the outstanding discovery within 30 days. Ex. 8. As of the time of the next compliance conference on March 20, 2012, there still had not been compliance by defendants and this Court (Jaffe, J.) ordered defendants to respond to the 12/6/11 and 2/20/12 letters within 21 days. Ex. 9. A further compliance conference was held on July 10, 2012, by which time defendants still had not responded to the letters. Ex. 10. At that conference, this Court (Jaffe, J.) ordered defendants to respond to the letters dated 12/6/11 and 2/20/12 within 30 days and marked this order "final!" Ex. 10.

At the next compliance conference, on September 25, 2012, defendants provided plaintiff with a purported response to the letters of 12/6/11 and 2/20/12. Exs. 12, 14. However, this "response," dated September 25, 2012 (Ex. 14), was merely a blanket objection to plaintiff's discovery demands and annexed no document discovery. At the compliance conference that day,

the parties entered into a so-ordered stipulation (Jaffe, J.) acknowledging that defendants had provided a response to the 12/6/11 and 2/20/12 letters and allowing plaintiff 30 days to review the same and to respond in writing. Ex. 12. Defendants were to respond to plaintiff's letter regarding the response within 30 days. Ex. 12.

On October 23, 2012, plaintiff's counsel wrote to counsel for defendants to respond to the objections set forth by defendants in their purported discovery response of September 25, 2012 and to explain why the discovery demanded was necessary. Ex. 13. Although the so-ordered stipulation dated September 25, 2012 required defendants to respond to plaintiff's October 23, 2012 letter by November 23, 2012 (Ex. 12), defendants did not do so.

By so-ordered stipulation dated November 27, 2012 (Jaffe, J.), defendants agreed to respond to the plaintiff's October 23, 2012 letter by December 28, 2012. Ex. 15. When defendants failed to meet this deadline, this Court so-ordered a stipulation dated January 29, 2013 requiring defendants to respond to the said letter by February 22, 2013. Ex. 16. However, defendants did not respond to the letter until March 19, 2013, the date of the next compliance conference. Exs. 17, 18. Although defendants' March 19, 2013 letter represented that defendants would provide affidavits regarding their searches for certain records, defendants have not submitted any papers in connection with this motion and thus this Court cannot ascertain whether such affidavits were ever provided. Additionally, instead of providing discovery, defendants' March 19, 2013 letter instructs the plaintiff to refer to discovery exchanged by defendants in another action.

Plaintiff now moves, pursuant to CPLR 3126, to strike defendants' answer given their failure to provide discovery or, in the alternative, to preclude defendants from introducing evidence at trial given their failure to provide discovery. In the alternative, plaintiff asserts that this Court should

issue and order directing defendants to produce the outstanding discovery.

Position of the Plaintiff:

Plaintiff argues that defendants' answer must be stricken given their "persistent and repeated failures to comply with their discovery obligations and the orders of this [C]ourt." Alternatively, plaintiff seeks an order precluding defendants from offering evidence at trial or compelling defendants to provide outstanding discovery.

Legal Conclusions:

CPLR 3126 provides that a court may strike a pleading as a sanction against a party who "refuses to obey an order for disclosure or willfully fails to disclose information which the court finds ought to have been disclosed." "If the credibility of court orders and the integrity of our judicial system are to be maintained, a litigant cannot ignore court orders with impunity." *Kihl v Pfeffer*, 94 NY2d 118, 123 (1999). Although actions should be resolved on the merits whenever possible, a court may strike an answer where the moving party makes a clear showing that the failure to comply is willful, contumacious, or in bad faith. *See Almonte v Pichardo*, 105 AD3d 687 (1st Dept 2013); *Rodriguez v United Bronx Parents, Inc.*, 70 AD3d 492 (1st Dept 2010).

Here, plaintiff's counsel wrote to defendants' attorney on December 6, 2011 and February 20, 2012 requesting discovery. Exs. 7, 8. Despite three court orders directing defendants to respond to plaintiff's demands (Exs. 8, 9, 10), defendants did not respond in any manner until September 25, 2012, the date of the next compliance conference, on which they simply served a purported response containing a blanket objection to all of plaintiff's demands. Exs. 12, 14. The September 25, 2012

compliance conference order reflected that the defendants had provided a response to the 12/6/11 and 2/20/12 letters and provided plaintiff 30 days to review the same and to respond in writing. Ex. 12. The defendants were to respond to plaintiff's letter regarding the response within 30 days. Ex. 12.

Although plaintiff's counsel wrote to counsel for the defendants on October 23, 2012 to respond to the objections set forth by defendants in their purported discovery response of September 25, 2012 and to explain why the discovery demanded was necessary (Ex. 13), defendants did not respond to the letter within 30 days pursuant to the order of September 25, 2012. At the compliance conference of November 27, 2012, defendants were directed to respond to the plaintiff's October 23, 2012 letter by December 28, 2012. Ex. 15. On January 29, 2013, after defendants again failed to meet the deadline for responding to the October 23, 2012 letter, they were directed to respond to the same by February 22, 2013. Ex. 16. However, defendants did not respond to the letter until March 19, 2013, the date of the next compliance conference. Exs. 17, 18.

Although defendants' represented in their March 19, 2013 letter that they would provide affidavits regarding their searches for certain records, they have not submitted any papers in connection with this motion and thus this Court cannot ascertain whether such affidavits were ever provided. Additionally, instead of providing discovery, defendants' March 19, 2013 letter instructs the plaintiff to refer to discovery exchanged by the defendants in another action. Defendants' failure to oppose plaintiff's motion also renders this Court unable to determine the relationship, if any, of the other action referred to in their letter, in which they claims they provided discovery, to this litigation. In any event, this Court refuses to consider defendants' March 19, 2013 letter, which is untimely given that it was not served by the deadline set forth in the January 29, 2013 order. Ex. 16.

It is evident from the foregoing that the City has engaged in an obvious pattern of repeatedly ignoring court orders. Additionally, when it twice purported to comply with court orders, it did not do so by the court ordered deadlines for complying, but rather made last-ditch efforts to comply by serving purported responses prepared on the date of subsequent compliance conferences, seemingly designed to avoid discovery sanctions.

In moving to strike defendants' answer, plaintiff has the burden of establishing that their conduct was willful, contumacious, or in bad faith. *See Palmenta v Columbia Univ.*, 266 AD2d 90, 91 (1st Dept 1999). This court finds that plaintiff fulfilled this burden by establishing defendants' pattern of repeated noncompliance with court-ordered disclosure from December of 2011, the date of plaintiff's initial letter requesting the discovery which is the subject of this motion (Ex. 7) through April of 2013, the date of this motion. *See Perez v City of New York*, 95 AD3d 675, 677 (1st Dept 2012); *Bryant v New York City Hous. Auth.*, 69 AD3d 488, 489 (1st Dept 2010). Defendants' history of noncompliance in this matter dates back to May of 2009, at which time they were directed to comply with plaintiff's demands or have their conduct deemed "willful and contumacious." Ex. 3. Indeed, defendants' cavalier approach to disclosure in this matter is highlighted by their failure to even respond to the instant motion. Since plaintiff demonstrated that defendants' conduct was willful and contumacious, the burden shifted to defendants to establish a reasonable excuse for their repeated failure to comply with the orders referenced above. *See Palmenta v Columbia Univ.*, *supra* at 91. However, since defendants submitted no opposition to plaintiff's motion, they clearly failed to enumerate any reasonable excuse for their repeated noncompliance.

Therefore, this Court directs defendants to produce the discovery demanded in plaintiff's letters of December 6, 2011 and February 20, 2012 by May 1, 2014, pursuant to CPLR 3124, or their

answer will be stricken without the need for further motion practice upon production by plaintiff of an affidavit of noncompliance. See CPLR 3126; *Bryant, supra* at 489.

Therefore, in accordance with the foregoing, it is:

ORDERED that plaintiff's motion is granted to the extent of ordering defendants to provide the discovery requested by plaintiff in his letters dated December 6, 2011 and February 20, 2012 by May 1, 2014; and it is further,

ORDERED that defendants' failure to timely comply with this order shall result in the striking of their answer upon the submission by plaintiff of an affirmation of noncompliance; and it is further,

ORDERED that this constitutes the decision and order of this Court.

FILED

Dated: March 26, 2014

MAR 28 2014

ENTER

COUNTY CLERK'S OFFICE
NEW YORK



KATHRYN E. FREED,
J.S.C.