

Hilton M. Wiener, LLC v Andersen
2020 NY Slip Op 32652(U)
August 13, 2020
Supreme Court, New York County
Docket Number: 650858/2019
Judge: Nancy M. Bannon
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: I.A.S. PART 42

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HILTON M. WIENER, LLC,

Plaintiff,

DECISION AND ORDER

-against-

Index No. 650858/2019
MOT SEQ 003, 004

LOWELL ANDERSEN,

Defendant.

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NANCY M. BANNON, J. :

I. INTRODUCTION

In this action to recover \$35,355.00 in attorney's fees, the plaintiff, Hilton M. Wiener, LLC, moves pursuant to CPLR 3126 for an order holding the defendant, Lowell Andersen, a former client, in contempt for his failure to appear for a deposition, and striking his answer (MOT SEQ 003).

The defendant opposes the motion and cross-moves for an order pursuant to CPLR 3212 dismissing the complaint or, in the alternative, issuing a protective order pursuant to CPLR 3103, limiting the scope of the deposition.

The plaintiff also moves, by separate motion, pursuant to CPLR 3124 for an order compelling defendant to supplement his responses to the plaintiff's discovery demand of April 1, 2019 and imposing sanctions for his failure to timely respond.

The plaintiff's motion for an order of contempt and to strike the defendant's answer is granted to the extent that the defendant's answer shall be stricken should the defendant fail to appear for a deposition within 60 days. The defendant's cross-motion for summary judgment, or alternatively a protective order, is granted to the extent that the deposition shall be conducted by remote technology (see Administrative Order of the Chief Administrative Judge of the Courts AO/129/20) and the plaintiff is directed to abide by the Uniform Rules for the Conduct of Depositions (22 NYCRR part 221). The plaintiff's motion to compel discovery and for sanctions is denied as moot.

II. BACKGROUND

In October 2015, the defendant retained the Law Office of Hilton Weiner, Esq., to file an arbitration claim against nonparty Spartan Capital Securities, LLC (FINRA arbitration). The parties entered into a license servicing agreement which defined the scope of engagement and compensation, including but not limited to whether compensation would be due to Weiner in the event Weiner's services were terminated by the client.

The plaintiff claims that in October 2017, it received a settlement payment of \$12,500 in connection with the settlement from an individual codefendant in the FINRA arbitration but that

the arbitration continued against Spartan and the plaintiff continued to represent Anderson in the matter. The plaintiff held on to those settlement funds despite the defendant's request for them. In December 2017, the defendant filed a bar complaint against plaintiff. The plaintiff, in turn, sent an invoice for payment to defendant in the amount of \$35,355.00, and advised defendant of his right to arbitrate the fee dispute. The parties thereafter entered into arbitration.

On January 15, 2019, the arbitrator awarded the defendant \$8,750. In the notice of arbitration award, the parties were advised that:

"This determination is final and binding on the parties, except that a party dissatisfied with this award may . . .

1. Trial de novo: Either party may reject the decision of the arbitrator(s) and commence an action on the merits of the fee dispute in a court of competent jurisdiction within 30 days after the arbitration award has been mailed;

NOTE Trial de novo is not available to parties who have previously waived this right. See 22 NYCRR 137.2(c), 137.8(b) and Standards and Guidelines Section 6(B)(2) and Section 12(C).

OR

2. Vacatur: Either party may seek to vacate the award within 90 days after delivery to the party. This post award option is governed by CPLR 7511."

On February 8, 2019, the plaintiff filed the instant action for a trial de novo. The defendant filed a counterclaim seeking recovery of the settlement funds retained by Weiner and demanded

that, as a result of his conduct, the plaintiff forfeited any right to a legal fee in connection with plaintiff's representation in the arbitration proceeding.

On April 8, 2019, the plaintiff served defendant's counsel with a notice to take the deposition of the defendant. The defendant failed to appear. On May 13, 2019, the plaintiff moved to compel discovery. By order dated July 31, 2019, the court granted the motion and directed the defendant to respond to plaintiff's demands dated April 1, 2019 on or before August 30, 2019. The parties were to appear for a settlement/preliminary conference on September 26, 2019.

In the meantime, on September 3, 2019, the plaintiff filed another motion for contempt based on the defendant's failure to comply with the court's July 31, 2019 order. The motion was withdrawn without prejudice by stipulation dated September 26, 2019.

At the preliminary conference on September 26, 2019, the court ordered that the depositions of all parties were to take place by October 25, 2019, with an alternative back up date of November 7, 2019, and that any post-deposition demands were to be made within 10 days of the deposition and responded to within 10 days after the demand. On November 6, 2019, one day before his scheduled deposition, the defendant commenced another action

(Lowell Anderson v Hilton Wiener, Esq. Index No. 656474/2019)

and moved by Order to Show Cause for a stay of the court-ordered deposition and discovery proceedings in the instant case. The court denied the request for a stay and ordered the defendant to appear at the deposition. The defendant failed to appear.

On November 7, 2019, the plaintiff filed MOT SEQ 003.

In his cross-motion, the defendant claims that the plaintiff did not represent the defendant in the underlying arbitration proceeding, and, therefore, the plaintiff does not have standing to recover attorneys' fees from the defendant. Further, the defendant argues that there are no relevant facts to be discovered, as the matter concerning Weiner's attorneys' fees was fully litigated at the arbitration hearing, and any and all relevant documents and information had been exchanged.

The defendant further alleges that the plaintiff seeks the deposition to use for a collateral purpose, *i.e.*, to explore whether a nonparty tortiously interfered with the plaintiff's contract with the defendant. The defendant argues that since no such cause of action is asserted in this case, his deposition is unnecessary. The defendant also asserts that he is entitled to summary judgment dismissing the complaint, or, alternatively, a protective order limiting his deposition to: (i) whether the plaintiff forfeited any right to a fee that it may have had by

virtue of its wrongful conversion of the defendant's funds; and (ii) what were the reasonable value of services provided by plaintiff, assuming plaintiff did not forfeit his right to fees.

On November 8, 2019, the plaintiff moved to compel further document discovery (MOT SEQ 004).

At a compliance conference held on January 16, 2020, the parties represented that document discovery was completed, but depositions remained outstanding. The court ordered that defendant's deposition was to take place on February 10, 2020 at 10:00 a.m., and plaintiff's deposition was to take place on February 18, 2020 at 10:00 a.m., both of which were to be taken in New York. Further, the court warned that "[f]ailure to comply may result in preclusion or striking of pleading per CPLR 3126." Additionally, the parties were warned that "[failure] to comply with these directives may result in the imposition of costs or sanctions including dismissal or default judgment."

On February 10, 2020, the plaintiff filed a supplemental affirmation in support of its initial motion for contempt, stating that he was notified by the defendant at 4:00 p.m. on February 9, 2020, the day before the deposition was to take place, that the defendant would not be appearing for the scheduled deposition.

On February 18, 2020, defense counsel wrote to the court asserting that plaintiff's affirmation should be rejected as untimely and improper.

The status conference scheduled for April 23, 2020, was canceled due to temporary court closure due to the COVID-19 pandemic.

In a letter to the court dated May 28, 2020, defense counsel advised that by an order dated April 23, 2020, the First Department disbarred Hilton Weiner effective January 8, 2018, the date he pleaded guilty to grand theft in the third degree in a Florida court, which is the equivalent of New York's felony of grand larceny in the third degree.

On June 1, 2020, this court issued an interim Decision and Order on MOT SEQ 003 and 004 staying the action and holding the motions in abeyance in light of the disbarment of plaintiff's counsel. Pursuant to CPLR 321[c], the action was stayed until 30 days after defendant serves plaintiff with notice to obtain new counsel, or until the court grants leave to resume proceedings. This court also held that the "defendant's application to dismiss the complaint on the basis of disbarment, made by letter filed May 28, 2020, is denied without prejudice to renew on proper papers and in accordance with CPLR 321 [c] (see Moray v Koven & Krause, Esqs., 15 NY3d 384 [2010])."

By order dated June 21, 2020, this court denied Weiner's motion to substitute himself personally as plaintiff in the action and appear self-represented as procedurally improper and in violation of the stay. The court also held that defendant's opposition to the motion, filed June 11, 2020, shall serve as the requisite notice to the plaintiff to obtain new counsel.

A substitution of attorney was filed on July 31, 2020. Therefore, the stay is vacated and the court now considers MOT SEQ 003 and 004.

III. DISCUSSION

A. Plaintiff's Motion for Contempt and Sanctions

To prevail on a motion to punish a party for civil contempt, a party must establish that the party to be held in contempt violated a clear and unequivocal court order, known to the parties. See Judiciary Law § 753(A)(3); see also McCormick v Axelrod, 59 NY2d 574 (1983), amended 60 NY2d 652 (1983). The movant must also establish that the party to be held in contempt engaged in conduct that was calculated to and actually did defeat, impair, impede, and prejudice the rights of the movant. See 450 West 14th St. Corp. v 40-56 Tenth Avenue, LLC, 15 AD3d 166 (1st Dept. 2005); Lipstick, Ltd. v Grupo Tribasa, S.A. de C.V., 304 AD2d 482 (1st Dept. 2003). "Contempt is a drastic remedy which should not be granted absent a clear right to such

relief.” Pinto v Pinto, 120 AD2d 337, 338 (1st Dept. 1986). While it is undisputed that the defendant violated a clear and unequivocal court order, known to the parties (see Judiciary Law § 753[A][3]), the court declines to impose this relief under the circumstances of this case. The defendant’s failure to appear for a deposition is more properly addressed under article 31 of the CPLR.

CPLR 3101(a) provides that “there shall be full disclosure of all matter material and necessary in the prosecution or defense of an action” and this language 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.” Osowski v AMEC Constr. Mgt., Inc., 69 AD3d 99, 106 (1st Dept. 2009) quoting Allen v Crowell-Collier Publ. Co., 21 NY2d 403, 406-407 (1968). CPLR 3124 provides that “[i]f a person fails to respond to or comply with any request, notice, interrogatory, demand, question or order under this article..., the party seeking disclosure may move to compel compliance or a response.” As in any motion, on a motion brought pursuant to CPLR 3124, the burden is on the party seeking the disclosure to establish entitlement to the relief sought. “The burden of showing that the disclosure sought is improper is upon the party asserting

it." Roman Catholic Church of the Good Shepherd v Tempco Systems, 202 AD2d 257, 258 (1st Dept. 1994).

CPLR 3126 authorizes the court to sanction a party who "refuses to obey an order for disclosure or willfully fails to disclose information which the court finds ought to have been disclosed." Furthermore, failure to comply with discovery, particularly after a court order has been issued, may constitute the "dilatory and obstructive, and thus contumacious, conduct warranting the striking of [the answer]." Kutner v Feiden, Dweck & Sladkus, 223 AD2d 488, 489 (1st Dept 1996). "The striking of a party's pleadings should not, however, be imposed except in instances where the party seeking disclosure demonstrates conclusively that the failure to disclose was willful, contumacious or due to bad faith." Hassan v Manhattan & Bronx Surface Tr. Operating Auth., 286 AD2d 303, 304 (1st Dept. 2001).

The defendant's repeated failure to appear for a deposition despite the court's numerous orders requiring him to appear is the type of dilatory conduct that rises to the level of willful and contumacious, such that striking of his answer would be warranted. See LaSalle Talman Bank, F.S.B. v Weisblum & Felice, 99 AD3d 543 (1st Dept. 2012); Perez v City of New York, 95 AD3d 675 (1st Dept. 2012); Figiel v Met Food, 48 AD3d 330 (1st Dept.

2008). Moreover, the defendant offers no reason for his nonappearance.

Therefore, the motion is granted to the extent that the defendant is directed to appear for a deposition within 60 days and his failure to appear shall result in the striking of his answer. The order will be self-executing, and become absolute upon plaintiff's failure to comply, without the necessity of further motion practice. See Standard Fire Ins. Co. v Federal Pac. Elec. Co., 14 AD3d 213 (1st Dept. 2004); Lopez v City of New York, 2 AD3d 693 (2nd Dept. 2003). In light of the ongoing COVID-19 pandemic and attendant risks presented by in-person proceedings, the deposition shall be conducted by remote technology. See Administrative Order of the Chief Administrative Judge of the Courts AO/129/20.

However, the plaintiff is cautioned that a deposition may not be a fishing expedition and is limited to seeking discovery "material and necessary in the prosecution" of *this action* or "facts bearing on the controversy which will assist preparation for trial" in *this case*. Osowski v AMEC Constr. Mgt., Inc., supra at 106. The plaintiff is further directed to abide by all provisions of CPLR 3113 and the Uniform Rules for the Conduct of Depositions (22 NYCRR part 221).

B. Defendant's Cross-Motion for Summary Judgment or Protective Order

It is well established that the proponent of a summary judgment motion "must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact." Nomura Asset Capital Corp. v Cadwalader, Wickersham & Taft LLP, 26 NY3d 40, 49 (2015), quoting Alvarez v Prospect Hosp., 68 NY2d 320, 324 (1986). "If the moving party produces the requisite evidence, the burden then shifts to the nonmoving party to establish the existence of material issues of fact which require a trial of the action." Nomura Asset Capital Corp. v Cadwalader, Wickersham & Taft LLP, supra; Zuckerman v City of New York, 49 NY2d 557 (1980). The court must view the evidence in the light most favorable to the nonmoving party, and give the nonmoving party the benefit of all reasonable inferences that can be drawn from the evidence. See Vega v Restani Constr. Corp., 18 NY3d 499 (2012); Negri v Stop & Shop, Inc., 65 NY2d 625 (1985); Sosa v 46th St. Dev. LLC, 101 AD3d 490 (1st Dept. 2012). When there is any doubt as to the existence of triable issues, summary judgment should not be granted. See McCummings v New York City Tr. Auth., 81 NY2d 923 [1993]; Rotuba Extruders v Ceppos, 46 NY2d 223 (1978).

Here, the defendant has not met his burden in the first instance. He merely argues that the complaint should be dismissed in its entirety because the plaintiff, Hilton M. Weiner, LLC, was not the law firm of record in defendant's FINRA proceeding, which was the "Law Office of Hilton M. Weiner, Esq", and that Weiner's services were not invoiced under the name of such entity. However, while the firm went through a name change, Weiner remained the sole principal of both entities, until his disbarment. The retainer agreement in connection with the FINRA arbitration was signed by Hilton Weiner. Nor has the defendant provide persuasive authority for his arguments in support of summary judgment. The court, therefore, denies that portion of the defendant's cross motion.

Moreover, to the extent that the defendant also argues that this matter has already been litigated in arbitration, the plaintiff correctly observes that under the terms of the arbitration award, the plaintiff was permitted seek review *de novo*. Thus, dismissal of this action based upon the arbitration award would be improper.

As to the portion of the defendant's motion which seeks, in the alternative, a protective order limiting the scope of defendant's deposition, as stated above, CPLR 3101(a) requires the parties to fully disclose "all matter material and necessary

in the prosecution or defense of an action." The phrase "material and necessary" is "to be interpreted liberally to require disclosure, upon request, of any facts bearing on the controversy, the test being one of usefulness and reason. ty. See Allen v Crowell-Collier Publ. Co., supra. However, "unlimited disclosure is not mandated, and the rules provide that the court may issue a protective order 'denying, limiting, conditioning or regulating the use of any disclosure device' to 'prevent unreasonable annoyance, expense, embarrassment, disadvantage, or other prejudice to any person or the courts.'" County of Suffolk v Long Is. Power Auth., 100 AD3d 944, 946 (2nd Dept. 2012); CPLR 3103 (a).

Here, the defendant does not demonstrate that the taking of his deposition would result in "unreasonable annoyance, expense, embarrassment, disadvantage or other prejudice". Further, the defendant's proposal that the deposition be strictly limited to the issues of whether the plaintiff forfeited his fee by retaining the defendant's funds and, if not, the reasonable value of services provided by plaintiff, is improperly narrow and not in keeping with CPLR 3101(a). Nonetheless, some limitations and cautions are warranted. First, the parties should keep in mind that this is a limited issue case, not requiring the broadest of discovery for proper resolution. Further, as previously discussed, the deposition shall be

conducted by remote technology (see Administrative Order of the Chief Administrative Judge of the Courts AO/129/20) and in accordance with all provisions of CPLR 3113 and the Uniform Rules for the Conduct of Depositions (22 NYCRR part 221). The cross-motion is granted to that extent.

C. The Plaintiff's Motion to Compel Document Discovery

The plaintiff's motion to compel document production and for related sanctions is denied as moot. This court's January 16, 2020 order states that all document discovery was complete.

IV. CONCLUSION

Accordingly, it is hereby,

ORDERED that the stay imposed by this court's order dated June 1, 2020, order is vacated, and it is further,

ORDERED that the plaintiff's motion pursuant to CPLR 3126 to strike the defendant's answer or for other relief (MOT SEQ 003), is granted to the extent that the defendant's answer is stricken unless the defendant appears for a deposition within 60 days of service of this order with notice of entry, and it is further,

ORDERED that the defendant's cross-motion for summary judgment dismissing the complaint pursuant to CPLR 3212 or, in the alternative, for a protective order limiting the scope of his deposition pursuant to CPLR 3103 (MOT SEQ 003), is granted to the extent that deposition shall be conducted by remote technology (see Administrative Order of the Chief Administrative Judge of the Courts AO/129/20) and in accordance with all provisions of CPLR 3113 and the Uniform Rules for the Conduct of Depositions (22 NYCRR part 221), and the motion is otherwise denied; and it is further,

ORDERED that the plaintiff's motion to compel the defendant to provide further document discovery and for sanctions (MOT SEQ 004) is denied as moot; and it is further,

ORDERED that any relief not expressly granted herein is denied, and it is further

ORDERED that the plaintiff shall serve a copy of this order on defendant or his counsel by overnight mail within 10 days of entry of this order.

This constitutes the Decision and Order of the court.

Dated: August 13, 2020

ENTER:



 NANCY M. BANNON, J.S.C.
HON. NANCY M. BANNON