

**Von Maack v Wyckoff Hgts. Med. Ctr.**

2019 NY Slip Op 34206(U)

April 1, 2019

Supreme Court, Kings County

Docket Number: 504150/13

Judge: Wavny Toussaint

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At an IAS Term, Part 70 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 1<sup>st</sup> day of April 2019.

P R E S E N T:

HON. WAVNY TOUSSAINT,  
Justice.

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DOROTA VON MAACK,  
Plaintiff,

- against -

Index No. 504150/13

WYCKOFF HEIGHTS MEDICAL CENTER,  
Defendant.

-----X

The following papers numbered 1 to 11 read herein:

Notice of Motion/Order to Show Cause/  
Petition/Cross Motion and  
Affidavits (Affirmations) Annexed \_\_\_\_\_  
Opposing Affidavits (Affirmations) \_\_\_\_\_  
Reply Affidavits (Affirmations) \_\_\_\_\_

Papers Numbered

1-3, 4-5,6-7,8-9, 10-11

Upon the foregoing papers, defendant Wyckoff Heights Medical Center (defendant or Wyckoff) cross-moves, pursuant to CPLR 3124 and CPLR 3126, for an order: (1) dismissing the verified complaint of pro se plaintiff Dorota Von Maack (plaintiff) for failure to obey a court order to provide discovery pursuant to CPLR 3126 or, alternatively, (2) directing plaintiff to appear for her deposition and answer all questions asked of her; (3) imposing monetary sanctions on plaintiff in an

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amount sufficient to deter future misconduct; and (4) awarding defendant its attorney's fees and costs of plaintiff's first deposition, the subsequent court hearing, all efforts related to secure plaintiff's compliance with her discovery obligations, this motion, opposing plaintiff's motion to recuse Justice Johnny Lee Baynes, and any future expenses associated with these issues (such as any subsequent deposition, in the event the verified complaint is not dismissed) (Motion Sequence 5 [Mot. Seq.] - dismiss/compel).<sup>1</sup>

Plaintiff moves for "statutory relief" under her Labor Law § 741 cause of action (Mot. Seq. 6).

By separate motion, defendant cross-moves, pursuant to CPLR 3126, for an order: (1) dismissing the verified complaint for plaintiff's continued failure to obey a court order to provide discovery pursuant to CPLR 3126 or; (2) dismissing the verified complaint for failure to file a note of issue relating to plaintiff's Labor Law § 741 cause of action or alternatively, (3) vacating the April 24, 2018 note of issue pursuant to Uniform Rules for Trial Courts (22 NYCRR) § 202.21 as discovery is still outstanding; and (4) compelling plaintiff to appear for a deposition and answer all questions asked of her regarding her Labor Law § 741 cause of action; or, if the note of issue is not vacated, (5) extending its time to file a motion for summary judgment

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<sup>1</sup>As noted, this motion was made in response to plaintiff's motion to recuse Justice Johnny Lee Baynes from the instant action (Mot. Seq. 4). By order dated January 24, 2018, Justice Baynes recused himself from this action.

within 60 days from the completion of post-note discovery and; (6) striking, for a second time, plaintiff's request for a trial by jury (Mot. Seq. 7 - dismiss/vacate).

By separate motion, defendant moves, pursuant to CPLR 3126, for an order dismissing the verified complaint with prejudice based on plaintiff's continued refusal to obey court orders and refusal to provide discovery (Mot. Seq. 8 - dismiss with prejudice).

By separate motion, plaintiff moves to recuse Justice Wavny Toussaint from the instant action (Mot. Seq. 9).

### ***Facts and Procedural History***

The motions before the court stem from plaintiff's belief that she is not required to comply with discovery and answer questions at a deposition because her verified complaint, which had been dismissed by this court in 2014, was reinstated by the Appellate Division, Second Department in 2016.

As set forth more fully in *Von Maack v Wyckoff Hgts. Med. Ctr.* (43 Misc 3d 1206 [A], 2014 NY Slip Op 50514 [U] [Sup Ct, Kings County 2013], *rev'd* 140 AD3d 1055 [2d Dept 2016]), plaintiff is a pharmacist formerly employed by defendant who commenced the instant retaliatory personnel action seeking to recover damages because she was allegedly discharged for complaining about unsafe conditions in defendant's pharmacy, in violation of Labor Law § 741, New York's Health Care Whistle blower Law. On or about September 25, 2013, defendant moved for, among other things, dismissal of the verified complaint pursuant to CPLR 3211 (a) (7),

which was granted by decision and order of this court, dated March 13, 2014 (Schmidt, J.). Thereafter, plaintiff, at that point proceeding pro se, appealed from so much of the order which granted that branch of defendant's motion to dismiss. The appeal was granted, the order of this court was reversed, and the verified complaint was reinstated (the Appellate Division order) (*Von Maack*, 140 AD3d 1055).<sup>2</sup> Specifically, the Appellate Division held that plaintiff's allegations were sufficient to state a claim but stated that "[t]o the extent that the plaintiff raises contentions regarding the merits of her cause of action, these contentions involve disputed factual issues that are not properly resolved on a motion to dismiss pursuant to CPLR 3211 (a) (7)" (*id.* at 1058).

#### *Commencement of Discovery*

On November 10, 2016, defendant filed a verified answer. On November 11, 2016, defendant served plaintiff with the first deposition notice in this matter for January 30, 2017. On December 12, 2016, defendant served plaintiff with its first request for production of documents and first set of interrogatories. It is undisputed that plaintiff did not timely object to, respond to, or otherwise answer defendant's discovery demands.

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<sup>2</sup>Defendant's motion for leave to reargue the appeal from the order of the Supreme Court, Kings County, dated March 13, 2014, which was determined by the Appellate Division, Second Department on June 22, 2016, was denied by order of Appellate Division, Second Department, dated January 23, 2017 (M224868).

Instead, on or about December 17, 2016, plaintiff sent a letter to District Judge Edgardo Ramos of the United States District Court for the Southern District of New York, who was presiding over a parallel litigation in Federal Court in which plaintiff claimed she was terminated - not because of whistle-blowing - but because of her age, sex, nationality, race, disability, and in violation of OSHA and other federal statutes (*see Von Maack v Wyckoff Heights Medical Center*, 15-cv-3951 [SD NY December 19, 2016]). In her letter, plaintiff complained that defendant's discovery requests in the instant state action were an attempt to "delay, obscure and obstruct" the Appellate Division order reinstating her verified complaint, which constituted the "continuation of the retaliation of [her] human rights taking place right in front of involved courts" and defendant's attempt to "conduct [a] private interrogation of [her] without any court's knowledge or permission." Plaintiff also stated that defendant could not "request and bring any new evidence here;" that "[t]he menacing requests are revengeful toward me;" that it "look[ed] like [d]efendant [was] prepping for a trial even though any discovery . . . attempts are not permitted;" and asked the court to prevent defendant "from mailing to me such harassing and prejudicial off-court requests" and to "prohibit [d]efendant from forwarding to me any interrogatory requests without the Court's prior permission."

On January 9, 2017, defendant sent a letter to plaintiff by overnight mail stating, among other things, that her discovery responses were overdue, cautioning that if she did not produce responsive documents and provide written responses by

January 17, 2017, it would file a motion to compel compliance. Defendant also informed plaintiff that her letter to Judge Ramos had been rejected because the discovery demands had been served in the instant state action, not the federal action, and that even assuming plaintiff's letter were deemed responsive to its discovery demands, the letter failed to comply with the CPLR. In addition, defendant advised plaintiff that it did not need court approval to serve her with document requests or interrogatories, that its demands were directly related to plaintiff's allegations in her complaint and were material and necessary to its defense, and that it could not proceed with the scheduled January 30, 2017 deposition unless plaintiff produced documents and written responses to its discovery demands sufficiently in advance of the deposition.

On January 25, 2017, defendant filed a motion in this court to compel plaintiff to provide responses to the outstanding discovery demands. Rather than deciding the motion, the court marked it withdrawn over defense counsel's objections and scheduled the matter for a preliminary conference to set a discovery schedule. Plaintiff states that "[i]n effect, the Supreme Court dismissed this motion," and that "[a] court hearing referring to this matter was cancelled."

The parties first appeared for a preliminary conference on April 24, 2017; plaintiff explained that she had won the case because of the Appellate Division order (reinstating the verified complaint) and therefore did not need to respond to defendant's discovery requests. The court attorney handling the matter explained

to plaintiff that the Appellate Division order did not mean that she had won the case and that she had to now litigate the case in order to prove legal liability and potential damages, and the court attorney adjourned the preliminary conference to May 31, 2017 in order to afford plaintiff the opportunity to retain counsel. According to plaintiff, “[e]very [c]ourt lawyer and [c]ourt [o]fficer” before whom she appeared “told [her] conclusively that [she had] won the Section 741 of [her] claim and that there [was] no [remand] for any trial,” and that “[d]efendant wants to litigate my health loss [claim].”

On May 31, 2017, the parties appeared for a second preliminary conference. According to defendant, plaintiff advised defendant that she had not retained counsel and the court attorney again advised plaintiff that she had not won her case because of the Appellate Division order and had to submit to discovery. The court (Baynes, J. by JHO Schneier) entered a preliminary conference order (PCO) providing plaintiff with 60 days to respond to defendant’s outstanding discovery requests, directed that all depositions were to be completed by October 31, 2017, and set January 25, 2018 as the end date for discovery. According to plaintiff, JHO Schneier “made the health loss claim the only subject of the prehearing and compliance conferences;” the May 31, 2017 PCO “directed the [d]efendant to conduct discovery concerning the health loss claim;” the court attorney assigned the matter “a complex track due to the health loss issue it contain[ed];” Mr. Suden (defense counsel) stated that with respect to “discovery demands related to [p]laintiff’s health

and mental status,” plaintiff had “put those topics at issue by alleging that she developed serious health problems as a result of her exposure to toxins while working in the . . . pharmacy” and was “seeking damages for all alleged emotional distress and mental anguish” and that therefore “the discovery demands relating to [p]laintiff’s health are material and necessary to the claims and defenses in this action.”<sup>3</sup>

Thereafter, the parties engaged in written discovery and plaintiff provided documents and answers to interrogatories. Plaintiff claimed, among other things, that the Appellate Division had already decided her Labor Law § 741 claim, that the Appellate Division order did not remand the matter for further discovery, and that any new discovery regarding her § 741 claim was not allowed by law. In particular, in response to the first question asking plaintiff to describe her understanding of the policies and procedures in effect at Wyckoff during plaintiff’s employment with respect to reporting unsafe working conditions, plaintiff responded: “It is really disgraceful for the defense that it asks such basic questions right after the final order of the Appellate Division was issued.” With respect to the sixth question asking plaintiff to identify, among other things, the physicians, nurses, and patients with whom plaintiff consulted, plaintiff replied that the issue had been “asserted in plentiful detail in my appeal briefs. They were [sic] considered by the Appellate

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<sup>3</sup>Plaintiff also states that this “prehearing conference” pertained only to her “health loss claim.”

Division that issued a final order on this matter;” “I request the King[s] County Supreme Court to prevent the defendant [from] its endless attempts of re-litigating [‘]settled by law[’] matters;” “[s]ince the Appellate Division’s decision is final the defendant’s request is not only untimely but also unreasonable;” and the “defendant attempts to re-litigate [‘]settled by law[’] matters . . . is contemptuous to the Appellate Division which issued [a] specific order in this legal action.”

In addition, by letter to defendant dated July 6, 2017, plaintiff stated that there were two claims alleged in the complaint, her § 741 claim and her “health loss” claim, and that “the decision and order in this legal action is already in place and is final.” In particular, plaintiff asserted that discovery was “limited only to evidence presented to the Appellate Division” and that “defendant is prohibited to relitigate this matter here . . . [t]herefore, any new discovery in reference to section 741 is disallowed by law.” In response, by letter dated July 18, 2018, defense counsel explained to plaintiff that her belief that she had won the case was false, and that she was required to submit to full discovery on her § 741 claim. Counsel also asserted that the verified complaint only contained her §741 claim; that in any event, any claim related to “[h]ealth loss acquired in the course of employment” was barred by the Worker’s Compensation Law; and that even were it not precluded, it was time-barred.

On September 19, 2017, defendant served plaintiff with an amended deposition notice for October 19, 2017. Plaintiff states that she attended an October

9<sup>th</sup>, 2017 compliance conference during which she provided defendant with answers to its interrogatories and requests for production of evidence, and that the court attorney agreed that the Appellate Division order did not remand her § 741 claim for discovery or trial.

On October 19, 2017, plaintiff appeared for her deposition but objected and refused to answer questions because they were not related to her § 741 claim; refused to answer questions about written statements she made because they were submitted in other forums, such as in federal court or before the National Labor Relations Board; and refused to answer most questions relating to her § 741 claim on the grounds that it had already been decided by the Appellate Division order, that she had “won,” and that defense counsel was trying to “put down” the decision of the Appellate Court. She also refused to answer questions regarding the specific violations she was alleging or questions about her job duties.

Plaintiff states that during the deposition, defense counsel attempted to intimidate her by inviting her former director and “[d]efendant’s Labor Relation Manager” plus two other attorneys to the deposition; that she “became a victim of deceit when [d]efendant avoided questions related to the health loss claim (as directed by the JHO)” and questioned her about her “Section 741 [cause of action] to ‘challenge’ the Appellate [o]rder;” and that during the deposition she answered defendant’s questions “to the best of [her] knowledge.” Plaintiff also asserts that during the deposition she asked defense counsel to show her where the Appellate

Division order remanded the case for discovery, but that during the break and thereafter, defense counsel failed to do so.

*Proceedings before Justice Johnny Lee Baynes*

Based upon plaintiff's refusal to answer questions, and in advance of a November 1, 2017 conference, defense counsel sent Justice Johnny Lee Baynes a letter,<sup>4</sup> dated October 30, 2017, setting forth the background of this case, outlining issues which arose during plaintiff's deposition, and asking the court to: (1) enter an order clarifying for plaintiff the status of the case, and (2) directing plaintiff to sit for a second deposition and to respond to questioning posed by defense counsel, to the extent permitted under CPLR 3101, 3113, and 3115.

On November 1, 2017, the parties appeared before Justice Baynes to address the October 19, 2017 deposition which, according to plaintiff, was meant "to force [her] to answer prohibited questions" at a second deposition. During the proceedings, plaintiff commented that the "higher court" had "decided on" the § 741 claim and that her "understanding" was that her § 741 claim had been "ruled [on] by the higher court in [her] favor." The court advised plaintiff that she had to answer questions posed by defense counsel during the deposition. In particular, the court explained that:

- because the complaint had been reinstated, namely because defendant "won initially and then the Appellate

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<sup>4</sup>After Justice Schmidt retired, the matter was transferred to Justice Kathy King. Thereafter, it was transferred to Justice Johnny Lee Baynes.

Division which is a higher court, said [it] didn't win . . . you are going back to the beginning, which in essence means now you have to answer questions. It's as simple as that";

- that the Appellate Division order meant that the matter "[s]tart[s] all over";

- that "[w]hen you object . . . you still have to answer the question. I will make it easy, you still are going to have to answer the question";

- that "the Appellate Division said [the case] shouldn't have been dismissed . . . Now if the case was not dismissed there is something called discovery. Okay. And this is what [defendant] is doing now, discovery"; and

- that "she [plaintiff] is going to answer the questions that are put to her."

When defense counsel asked the court if it would issue a written decision clarifying what had occurred at the hearing, the court directed defense counsel to order the record from the court reporter, and defense counsel agreed. The court then responded:

"I don't think that's necessary, but order the record from the court reporter. Everybody knows what I said, and it should speak for itself. But order the record from the court reporter. That's as clear as I can make it."

According to plaintiff, the court, which "showed favoritism and collaboration with the defense," "sided with the [d]efendant on every issue raised by [defense counsel] and granted . . . every request [defense counsel] asked for" and that she had to object to questions related to her §741 claim because they were "*set forth in an*

*order of [the appellate] court*” and were therefore “prohibited by 22 NYCRR 221.2 (ii).”<sup>5</sup>

Later that day, defendant served plaintiff with a notice of continued deposition for November 8, 2017. On November 6, 2017, defense counsel advised plaintiff via email that she had to adjourn the November 8, 2017 deposition, and requested plaintiff’s availability for alternate dates. Plaintiff replied that she had received the message and that she was “ready . . . for the next deposition. Anytime.” On November 7, 2017, defense counsel emailed plaintiff asking whether the deposition could be rescheduled for November 17, 2017. Plaintiff did not respond to this email.

On November 9, 2017, the parties appeared for a compliance conference. According to defendant, during the conference, plaintiff again objected to continued discovery of her § 741 claim based on her belief that she had won the case, and further explained her intention to file a motion to recuse Justice Baynes. As a result, the court issued a compliance conference order giving plaintiff until December 1,

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<sup>5</sup>Section 221.2 of the Uniform Rules for the Conduct of Depositions provides:

“[a] deponent shall answer all questions at a deposition, except (a) to preserve a privilege or right of confidentiality, (b) to enforce a limitation set forth in an order of a court, or (c) when the question is plainly improper and would, if answered, cause significant prejudice to any person. An attorney shall not direct a deponent not to answer except as provided in CPLR Rule 3115 or this subdivision. Any refusal to answer or direction not to answer shall be accompanied by a succinct and clear statement of the basis therefor. If the deponent does not answer a question, the examining party shall have the right to complete the remainder of the deposition.”

2017 to file her motion, setting December 15, 2017 as the deadline to complete plaintiff's deposition, and directing plaintiff to file her note of issue on or before April 25, 2018.

Plaintiff states that the order "pertain[ed] only to my health loss claim. It permitted oral deposition only in reference to that particular claim." Defendant states, and plaintiff does not dispute, that the court attorney directed plaintiff to respond in writing as to whether she intended to appear for the second day of deposition on November 17, 2017. That same day, defense counsel sent plaintiff an email requesting that she respond by 5 p.m. on November 13, 2017 as to whether she intended to appear for the continued deposition on November 17, 2017.

On November 11, 2017, plaintiff responded that "[d]espite [her] best efforts," she would not be able to attend the November 17, 2017 deposition. Defense counsel responded, via email, asking why plaintiff could not respond and to provide alternate dates before the December 15, 2017 deadline. Plaintiff replied that she had personal obligations, including finding a job and writing the motion to recuse Justice Baynes. Defense counsel agreed to reschedule the deposition and asked plaintiff to provide alternate dates.

Plaintiff failed to respond. On November 15, 2017, defense counsel served plaintiff with an amended notice of continued deposition for December 4, 2017. On November 21, 2017, plaintiff emailed defense counsel stating that she could not attend the December 4, 2017 deposition, and offered to attend on December 11, 2017.

When defense counsel asked for a reason, plaintiff responded that she had technicians coming to her house to repair her heating system. Defense counsel then offered to conduct the deposition on December 5, 2017, as she was not available on December 11, 2017.

Before plaintiff responded, defense counsel received plaintiff's notice of motion to recuse Justice Baynes on November 27, 2017.<sup>6</sup> Defense counsel, became concerned that plaintiff would not abide by Justice Baynes' "order;" and would refuse to answer certain questions at her deposition, thus requiring additional judicial intervention. So as to avoid the risk of paying additional fees and costs to prepare for the deposition, counsel for defendant emailed plaintiff, asking her, inter alia to "please confirm that when you appear for deposition you will answer the questions which we put to you."

In response, plaintiff asked what counsel meant by "questions about your claims" and requested that counsel list these claims "one by one." Defense counsel again explained plaintiff's broad discovery obligations under the CPLR; advised plaintiff that Justice Baynes had instructed that she must answer questions at the

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This motion has been resolved by virtue of Justice Baynes recusal, by order dated January 24, 2018. However, in her reply to defendant's cross motion to dismiss or compel, plaintiff stated that at the November 1, 2017 hearing, Justice Baynes "overruled" the Appellate Division order by "sending the Section 741 claim for discovery and re-litigation" and that Justice Baynes did not understand that the Appellate Division had "not only reversed the lower court's order but issued a conclusive and specific order . . . in my favor" and that the order "granted me relief under Section 741 . . . (reinstatement, back pay and other remunerations) without any remand to the King[s] County Supreme Court."

deposition even if she objected to them; that they could only proceed if plaintiff agreed to appear and answer questions; and that if she did not agree to do so, defendant would cross-move to compel her deposition.

Plaintiff offered December 12, 2017 as an alternate date and, because that date was not possible, defense counsel offered December 14, 2017, asking for a third time to “please confirm that you will follow the orders of Judge Baynes and answer the questions which I present to you,” and that “[i]f you are going to ‘object’ and refuse to answer questions, any deposition will be a waste of time.”

On November 27, 2017, plaintiff responded that the “coming week” was very busy for her, and stated: “Ms. Hoey I will answer all your questions related to the matter and according to law,” and that “[i]f you ask me questions in regard to the pending cases I certainly will oppose. This is my legal right.” On November 29, 2017, defense counsel asked whether plaintiff would appear on December 4 or 5, 2017; offered December 14, 2017 as an alternate date; asked whether plaintiff was going to “refuse to answer questions about her “pending cases;” and stated that if that were the case, defendant might have to make a cross motion to “have that issue resolved before” they proceeded.

On November 30, 2017, not having received a response, defendant served plaintiff with a second amended notice of continued deposition for December 14, 2017. Defense counsel also emailed the amended notice to plaintiff stating:

**“If you do not intend to comply with the Court’s order to answer all the questions put to you, please advise immediately so that we may bring the issue back to Judge Baynes.”**

On December 1, 2017, plaintiff responded that she wanted the answer to “four important questions” before she would provide answers during her deposition, namely:

1. “Which claim exactly are you trying to litigate at this point?”;
2. “[W]here [does] the Appellate Division’s order mention[] the word **REMAND**[?]”;
3. “Another matter is what - according to you - the Appellate Division remands for discovery[?]”;
4. “[W]hat court is superior to what court. I claim that the Appellate Division has commanding authority over the Supreme Court that has to fulfill the appellate court’s final orders unconditionally.”

Defense counsel replied, among other things, that it was apparent from plaintiff’s email that she did not believe she had to appear for a deposition and answer questions as she had already won on the merits of her claim in the Appellate Division; that this was not true and that plaintiff knew it; and that she would file a motion to compel unless plaintiff would confirm that she would appear and answer all questions during the second day of deposition. Plaintiff replied that:

1. “Prior to the deposition you must visit the clerk[’s] office so it could explain to you the Appellate Division’s order. It [sic] will tell you that I won the Section 741 claim and it is off limits to any re-litigation”;

2. [During the preliminary conferences on May 31, 2017 and October 9, 2017] “Judge Schneier permitted discovery only in reference to health loss . . . therefore your questions during the deposition can refer only to this particular cause of action”;

3. [Therefore], “everything beyond the health loss claim is prohibited by law, rules and regulations, e.g. 22 NYCRR 221.2 (ii), ‘to enforce a limitation set forth in an order of a court.’ Ms. Hoey, I am referring you again to the Document 41 of the NYSCEF Document List to see *an order of a court*. The Appellate Division’s final order is listed there. Besides, all my claims are protected by a *privilege or right of confidentiality*”;

4. “You do not have the authority to conduct open-ended, comprehensive, and harassing depositions”;

5. “I do not need legal representation because I won the claim under 741 already.”

Based upon these statements, defense counsel cancelled the second day of deposition and requested judicial intervention. Plaintiff, nevertheless appeared at its offices on that date. An attorney at defense counsel’s office explained that the deposition had been cancelled and that defendant would be filing a motion shortly and, according to defendant, plaintiff stated that she had misunderstood and left.

On December 15, 2017, defendant filed a cross motion in response to plaintiff’s motion to recuse Justice Baynes seeking, among other things, to dismiss plaintiff’s verified complaint or, in the alternative, to compel her to attend her deposition and answer questions relating to her § 741 claim (Mot Seq. 5). This cross motion and plaintiff’s motion to recuse were returnable on February 6, 2018.

On January 1, 2018, plaintiff petitioned the Appellate Division, Second Department, for a writ of mandamus to compel the Supreme Court to recognize that she had already won her § 741 claim. Defendant moved to dismiss the petition. By order decided March 28, 2018, the petition was denied on the merits, and the proceeding was dismissed (*Matter of Von Maack v Baynes*, 159 AD3d 1012 [2d Dept 2018]).

By order dated January 24, 2018, Justice Baynes recused himself from this matter, and plaintiff's motion to recuse Justice Baynes and defendant's cross motion to dismiss/compel were transferred to Justice Paul Wooten for disposition.

*Proceedings before Justice Paul Wooten*

On April 18, 2018, at oral argument before Justice Wooten, the court determined that plaintiff's motion to recuse was moot. With respect to defendant's cross motion to dismiss/compel, plaintiff again stated that the Appellate Division had decided her § 741 claim; that she was only prepared to proceed at the deposition on her "health issue;" and that she would not answer questions on her § 741 claim "because there is no statement that the case is remanded to this court;" but then stated she was prepared to cooperate at the deposition but wanted the court to grant her statutory relief on her § 741 claim based upon the Appellate Division order. The court reserved decision on defendant's cross motion, upon receipt of the oral argument transcript.

On April 20, 2018, the parties were required to attend a final pre-note conference. Defendant appeared but plaintiff did not; a final pre-note order was issued, which stated that defendant's cross motion to dismiss/compel and the balance of plaintiff's deposition were the only outstanding discovery, and directed plaintiff to file a note of issue by April 25, 2018. Plaintiff states that she did not attend the conference because defendant did not notify her of same.

On April 23, 2018, plaintiff filed a motion seeking "statutory relief" on her § 741 claim based upon the Appellate Division order (Mot. Seq. 6). On April 25, 2018, the clerk entered an order from Justice Wooten dated April 18, 2018 referring defendant's cross motion to dismiss/compel to the Central Compliance Part, where it was scheduled to be heard on May 30, 2018. By order dated April 24, 2018, Justice Wooten recused himself from this matter, and the case was ultimately re-assigned to Justice Wavny Toussaint.

*Proceedings before Justice Wavny Toussaint*

On April 24, 2018, plaintiff served by regular mail her note of issue and certificate of readiness. On the first page of the note of issue, plaintiff sought a jury trial on "Labor Law, Whistle Blower & Retaliation & Health Loss" but in an annexed exhibit to the note of issue plaintiff stated that since the Appellate Division order "does NOT REMAND the matter for trial to this lower court any pretrial discovery in reference to section 741 is forbidden or even absurd." Further, plaintiff erroneously certified that discovery "now know[n] to be necessary [is] completed.

On May 11, 2018, defendant received a copy of a letter plaintiff had sent to Justice Wooten, stating that she had fully complied with discovery, asserting, among other things, that the Appellate Division had “issued a FINAL DECISION AND ORDER in [her] favor based on the law with costs;” that defendant was “prohibited [from litigating] a claim decided by a higher court;” and that “[t]he only option for [d]efendant is to settle the claim.” On May 18, 2018, defendant cross-moved to dismiss the complaint or, in the alternative, to vacate the April 24, 2018 note of issue (Mot. Seq. 7). This motion was made in response to plaintiff’s motion for statutory relief.

On June 6, 2018, the parties appeared before this court (Toussaint, J.) to address plaintiff’s motion for statutory relief, and defendant’s cross motions to dismiss/compel (Mot. Seq. 5) and to dismiss/vacate (Mot. Seq. 7). The court explained to plaintiff that although she had been successful on appeal, she did not win her case. In particular, the court stated that:

1. “And, I think a number of judges have tried to explain to you that because the Appellate Division reversed the dismissal of the claim doesn’t mean that you’ve won everything”;
2. “Then, the [Appellate Division] goes on in the next paragraph and says: ‘To the extent that the [p]laintiff raises contentions regarding the merits of her cause of action, these contentions involve disputed factual issues that are not properly resolved on a motion to dismiss the complaint pursuant to CPLR 3211 (a) (7).’ So, the court was saying there are still matters to be resolved . . . here in the . . . trial court”;

3. “So, the [Appellate Division] said: We are not going to look at the merits. That’s what they call it, of the case. So, now we’re here so that we can deal with the merits of the case. And, the merits of the case required that you submit documents. And, that you answer questions concerning the merits of the case”;

4. “You, as the plaintiff, cannot direct the Defendant as to how they should proceed with their defense. You may think it’s important. They may not. So, you cannot tell them what questions to ask at the deposition. Your only duty is to answer the questions that they ask. If it becomes relevant later, and they didn’t ask it, that’s on them”;

5. “You [defense counsel] get to ask questions. [Plaintiff]’s got to answer . . . [s]o you [defense counsel] tailor your questions to what you believe is appropriate for this Labor Law case”;

6. “You [plaintiff] are to answer the questions. If you have an issue with the questions, you can say: ‘I object.’ But, you still must answer.”

Plaintiff asked the court whether defense counsel would ask her questions at the deposition about her § 741 claim, “and only of 741?” The court responded:

“They are going to ask you questions about your 741 claim. They may also ask you questions that they believe are relevant to the case. So, it may not be, specifically, on that question. But, they are entitled to ask things that they believe may address your credibility . . . So, a question that may appear to you that has nothing to do with your 741 claim . . . [m]ay . . . be relevant when the time comes for trial. So, that’s why I said to you that you could say: ‘I object to the question.’ So, you have a record. But, you, nonetheless, still provide an answer.”

According to plaintiff, at the deposition the court sided with defendant; agreed to all its requests; did not allow her to speak; ignored the Appellate Division order holding that she had won her § 741 claim; ordered her to appear for her deposition

although the Appellate Division order did not remand her § 741 claim to this court; did not explain what the court meant when it said reversal of the dismissal of her claim did not “mean you’ve won anything” but instead told her an analogy to “twist” the meaning of the order; and disobeyed the May 31 and October 9, 2017 PCO’s by permitting defendant to ask questions at the deposition besides her health loss claim.

The parties agreed to continue plaintiff’s deposition on June 26 and 27, 2018. This court (Toussaint, J.), issued an order regarding the June 6, 2018 hearing which provides, in pertinent part, that:

“In accordance with the argument on the record, [p]laintiff shall appear for her continued examination before trial on 6/26/18. Said examination before trial shall continue to 6/27/18, if necessary. Plaintiff is to answer all questions, including but not limited to questions about her Labor Law § 741 claim. Plaintiff has the right to state her objection to any question, but all questions shall be answered.”

Defendant served a notice of entry for the June 6, 2018 order on plaintiff on June 12, 2018. On June 7, 2018, defendant served plaintiff with a third amended notice of continued deposition for June 26 and 27, 2018. At the deposition, it is undisputed that plaintiff refused to answer questions about her §741 claim. In particular, plaintiff stated:

1. “Section 741 of the labor law was decided by the Appellate Court. Four judges, they made their decision in my favor with cause by law [sic]. You cannot change the law . . . no judge from the . . . lower court has power to change the order which is already final”;

2. In response to a question as to whether plaintiff had “taken any medications or ingested any substance that would affect [her] ability to give responsive and truthful testimony,” plaintiff responded: “Who gave you the rights to . . . do the deposition or to ask me any questions?”;

3. Again in response to the above question, plaintiff responded: “Please show me in the decision and order of the Appellate Court that the case is remanded for trial or for any kind of deposition”;

4. After defense counsel read this court’s June 6, 2018 order into the record, and asked if there was anything in the order plaintiff did not understand, plaintiff responded:

“How can I answer questions in regard to 741 Section when the section was decided already by the Appellate Division . . . Who was the person to give you the right to do the deposition on a matter that was already decided”;

“Judge Toussaint did not prove that there is remand . . . in Section 741 for any kind of trial”;

“What is done is done against the order of the Appellate Court”;

“Judge Toussaint did not prove that there is remand for the Section 741 of labor law for any kind of trial or for deposition. She did not prove. She did not let me speak. She did not let me ask her questions”;

8. In answer to whether plaintiff had spoken to any current or former employees of Wyckoff since she had left the hospital in 2011, plaintiff replied: “Ms. Hoey, as I said, I am going to answer your question under one condition: That you, as a lawyer, show to me in the order and decision of [the] Appellate Court, the order that the case is remanded for trial or deposition, because I . . . did read so many times, and I found not even half of the word ‘remanded.’”

After reading through the transcript of the June 6, 2018 hearing, showing plaintiff that the court had ordered her to answer questions with respect to her § 741 claim, defense counsel asked plaintiff:

“Are you going to answer questions at this deposition about your 741 claim and your termination from . . . Wyckoff Heights Medical Center as directed by Judge Toussaint, or are you declining to answer those questions because you’ve now made a complaint . . . against the judge and you disagree with her order . . .”

In response, plaintiff stated:

“I will answer . . . your question, as long as you prove it to me that the Appellate Division remanded 741 Section of [L]abor [L]aw for trial for deposition or for anything that is related to litigation.”

Due to plaintiff’s refusal to comply with the court’s June 6, 2018 order, the parties contacted this court. Defense counsel explained that rather than answering her questions, plaintiff asked questions and would only answer questions if defense counsel showed her “where the Appellate Division remanded this [matter] for trial and discovery.” Plaintiff then told the court that she was willing to answer questions:

“under the . . . condition that [defense counsel] or the judge is going to prove [to] me that the Appellate Division . . . sent okays for the trial, which is not [sic]. There is no remand for trial. There is a court order.”

In response, the court stated:

“The [c]ourt does not have to give you any explanation with respect to what the Appellate Division did. I’ve already reviewed that issue when you appeared before me. I have issued an order dated June 6<sup>th</sup> of 2018. I believe

from what I've heard, that order has been marked. That order is very clear. In it, it specifically says, 'Plaintiff is to answer all questions including, but not limited to questions about her Labor Law 741 claim. Plaintiff has the right to state her objection to any question, but all questions shall be answered.

\* \* \*

"But for now at this deposition, although you may be of the belief that the Court is wrong, but wrong or not, unless there is an order from a higher [c]ourt directing that you do not comply with the order, that is my order of June 6<sup>th</sup>. You would be violating the order.

"So this is to make it very clear: You are directed to answer the questions that are posed to you. If you have any objection, you will simply state 'objection.'"

Plaintiff responded:

"Your Honor . . . who gave the right to you . . . to direct Section 741 of the [L]abor [L]aw for the . . . litigation for the trial. Based on what you made the decision, Your Honor?"

The court explained to plaintiff that it had already "gone over that when you were before me," and that it had merely restated its order; that plaintiff was required to answer the questions posed, but could state an objection; and that if plaintiff chose "to disobey the ruling of this court, then you will have to deal with the consequences of doing that. But this [c]ourt has ruled."

After the conference call ended and the deposition continued, during a line of questioning with respect to which Wyckoff employee retaliated against plaintiff, Ms.

Von Maack stated:

“Mrs. Hoey [defense counsel], I should not answer any questions. The judge did not follow the order of [the] Appellate Division. She did not . . . give me [an] example [of] how to follow the orders.”

After asking whether a particular employee had retaliated against plaintiff, plaintiff then stated: “I object, because the Appellate Division issued the order without remanding the 741 . . . Section for trial . . . or for any kind of deposition.” Defense counsel tried to contact the court’s chambers, but the court explained that it would not take the telephone call. When defense counsel asked plaintiff whether she would answer questions, plaintiff replied:

“I am more than glad to answer your questions, as long as you answer my question, which was where is the word ‘remand’ in the Appellate Division decision and order?”

Plaintiff further stated that the court:

“did not explain to me why she decided the way she decided, who gave her the right, and she did not say to me please disregard the Appellate Division court order and decision. She did not say to disregard. She just did not follow the order [b]ut . . . she’s requesting me to follow her order. Therefore, that was the reason for me to file the complaint against the judge. And I believe that the judge should step aside and wait for the decision of the . . . person who is above her to decide.”

When defense counsel again asked plaintiff whether she wanted to proceed with the deposition or decline to answer questions, plaintiff responded: “Yes, I will . . . as long as someone from the [c]ourt or from you will tell me where is the word ‘remand’ for the trial.” Defense counsel then asked plaintiff whether she would decline to

answer questions about the case unless either defense counsel or the court explained to her “the reasons for [the] decision and order on June 6<sup>th</sup> and the order that [the court] repeated today?” to which plaintiff responded: “The basis, yes.” When defense counsel again asked whether plaintiff was going to answer questions about the § 741 claim, plaintiff stated that the § 741 claim had already been decided by the Appellate Court. Finally, defense counsel asked plaintiff: “Are you going to answers questions,” to which plaintiff replied: “No.” At that point, defense counsel terminated the deposition.

On or about July 26, 2018, defendant moved to dismiss the verified complaint with prejudice based on plaintiff’s “continued refusal to obey court orders and refusal to provide discovery pursuant to CPLR 3216” (Mot. Seq. 8). On or about July 30, 2018, plaintiff moved to recuse Justice Toussaint from this action. Defendant’s motion and two cross motions to dismiss, and plaintiff’s motions for statutory relief and to recuse Justice Toussaint from this action are presently before the court for disposition.

### ***Discussion***

#### ***Defendant’s Cross Motions To Dismiss/Compel and To Dismiss/Vacate and Motion To Dismiss with Prejudice***

“The Supreme Court has broad discretion in supervising disclosure and in resolving discovery disputes” (*HSBC Bank USA, Nat’l Ass’n v Oscar*, 161 AD3d 1055, 1057 [2d Dept 2018] [internal citations and quotation marks omitted]). Accordingly,

“[r]esolution of discovery disputes and the nature and degree of the penalty to be imposed pursuant to CPLR 3126 are matters within the sound discretion of the motion court” (*Honghui Kuang v MetLife*, 159 AD3d 878, 881 [2d Dept 2018]). “If a party refuses to obey an order for disclosure or willfully fails to disclose information, the court may dismiss the action” (*Corex-SPA v Janel Group of N.Y., Inc.*, 156 AD3d 599, 601 [2d Dept 2017], citing CPLR 3126[3]; see *HSBC Bank USA, N.A. v Oscar*, 161 AD3d 1055, 1057 [2d Dept 2018] [internal citations and quotation marks omitted] [(a) court may strike a party's pleading or impose some other sanction if the party refuses to obey an order for disclosure or wilfully fails to disclose information which the court finds ought to have been disclosed”). Thus, “[w]hile actions should be resolved on the merits when possible, a court may strike [a pleading] upon a clear showing that [a party's] failure to comply with a disclosure order was the result of willful and contumacious conduct” (*Corex-SPA*, 156 AD3d at 601 [internal citations and quotation marks omitted]). “Willful and contumacious conduct may be inferred from a party's repeated failure to comply with court-ordered discovery, coupled with inadequate explanations for the failures to comply, or a failure to comply with court-ordered discovery over an extended period of time” (*Honghui Kuang*, 159 AD3d at 881). In determining the type of sanction to impose, the court must consider the degree to which the contumacious conduct or destruction of evidence prejudiced the other party (*Melcher v Apollo Med. Fund Mgt. L.L.C.*, 105 AD3d 15, 23 [2d Dept 2013], citing among other cases *Sienkiewicz*

*v 370/CPW Owners Corp.*, 74 AD3d 781 [2d Dept 2010]). “Absent an improvident exercise of discretion, the determination to impose sanctions for conduct that frustrates the purpose of the CPLR should not be disturbed” (*Honghui Kuang*, 159 AD3d at 881).

In support of its cross motion to dismiss/vacate and its motion to dismiss with prejudice, defendant argues that plaintiff’s repeated and continued actions in obfuscating discovery in this action, including her written and oral admissions in response to discovery requests and her conduct at both her depositions, demonstrates that she is unwilling to engage in discovery, or abide by any discovery rules or court orders requiring her to engage in discovery and answer questions relating to her § 741 claim.

In opposition, plaintiff argues, among other things, that “[d]efendant lost the 741 claim in the [h]igher [c]ourt . . .” and that her § 741 claim therefore cannot and should not be dismissed; that she did not decline a jury trial on her § 741 claim based on her erroneous belief that she won her claim, rather the trial, discovery and any depositions are prohibited by the order of the Appellate Division, which did not remand her claim for a trial; that she only seeks a trial on her health loss claim, which should not be dismissed because it was never allegedly opposed by defendant; and that she filed the note of issue as per the court’s April 18, 2018.

Plaintiff again argues that the motion must be denied because the Appellate Division already ruled on and finally decided her § 741 claim - unconditionally, on

the merits, and in her favor; the order did not remand the matter for trial or discovery; and that as such, this court's July 6, 2018 order is baseless and in violation of the Appellate Division order, and the judge was legally bound to follow the Appellate Division order and grant her the remedies afforded under the statute.

Plaintiff argues that all of defendant's motions regarding depositions and any issues related to her § 741 claim should be denied based upon the order of the Appellate Division; that she prevailed on the merits of her claim by virtue of that order; that the order did not reinstate her verified complaint; that defense counsel asked her questions during the June 26, 2018 deposition which violated the Appellate Division order; that this court did not tell her during oral argument on July 6, 2018 where the Appellate Division order directed that the action was remanded to the trial court; that this court acted as if it had the power to "dismiss" the order; and that she (plaintiff) is entitled to statutory relief based upon the Appellate Division order.

As set forth above, plaintiff has a history of failing to comply with discovery. In response to defendant's first discovery request (November 11, 2016), plaintiff responded by writing to District Court Judge Ramos stating that she had won her case, and that discovery was therefore not necessary; she reiterated this claim at the next two preliminary conference despite having been told by court attorneys that she was still required to submit to discovery; and then, while ultimately providing

defendants with documents and answers to interrogatories,<sup>7</sup> made the same claim in July 2017 in her response to interrogatories and her subsequent correspondence to defendant, stating, among other things, that the Appellate Division had already decided her § 741 claim, that it had not remanded the matter for further discovery, and that any new discovery relating to this claim was prohibited.

Thereafter, at her first deposition in October, 2017, plaintiff refused to answer the most basic questions relating to her § 741 claim despite having been advised by defendant in correspondence of her discovery obligations; refused to cooperate again in response to Justice Baynes' November 1, 2017 order directing her to answer all questions at her deposition, instead moving to recuse him; and then again claimed that she had won her case at the April 18, 2018 hearing before Justice Wooten admitting, when pressed, that she would not answer questions on her § 741 claim because the Appellate Division order did not remand the case for trial.

At the July 6, 2018 hearing before Justice Toussaint, plaintiff's intransigence escalated when she reiterated her belief that she had won on the merits of her claim, and then defied this court's July 6 and July 26, 2018 orders to answer all questions posed at her deposition, stating flatly at her continued deposition that she refused

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<sup>7</sup>It is unclear whether plaintiff still owes defendant additional outstanding discovery. Notably, plaintiff states in her reply to defendant's memorandum of law in opposition to her motion for statutory relief and in support of its cross motion for sanctions dismissing the complaint that "[d]efendant has not argued against the evidence received and does not claim in this respect that I refused to participate in discovery."

to do so unless defense counsel or the court explained where the order of the Appellate Division had remanded her claim “for the trial.”

Contrary to plaintiff’s claim, the order of the Appellate Division did not grant plaintiff relief on the merits of her § 741 claim. Rather, the order reversed Justice Schmidt’s decision and order dismissing the verified complaint, and reinstated the verified complaint, which in turn initiated the discovery process. Thus, as noted throughout these proceedings, the Appellate Division order did not make any findings with respect to the merits of plaintiff’s Labor Law § 741 cause of action. The order states, as relevant here, that:

“[t]o the extent that the plaintiff raises contentions regarding the merits of her cause of action, these contentions involve disputed factual issues that are not properly resolved on a motion to dismiss the complaint pursuant to CPLR 3211 (a) (7)” (*Von Maack*, 140 AD3d at 1058).

In any event, whether or not plaintiff truly believes that she won her case by virtue of the Appellate Division order, her singular adherence to this claim for the last two years in written and oral statements, at hearings, and at depositions - despite repeated explanations by defense counsel, court referees, and judges to the contrary - in addition to her refusal to follow the instructions of Justice Baynes and the written or oral orders of this justice, demonstrates that she is either unwilling or unable to engage in discovery and answer questions relating to her § 741 claim,

without which defendant cannot defend itself in this action.<sup>8</sup> As such, plaintiff's willful and contumacious conduct can clearly be inferred from her repeated failure to comply with court orders to engage in discovery and to fulfill her discovery obligations (*Honghui Kuang*, 159 AD3d at 881; *Morales v Zherka*, 140 AD3d 836, 837 [2d Dept 2016]; *Tos v Jackson Heights Care Ctr., LLC*, 91 AD3d 943, 944 [2d Dept 2012]; see also *Kihl v Pfeffer*, 94 NY2d 118 [1999]).

Accordingly, defendant's cross motion to dismiss/vacate (Mot. Seq. 7) and motion to dismiss with prejudice (Mot. Seq. 8) are granted to the extent of: 1) directing plaintiff to appear for a deposition and answer all questions relating to her Labor Law § 741 cause of action, as well as all other questions unless prohibited by Uniform Rules for Trial Courts (22 NYCRR) § 221.2, and to provide any other outstanding discovery within sixty (60) days of service of a copy of this order with notice of entry. If plaintiff fails to fully comply with these conditions, defendant shall be permitted to file an affirmation regarding plaintiff's non-compliance, and the verified complaint will be dismissed forthwith; (2), if plaintiff complies with this order, extending defendant's time to file a motion for summary judgment is extended to 60 days from the completion of post-note discovery.

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<sup>8</sup>It seems that plaintiff might believe that the verified complaint has been reinstated inasmuch as she states in her reply to defendant's memorandum of law in opposition to the motion to recuse Justice Baynes and in support of its cross motion to compel and for sanctions that: "I am supplementing the exhibits again right now *taking advantage of the opportunity that the complaint came back to the Supreme Court*" (emphasis added).

With respect to plaintiff's motion for statutory relief pursuant to Labor Law § 741, plaintiff argues that she won her case on appeal. However, as defendant argues, inasmuch as plaintiff has not been successful on the merits of her claim, namely since there has been no finding of liability in this case which would warrant an award of any relief under § 741, this motion must be denied.

As to plaintiff's motion to recuse the court from this action, Judiciary Law § 14, which provides the statutory authority for recusal, provides that:

“A judge shall not sit as such in, or take any part in the decision of, an action, claim, matter, motion or proceeding to which he is a party, or in which he has been attorney or counsel, or in which he is interested, or if he is related by consanguinity or affinity to any party to the controversy within the sixth degree” (Judiciary Law § 14 [McKinney 2015]).

“Absent a legal disqualification under Judiciary Law § 14, a court is the sole arbiter [of its] recusal, and its decision is a matter of discretion and personal conscience” (*US Bank, N.A. v Morrison*, 160 AD3d 680, 681 [2d Dept 2018], quoting *Aebly v Lally*, 140 AD3d 677, 678 [2d Dept 2016]).

Plaintiff has failed to allege any statutory bases warranting mandatory recusal.<sup>9</sup> Moreover, plaintiff's complaints are premised upon her mistaken belief that the court failed to comply with the Appellate Division order by twice directing

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<sup>9</sup>To the extent plaintiff asserts in her reply that the court “is interested” in this matter by claiming that “a question” exists as to whether the court benefitted from “siding” with defendant and failing to comply with the Appellate Division order, it is rejected. Plaintiff fails to provide any support for this claim. In any event, the court fully complied with the order by directing plaintiff to answer questions about her § 741 claim at her deposition, as required by the CPLR.

her to answer questions at her deposition including, but not limited to, plaintiff's § 741 claim.

In any event, in support of her motion, plaintiff first argues that defense counsel misled the court by failing to fully explain that the Appellate Division order granted her relief on her § 741 claim, and that the court did not “show any interest” in the order, which did not remand the matter for trial to this court, demonstrating the court’s “obstruction of justice.” Plaintiff goes on to assert that instead of “issuing a [j]udgment” in her favor, this court stated “in a malicious way” that: “Because the Appellate Division reversed the dismissal of the claim doesn’t mean that you’ve won everything” but did not explain the meaning of this comment, and instead “in an arrogant way” explained the order by using an analogy, and did not “follow the [l]aw.” However, as repeatedly explained to plaintiff, the Appellate Division order merely reversed dismissal of the verified complaint, and thus did not make any ruling on the merits. Further, contrary to plaintiff’s claim, the court explained at the July 6, 2018 hearing, first by analogy and then reading the last part of the order, that it was not on the merits, that while the order “did not specifically state it” plaintiff was required to “go through a process [of submitting to discovery] before you can win the case” and later restating the same, but adding that:

“now we’re here so that we can deal with the merits of the case . . . [which] require that you submit documents. And, that you answer questions concerning the merits of the case.”

Moreover, to the extent plaintiff alleges bias, she has failed to provide any evidence in support.

Plaintiff next contends that at the July 6, 2018 hearing, the court harassed her by threatening that there would be consequences if she disobeyed the court's order. In this regard, in response to defense counsel's request that the court clarify that plaintiff would be required to answer questions relating to her § 741 claim at the continued deposition, the court stated that defense counsel's "suggestion" that plaintiff "would deliberately disobey this [c]ourt's order . . . can't be decided now" and that "[w]e'll see what happens." According to plaintiff, this exchange also shows that the court was biased and not credible. Plaintiff also asserts that the court allowed defense counsel to ask her questions at the deposition which addressed her credibility, proving the court would "postpone" awarding her relief under her § 741 claim as per the Appellate Division order.

However, rather than "harassing" plaintiff, the court was affording plaintiff another chance to comply with her discovery obligations, albeit suggesting there would be consequences if plaintiff failed to comply. Thus, this exchange did not evidence bias. Moreover, the court merely informed plaintiff that defendant would be permitted to ask questions addressing plaintiff's credibility which, contrary to plaintiff's claim, did not mean that the court was postponing or undermining the Appellate Division order.

Plaintiff next asserts that the court was hostile, namely by "adher[ing] to the fraudulent plan" to delay her relief by granting every request of defense counsel, with

whom the court collaborated, as evidenced by the above colloquy during which the court ruled that plaintiff would have to answer “open-ended, all-inclusive questions” relating to her § 741 claim at the continued deposition, by ignoring the Appellate Division order, and by not letting her speak or ask questions.

However, directing plaintiff to answer questions at her deposition fails to establish that the court collaborated with the defense in a fraudulent plan, improperly granted all its requests, or ignored the Appellate Division order. Rather, the court was merely following the law by directing plaintiff to engage in discovery. Moreover, the court afforded plaintiff sufficient opportunity to speak and ask questions.

Next, plaintiff argues that during the telephone conversation with the court at the June 26, 2108 deposition, the court improperly directed her to answer all questions without showing her where the word “remand” appeared in the Appellate Division order, and arrogantly told her that the court was not required to provide her with any explanation for its ruling.

Contrary to plaintiff’s argument, during the telephone conversation with the court on June 26, 2018, in response to plaintiff’s statement that she would only answer questions on the condition that defense counsel or the court proved to her that the Appellate Division remanded the matter for trial, the court stated that it had already explained the Appellate Division order to her, and clearly advised plaintiff, four times, that its July 6, 2018 order required plaintiff to answer all questions, and

that she had the right to object to the questions, but was still required to answer them. Plaintiff has failed to demonstrate any bias or prejudice.

Plaintiff also maintains that the court ignored her health loss claim, exposing the court's bias. However, the court did not fail to address plaintiff's health loss claim. Rather, the court addressed plaintiff's failure to answer questions at her deposition, which was the only issue before the court for disposition. Accordingly, plaintiff's motion is denied.

Accordingly, it is

ORDERED that the cross motion to dismiss/compel (Mot. Seq. 5); the cross motion to dismiss/vacate (Mot. Seq. 7), and the motion to dismiss with prejudice (Mot. Seq. 8) are granted to the extent of: 1) directing plaintiff to appear for a deposition and answer all questions relating to her Labor Law § 741 cause of action, as well as all other questions unless prohibited by Uniform Rules for Trial Courts (22 NYCRR) § 221.2, and to provide all outstanding discovery within sixty days of service of a copy of this order with notice of entry. Upon plaintiff's failure to fully comply with these conditions, defendant shall be permitted to file an affirmation with this court regarding plaintiff's non-compliance, and the verified complaint will be dismissed forthwith;<sup>10</sup> and, it is further

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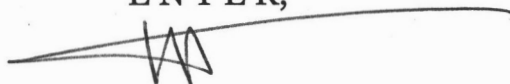
<sup>10</sup>Stated otherwise, this order is self-executing, i.e. the terms automatically came into place without the requirement of an additional motion to dismiss the verified complaint by defendant.

ORDERED that if plaintiff complies with this order; defendant's time to file a motion for summary judgment is extended to 60 days from the completion of post-note discovery; and it is further

ORDERED that the motions of plaintiff for statutory relief (Mot. Seq. 6) and to recuse Justice Wavny Toussaint from this action (Mot. Seq. 9) are denied.

This constitutes the decision and order of the court.

ENTER,



J. S. C.

HON. WAVNY TOUSSAINT  
J. S. C.

2019 APR -4 AM 9:14  
KINGS COUNTY CLERK  
FILED