

**Verdi v Dinowitz**

2021 NY Slip Op 31281(U)

April 15, 2021

Supreme Court, New York County

Docket Number: 158747/2016

Judge: Lynn R. Kotler

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**SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY**

PRESENT: HON. LYNN R. KOTLER, J.S.C.PART 8MANUELE VERDI

INDEX NO. 158747/2016

- v -

MOT. DATE

JEFFREY DINOWITZ

MOT. SEQ. NO. 017

The following papers were read on this motion to/for COMPEL

Notice of Motion/Petition/O.S.C. — Affidavits — Exhibits

ECFS DOC No(s). \_\_\_\_\_

Notice of Cross-Motion/Answering Affidavits — Exhibits

ECFS DOC No(s). \_\_\_\_\_

Replying Affidavits

ECFS DOC No(s). \_\_\_\_\_

10/20/20 Transcript

The procedural history of this case set forth in the court's prior orders dated December 10, 2020 and February 22, 2021 is herein incorporated by reference. In short, in an order dated October 20, 2020, the court directed the parties to, within 60 days thereof, "make any discovery-related motions on issues not raised in motion sequence number(s) 12, 13 and 14 such as motions to compel discovery or regarding objections raised in prior depositions". Meanwhile, any discovery issues which were raised in motion sequence numbers 12, 13 and 14 were decided in the December 10, 2020 decision/order to the extent that they were denied, the parties were directed to complete all outstanding depositions within 90 days and all outstanding discovery on or before May 14, 2021.

The October 20, 2020 order memorialized this court's explicit directives at a virtual conference with the parties held on the record, the transcript of which is filed as NYSCEF Doc. No. 441. During that conference, the court plainly advised the parties that any other discovery matters that were not previously raised would need to be addressed by way of a new motion:

If there's something that you want the Court to make a ruling, that should be the subject of the motion, however, in 12, 13 and 14, I don't recall seeing anything that specific in any of those motions, and if there's something that happened prior to motions 12, 13 and 14, that you require the Court to make a ruling on, because at those depositions, then that must be your motion sequence 15. Don't try to hide it in this supplemental affirmation. It's going to have to be something new. And that goes for any sort of documents that you believe you do not have. That has to be the source of yet another motion, unless it is relevant to motion sequence 12, 13 and 14. The Court did not send this case to a special [referee] to make rulings on deposition objections. Just so we're clear.

(NYSCEF Doc. No. 441, p22-23)

Dated: 4/15/21
  
 \_\_\_\_\_  
 HON. LYNN R. KOTLER, J.S.C.

1. Check one:

 CASE DISPOSED     NON-FINAL DISPOSITION

2. Check as appropriate: Motion is

 GRANTED     DENIED     GRANTED IN PART     OTHER

3. Check if appropriate:

 SETTLE ORDER     SUBMIT ORDER     DO NOT POST

 FIDUCIARY APPOINTMENT     REFERENCE

...

The Court is going to give both sides, Mr. Glaser, Mr. Bertaccini, 30 days to submit supplemental affirmations with regard to any of the outstanding discovery that was referenced in their motions 12, 13 and 14. If you have not referenced any documents that you did not get, then you need to make another motion. You need to make a motion to compel. The same thing if there are any objections in any depositions. You need to make additional motions with regard to that. The Court is going to give you -- you have 30 days from today to submit a supplemental affirmation. If you need to make a motion to compel certain documents that you indicate were previously requested, you have 60 days. The same thing if you need a ruling from any of the depositions, you have 60 days to make a motion. The Court will make a ruling; okay?  
(NYSCEF Doc. No. 441, p29-30.)

Neither side made a discovery-related motion within the sixty-day deadline set forth in the court's 10/20/20 Order. The December 10, 2020 decision memorialized outstanding discovery as follows:

Plaintiff claims that there are currently four open depositions. Plaintiff's counsel further indicates a desire to serve subpoenas for additional testimony. The court hereby directs the parties to complete all outstanding depositions within 90 days and all outstanding discovery on or before May 14, 2021. The deadline to file note of issue is extended to May 14, 2021.

On Saturday, December 19, 2020, sixty days after the court's October 20, 2020 order, plaintiff moved to amend his complaint (motion sequence 15). The defendant cross-moved for costs and attorney's fees. Both that motion and the cross-motion were denied in the February 22, 2021 decision/order. In that decision, the court warned the parties:

This case has been languishing for years. Significant discovery has been exchanged and numerous depositions have been held. In this court's decision/order dated December 10, 2020, this court directed the parties to complete all outstanding depositions within 90 days thereof and all outstanding discovery on or before May 14, 2021. Court-imposed deadlines have meaning.

Plaintiff now moves to compel "each one of the outstanding depositions and provision of other discovery in this matter pursuant to prior court orders, based on the failure of the parties to reach any accommodation pertaining to scheduling the aforesaid matters" (emphasis removed). Plaintiff further seeks an order compelling non-party witnesses Randi Martos and Laura Moukas in connection with subpoenae *duces tecum* to produce documents and appear and/or complete depositions. Plaintiff requests that the court order the following depositions: [1] Laura Feijoo; [2] Steven Schwartz, continued; [3] Justin Brannan; [4] Laura Moukas, continued; [5] Andrew Wolf; [6] John Zaccaro; [7] Randi Martos; [8] Ezra B. Glaser, [9] Charles Moerdler, [10] Pamela Takefman; and [11] Daniel Bertaccini.

Defendant opposes the motion. Defense counsel argues that the first branch of the motion should be denied because this court previously directed the parties to file new discovery-related motions within 60 days of the October 20, 2020 order and "based on Defendant's willingness to work with Plaintiff on a discovery schedule, including Defendant's efforts to enter into a stipulation based on terms that Plaintiff proposed—which, without justification, Plaintiff rejected—Plaintiff cannot demonstrate good cause for his untimely Motion." Defendant further argues that the January 2021 subpoena to Martos is untimely and procedurally defective. Lastly, defense counsel maintains that plaintiff and his attorney, Ezra Glaser, Esq., has continued to engage in frivolous conduct:

... in light of Plaintiff's refusal to enter the scheduling stipulation that Defendant proposed to resolve the matters raised in Prong One of the Motion, as well as the

obvious defects in the subpoenas issued to Ms. Martos, it would appear that the instant Motion was filed primarily to delay or prolong the resolution of this litigation, or to harass Defendant, Ms. Martos, their attorneys, and other non-party witnesses and their counsel. In short, Plaintiff and Mr. Glaser continue to engage in the type of frivolous conduct for which they were previously sanctioned under Part 130.

At the outset, the court rejects defense counsel's argument that plaintiff's motion violates the court's October 20, 2020 order on its face. Indeed, discovery was not complete at that time and any discovery issues that arose thereafter could and should be timely raised. That is not to say that discovery which plaintiff should have sought before the October 20, 2020 order can now be obtained. On that point, defendant is correct that plaintiff must demonstrate good cause for not seeking such discovery prior to the expiration of the court-imposed 60-day deadline in the October 20, 2020 order.

Plaintiff's counsel now claims that there are ten depositions which need to be held. Whereas, in his affirmation dated November 20, 2020, plaintiff's counsel claimed the following non-party depositions were open or subpoenaed but not yet "initiated": [1] Melodie Mashel, open; [2] Laura Moukas, open; [3] Steven Schwartz, open; [4] Andrea Feldman, open; [5] Andrew Wolf; [6] Justin Brannan; [7] John Zaccaro; and [8] Laura Feijoo.

Meanwhile, in his affirmation, defense counsel acknowledged depositions with proposed dates and times for the following: Mashel, Schwartz and Brannan. Defense counsel further represents that instead of resolving their scheduling issues, plaintiff's counsel resorted to motion practice. Defendant maintains that he "has further agreed to schedule an additional four depositions, as well as to confirm dates for the remaining two depositions once all others have been scheduled." Defense counsel further objects to subpoenas served on three of Defendant's attorneys for documents and testimony, claiming that "Plaintiff does not meet the test in *Liberty Petroleum Realty, LLC v. Gulf Oil, L.P.*, 164 A.D.3d 401 (1st Dep't 2018), for subpoenaing documents or deposition testimony from opposing counsel." Thus defendant's motion sequence 18, presently returnable in May.

On this record, the motion is granted to the extent that the court will set dates for all previously agreed upon depositions to the extent that the parties cannot agree to dates. This does not include depositions for defense counsel which are the subject of motion sequence 18 and the depositions shall be conducted remotely via virtual technology in light of the ongoing Covid-19 pandemic. The parties are directed to settle an order on notice within 20 days with dates for the previously agreed upon depositions and to the extent that the parties dispute as to whether a deposition had been previously agreed to, they should submit an affirmation in support of their proposed order.

The court now turns to the balance of the motion. Martos was deposed by Plaintiff's counsel on October 10, 2018. Plaintiff did not subpoena Martos for documents at that time. On January 9, 2021, plaintiff served a subpoena *duces tecum* on Martos requesting the production of certain documents. That subpoena set down a compliance date of February 15, 2021. Martos served her responses and objections to plaintiff's subpoena on January 29, 2021, which set forth the documents she agreed to search for and produce by February 15, 2021, as well as specific objections to other aspects of the document subpoena. Meanwhile, on January 18, 2021, plaintiff filed on NYSCEF a further subpoena *ad testificandum* addressed to Martos. (NYSCEF Doc. No. 503), which defense counsel maintains was not properly served as Martos has not recorded her consent to be served through NYSCEF. Therein, plaintiff seeks to depose Martos a second time purportedly for the sole purpose of asking her questions about documents responsive to the subpoena *duces tecum* served on her on January 9, 2021. The subpoena for Martos's second deposition called for her to testify on February 11, 2021, four days before the date she was asked to produce documents.

Plaintiff's motion to compel Martos to comply with a subpoena must be denied as procedurally improper since it was made before Martos' time to comply with the subpoena had expired. Therefore, the

balance of the motion as to Martos is premature. Any motion to compel Martos to comply with the previously served subpoenas must be made within 20 days.

The subpoenas served upon Moukas are dated December 13, 2020 and sought a continued deposition on January 15, 2021 at 11am and the production of documents on "December 28, 2021." Moukas is not represented by defense counsel, but rather Jennifer M. Lanni, Esq., as evidenced by email correspondence regarding the subject subpoenas which plaintiff has provided to the court. Since notice of this motion was not provided to Moukas and/or her counsel, this branch of the motion must also be denied without prejudice to renewal in 20 days.

### Conclusion

Accordingly, it is hereby

**ORDERED** that the motion is granted only to the extent that the court will set dates for all previously agreed upon depositions to the extent that the parties cannot agree to dates. The parties are directed to settle an order on notice **within 20 days** with dates for the previously agreed upon depositions and to the extent that the parties dispute as to whether a deposition had been previously agreed to, they should submit an affirmation in support of their proposed order; and it is further

**ORDERED** that any motion to compel Martos and/or Moukas to comply with previously served subpoenas must be made **within 20 days** and upon proper notice; and it is further

**ORDERED** that the motion is otherwise denied.

Any requested relief not expressly addressed herein has nonetheless been considered and is hereby expressly denied and this constitutes the Decision and Order of the court.

Dated: 4/15/21  
New York, New York

So Ordered:

  
\_\_\_\_\_  
Hon. Lynn R. Kotler, J.S.C.