

Muniz v ENT & Allergy Assoc., LLP

2021 NY Slip Op 32540(U)

December 2, 2021

Supreme Court, New York County

Docket Number: Index No. 158060/2020

Judge: David Benjamin Cohen

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(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. DAVID B. COHEN, J.S.C. PART 58

Justice

-----X

INDEX NO. 158060/2020

NEREIDA MUNIZ,

Plaintiff,

MOTION SEQ. NO. 001

- v -

ENT AND ALLERGY ASSOCIATES, LLP,

**DECISION + ORDER ON
MOTION**

Defendant.

-----X

The following e-filed documents, listed by NYSCEF document number (Motion 001) 6, 7, 8, 9, 10, 11, 12, 14, 15, 16

were read on this motion to/for

DISMISS

In this employment discrimination action commenced by Nereida Muniz, defendant ENT and Allergy Associates, LLP moves: 1) pursuant to CPLR 3126, to dismiss the complaint with prejudice or, in the alternative, 2) to preclude plaintiff from introducing evidence supporting her claims and/or opposing defendant's defenses, or, in the alternative, 3) compelling plaintiff to respond to defendant's discovery demands by a date certain pursuant to CPLR 3124, and 4) for such other relief as this Court deems just and proper. Plaintiff's counsel opposes the motion. After consideration of the parties' contentions, as well as a review of the relevant statutes and case law, the motion is decided as follows.

FACTUAL AND PROCEDURAL BACKGROUND

The following factual and procedural history of this matter, as set forth in defendant's moving papers, is undisputed. Docs. 7 and 14.

On November 18, 2020, defendant served plaintiff with a Notice of Deposition, a First Request for Production of Documents, and a First Set of Interrogatories. Doc. 8. Responses to

the said demands were due by December 8, 2020. Doc. 7 at par. 4. On December 9, 2020, plaintiff's counsel contacted defendant's attorney and advised him that he (plaintiff's counsel) was in the process of preparing discovery responses but needed additional time and requested an extension of time until December 23, 2020 to respond. Doc. 7 at par. 4. Defendant's attorney consented to this request. Doc. 7 at par. 4.

On December 21, 2020, plaintiff's counsel contacted defendant's attorney to advise that he was in the process of finalizing plaintiff's discovery responses but required an additional extension of time until January 8, 2021. Doc. 7 at par. 4. Once again, defendant consented to plaintiff's request. Doc. 7 at par. 5. On January 8, 2021, plaintiff's counsel advised that plaintiff required additional time to complete her discovery responses and requested a two week extension to provide responses by January 22, 2021. Doc. 10. Defendant again consented. Doc. 7 at par. 6.

On January 21, 2021, plaintiff's counsel advised defendant's attorney for the first time that plaintiff was in a remote area in Puerto Rico caring for her father, who had contracted COVID-19, and requested an additional 30-day extension until February 22, 2021. Doc. 10. Defendant's attorney again consented to plaintiff's request. Doc. 7 at par. 7. After receiving no response by February 22, 2021, defendant's attorney contacted plaintiff's counsel in an attempt to ascertain when a response would be served. Doc. 7 at par. 8.

On February 26, 2021, plaintiff's counsel advised defendant's attorney that he was having difficulty communicating with his client and would provide definite dates for the responses once he was able to establish consistent contact with plaintiff. Doc. 7 at par. 8.

On March 18, 2021, defendant's attorney served a good faith letter requesting that plaintiff provide responses to the outstanding discovery demands by April 1, 2021. Doc. 7 at par. 9; Doc. 10.

On April 1, 2021, plaintiff's counsel told defendant's attorney that plaintiff was not disregarding her discovery obligations but, rather, she was in Puerto Rico caring for her father in a town that was "off the grid" and requested a further extension of time to respond. Doc. 7 at par. 10; Doc. 10.

On April 2, 2021, defendant's attorney documented all of the extensions of time he had provided plaintiff's counsel and requested that the latter provide a date certain by which plaintiff would respond to defendant's demands. Doc. 7 at par. 10. On April 4, 2021, plaintiff's counsel responded that he could not provide a date certain by which plaintiff would respond because he could not reach plaintiff in order to prepare the responses. Doc. 7 at par. 11; Doc. 10. Plaintiff's counsel also requested that the parties stipulate to stay the matter pursuant to CPLR 2201. Doc. 7 at par. 11; Doc. 10.

On April 5, 2021, defendant's attorney advised plaintiff's counsel that he was willing to revisit the issue of plaintiff's responses at a later date. Doc. 7 at par. 12; Doc. 10. The same day, plaintiff's counsel advised defendant's attorney that he did not know when he would hear from his client, but that he would continue his efforts to reach her. Doc. 7 at par. 12; Doc. 10.

On May 11, 2021, defendant's counsel emailed plaintiff's attorney to check on the status of plaintiff's responses. Doc. 7 at par. 13; Doc. 10. Defendant's attorney did not hear back and followed up again on May 19, 2021. Doc. 7 at par. 13; Doc. 10. Plaintiff's attorney responded that, although his efforts to contact plaintiff were ongoing, he was unable to contact her. Doc. 7 at par. 13; Doc. 10.

On July 1, 2021, defendant's counsel again followed up with plaintiff's attorney to ask whether plaintiff intended to pursue her case or would agree to voluntarily discontinue it. Doc. 7 at par. 14; doc. 10. After plaintiff's counsel failed to respond, defendant's attorney followed up again on July 20, 2021. Doc. 7 at par. 15; Doc. 10. Plaintiff's counsel responded and asked whether defendant's attorney would agree to stay the action. Doc. 7 at par. 15; Doc. 10.

On July 21, 2021, defense counsel spoke with plaintiff's attorney to discuss plaintiff's failure to participate in the discovery process. Doc. 7 at par. 16. On July 27, 2021, defense counsel emailed plaintiff's attorney to advise him that, given the latter's inability to communicate with plaintiff, as well as the amount of time which had elapsed since the service of defendant's demands, he (defendant's attorney) had no option but to move to dismiss the case. Doc. 7 at par. 17; Doc. 10. Defendant's attorney further requested that plaintiff's counsel advise him by the end of the week whether he believed there was an alternative solution. Doc. 7 at par. 17; Doc. 10. On July 28, 2021, plaintiff's counsel responded that, given defendant's unwillingness to stay the case, motion practice appeared to be the sole option. Doc. 7 at par. 18; Doc. 10.

On August 16, 2021, defendant's counsel filed the instant motion seeking the relief set forth above. Doc. 6. In support of the motion, defendant's counsel argues that the complaint must be dismissed pursuant to CPLR 3126 due to plaintiff's protracted failure to provide discovery. Doc. 7; Doc. 11. Alternatively, counsel argues that this protracted failure warrants preclusion of plaintiff from introducing evidence in support of his case and/or in opposition to defendant's defenses. Doc. 7; Doc. 11. Counsel also argues that, if the foregoing relief is not granted, then plaintiff must be compelled to provide responses to the demands pursuant to CPLR 3124 within 30 days or be precluded from introducing evidence at trial. Doc. 7; Doc. 11.

In opposition, plaintiff's counsel argues that the complaint should not be dismissed, and plaintiff should not be precluded, since he has proffered a sufficient excuse for plaintiff's failure to provide discovery. Doc. 14.

In reply, defendant's attorney substantially reiterates his initial arguments. Doc. 15.

LEGAL CONCLUSIONS

Pursuant to CPLR 3126 the Court may impose penalties upon any party who "willfully fails to disclose information which the Court determines ought to have been disclosed." CPLR 3126[3] provides the drastic sanction of dismissing a party's pleadings for failure "to comply with outstanding discovery requests or court-ordered discovery obligations." "[W]hen a party fails to comply with a court order and frustrates the disclosure scheme set forth in the CPLR, it is well within the Trial Judge's discretion to dismiss [its pleading]" (*Kihl v Pfeffer*, 94 NY2d 118, 122-23 [1999]). "[T]he 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 and Bronx Surface Transit Operating Authority*, 286 AD2d 303 [1st Dept 2001] [finding that a five year delay in serving a bill of particulars did not warrant dismissal of a personal injury claim where "there was no motion practice at all prior to defendants' motion to preclude and dismiss"] citing *Dauria v City of New York*, 127 AD2d 459, 460 [1st Dept 1987]). The failure to comply with court ordered discovery or failure to proffer any excuse for "failure to comply, indicates willful, contumacious and evasive conduct" (*Austin v Coin Devices Corp.*, 234 AD2d 155, 156 [1st Dept 1996]).

(*Grandelli v Clyburn*, 2019 NY Slip Op 31309[U], *2 [Sup Ct, NY County 2019] [Silvera, J.]).

"[W]illfulness can be inferred when a party repeatedly fails to respond to discovery demands and/or to comply with discovery orders, coupled with inadequate excuses for those defaults" (*Oversea Chinese Mission v Well-Come Holdings, Inc.*, 145 AD3d 634, 635 [1st Dept 2016] [citation omitted]; see also *Cooper v Metro. Transp. Auth.*, 186 AD3d 1150, 1151 [1st Dept 2020]).

Thus far, this Court has not issued a discovery order in this case. In fact, a preliminary conference has yet to be held. Nevertheless, defendant's attorney represents, and plaintiff's

counsel does not deny, that he (defense counsel) has made repeated good faith efforts, in vain, to obtain responses to the demands he served on November 18, 2020, over one year ago.

Since there is no dispute that plaintiff has repeatedly failed to provide discovery responses, this Court turns to the issue of her attorney's excuse for failing to do so. As detailed above, plaintiff's counsel maintains that he is unable to communicate with his client, who is "off the grid" taking care of her father, who is suffering from COVID in Puerto Rico. Although counsel asserts that plaintiff made "good faith attempts to complete written discovery *prior* to the medical emergency of her father", he does not specify what such efforts were or why they did not culminate in the production of discovery responses. Doc. 14 (emphasis added).

Nor does counsel provide any detail whatsoever to support his contention that he has set forth an "adequate explanation" regarding why plaintiff cannot provide discovery responses at this time. Doc. 14. Specifically, counsel fails to provide: 1) the name, address, and/or telephone number of plaintiff's father, or any reason why plaintiff cannot be contacted at such address and/or number; 2) any medical records or a doctor's note regarding the condition of plaintiff's father; 3) the name of the town where plaintiff's father is allegedly located; 4) evidence of any investigation he or anyone else conducted in an attempt to locate plaintiff in Puerto Rico; or 5) any information regarding whether plaintiff has contacted him since she has been in Puerto Rico.¹ Thus, the conclusory excuse by plaintiff's counsel is woefully inadequate (*See Bustamante v Green Door Realty Corp.*, 158 AD3d 444, 445 [1st Dept 2018]; *Touray v Munoz*, 96 AD3d 623, 946 NYS2d 860 [1st Dept 2012]; *Reidel v Ryder TRS, Inc.*, 13 AD3d 170, 171-172 [1st Dept 2004]).² Even assuming that plaintiff's counsel had set forth a valid excuse for his client's failure to provide

¹ Plaintiff's counsel represents that plaintiff left for Puerto Rico in or about January 2021. Doc. 14. He implies, but does not state for certain, that plaintiff has remained in Puerto Rico since that time. Doc. 14.

² This Court also notes that the opposing papers served by plaintiff's counsel consist of an unsworn letter citing a single case, addressed below, which does not address the discovery provisions of the CPLR. Doc. 14.

discovery, the fact that plaintiff made herself unavailable would “not preclude the imposition of sanctions for failure to comply with discovery” (*Gonzalez v Paniccioni*, 174 AD2d 709 [2d Dept 1991]).

Despite the shortcomings of the opposing papers, as well as the delay of over one year caused by plaintiff’s failure to provide discovery, plaintiff has not yet been directed by court order to respond to defendant’s demands. Therefore, assuming that the excuse provided by plaintiff’s counsel is true, this Court, in its discretion, directs plaintiff to serve responses to defendant’s Notice of Deposition, First Request for Production of Documents, and First Set of Interrogatories, each dated November 18, 2020 (Doc. 8), within 90 days after service of this order with notice of entry (*See* CPLR 3124). Should plaintiff fail to provide responses to the said demands by this deadline, then defendant may move for the appropriate discovery sanctions as a result of the violation of this order.

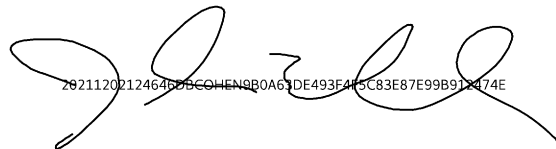
Finally, this Court denies the request by plaintiff’s counsel for a stay of this action. In support of this request, counsel cites to CPLR 2201, as well as *Landmark Ins. Co. v. Virginia Sur. Co.*, 2007 N.Y.Misc. LEXIS 6409, *8 (Sup. Ct. NY Cty. 2007) which, as he asserts, held that a court may, in its discretion, issue a stay of an action. Initially, however, plaintiff did not move or cross-move for a stay (*See* CPLR 3214; CPLR 3215; Siegel, NY Prac § 255 at 498 [6th ed]). Even if a motion had been filed, however, this Court would not be inclined to stay the action since, as discussed above, it has virtually no knowledge regarding plaintiff’s current circumstances. It is unclear when plaintiff will return from Puerto Rico or if she ever will do so. Indeed, plaintiff’s counsel’s admitted that he did not know when he would hear from his client again. Doc. 7 at par. 12; Doc. 10. It is the opinion of this Court that, without any further

information, a stay of this action would be prejudicial to defendant, who has made Herculean efforts to activate the discovery process.

Accordingly, it is hereby:

ORDERED that the motion by defendant ENT and Allergy Associates, LLP is granted to the extent of directing plaintiff Nereida Muniz to serve responses to its Notice of Deposition, First Request for Production of Documents, and First Set of Interrogatories, each dated November 18, 2020 (Doc. 8), within 90 days after service of this order with notice of entry, and the motion is otherwise denied; and it is further

ORDERED that should plaintiff fail to provide responses to the foregoing demands by the deadline set forth above, then defendant may move for the appropriate discovery sanctions as a result of the violation of this order.



2021120212464505COHENSR0A63DE493F45C83E87E99B912074E

DAVID B. COHEN, J.S.C.

12/2/2021
DATE

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