Molinoff v Tanenbaum
2014 NY Slip Op 31895(U)
March 31, 2014
Sup Ct, Westchester County
Docket Number: 51064/2013
Judge: Joan B. Lefkowitz

INDEX NO. 51064/2013

NYSCEF DOC. NO. 39 RECEIVED NYSCEF: 03/31/2014

To commence the statutory time period for appeals as of right [CPLR 5513(a)], you are advised to serve a copy of this order, with notice of entry upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER – COMPLIANCE PART

----------x

DANIEL D. MOLINOFF, ESQ.,

Plaintiff,

-against-

MARK TANENBAUM, ESQ.,

Defendant.

----------x

DECISION & ORDER

Index No. 51064/2013
Decision Date: Mar. 31, 2014
Motion Seq. 5 & 6

LEFKOWITZ, J.

The following papers were read on: (1) this motion by defendant (Motion Sequence #5) for an order pursuant to CPLR 3126 dismissing plaintiff's complaint or, in the alternative, pursuant to CPLR 3124 to compel certain discovery; and (2) this motion by plaintiff (Motion Sequence #6) for a protective order pursuant to CPLR 3103(a) against certain of defendant's discovery demands:

Motion Sequence #5:	Order to Show Cause Affirmation in Support, Exhs. A-G Affirmation in Opposition Affidavits of Service
Motion Sequence #6:	Order to Show Cause Affirmation in Support, Exh. A-I Affirmation in Opposition Affidavits of Service

Upon the foregoing papers and proceedings held on February 24, 2014, the motions are consolidated for purposes of decision and are determined as follows:

This action by plaintiff Daniel Molinoff to collect an alleged $18,402.50 invoice for legal services he performed for defendant Mark Tanenbaum arises out of a 2009 Family Court proceeding involving defendant and his ex-wife, which proceeding resulted in findings adverse to Tanenbaum. This invoice was submitted to mandatory fee arbitration pursuant to 22 NYCRR [Rules of the Chief Administrative Judge] Part 137, and on or about March 16, 2012, an arbitral award of $8,274.83 was rendered in Molinoff's favor. Alleging that Molinoff committed legal malpractice in the underlying representation, Tanenbaum commenced a legal malpractice action against Molinoff on or about June 6, 2012. By Decision and Order dated January 16, 2013, this Court (Lefkowitz, J.) granted Molinoff's motion to dismiss such action; by further Decision and

Order dated March 22, 2013, this Court (Lefkowitz, J.) denied Tanenbaum's motion to reargue such dismissal. Molinoff entered no Notice of Appeal for either of these decisions. Thereafter, on January 24, 2013, Molinoff commenced the instant action, in the nature of *de novo* review of the Part 137 arbitral award, to collect the full amount of the original invoice. By Decision and Order dated June 6, 2013, this Court (DiBella, J.) denied Tanenbaum's motion to dismiss the instant action, and also denied Molinoff's cross motion to dismiss Tanenbaum's counterclaim to return his $5,000 retainer. Tanenbaum's motion to reargue remains pending.

The gravamen of Tanenbaum's position in the instant action is that Molinoff inflated his invoice, and that it shouldn't have taken Molinoff eight hours to prepare papers for submission in the underlying Family Court action. In furtherance thereof, Tanenbaum propounded a Demand for Interrogatories on Molinoff, and Molinoff filed responses dated July 3, 2013. Tanenbaum alleges that of the 30 questions he propounded, Tanenbaum wrongly stated boilerplate objections to 21 of them. Tanenbaum also asserts that at Molinoff's deposition on November 14, 2013, which Tanenbaum as an attorney conducted himself, Molinoff improperly refused to answer dozens of questions. Pursuant to a briefing schedule, Tanenbaum moved by Order to Show Cause (Motion Sequence #5) for a CPLR 3126 order dismissing Molinoff's complaint or, in the alternative, a CPLR 3124 order compelling Molinoff to answer the interrogatory questions to which Molinoff objected and to appear for a further deposition to answer the blocked deposition questions. Pursuant to the same briefing schedule, Molinoff also moved by Order to Show Cause (Motion Sequence #6) for a CPLR 3103(a) protective order against such discovery.

It is axiomatic that parties are entitled to liberal discovery of "all matters material and necessary in the prosecution" of their action (CPLR 3101[a]), and the determination of what is "material and necessary" is within the sound discretion of the trial court (*see e.g. Andon v 302-304 Mott Assocs.*, 94 NY2d 740 [2000]). The phrase "material and necessary" is "interpreted liberally to require disclosure, upon request, of any facts bearing on the controversy which will assist preparation for trial by sharpening the issues and reducing delay and prolixity. The test is one of usefulness and reason" (*Allen v Crowell-Collier Publishing Co.*, 21 NY2d 403 [1968]; *Foster v Herbert Clepoy Corp.*, 74 AD3d 1139 [2d Dept 2010]). The foregoing standards vest in the trial court broad discretion to supervise discovery and issue such determinations as necessary to vindicate litigant rights and enforce litigant duties arising in the individual case (*see Mironer v City of New York*, 79 AD3d 1106, 1108 [2d Dept 2010]; *Auerbach v Klein*, 30 AD3d 451, 452 [2d Dept 2006]). Where the court determines that relevant discovery was withheld, the usual remedy is a CPLR 3124 order to compel such disclosure. The CPLR 3126 remedy of dismissing a plaintiff's complaint as a consequence of a discovery violation is a drastic one requiring the defendant to show that the plaintiff's conduct was willful and contumacious (*see Greene v Mullen*, 20 AD3d 996 [2d Dept 2010]; *Maiorino v City of New York*, 39 AD3d 601 [2d Dept 2007]; *Kingsley v Kantor*, 265 AD2d 529 [2d Dept 1999]). This showing, in turn, requires proof of a substantial pattern of noncompliance over time coupled with a lack of excuse (*see e.g. Estaba v Quow*, 101 AD3d 940 [2d Dept 2012]; *Dokaj v Ruxton Tower Ltd. Partnership*, 91 AD3d 812 [2d Dept 2012]). Conversely, where the court finds that discovery demands are improper, it may issue a protective order against such discovery to "prevent unreasonable annoyance, expense, embarrassment, disadvantage, or other prejudice to any person or the

courts" (CPLR 3103[a]).

Based on the foregoing standards, Tanenbaum's CPLR 3126 motion to dismiss is denied. Tanenbaum failed to carry the burden of demonstrating that Molinoff committed a substantial pattern of noncompliance over time with no excuse therefor. This Court cannot conclude that Molinoff's objections are frivolous or otherwise have no colorable justification, so as to constitute a lack of excuse for failing to comply. Neither can this Court conclude, on the present record, that Molinoff accrued a substantial pattern of noncompliance. Molinoff's mere making of objections to interrogatories and deposition questions does not alone constitute grounds for the "drastic" remedy of striking his papers, and Tanenbaum presents this Court no basis in law to conclude otherwise. Accordingly, the branch of Tanenbaum's motion seeking to dismiss Molinoff's action as a consequence of alleged discovery violations is denied.

Turning to the interrogatories, Molinoff objected on relevance grounds, among others, to each of the following interrogatory questions: #1 (date on which Molinoff began work on the underlying Family Court papers); #2 (time of day for same); #3 (time of day that Molinoff finished work thereon); #8 (Molinoff's vacation schedule during certain months of the representation); #11 (whether Molinoff's worked on the papers longhand on a legal pad or otherwise, and demanding copies of all drafts); #12 (whether Molinoff employed a secretary and, if so, the secretary's name, duties, working hours and current employment status); #13 (whether Molinoff employed a paralegal and, if so, the paralegal's name, duties, working hours and current employment status); #14 (whether Molinoff employed anyone else and, if so, their names, duties, working hours and current employment status); #15 (what Molinoff did to prepare "for the possibility that [respondent in the Family Court action] would concede on all issues [before the Family Court] except the issue of legal fees"); #17 (when Molinoff knew it would take him eight hours to prepare the Family Court papers); #18 (Molinoff's year of birth and year of admission to the Bar); #20 (details concerning plaintiff's allocation of time between office, courts in particular venues, and other work locations); #21 (year that Molinoff became a sole practitioner); #22 (Molinoff's history of affiliation with other law firms); #23 (whether Molinoff ever employed attorneys in his firm, and if so, giving their names and employment dates); #24 (whether Molinoff is in good standing as an attorney); and #25 (Molinoff's complete disciplinary history, if any). As to the foregoing, Tanenbaum does not explicate the particular relevance of any of the foregoing, instead asserting generally that Molinoff's boilerplate objections are improper and calculated to frustrate Tanenbaum's discovery of evidence to corroborate his claim that Molinoff inflated his invoices.

Interrogatory questions #1, #2 and #3 appear to be substantially duplicative of question #6, which asked Molinoff how he kept track of his time and directed him to provide copies of his timesheets in the underlying Family Court action. To that question, Molinoff's response was that he provided his dated timesheets to Tanenbaum on February 20, 2013. Tanenbaum does not dispute this assertion; neither does he satisfactorily explain why the exact start and end times of Molinoff's work are relevant to Tanenbaum's advocacy in this action. Accordingly, interrogatory questions #1, #2 and #3 do not appear reasonably calculated to lead to discoverable evidence, the same were the subject of Molinoff's proper objections, Tanenbaum's motion to

compel responses thereto is denied, and a protective order against them is granted.

Moreover, even given the liberal presumption of entitlement to discovery under CPLR 3101(a), this Court cannot discern (and indeed, Tanenbaum fails to carry his CPLR 3124 burden to show) the relevance of the remaining interrogatory questions, including Molinoff's vacation schedule, whether Molinoff typed or handwrote first drafts of his legal papers – which question Molinoff answered in his deposition (*see* Tr., at 80), whom Molinoff ever employed, Molinoff's year of birth or Bar admission year – which latter question Molinoff answered in his deposition (*see* Tr., at 5), where else Molinoff works or what courts he may appear in, when he became a sole practitioner – which question Molinoff answered in his deposition (*see* Tr., at 146), whether and when he ever affiliated with other firms, whether Molinoff is in good standing, and what his disciplinary history may be. Neither can this Court discern – and Tanenbaum offers this Court no cogent argument to explicate – why questions #15 and #17 are relevant to the work actually done. None of the foregoing questions appear relevant to whether Molinoff's invoice is due and payable in the amount alleged, or some other amount, or otherwise is reasonably calculated to lead to discoverable evidence concerning the same. While some of these questions might have been relevant to whether Molinoff committed malpractice in his representation of Tanenbaum, such is not the question in the instant action. To the contrary, this Court dismissed Tanenbaum's malpractice action against Molinoff, and denied reargument thereon. Accordingly, the balance of the interrogatory questions to which Molinoff objected and did not thereafter answer in his deposition are irrelevant to the instant action. This Court further finds, on review of the record, that the volume and nature of Tanenbaum's interrogatory questions appears to this Court to be unduly burdensome and invasive. Accordingly, Tanenbaum's motion to compel responses thereto is denied, and a protective order against such discovery pursuant to CPLR 3103(a) is granted.

Turning next to Molinoff's deposition of November 14, 2013, the transcript indicates some 39 matters marked for rulings, denominated as marked matters #1 (Molinoff's home address: Tr., at 4); #2 (pendency of any lawsuits against Molinoff: Tr., at 5); #3 (pending grievances against Molinoff: Tr, at 5); #4 (Molinoff's attorney identification number: Tr., at 6); #5 (whether Molinoff was taking any medication at the time of his deposition: Tr., at 6); #6 (whether Molinoff consumed alcohol in the prior 24 hours: Tr., at 6); #7 (lease term on Molinoff's law office: Tr., at 6); #8 (number of rooms in Molinoff's law office: Tr., at 7); #9 (whether Molinoff shares office space with anyone: Tr., at 7); #10 (employees working for Molinoff in August 2009: Tr., at 7); #11 (whether someone named "Peter" worked for Molinoff at that time: Tr., at 7); #12 (whether "Peter" had authorization to send work emails: Tr., at 7); #13 (identity of Marisol Chapelle); #14 (whether Molinoff could have sued Tanenbaum for invoice payment, or ethically could have threatened litigation, prior to serving the Part 137 notice to arbitrate: Tr., at 28); #15 (the job title of "Peter": Tr., at 29); #16 (whether Molinoff currently employs "Peter": Tr., at 29); #17 (whether Molinoff has a computer at his work desk: Tr., at 30); #18 (who has access to Molinoff's computer: Tr., at 30); #19 (how many email addresses Molinoff has: Tr., at 30); #20 (whether "Peter" continues to work for Molinoff); #21 (where Molinoff went on vacation other than Santa Fe, New Mexico, during late September or early October 2009: Tr., at 53); #22 (name of Molinoff's secretary: Tr., at 79); #23 (whether Molinoff

uses a computer: Tr., at 80); #24 (Molinoff's number of assistants: Tr., at 101); #25 and #26 (the time and day when plaintiff started work on the Family Court papers: Tr., at 130-131); #27 (Molinoff's vacation schedule from August 2009 to April 2010: Tr., at 139-140); #28 (when Molinoff made vacation reservations: Tr., at 140); #29 and #30 (whether Molinoff used a travel agent to make vacation reservations: Tr., at 140); #31 (whether Family Court papers would have been necessary if Tanenbaum's ex-wife had received a certain letter demanding relief and then consented to such relief: Tr., at 143); #32 (name of Molinoff's secretary: Tr., at 144); #33 (what Molinoff did to prepare for the possibility that there would be a concession on certain issues before the Family Court: Tr., at 146); #34 (whether Molinoff also works as a writer and manages real estate: Tr., at 146); #35 (how many hours Molinoff works per week: Tr., at 147); #36 (average number of hours worked per week and percentage of time spent in office, courts of various venues and other locations: Tr., at 147); #37 (whether Molinoff ever worked for a law firm: Tr., at 147-148); #38 (whether Molinoff ever employed attorneys and if so their dates of employment: Tr., at 148); and #39 (whether Molinoff had an attorney who left employment due to "unhapp[iness] with what was perceived as [Molinoff's] lack of integrity": Tr., at 148).

The strong presumption of our law is that a "deponent shall answer all questions at a deposition," subject to a strictly limited number of enumerated exceptions (22 NYCRR [Uniform Rules of the Trial Courts] § 221.2). The rule recognizes only three such exceptions: where refusal to answer is necessary to preserve a privilege or right of confidentiality, or to enforce a limitation set forth in a court order, or if "the question is plainly improper and would, if answered, cause significant prejudice to any person" (Uniform Rule 221.2[iii]). It is against these standards that the 39 marked items must be adjudged.

On the facts and circumstances presented, this Court finds that marked items constituting deposition questions that Tanenbaum read verbatim or substantially paraphrased from Molinoff's interrogatory objections, and as to which interrogatory questions this Court enters a protective order herein, remain properly blocked under Rule 221.2. Two related reasons direct this result. First, Tanenbaum waited fully six months after Molinoff's July 2013 objections to interrogatories before seeking judicial relief with respect thereto. Not only did Tanenbaum fail to seek judicial relief expeditiously, but also he failed to seek such relief when the parties appeared before this Court for their next Compliance Conference on October 8, 2013. The only judicial intervention noted or sought in that day's Compliance Conference Order related to Tanenbaum's then-pending motion to dismiss this action, which this Court denied. Moreover, the Compliance Conference Order expressly directed that "disclosure demands not raised at the Compliance Conference are deemed waived." Nevertheless, this Court, to give Tanenbaum every reasonable opportunity to raise discovery issues, directed in such Compliance Conference Order that any further responses that Molinoff may provide in relation to Tanenbaum's interrogatories were to be transmitted by October 21, 2013. Tanenbaum did not thereafter object to Molinoff's further interrogatory responses or lack thereof, and thereby waived objection.

Second, having opted to propound interrogatories, and then having failed to seek judicial redress in relation to objections raised to those interrogatories, Tanenbaum instead converted those interrogatories into an extensive series of deposition questions posed substantially verbatim

from the blocked interrogatories. It would substantially undermine judicial economy and unduly delay discovery without any countervailing benefit to allow a party to evade objections to – or judicial restrictions on – interrogatory questions by posing those same questions in a deposition, so as to reverse the burden of persuasion as to the validity of those questions. A deposition is a disclosure device, not a sword to pierce the shield of meritorious objections to discovery. To be sure, for his part, Molinoff could have earlier sought a CPLR 3103(a) protective order in relation to interrogatory questions as to which he stated objections, and thereby obtain the court order that Rule 221.2 envisions. On the other hand, it would not have been reasonable for Molinoff to predict - and our law did not oblige Molinoff to predict - that Tanenbaum would repeat in the deposition the same questions he asked by interrogatory, so as to impel Molinoff to earlier seek a protective order against redundancy. In the present procedural posture, where Molinoff stated objections to questions, it was Tanenbaum – not Molinoff – who bore the burden to bring a timely CPLR 3124 motion to compel responses. Tanenbaum having failed to do so, not Molinoff but Tanenbaum ought to bear that consequence. In addition to the foregoing, this Court observes that many of the blocked interrogatory questions, if relevant at all, went to the accusation of legal malpractice, which action this Court dismissed.

Accordingly, marked deposition items numbered 3, 10-12, 15-16, 20, 22, 24-26, 31-33 and 35-38 referenced above, each of them substantially replicating one or more of interrogatory questions to which Molinoff objected as palpably irrelevant, and as to which this Court enters a protective order herein, remain blocked under Rule 221.2(ii). To these questions, Tanenbaum's CPLR 3124 motion to compel is denied and Molinoff's CPLR 3103(a) motion for a protective order is granted.

In addition, certain of these deposition questions are patently improper and, if answered, could result in substantial prejudice to Molioff within the meaning of Rule 221.2(iii). Marked item #3 asked Molinoff about any pending grievances against him, an answer to which may have betrayed statutory requirements of confidentiality that only the Appellate Division may waive in a particular case (*see* Judiciary Law § 90[10]). Marked item #5 asked Molinoff about medication he might be taking, an intrusive fishing expedition into his personal medical status without any foundation in context. Marked item #14 asked Molinoff to opine whether he is perceived to have committed an ethical violation unrelated to this action. These questions were palpably improper and prejudicial within the meaning of Rule 221.2(iii), and were properly blocked on that basis.

As to the remaining marked items referenced above, numbered 1, 2, 4, 6-9, 13, 17-19, 21, 23 27-30, 34 and 39, Tanenbaum gives this Court no basis to find that any of these deposition questions is relevant to Tanenbaum's position in this action. As to what Molinoff's home address is, whether there exist any lawsuits against Molinoff, what Molinoff's attorney identification number is, whether Molinoff had consumed alcohol in the prior 24 hours, information about Molinoff's law office lease and layout, who Marisol Chapelle is, whether Molinoff works with a computer and how many emails he has, where he went on vacation and whether he used a travel agent to make reservations, whether Molinoff has other professional interests and the circumstances under which a prior attorney may have left Molinoff's office – these matters in no respect seem reasonably calculated to lead to discoverable evidence.

Nevertheless, Rule 221.2 does not allow a deponent to refuse to answer a deposition question merely because he or she believes it to lack a close nexus to the prosecution or defense of an action. While the record gives this Court substantial concern that Tanenbaum's deposition examination of Molinoff approached the level of abusiveness, this Court cannot conclude that the examination crossed that line to an extent so palpably improper, and so prejudicial to Molinoff, as to justify blocking these other questions. On the other hand, given that Tanenbaum does not meaningfully explicate the relevance of these questions, and in consideration of all the foregoing the facts and circumstances, this Court is not prepared at this time to require a further deposition of Molinoff. Rather, in the interest of preventing abuse compatibly with Tanenbaum's discovery rights herein, this Court will grant Tanenbaum's CPLR 3124 motion only to the extent of requiring Molinoff to answer, by means of written responses, the limited questions referenced in this paragraph; and this Court therefore also grants the remaining branch of Molinoff's CPLR 3103(a) motion for a protective order against appearing for a further deposition. If Molinoff's written responses to the foregoing questions create a reasonable basis for Tanenbaum to seek further discovery as follow-up to Molinoff's written responses, then Tanenbaum may apply to this Court for consent to seek such further discovery in accordance herewith. All other relief not specifically granted herein is denied. Accordingly, it is hereby

ORDERED that the branch of defendant's motion (Motion Sequence #5) for an order pursuant to CPLR 3126 to dismiss plaintiff's complaint is denied; and it is further

ORDERED that the branch of defendant's motion (Motion Sequence #5) for an order pursuant to CPLR 3124 to compel discovery is granted to the limited extent that not later than 14 days after defendant shall cause this Decision and Order, with Notice of Entry thereof, to be served on plaintiff, plaintiff shall personally serve on defendant responsive written answers to the depositions questions denominated herein as marked items numbered 1, 2, 4, 6-9, 13, 17-19, 21, 23, 27-30, 34 and 39, and all other branches of defendant's motion to compel is denied; and it is further

ORDERED that plaintiff's motion (Motion Sequence #6) for a protective order pursuant to CPLR 3103(a) is granted as against (1) each question propounded in defendant's Demand for Interrogatories as to which plaintiff objected in his written responses thereto; (2) the deposition questions denominated herein as marked items numbered 3, 5, 10-12, 14-16, 20, 22, 24-26, 31-33 and 35-38; and (3) the need to appear for any further deposition in this action, except as this Court hereafter may order in accordance herewith; and it is further

ORDERED that if plaintiff's further written responses, as required hereunder, create a reasonable basis for further discovery with respect thereto, then defendant may seek leave of this Court to conduct such further discovery provided that defendant first shall demand, by electronic mail sent to *compliancewestchester@nycourts.gov* on notice to plaintiff, a compliance conference concerning the need for such discovery not later than 14 days after plaintiff shall personally serve such responses on defendant, or else such further discovery shall be deemed waived; provided that any motion for judicial relief in relation to such further discovery shall be brought by Order to Show Cause pursuant to a briefing schedule issued in conformity with the

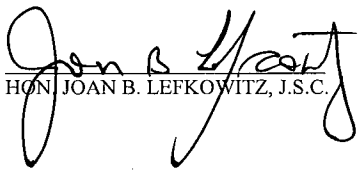
Differentiated Case Management Rules of this Court; and it is further

ORDERED that defendant shall serve this Decision and Order, with Notice of Entry thereof, on plaintiff within seven days of the date hereof; and it is further

ORDERED that all parties are directed to appear in the Compliance Part, Room 800, of this Courthouse, at 9:30am on Monday, May 19, 2014, and all other Compliance Part conferences heretofore scheduled are adjourned to such date.

The foregoing constitutes the Decision and Order of this Court.

Dated: White Plains, New York
March 31, 2014



HON. JOAN B. LEFKOWITZ, J.S.C.

TO: Daniel Molinoff, Esq.
Plaintiff pro se
2039 Palmer Avenue
Larchmont, NY 10538
By NYSCEF

Mark Tanenbaum, Esq.
Defendant pro se
P.O. Box 500
43-29 Bell Boulevard
Bayside, NY 11361
FAX: (718) 224-7646