

<b>Tiago v Trachtman</b>
2021 NY Slip Op 31386(U)
April 22, 2021
Supreme Court, New York County
Docket Number: 651404/2019
Judge: Arlene P. Bluth
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.
This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. ARLENE P. BLUTH PART IAS MOTION 14

Justice

-----X

JANINE A. TIAGO, PH.D., ABPP-CN, M. MARGARET WHELLEY, PH.D.

Plaintiff,

- v -

ALAN C. TRACHTMAN, ESQ dba LAW OFFICE OF ALAN C. TRACHTMAN

Defendant.

-----X

INDEX NO. 651404/2019
MOTION DATE N/A
MOTION SEQ. NO. 002

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 002) 50, 51, 52, 53, 54, 55, 56, 57, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72

were read on this motion to/for STRIKE PLEADINGS.

The motion by defendant to strike plaintiff's pleadings is denied.

Defendant complains that plaintiff Whelley did not submit a Jackson affidavit as ordered by this Court. He points out that the key issue during discovery is that right before the discovery of last remaining witness, a non-party witness, plaintiffs produced over 2,000 pages of documents that plaintiff claims should have been produced years ago. Another 250 pages of discovery was later produced by plaintiffs.

After a discovery conference, the Court ordered that an affidavit be submitted by the plaintiffs addressing why these documents were not found earlier (NYSCEF Doc. No. 49).

Defendant complains that only plaintiff Tiago produced an affidavit and complains about the explanation given by Tiago.

In opposition, plaintiffs contend that some of the documents were not withheld by plaintiffs but were in counsel for plaintiffs' possession. They claim they initially objected to

production but eventually chose to produce all of the documents. Plaintiffs admit that while preparing the post-deposition production, plaintiff Tiago discovered additional documents located on an iPad she had recently purchased. Plaintiffs argue that the affidavit from Tiago explains the delay and that Whelley attaches an affidavit in connection with this motion.

In reply, defendant emphasizes that Whelley ignored the Court deadline for her affidavit and failed to address this issue. He also questions the quality of Tiago's affidavit addressing the missing documents. Defendant concludes that the poor quality of these affidavits should compel the Court to grant the motion.

### **Discussion**

As an initial matter, the Court observes that the affidavit from Dr. Whelley is late and emails between the parties confirm that plaintiffs appear to have decided to set their own schedule for her affidavit (*see* NYSCEF Doc. No. 55). But this Court is less concerned with deadlines and more interested in the substance of both affidavits from plaintiffs. The Court prefers that cases be decided on the merits.

The circumstances surrounding the newly produced documents are troubling. On the eve of the completion of discovery, plaintiffs suddenly produced thousands of pages of discovery that should have been produced earlier. Certainly, the Court recognizes that things happen in discovery—passwords get lost, witnesses suddenly remember to search in new places. Here, Dr. Tiago claims she did an initial search in 2019 for relevant documents on her desktop computer and her other Apple devices (NYSCEF Doc. No. 54, ¶ 3). She contends that in late 2019 her desktop began to malfunction and she bought a new hard drive in February 2020 (*id.* ¶ 4). This computer apparently failed in December 2020 (*id.* ¶ 5).

Dr. Tiago contends that she learned from a computer technician that her “cloud” backup settings had been altered and she had not been backing up her computer (*id.* ¶ 6). She says she hired a third-party recovery company in January 2021 to recover data and found new documents on a newly purchased iPad although the documents did not appear on her computer when the same search was done (*id.* ¶¶ 7-12). Dr. Tiago speculates that the documents were in cloud storage or were restored when she hired the third-party recovery company. In fact, Dr. Tiago attaches exhibits which depict the difference search results on her computer and on her iPad (NYSCEF Doc. No. 63, exhs 4 and 5).

The Court is satisfied with this explanation. Although the timing is concerning, the fact is that this plaintiff conducted another search when requested by her attorney and produced relevant documents that she discovered. The difference in the search results between the two devices (the computer and the iPad) is confusing but plaintiff’s exhibits are sufficient to defeat defendant’s request for striking the complaint. The Court cannot strike plaintiffs’ pleadings based on this account. There is no evidence that Dr. Tiago intentionally withheld documents; instead, it appears her technological proficiency is lacking.

The affidavit from Dr. Whelley explains that she does not have copies of communications from Dr. Tiago (that were recently discovered) and that she has no idea why she no longer possesses these emails (NYSCEF Doc. No. 65, ¶¶ 11-12). She speculates that she routinely deletes text messages to protect patient privacy, although she maintains that she deleted nothing after this litigation began, and that some of her emails from Columbia University may have been deleted by the school (*id.* ¶ 12).

The Court is unable to grant the motion after reviewing this affidavit. While the affidavit should have been produced timely, the fact is that the focus of the Court’s order was on Dr.

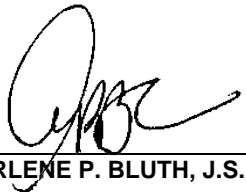
Tiago's recent discovery of documents. A single missed deadline is not a basis to strike a pleading especially where there was little prejudice to defendant.

Accordingly, it is hereby

ORDERED that the motion by defendant to strike plaintiffs' complaint is denied and all stays are hereby lifted.

Remote Conference: June 10, 2021 at 2:30 p.m.

4/22/2021  
DATE

  
ARLENE P. BLUTH, J.S.C.

CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION		
	<input type="checkbox"/>	GRANTED	<input checked="" type="checkbox"/>	DENIED	<input type="checkbox"/>	OTHER
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>	SUBMIT ORDER		
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/>	REFERENCE