SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

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

SUNDAY OKAFOR

INDEX NO. 161614/18

MOT. DATE

- v -

MOT. SEQ. NO. 001 &002

HAIRLINE INK, LLC

The following papers were read on this motion to/for compel and cross-motion

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)._____

In motion sequence 001, defendant Hairline Ink, LLC (Hairline) moves to compel plaintiff to respond to questions at his deposition and other related relief. Plaintiff Sunday Okafor (Okafor) opposes the motion and cross moves for an order deeming defendant to have waived its right to take a further deposition of the plaintiff and to compel defendant to produce a witness for deposition. In motion sequence 002, Hairline moves to dismiss Okafor's complaint for failure to comply with discovery or in the alternative to preclude Okafor from providing evidence at the time of trial. Okafor opposes the motion and cross moves for the same relief as in motion sequence 001. The motions are decided as follows.

The following facts are alleged in the complaint. Briefly, defendant Hairline operates a business providing a hair loss solution called scalp micro-pigmentation ("SMP"). Plaintiff alleges that Hairline advertised that it used specialized equipment and techniques to inject pigment to the scalp to create the appearance of a full head of hair after a close-cut hair style. Plaintiff further alleges that on February 25, 2017 and March 26, 2017, he underwent SMP sessions at Hairline. Plaintiff further alleges that after the second session, the micropigmentation extended to places where he did not have hair but that defendant's representative Chris Lopez explained it was necessary to achieve the right result. Plaintiff contends that as a result he "received embarrassing negative feedback concerning his family, friends and strangers" and that the "botched SMP had a devastating impact on Plaintiff's appearance and overall confidence" including" …. "the need the cover his hair with a cap to shield himself from the embarrassing scrutiny…". Plaintiff attempted to get defendant to remedy the situation to no avail. On December 12, 2018, plaintiff filed this action.

Dated: 1/10/22

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**

On March 4, 2021, the Court issued an Order directing Plaintiff to resume prosecution of this matter within 90 days and extended plaintiff's time to file his note of issue until June 25, 2021. The parties executed a stipulation extending discovery to September 24, 2021. Plaintiff's deposition was conducted on May 13, 2021 and July 9, 2021, but was not completed. Hairline has not yet appeared for a deposition.

MOTION SEQUENCE 001

Defendant argues that plaintiff's counsel violated Uniform Rule 22 NYCCR 221 by refusing to let his client/plaintiff answer questions at the depositions and did not provide a reason for failing to answer. Defendant further argues that there are limited exceptions when a deponent may refuse to answer a question at a deposition when an objection is made, none of which existed at the times of plaintiff's depositions. Defendant highlights various portions of the deposition transcript where plaintiff's counsel refuses to let Plaintiff answer and further fails to provide a reason for same.

1) "For example:
Q. When you are off on those two days where do you stay?
A. With my friend.
Q. Do you have a lease for any residents that you spend time overnight at?
A. No, I can't have a lease for two days.
Q. Is the answer no?
A. No.
Q. Who was the individual that you stayed with for the two days that you were off?
A. My girlfriend.· That's my information.
Q. What's her name?
A. I can't give you her name.
Ms. Rebar: Yes, you can.
Mr. DeSantis: We can mark that for a ruling.
Ms. Rebar: You are not allowing him to provide the individual with whom he lives?· We can mark it for a ruling. I will seek costs. ·
Plaintiff's counsel refuses to let Plaintiff answer and further, fails to provide a reason for same."

2) "Plaintiff's counsel continuously instructed Plaintiff not to answer in instances not covered under 22 NYCRR 221.2.
Q. Have you ever been sued?
A. My landlord.
Q. What was the name of the landlord?
A. I don't have the name now. · · · · · · · · ·
Q. Where was that lawsuit brought, do you remember the County?
A. Westchester.
Q. What property were you sued by your landlord over?
Mr. DeSantis: Objection.· Don't answer it.· It is not relevant.
Ms. Rebar: The fact that he was sued by his landlord?
Mr. DeSantis: It is not relevant. I am instructing him not to answer.
Q. What was the lawsuit over?
Mr. DeSantis: Don't answer"

Finally, defendant argues that "plaintiff's counsel made a number of improper speaking objections, suggesting the answer to Plaintiff" and referenced various deposition pages annexed to Exhibit "E" pgs. 26, 38, 39, 40, 47 ,80,81, 93,94, 107,108, and 130 in violation of Rule 221.1(b) because each suggests a

particular answer, that Plaintiff answer that he does not understand the question, or coaches plaintiff to respond a certain way and that Plaintiff's counsel fails to provide a permissive basis for the objection under Rule 221.3.

Plaintiff opposes the motion and cross moves for an order that defendant waived its right to conduct a further deposition of plaintiff and to compel defendant to produce its witness. Plaintiff contends that during the deposition, defense counsel "went after plaintiff in a derogatory way", that counsel "Not happy with the explanation, defense counsel continues to poke fun at Mr. Okafor", that the line of questioning about plaintiff wearing a hat is improper and that plaintiff's counsel objected to improper questions.

First, plaintiff's cross-motions (motion sequence 1 and 2) are granted to the extent that defendant shall produce a witness for deposition on or before March 31, 2022. The balance of plaintiff's cross-motions are denied for the reasons set forth below.

Pre-trial depositions are governed by CPLR 3115 and by the Uniform Rules for the Conduct of Depositions. The "Uniform Rules, as amended in 2006, sharply limit the appropriate scope of objections at a deposition." *Veloso v Scaturro Bros., Inc*., 68 Misc 3d 1024, 130 NYS3d 218 [Sup Ct, NY County 2020]. The Rules permit only those objections that would be waived under CPLR 3115 (b)-(d) if not interposed—principally an objection to the form of a question. *See* 22 NYCRR 221.1 [a]; CPLR 3115.)

"[T]he scope of examination on deposition is broader than what may be admissible on trial." (*White v Martins*, 100 AD2d 805, 474 NYS2d 733 [1st Dept 1984]; cf. *Orner v Mount Sinai Hosp*., 305 AD2d 307, 761 NYS2d 603 [1st Dept 2003] ["the evidentiary scope of an examination before trial is at least as broad as that applicable at the trial itself"].) "In conducting depositions, questions should be freely permitted 'unless a question is clearly violative of a witness' constitutional rights, or of some privilege recognized in law, or is palpably irrelevant.'" *Barber v BPS Venture, Inc.*, 31 AD3d 897, 819 NYS2d 329 [3d Dept 2006] [citation omitted]; *Freedco Prods. v New York Tel. Co.*, 47 AD2d 654, 366 NYS2d 401 [2d Dept 1975]; *see O'Neill v Ho*, 28 AD3d 626, 814 NYS2d 202 [2d Dept 2006].

Part 221 was designed to combat obstructive behavior during a deposition. 22 NYCRR 221.1 permits objections only with regard to those that would be waived if not interposed, pursuant to CPLR Rule 3115. Section 221.2 requires a deponent to answer all questions, except to preserve a privilege or right of confidentiality or when the question is plainly improper and would, if answered, cause significant prejudice to any person.

The Uniform Rules also expressly limit "[s]peaking objections." (22 NYCRR 221.1 [b].) Objections must instead "be stated succinctly and framed so as not to suggest an answer to the deponent." *Id.* Additionally, except as otherwise permitted by CPLR 3115 and § 221.1, "persons in attendance" at the deposition "shall not make statements or comments that interfere with the questioning." *Id.* Speaking objections are thus singled out as undesirable: they are not necessary to preserve an objection to form, they disrupt and impede the conduct of the deposition, and they risk coaching the deponent on how to answer a pending question. *Freidman v Fayenson*, 41 Misc3d 1236[A], 983 NYS2d 203, 2013 NY Slip Op 52038[U], at *11-*12 [Sup Ct, NY County Dec. 4, 2013] [criticizing speaking objections and other statements made by counsel during a deposition], *aff'd sub nom. Freidman v Yakov*, 138 AD3d 554, 30 NYS3d 58 [1st Dept 2016].

The Court now turns to the branch of defendants' motion concerning the specific objections raised at plaintiff's depositions and the colloquy that ensued between counsel.

First, the court will rule on the two examples highlighted by defense counsel in her affirmation. Plaintiff's counsel direction to his client not to answer questions as to the name of his girlfriend and

about a landlord-tenant action in Westchester County was improper. Part 221 was designed to prevent such conduct in depositions. Rather, plaintiff's counsel's first few objections set the tone for the balance of plaintiff's deposition as the court will address not only the objections but the interruptions by plaintiff's counsel.

Plaintiff's counsel's direction to his client not to answer based on "asked and answered" was improper. Defense counsel asked an innocuous question, the address of plaintiff's girlfriend when he is off on weekends. Not only was plaintiff's counsel's statement "asked and answered" twice on the record improper, but then plaintiff responded p. 27, L. 3 "I don't need to memorize it" and on line 11 "I am not answering that". Plaintiff shall answer this question at a further deposition.

As to pages 36 through 38, plaintiff's counsel repeatedly interrupted the line of questioning on basic questions concerning which email address plaintiff used to contact Hairline. For example, the following colloquy between counsel occurred on pages 36-38:

> Q· · · ·What E-mail address did you use to communicate with that company?
> A· · · ·I can't recall right now. I didn't know I would need it.
> MR. DeSANTIS: Just answer the question.
> A· · · ·I don't know which one.· I have a number.
> Q· · · ·What are the number of E-mails that you have?
> A· · · ·I don't remember if it was the phone or text message.· I can't recall precisely. I made contact with them before I found Hairline.
> Q· · · ·Before your counsel interrupted you you indicated that you could not remember it right now because you didn't know you would need it. Do you have the information contained somewhere that you can locate the name of the company in Minneapolis that you contacted?
> MR. DeSANTIS:· Please refrain from doing that, it is not appreciated.
> MS. REBAR:· I would appreciate if you refrain from interrupting.
> MR. DeSANTIS:· I am counseling.
> MS. REBAR:· You are not allowed to counsel in the middle of a deposition.
> MR. DeSANTIS:· Do you think I need instructions from you?
> MS. REBAR:· It seems like you think you need to man-splain things to me as if I don't understand them and I don't understand them.· Please let me continue my deposition.
> MR. DeSANTIS:· Don't make comments about my counseling.
> MS. REBAR:· Please stop making speaking objections on the record.· They are completely improper and you know better.
> MR. DeSANTIS:· Don't tell me what I know and don't know.
> MS. REBAR:· You seem to feel free to tell me what you think I know.
> MR. DeSANTIS:· Please do not tell my client about what I am doing.· I am not interrupting him.
> MS. REBAR:· I am simply explaining what happened on the record and you continue to interrupt.· Please stop wasting time.
> MR. DeSANTIS:· We don't need you to characterize what is on the record.
> MS. REBAR:· I understand that it is intimidating to you that I am a woman.
> MR. DeSANTIS:· Here we go.
> MS. REBAR:· You don't need to tell me what I don't know like I have not been practicing law for 24 years.· Please stop with the speaking objections.

Part 221 was designed to combat obstructive behavior during depositions. Counsel asked about plaintiff's email address and rather than objecting, plaintiff's counsel stated to his client "just answer the

question", which was followed by defense counsel stating "before you were interrupted…..". While plaintiff's comment about answering the question was interpreted by defense counsel as counseling plaintiff. Moreover, on page 40, plaintiff's counsel rather than stating an objection and a succinct reason, interjects with commentary and then directs his client not to answer the question (P. 40, L. 10) This behavior is unbecoming of experienced practitioners. Plaintiff is directed to answer the question on p. 37, L 10. As for the use of the NYU email address, plaintiff responded to the question on p. 40, L.19-20.

Further inappropriate conduct/behavior by plaintiff's counsel is exhibited on pages 46-47. Since this deposition was conducted virtually, defense counsel asked plaintiff "Are you looking at something else in the room?", which plaintiff's counsel retorted "Is he obligated to look at you?". This conduct is unwarranted and is unprofessional. Further commentary ensued between counsel and then plaintiff chimed in, further disrupting the deposition.

Next, the court considers defense counsel's line of questioning. She asked if plaintiff had a receipt for money he paid, rather than answer the question he responded that Mr. Lopez refused to give me a receipt…". Defense counsel continued with this line of questioning. "You do not have a receipt?", seeking either a yes or no response. Rather than objecting, plaintiff's counsel stated "You are being argumentative. Mark it for a ruling". The court directs plaintiff to respond to whether or not he has a receipt with either a yes, no, I don't know or I don't remember or recall. There is nothing that prevents plaintiff from responding to this line of questions in light of the fact that he stated earlier that he has "proof". However, defense counsel's questioning about where the money plaintiff gave defendant was deposited was answered even though not with the yes, no or a response counsel wanted.

As to the balance of the objections, the court's ruling is as follows: plaintiff is directed to answer the question whether he has a receipt (May 13, 2021 p. 79, L. 2). The court finds that plaintiff sufficiently responded to the line of questioning from pgs. 93 through 96 as to whether or not he has any documentation.

Finally, the court disagrees with plaintiff's characterization that defense counsel "went after plaintiff in a derogatory way", "…. poking fun at Mr. Okafor" and the improper line of questioning about plaintiff wearing a hat. The court reviewed page after page of counsel's commentary without stating proper objections. There was nothing improper in defendant's questioning of plaintiff. In fact, plaintiff himself alleges that he is embarrassed by his head/hair and therefore wears a hat to cover his scalp. Presumably, plaintiff will be seeking damages on this very issue and therefore defense counsel's questioning on this point was proper.

In light of the above, motion sequence 002 to dismiss or preclude is denied. Plaintiff is directed to respond to defendant's discovery demands within thirty days. Failure to do so may result in the dismissal of the complaint upon submission of an affirmation of noncompliance.

Accordingly, it is hereby

ORDERED that the motion sequence 1 is granted to the extent that plaintiff shall respond to the deposition questions as set forth herein; and it is further

ORDERED that motion sequence 2 is denied except that plaintiff will respond to defendant's combined demands within 30 days; and it is further

ORDERED that plaintiff is directed to appear for a further deposition on or before February 28, 2022 and answer those questions identified in this court's decision/order herein; defendant Hairline LLC

shall produce a representative with knowledge for a virtual deposition on or before March 31, 2022; and plaintiff's time to file his note of issue is extended to April 15, 2022; and it is

ORDERED that the cross-motions under motion sequences 1 and 2 are 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 and Judgment of the court.

Dated: 1/10/22
New York, New York

So Ordered:

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