

Bleakley Platt & Schmidt, LLP v Barbera
2014 NY Slip Op 33711(U)
October 6, 2014
Supreme Court, Westchester County
Docket Number: 50984/2012
Judge: Joan B. Lefkowitz
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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
BLEAKLEY PLATT & SCHMIDT, LLP,

Plaintiff,

-against-

LISA G. BARBERA,

Defendant.
-----X

DECISION & ORDER

Index No. 50984/2012
Decision Date: Oct. 6, 2014
Motion Seq. #2 & #3

The following papers were read on: (1) this motion by defendant to stay discovery, consolidate this action with another action between the parties pending in this Court for discovery purposes, and vacate or modify a prior Compliance Conference Order of this Court consistent with the foregoing relief (Motion Sequence #2); and (2) this motion by plaintiff pursuant to CPLR 3126 to strike defendant’s answer, grant judgment in favor of plaintiff, and award plaintiff attorneys fees in this action (Motion Sequence #3):

- Motion Sequence #2: Order to Show Cause, Affirmation in Support
Affirmation in Opposition
- Motion Sequence #3: Order to Show Cause, Affirmation in Support
Movant’s Memorandum of Law, Exhs A-DD
Affirmation in Opposition

Upon the foregoing papers and proceedings held on October 6, 2014, the motions are consolidated for purposes of decision and are determined as follows:

Plaintiff Bleakley Platt & Schmidt, LLP (hereinafter “BPS”), commenced this collection action by Verified Complaint dated January 24, 2012, against its former client, defendant Lisa G. Barbera, alleging that defendant failed to pay BPS \$502,816.18 in connection with plaintiff’s provision of legal services representing defendant in certain probate, guardianship and corporate matters between 2005 and 2011. After defendant interposed her answer, the parties entered into a Preliminary Conference Stipulation dated February 24, 2014, which provided for documentary disclosure and party depositions. After the Compliance Conference of May 6, 2014, a Compliance Conference Order (hereinafter “CCO”) was entered directing defendant to respond by May 30, 2014, to plaintiff’s discovery demands dated January 31, 2013. After the Compliance Conference on June 5, 2014, a second CCO was entered directing plaintiff to provide defendant with “documents, emails [and] billing records on a disc [or otherwise] in electronic form within 30 days hereof.” Such CCO also fixed dates certain for plaintiff and

defendant depositions in August and September 2014, respectively. At the next Compliance Conference of August 5, 2014, a third CCO was entered directing the conduct of plaintiff's depositions in August 2014 and defendant's depositions in September 2014, on the same dates certain as the second CCO of June 5, 2014, provided. The third CCO of August 5, 2014, mandated that these "depositions shall not be adjourned without prior court order."

On August 8, 2014, defendant filed a Notice of Motion to consolidate this action with another action pending in this Court, *Barbera v Bleakley Platt & Schmidt, LLP* (Index No. 64986/2012 [Sup Ct Westchester Co]) (hereinafter "the malpractice action"), in which the client alleges that counsel committed legal malpractice in certain representations for which the client's alleged nonpayment is at issue in the instant collection action. On August 19, 2014, after defendant declined to proceed with plaintiff's depositions on the dates specified in the third CCO, plaintiff demanded a pre-motion conference to remedy this refusal to proceed with discovery. Pursuant to a briefing schedule, defendant now moves to stay the depositions in the instant action until completion of documentary discovery that defendant alleges remains outstanding, to consolidate the instant collection action with the malpractice action, and to vacate or modify the CCO of August 5, 2014. Also pursuant to a briefing schedule, plaintiff moves pursuant to CPLR 3126 to strike defendant's answer, grant judgment in plaintiff's favor, and award plaintiff attorney's fees in this action.

Defendant's Motion to Stay Discovery

The branch of defendant's motion seeking a stay of discovery is denied. Defendant made no substantial demonstration that discovery should be stayed, much less a demonstration adequate to invoke this Court's discretion. Given that defendant asserts that depositions should await the completion of outstanding documentary discovery, this Court construes this branch of defendant's motion instead as an application to compel such discovery pursuant to CPLR 3124.

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 enforce litigant rights and duties in discovery (*see Mironer v City of New York*, 79 AD3d 1106, 1108 [2d Dept 2010]; *Auerbach v Klein*, 30 AD3d 451, 452 [2d Dept 2006]).

On a CPLR 3124 application to compel discovery, the movant (here, defendant) bears the burden to explicate with particularity the discovery withheld, and then prove that such discovery meets the foregoing standards of materiality and relevance.

In support of this CPLR 3124 application, defendant avers that in response to defendant's Notice for Discovery and Inspection, plaintiff made available to defendant at plaintiff's office in March 2014 some 50 boxes of documents. Defendant concedes defense counsel and a paralegal spent several weeks at plaintiff's offices in March 2014 reviewing and sorting these documents. Defendant asserts that the boxes were voluminous, poorly indexed, poorly organized and in some instances so duplicative that defense counsel could not discern which ones plaintiff used, which were drafts, and which were not complete. Defendant next avers that plaintiff opted to tender its files to defendant in electronic form, tendering three CDs covering some 1,651 documents that plaintiff deems to represent "Bleakley Platt's whole server regarding the [underlying] litigation." As to this submission, defendant does not indicate that any documents necessarily are withheld, only that the entire submission is voluminous. The gravamen of defendant's position is that "we have no means of determining which particular files or documents were actually completed and deployed to some purpose, to what specific purpose, in what proceeding and in what context." Defendant does not aver that plaintiff violated any term of the CCO dated June 5, 2014, which required plaintiff to tender to defendant all relevant "documents, emails [and] billing records on a disc [or otherwise] in electronic form within 30 days hereof."

This Court concludes that defendant failed to satisfy the CPLR 3124 threshold showing that any particular discovery remains outstanding, much less that any such discovery is material and relevant within the meaning of CPLR 3101(a). As defendant failed to make this threshold showing, and given the appearance that plaintiff allowed defendant unfettered access to plaintiff's office for several weeks, and tendered its entire file both in paper and electronic form, this Court has no basis to conclude that plaintiff wrongly withheld discovery. Accordingly, this branch of defendant's motion must be denied.

For the same reason, this Court has no basis to conclude that depositions should be further delayed – or indeed, that defendant had any credible basis unilaterally to refuse to proceed with depositions: the CCO dated August 5, 2014, specifically directed defendant to proceed with depositions on dates certain with no further extensions or adjournments absent prior written judicial authorization. That defendant nevertheless declined to proceed with depositions, and arrogated to itself the practical capacity to effectuate a stay of discovery during the pendency of this motion, warrants concern for the vitality and enforcement of judicial orders. As the Court of Appeals aptly noted, "a litigant cannot ignore [discovery obligations] with impunity" (*Kihl v Pfeffer*, 92 NY2d 118, 123 [1999]). If defendant has relevant questions to ask plaintiff about these documents, defendant can ask them at depositions, but after defendant's many additional months of custody of plaintiff's entire electronic file, this Court will accept no further delay of depositions by defendant on grounds of ostensibly incomplete discovery. Accordingly, this branch of defendant's motion is denied.

Defendant's Motion to Consolidate for Discovery Purposes

The next branch of defendant's motion is to consolidate the instant collection action with the malpractice action. As a prefatory matter, this Court notes that Barbera interposed on August 8, 2014, a Notice of Motion in the malpractice action to consolidate it with the instant action,

thus resulting in two separate motions to consolidate simultaneously pending before this Court. In support of the instant motion for consolidation, defendant cites *Tortorello v Carlin* (182 AD2d 524 [1st Dept 1992]) for the proposition that a collection action and a legal malpractice action arising out of the same nexus of operative facts can be consolidated for discovery purposes. Defendant further asserts that consolidation would best serve judicial economy inasmuch as the vast majority of discoverable materials concern the nature and extent of services rendered, which bears on both actions. Defendant also asserts that defendant unjustly would suffer undue cost by proceeding with both actions without consolidation, inasmuch as defendant must pay for representation in both actions whereas BPS is represented by its liability carrier in the malpractice action.

Plaintiff opposes the application, asserting that while plaintiff memorialized in early 2014 plaintiff's agreement to informally coordinate discovery in both actions, defendant never replied to plaintiff's overture except to agree that plaintiff should disclose its file only once for both actions. Thereafter, plaintiff avers, the two cases followed different tracks: the Preliminary Conference Stipulation in the malpractice case was not issued until August 14, 2014, and provides for a lag until December 1, 2014, for depositions – long after the closure of discovery in this collection action. Based on the foregoing recitation, and given that defendant did not raise the consolidation issue at any of the three Compliance Conferences memorialized above, plaintiff concludes that it is too late to consolidate the two actions.

CPLR 602(a) vests in this Court discretion to consolidate actions involving “a common question of law or fact” so as to “avoid unnecessary costs or delay.” In *Tortorello*, the Appellate Division affirmed such a consolidation between a collection action and related legal malpractice action, and rejected the view that consolidation would cause undue delay where “neither side has a premium on [causing] delay” (*Tortorello*, 182 AD2d at 525). By contrast, in *Ambac Assur. Corp. v Countrywide Home Loans, Inc.* (94 AD3d 455 [1st Dept 2012]), the Appellate Division declined to order consolidation where cases, while sharing a nexus of operative facts, were in “completely different stages of discovery, and consolidation would result in undue delay.”

On the facts presented, the collection action and malpractice action are at “completely different stages of discovery” inasmuch as the collection action is the subject of a Preliminary Conference Stipulation nearly eight months ago, while plaintiff sought and obtained a Preliminary Conference Stipulation in the malpractice action only in late August 2014. Under the Preliminary Conference Stipulation in the malpractice action, depositions are not due to be completed for another two months – and this Court already determined that no further delay in this action is warranted given that defendant unilaterally declined to proceed with depositions in violation of this Court's express Order to the contrary. Thus, granting defendant's consolidation motion would countenance the very delays that CPLR 602(a) seeks to avoid. Neither can this Court conceive of a legitimate reason that defendant should not have sought judicial intervention earlier in the malpractice action so as to bring on a Preliminary Conference and then seek to consolidate it with the instant collection action. This Court also is concerned that defendant's record of delay and prior violation of discovery orders may render illusory any remedial order by this Court that would attempt to accelerate discovery in the malpractice action so as to vindicate

BPS' legitimate interest in avoiding further delay (*cf. Alsol Enterprises, Ltd. v Premier Lincoln-Mercury, Inc.*, 11 AD3d 494 [2d Dept 2004]). Taken together, this Court concludes that granting defendant's consolidation motion at this time would have the perverse effect of rewarding delay with still more delay, in derogation of judicial economy and the policy goals of CPLR 602.

Accordingly, on these facts and circumstances, and in the invocation of this Court's discretion, this Court declines the invitation of CPLR 602(a) to order a consolidation of these actions at this time. If defendant timely proceeds with depositions in accordance herewith, and thereafter wishes to seek consolidation, this Court will consider a renewed consolidation application at that time. For now, however, the branch of defendant's motion seeking consolidation is denied without prejudice to a new application brought consistent herewith.

Defendant's Motion to Vacate or Amend the Compliance Order of August 5, 2014

The remaining branch of defendant's motion is to vacate or amend the CCO dated August 5, 2014. Based on the foregoing denial of the other branches of defendant's motion, this Court has no basis to vacate or amend the CCO. Thus, this branch of defendant's motion is denied.

Plaintiff's Motion to Strike Defendant's Answer

Turning to plaintiff's motion to strike defendant's answer as a consequence of failing to proceed with depositions, plaintiff concedes that New York law favors determination of disputes on the merits. For that reason, the CPLR 3126 remedy to strike a pleading in consequence of an alleged discovery violation is a "drastic" remedy predicated on a clear showing that the party's failure to comply with discovery obligations is "willful and contumacious" (*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]). Willful and contumacious derogation of pre-trial discovery obligations may be inferred from a substantial pattern of noncompliance over time, coupled with the party's lack of excuse for these failures (*see e.g. Estaba v Quow*, 101 AD3d 940 [2d Dept 2012]; *Dokaj v Ruxton Tower Ltd.*, 91 AD3d 812 [2d Dept 2012]).

Whether defendant acted willfully and contumaciously in derogation of its discovery duties is a close question. As recited above, defendant plainly violated the CCO dated August 5, 2014, by unilaterally declining to proceed with plaintiff's deposition absent advance judicial consent. Defendant's papers provide this Court no basis to conclude that defendant's conduct in this regard was anything but willful. As to whether such conduct was contumacious, defendant asserts that depositions could not proceed efficiently without other discovery relief. While this Court rejects this argument for the reasons stated above, this Court will grant defendant one final opportunity to proceed with discovery in accordance herewith before entertaining the "drastic" relief that plaintiff seeks. Accordingly it is hereby

ORDERED that defendant's motion to stay depositions until completion of documentary discovery, consolidate discovery in this action with another action between the parties pending in this Court, and vacate or modify a prior CCO of this Court consistent with the foregoing relief, is

denied provided that the branch of the motion seeking consolidation is denied without prejudice to the making of a further such application after the completion of party depositions in this action; and it is further

ORDERED that plaintiff's motion pursuant to CPLR 3126 is granted to the limited extent that defendant shall proceed with party depositions in this action such that plaintiff's depositions shall be completed no later than November 10, 2014, and defendant's depositions shall be completed no later than December 4, 2014; provided that if plaintiff complies herewith but defendant does not comply herewith, then within seven days after defendant's violation hereof, plaintiff may file with this Court by NYSCEF an affidavit of noncompliance attesting to the facts and circumstances of such violation, and this Court shall enter an order striking defendant's answer and granting judgment to plaintiff; and it is further

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

ORDERED that counsel for all parties are directed to appear in the Compliance Part, Room 800, of this Courthouse, at 9:30am on Friday, November 14, 2014.

The foregoing constitutes the Decision and Order of this Court.

Dated: White Plains, New York
October 6, 2014



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

TO: Richard F. Markert, Esq.
Bleakley Platt & Schmidt, LLP
Plaintiff
One North Lexington Avenue
White Plains, New York 10601
By NYSCEF

James B. Reich, Esq.
Belair & Evans, LLP
Attorneys for Defendant
61 Broadway, Suite 1320
New York, New York 10016
By NYSCEF