

Thompson v Stein

2020 NY Slip Op 32883(U)

August 13, 2020

Supreme Court, Westchester County

Docket Number: 59068/2019

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

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SHAMEL THOMPSON,

Plaintiff,

DECISION AND ORDER

-against-

Index No. 59068/2019
Motion Date: July 27, 2020

Seq. No. 2

SHERYL DICKER STEIN, FANNIE REBECCA STEIN
and THE FANNIE REBECCA STEIN SPECIAL NEEDS
TRUST,

Defendants.

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LEFKOWITZ, J.

The following papers were read on this motion (Seq. No. 2) by defendants for an order compelling plaintiff to appear for an in-person deposition, or, in the alternative, staying depositions, and granting such other and further relief as this Court deems just and proper.

- Notice of Motion; Affirmation in Support; Exs. A-E
- Affirmation in Opposition; Exs. 1-14
- Reply Affirmation; Ex. A
- NYSCEF File

Upon the foregoing papers, this motion is determined as follows:

Factual and Procedural Background

As noted in a prior Decision and Order of this Court (Lefkowitz, J.) dated December 5, 2019 (NYSCEF Doc. No. 34), plaintiff sues to recover monetary damages allegedly arising out of his former employment with defendants. In his complaint dated May 30, 2019 (NYSCEF Doc. No. 36), plaintiff alleges that defendants failed to pay plaintiff wages and failed to furnish him with proper wage notices and statements. Plaintiff further alleges that defendants discriminated against him by reason of plaintiff's race, color, national origin, and sex, in violation of New York law. Defendants answered the complaint on July 10, 2019.

Pursuant to the Preliminary Conference Order (NYSCEF Doc. No. 33), plaintiff's deposition was scheduled for December 20, 2019 and defendants' depositions were scheduled for January 17, 2020. The depositions were not conducted on those dates. Following a January 6,

2020 compliance conference, the Court directed the parties to complete depositions no later than March 6, 2020 (NYSCEF Doc. No. 38). At the February 10, 2020 conference, party depositions were scheduled for March 5, 2020 and March 6, 2020 (NYSCEF Doc. No. 39). At a conference held on February 25, 2020, the Court adjourned plaintiff's deposition to March 23, 2020 and defendants' depositions to March 24, 2020 (NYSCEF Doc. No. 41). The Compliance Conference Order states that "[d]epositions were rescheduled to accommodate defendants."

The March 23 and March 24 depositions were not conducted, and no new Court order has been issued directing party depositions. Plaintiff indicated that he was unwilling to appear for an in-person deposition due to coronavirus concerns. At a compliance conference held on June 23, 2020, the Court issued a briefing schedule authorizing defendants to file a motion to compel plaintiff's appearance for an in-person deposition (Def. Ex. A).

The Parties' Contentions

Defendants now seek an order compelling plaintiff to appear for an in-person deposition, or, in the alternative "staying depositions in this matter until Plaintiff is willing to appear for an in-person deposition" (Def. Aff. ¶2). According to defendants, CPLR 3102(a) and 3113(d) mandate plaintiff's in-person deposition. They contend that "other than making a cursory statement of concern about the coronavirus, Plaintiff has provided no basis, whatsoever, for his insistence upon being deposed remotely" (Def. Aff. ¶4). Defendants accuse the Court (by virtue of having issued the briefing schedule authorizing this motion) of erroneously shifting the burden of proof.

Defendants further opine that plaintiff's insistence on a remote deposition stems from "nefarious motives" and "is a strategic and calculated attempt to prejudice Defendants' efforts to defend themselves in this lawsuit by impeding and impairing Defendants' ability to conduct a meaningful and thorough examination before trial" (Def. Aff. ¶¶6, 8). While defendants acknowledge that New York State's courts and Chief Justice have urged litigants to conduct depositions remotely when possible, defendants insist that an in-person deposition is required here because both plaintiff and plaintiff's counsel are allegedly untrustworthy. Defendants deem plaintiff untrustworthy based on a 2004 drug-related conviction and 2010 drug-related indictment, and further claim that plaintiff allegedly modified and manipulated documents served in response to defendants' discovery demands. The purported untrustworthiness of plaintiff's counsel is based on defendants' claim that plaintiff's counsel allegedly "lied about having served Plaintiff's discovery demands prior to the Court imposed deadline" (Def. Aff. ¶20). Defendants also complain that a remote deposition would be prejudicial to defendants because the case is complex, defendants need to assess plaintiff's demeanor, there are numerous documents, technological difficulties may arise (both feigned and legitimate), and plaintiff's deposition will be lengthy.

In addition, defendants reference the affidavit of a private investigator, opining that based on the investigator's report, it is apparent that "neither Plaintiff nor any member of Plaintiff's family who reside together in Plaintiff's home appear to be exercising any precaution, or

following recommended social distancing procedures, or taking any steps to safeguard themselves from contracting the coronavirus” (Def. Aff. ¶36). Defendants also state that they have contacted Veritext Legal Solutions (which provides deposition services) and confirmed that this entity is employing various practices “to ensure the safety of the parties, witnesses, attorneys and Veritext staff who appear for a deposition at its offices” (Def. Aff. ¶43).

In his opposition papers, plaintiff characterizes defendants’ motion as “beyond frivolous and a complete waste of the Court’s time” (Pl. Aff. ¶2). He observes that defendants generally rely on pre-COVID-19 cases because “every recent case located addressing COVID-19 concerns has denied a party’s attempt to have an in-person deposition or proceeding. In so doing, these cases flatly reject the very arguments raised by Defendants herein, such as that an in-person examination is needed to assess [plaintiff’s] demeanor and that due to the volume of documents the deposition cannot be conducted by video. In fact, these cases recognize the reality that if the deposition is held in-person, the witness must wear a mask, while the witness will not need to wear a mask if the deposition is conducted by video. This completely belies any claim that the deposition must be held in-person to observe the witness’s demeanor” (Pl. Aff. ¶4 [emphasis removed]). Indeed, plaintiff points out, the rule that masks must be worn at all times is in effect at the very same Veritext office proffered by defendants as a location for an in-person deposition of plaintiff (Pl. Ex. 13). Plaintiff further states that Veritext has streamlined exhibit use during remote depositions, and attaches the relevant tutorial to his motion papers (Pl. Ex. 13).

In addition, plaintiff vigorously disputes defendants’ characterization of plaintiff’s counsel as a liar, and further argues that plaintiff’s criminal history is entirely irrelevant to the issue of whether a remote deposition is proper during a pandemic and that defendants fail to cite a single case stating otherwise. With respect to defendants’ claim that plaintiff manipulated document production in some manner, plaintiff notes that prior to the filing of their papers in connection with this motion, defendants never previously complained to him about the quality of his discovery responses.

Plaintiff also argues that under the “new normal,” there is a presumption that depositions and court conferences will be conducted remotely. Therefore, he reasons, it is entirely proper to require defendants to demonstrate why there should be a departure from the “new normal.” Plaintiff further posits that in any event, he established that an in-person deposition would cause him undue hardship “in light of the reality of the risks relating to the COVID-19 pandemic” (Pl. Aff. ¶50). Plaintiff appends an affidavit to his motion papers wherein he explains that his family includes his wife’s elderly parents and his children, who (according to plaintiff) suffer from breathing problems (Pl. Ex. 14). He avers that he keeps a nebulizer and albuterol (prescribed by a physician) in his home because his children tend to develop coughs that lead to wheezing, and attaches a picture which, according to plaintiff, depicts one of plaintiff’s children using a nebulizer at an urgent care facility to combat asthma.

In reply, defendants assert that notwithstanding the “new normal,” at no time did New York impose a statutory obligation to conduct remote depositions, and plaintiff has failed to demonstrate undue hardship. They restate their arguments with respect to untrustworthiness and concerns about exhibit use during remote depositions, and ask the Court to discount plaintiff’s

affidavit on the grounds that it is allegedly “incredibly vague” and that the Court refused to accept an affidavit from defendants on an unrelated issue (Reply Aff. ¶¶12-13). At the very least, defendants argue, they should be allowed to have their expert examine plaintiff and his family members to assess the veracity of plaintiff’s alleged coronavirus concerns. Lastly, defendants append to their reply papers a Notice of Appeal, wherein defendants purport to appeal from what they characterize as a “Discovery Motion Briefing Schedule Order” (Reply Ex. A).

Analysis

As correctly stated by plaintiff, recent cases addressing COVID-19 issues have denied a party’s attempt to conduct in-person depositions or proceedings. The cases reject arguments commonly made, including the contentions that in-person examinations are needed to assess a deponent’s demeanor and that cases with voluminous documents cannot be held by video conference. In addition, the courts have found that deponents’ concerns over the risk of becoming infected with COVID-19 are valid.

By way of example, in *Rouviere v Depuy Orthopaedics, Inc.* (2020 U.S. Dist. LEXIS 122184 [S.D.N.Y. July 11, 2020]), the court denied in its entirety plaintiffs’ motion to either compel defendant’s representative to appear for a deposition in-person or to extend the discovery deadline until an in-person deposition could be conducted. Initially, the court explained that since the advent of COVID-19, conducting court proceedings and depositions remotely has become the “new normal” and that the technology used for conducting depositions by video has improved significantly over time (*see id.* at *7-8). The court further stated that an in-person deposition would cause “hardship” to the deponent and others, as COVID-19 poses significant health risks to everyone, new cases in the United States are either plateauing or rising, and the recommended social distancing minimum of six feet may be difficult to maintain in a deposition setting (*see id.* at *8-9). The court also observed that given the length of depositions and given that they are held indoors, even social distancing “does not guarantee a safe deposition environment” (*id.* at *9). Nevertheless, plaintiffs asserted that an in-person deposition was warranted because the deposition would be “document intensive” and they needed to observe the demeanor of the witness. The court rejected these arguments, observing that extensive documents are “not an obstacle to a successful remote videoconference deposition,” and that “a deposition by videoconference actually would provide a better opportunity for Plaintiffs’ counsel to observe the demeanor of the witness” in light of the fact that an in-person deposition would require the use of masks (*see id.* at *9-12).

Similarly, in *Reynard v Washburn University of Topeka* (2020 U.S. Dist. LEXIS 118631 [D. Kan. July 7, 2020]), plaintiff (who had various underlying health conditions, as did her husband) sought to have her deposition conducted by remote video. Defendant opposed the motion, arguing that an in-person deposition was necessary because plaintiff had a significant damages claim and there were numerous deposition exhibits (*see id.* at *2). Defendant also argued that the threat of COVID-19 had been reduced, noting that Kansas had just entered Phase 3 of its reopening plan (*see id.* at *5). The court rejected these arguments, observing that the mere fact that Kansas had entered Phase 3 did not lessen the health risk posed by COVID-19 (*see id.* at 7-8). The court also explained that depositions by video have become the “new normal” and that in light of recent technological advances, the defendant’s argument with respect to exhibits was not persuasive (*see id.* at *13-14). The court further explained how conducting the deposition remotely would actually enhance defense counsel’s ability to observe plaintiff’s demeanor since the plaintiff would not have to wear a mask if the deposition was held remotely (*see id.* at *15). In addition, the court found that the mere possibility that the participants would

encounter technical problems during a remote deposition was not a basis to order an in-person deposition (*see id.*; *see also In re Broiler Chicken Antitrust Litig.*, 2020 U.S. Dist. LEXIS 111420, at *87 [N.D. Ill. June 25, 2020] [observing that “[t]echnological problems can arise during in-person as well as remote depositions, but that is not a reason to prevent remote depositions from occurring”]).

Lundquist v First National Insurance Company of America [2020 U.S. Dist. LEXIS 106124 [W.D. Wash. June 17, 2020]] is also instructive. In that case, the court denied defendant’s motion to compel two plaintiffs and plaintiffs’ expert to appear for in-person depositions, concluding that “[t]he Plaintiffs’ concerns over exposure to Covid-19 are sufficient grounds to have their depositions taken by ‘telephone or other remote means’” (*id.* at *5). The Court further remarked that while it “is sympathetic to the challenges to the legal community during this pandemic, attorneys and litigants are adapting to new ways to practice law, including preparing for and conducting depositions remotely” (*id.*; *see also Patricof v Patricof*, 2020 NY Misc. LEXIS 2456, at *4 [Sup Ct, NY County, June 1, 2020] [“Even if these parties cannot get along, their attorneys, as officers of the court, are expected to remain professional and work together to facilitate a video deposition. Figure it out and do it”]).¹

Based on the foregoing, this Court finds wholly unpersuasive defendants’ contention that an in-person deposition is necessary to assess plaintiff’s demeanor. Defendants fail to counter plaintiff’s point that plaintiff would be wearing a mask during an in-person deposition.² The Court further finds that defendants’ concerns with respect to documents, complexity, potential technological glitches, and deposition length are similarly without merit under the circumstances.

The Court next addresses defendants’ complaint that it was improper for the Court to issue a briefing schedule authorizing them to move to compel. The Court is bemused by defendants’ apparent outrage. As an initial matter, there was no reason for plaintiff to make a motion; there was no Court order directing plaintiff’s deposition after New York commenced lockdown procedures, and defendants did not notice an in-person deposition (thereby necessitating a motion for a protective order). In any event, it is difficult to understand how defendants were prejudiced in this instance, as they had the advantage of presenting their argument by way of initial papers *and* reply papers (which would not have been the case had defendants been responding to a motion filed by plaintiff).

The Court further observes that to the extent that plaintiff was required to establish that an in-person deposition would constitute undue hardship, he did so. As noted in several of the

¹ The few pandemic-related cases cited by defendants are either inapposite or support the plaintiff’s position (*see e.g. Manley v Bellendir*, 2020 U.S. Dist. LEXIS 92978 [D. Kan. May 28, 2020] [denying request for remote deposition where movant, inter alia, failed to provide an affidavit or case law]; *Johnson v Time Warner Cable N.Y. City LLC*, 2020 NY Misc LEXIS 2323 [Sup Ct, NY County, May 28, 2020] [directing remote depositions of nonparties and a defense witness over a defendant’s objection]).

² Moreover, the Court agrees with plaintiff’s claim that defendants have failed to establish that a criminal record necessitates an in-person deposition, and defendants have put forth no evidence whatsoever that plaintiff’s document production was suspect. In addition, upon review of the parties’ exhibits, the Court concludes that defendants have not established that plaintiff’s counsel intentionally deceived defense counsel.

cases previously cited, deponents' concerns about becoming infected with the coronavirus are warranted. None of the information provided in defendant's investigator's affidavit negates plaintiff's sworn statement that he personally has concerns about contracting COVID-19, that he lives with individuals who are at high risk of suffering COVID-19-related complications, and that he personally adheres to social distancing rules when he is outside the confines of his home. Defendants' directive for this Court to discount plaintiff's affidavit lacks a valid basis. Although defendants claim (without providing relevant key details) that this Court refused to accept an affidavit submitted by them, they fail to acknowledge that the affidavit pertained to an entirely distinguishable issue. Moreover, at no time did this Court authorize any expert to conduct an in-person physical examination of an individual defendant, whereas defendants now appear to be seeking permission to have an expert conduct in-person physical examinations of plaintiff and his family members.

Turning to defendants' request for alternative relief in the form of a delay of plaintiff's deposition, the Court notes that a request for such relief was not authorized in the briefing schedule. In any event, this relief is not warranted. "Recent statements by public health officials about the staying power of COVID-19 ... belie Defendants' speculation that things may be so different in the Fall as to render remote depositions in this or any other case unnecessary, or at least less likely. For example, Dr. Anthony Fauci, Director of the National Institute of Allergy and Infectious Diseases, said in an interview with NBC Sports on June 5, 2020, that there was 'virtually no chance' that the novel coronavirus, which causes the disease COVID-19, will be eradicated any time soon. To the contrary, Dr. Fauci, said he believes a second wave of coronavirus infections is 'inevitable' and that "the worst-case scenario...involves a second, larger wave of infections this fall and winter" (*see In re Broiler Chicken Antitrust Litig.*, 2020 U.S. Dist. LEXIS 111420, at *96-97 [N.D. Ill. June 25, 2020] [citation omitted]). Moreover, discovery in this matter has already been substantially delayed.

In light of the above, defendants' motion is denied in its entirety. Under the circumstances, plaintiff shall be deposed virtually no later than September 15, 2020. In the event that plaintiff appears and defendants fail to conduct the deposition, the deposition shall be deemed waived.

Lastly, the Court observes that in their efforts to discredit plaintiff, defendants have run afoul of 22 NYCRR 202.5(e). Pursuant to that provision, "[e]xcept in a matrimonial action, or a proceeding in surrogate's court, or a proceeding pursuant to article 81 of the mental hygiene law, or as otherwise provided by rule or law or court order, and whether or not a sealing order is or has been sought, the parties shall omit or redact confidential personal information in papers submitted to the court for filing." For purposes of this rule, confidential personal information (CPI) includes, inter alia, "the date of an individual's birth, except the year thereof" (*see* 22 NYCRR 202.5 [e][1][ii]). Here, defendants have unfortunately disseminated CPI pertaining to numerous nonparties, both in their exhibits and their motion papers.³

³ The Court must also address defendants' claim that a remote deposition would force them to disclose documents to plaintiff's counsel that were not previously disclosed during discovery, such that defendants would lose the element of surprise. First, this contention is belied by the fact that court reporting agencies allow attorneys to keep documents in private folders (Pl. Ex. 13). Second, plaintiff argues that defendants seek to ambush him with material that should already have been provided during discovery (namely, documents authored by plaintiff that constitute "statements of opposing parties") pursuant to a prior Court order. Although plaintiff asks this Court to direct the immediate disclosure of

All other arguments raised and evidence submitted by the parties have been considered by this Court notwithstanding the specific absence of reference thereto.

In view of the foregoing, it is hereby

ORDERED that defendants' motion is denied in its entirety; and it is further,

ORDERED that plaintiff shall appear for a virtual deposition no later than September 15, 2020, and that in the event that plaintiff appears and defendants fail to conduct his deposition, plaintiff's deposition shall be deemed waived; and it is further,

ORDERED that due to the COVID-19 health emergency, the parties are directed to use their best efforts to proceed with this action in accordance with the Administrative Order of the Chief Administrative Judge issued on June 22, 2020; and it is further,

ORDERED that defendants shall serve a copy of this Decision and Order with notice of entry upon plaintiff within five (5) days of entry; and it is further,

ORDERED that the parties shall appear for a virtual Compliance Conference via Skype for Business in accordance with the Virtual Courtroom Protocol implemented in the Ninth Judicial District at 11:30 a.m. on August 19, 2020, as previously directed.

The foregoing constitutes the Decision and Order of this Court.

Dated: White Plains, New York
August 13, 2020

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

To:

All Parties by NYSCEF

cc: Compliance Part Clerk

these documents, the Court notes that there is no cross-motion currently pending. Nevertheless, it is presumed that defendants are well aware of their continuing obligation to comply with all Court orders, including the directive in the Preliminary Conference Order to exchange all "statements of opposing parties" no later than November 8, 2019 (NYSCEF Doc. No. 33).

