Teshabaeva v Family Home Care Servs. of Brooklyn & Queens, Inc.
2021 NY Slip Op 31154(U)
April 8, 2021
Supreme Court, New York County
Docket Number: 158949/2017
Judge: Alexander M. Tisch
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. ALEXANDER M. TISCH** **PART** **IAS MOTION 18EFM**

Justice

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MAKTUMMA TESHABAEVA, AND JIAN HUA DENG INDIVIDUALLY AND ON BEHALF OF ALL OTHER PERSONS SIMILARLY SITUATED WHO WERE EMPLOYED BY FAMILY HOME CARE SERVICES OF BROOKLYN AND QUEENS, INC.,

Plaintiff,

- v -

FAMILY HOME CARE SERVICES OF BROOKLYN AND QUEENS, INC.,CARE AT HOME - DIOCESE OF BROOKLYN, INC.,

Defendant.

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INDEX NO. 158949/2017

MOTION DATE 03/22/2021

MOTION SEQ. NO. 004

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 004) 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124

were read on this motion to/for DISCOVERY.

Upon the foregoing documents, plaintiffs move to compel defendant to respond to plaintiffs' demands and extend discovery deadlines.

On June 5, 2018, plaintiffs served Plaintiffs' First Pre-Class Certification Set of Interrogatory Demands and Plaintiffs' First Pre-Class Certification Demand for the Production of Documents and Things (collectively, plaintiffs' demands). Defendant failed to timely respond in violation of three (3) court orders and a stipulation between the parties. On April 25, 2019, defendant provided a partial response, which was insufficient compliance with the demands and court orders. The Court thereafter granted plaintiffs' previous motion to compel, directing defendant to provide the requested discovery (see NYSCEF Doc. No. 53 [order dated May 22, 2019, resolving motion sequence no. 2]).

Defendant failed to comply with that order, and two (2) subsequent Court orders issued in August and October of 2019.

The parties stipulated to extend discovery deadlines while motion sequence no. 3 was pending and, after the motion and cross motion were decided in July 2020, the parties stipulated that defendant would produce the discovery; and then they entered into another stipulation that directed defendant to produce the discovery, which was so-ordered by the Court.

Defendant failed to comply with that order as well.

Defendant also failed to submit opposition to the instant motion. After the motion was marked submitted, defendant e-filed a letter to advise the Court that a federal court recently confirmed the arbitration award issued by Arbitrator Martin Scheinman (the proceeding of which was the subject of motion sequence no. 3) (NYSCEF Doc. No. 125). In the letter, defendant requested leave to renew motion sequence no. 3 in light of the federal court's order. Such "request" will not be entertained without a formal motion demonstrating entitlement to leave to renew (see CPLR 2221 [e] [requiring the movant to demonstrate "new facts not offered on the prior motion" or "a change in the law that would change the prior determination"]).

Nowhere in the letter did defendant attempt to provide any excuse for failing to submit opposition and/or failing to comply with the multiple court orders.

Plaintiffs' instant motion seeks only to compel the outstanding discovery pursuant to CPLR 3214. "In the instant case, there can be no dispute that the documents and information sought in the discovery demands at issue are material and necessary to the fair resolution of this action (Anonymous v High School for Envtl. Studies, 32 AD3d 353, 358 [1st Dept 2006]). The repeatedly court-ordered information is material and necessary for plaintiffs to attempt to meet requirements of class certification pursuant to CPLR 901 and 902. Plaintiffs have undeniably

been prejudiced as the litigation has not moved forward with depositions and a motion for class certification for over two years. "While discovery has trickled in with the passage of each compliance conference, the cavalier attitude of defendant, resulting as it has in substantial and gratuitous delay and expense, should not escape adverse consequence" (Figdor v City of New York, 33 AD3d 560, 560–61 [1st Dept 2006]).

The relief sought in the instant motion has been previously sought and granted, and this Court ordered defendant to comply numerous times. Accordingly, the Court finds that all the particulars for imposing a sanction are readily present in this record.[1] However, by moving only to compel pursuant to CPLR 3124, this Court is limited as to the relief it may grant, as "CPLR 3124 does not provide authority to impose sanctions" (Patrick M. Connors, Practice Commentaries, McKinneys Cons Laws of NY, Book 7B, C3124:6). In some instances, a "court might be empowered on appropriate facts to treat it as if made under CPLR 3126, using the device of the conditionally imposed sanction if it believes such a result would better tend to compel the disclosure" (id., citing McIntosh v City of New York, 275 AD2d 307, 307-08 [2d Dept 2000]; Anonymous v High School for Envtl. Studies, 32 AD3d 353, 358 [1st Dept 2006]). The Court prudently declines to do so here, solely because the motion papers do not specifically provide notice to defendant that any type of sanction would be demanded or imposed. Even if the

[1] Defendant's inexcusable and repeated pattern of noncompliance demonstrates that the disobedience was willful and contumacious (see Fish & Richardson, P.C. v Schindler, 75 AD3d 219, 220–23 [1st Dept 2010]). The Court further finds the disobedience has been carried out with a cavalier attitude, as demonstrated by defendant's failure to submit any opposition to the instant motion. Defendant chose, instead, to file a letter raising issues on a previously decided motion, inferring that this Court is without jurisdiction to hear the claims in this matter. The letter undoubtedly infers that defendant believes it need not follow court orders and constitutes an audacious and flagrant disregard of this Court's authority, the continuation of which would lead to chaos (see generally Gibbs v St. Barnabas Hosp., 16 NY3d 74, 81 [2010] ["Chronic noncompliance with deadlines breeds disrespect for the dictates of the Civil Practice Law and Rules and a culture in which cases can linger for years without resolution"]; Kihl v Pfeffer, 94 NY2d 118, 123 [1999] ["If the credibility of court orders and the integrity of our judicial system are to be maintained, a litigant cannot ignore court orders with impunity"]).

Court attempted to fashion a conditional order of preclusion, it would not be appropriate as that would prejudice plaintiffs even further and therefore would not be appropriately tailored and commensurate with the discovery abuse and violations.

Accordingly, it is hereby ORDERED that the motion is granted with costs and defendant shall respond to plaintiffs' demands and provide a sampling of putative class members (see NYSCEF Doc. No. 116) on or before May 15, 2021; and it is further

ORDERED that the failure to comply with this order may be sanctionable under CPLR 3126, Judiciary Law § 750, Judiciary Law § 753, and/or 22 NYCRR § 130-1.1 upon further motion; and it is further

ORDERED that the deadline for the close of pre-class certification discovery is extended to August 31, 2021; and it is further

ORDERED that plaintiffs shall move for class certification on or before September 30, 2021; and it is further

ORDERED that a **status conference** shall be scheduled in this matter on June 9, 2021 at 2:30 pm.

ORDERED that the time to file note of issue is extended to March 30, 2022.

This constitutes the decision and order of the Court.

4/8/2021
DATE

ALEXANDER M. TISCH, J.S.C.

CHECK ONE:		CASE DISPOSED			X	NON-FINAL DISPOSITION	
	X	GRANTED		DENIED		GRANTED IN PART		OTHER
APPLICATION:		SETTLE ORDER				SUBMIT ORDER		
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN				FIDUCIARY APPOINTMENT		REFERENCE