

Porter v Bachner

2022 NY Slip Op 30581(U)

February 24, 2022

Supreme Court, New York County

Docket Number: Index No. 100351-2019

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 8

Henry Porter

INDEX NO. 100351-2019

- v -

MOT. DATE

Michael F. Bachner et al

MOT. SEQ. NO. 3&4

The following papers were read on this motion to/for _____	
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). _____

There are two discovery-related motions pending before the court. In motion sequence 3, defendants move for an order precluding plaintiff from offering any evidence at trial that has been demanded but not provided of damages concerning legal fees plaintiff allegedly incurred in the lawsuit captioned Jefrey Jacobson, et al. v. Henry Porter, et al., pending in the Circuit Court of Maryland, Baltimore County, bearing Case No. 03- C-18-009971 (hereinafter, “the Maryland Lawsuit”); (ii) compelling, pursuant to CPLR §3124, plaintiff to produce documents concerning the Maryland Lawsuit; and (iii) awarding, pursuant to 22 NYCRR §130-1.1(a) and CPLR §3126, costs to defendants in connection with the instant application.

In motion sequence 4, defendants move to vacate note of issue and attorneys fees and costs pursuant to 22 NYCRR §130-1.1(a). Plaintiff opposes both motions. The motions are hereby consolidated for consideration and disposition in this single decision/order. For the reasons that follow, both motions are granted.

The court will first consider motion sequence 3. Plaintiff does not dispute that documents relating to the Maryland Lawsuit are not relevant. Instead, plaintiff’s counsel argues “plaintiff responded that he does not have any such documents, and as Defendants have conceded, the docket in the Maryland litigation is a public record accessible to Defendants in Maryland.” Plaintiff’s counsel further represents that plaintiff obtained from his attorneys the amended complaint and counterclaims in the Maryland Action and produced same since the motion was filed. Thus, plaintiff’s counsel maintains that motion sequence 3 is moot. On reply, defense counsel points out that plaintiff’s belated response lacks “decisions/orders/rulings resolving claims” in the Maryland Action and otherwise “wreaks (sic) of bad faith, and warrants sanctions.” The court agrees.

Dated: February 24, 2022



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

While the records which defendants seek are admittedly available to the public, defense counsel has explained that “they are only available in a courthouse located in another state”. Whereas, as plaintiff’s counsel concedes, all plaintiff had to do was ask his attorneys in the Maryland Action to provide him with copies of relevant documents. Pursuant to CPLR 3101(a), defendants are entitled to full disclosure of matter material and necessary in their defense of this action. The words “material and necessary” are to be interpreted liberally so as to require disclosure of “any facts bearing on the controversy which will assist preparation for trial by sharpening the issues and reducing delay and prolixity. . .” (*Allen v. Crowell-Collier Pub. Co.*, 21 NY2d 403, 407 [1968]). The test is one of “usefulness and reason” (*id.*).

Plaintiff’s counsel conflates defendants’ burden on this motion with that of a party seeking an additional deposition by arguing that that defendants can obtain the information they seek from another source (*see i.e. Liberty Petroleum Realty, LLC v. Gulf Oil, L.P.*, 164 AD3d 401 [1st Dept 2018]). To the contrary, the fact that defendants could hire a third-party and/or travel to Maryland just to obtain documents which plaintiff could easily turn over highlights the problem with plaintiff’s position. Moreover, defendants’ demand for these documents was served on January 17, 2020, almost twenty-two months before they made the instant motion. At no time did plaintiff move for a protective order if he really believed that the defendants weren’t entitled to the records sought.

Instead, twelve days after defendants filed motion sequence 3, and before plaintiff had even filed opposition to that motion, plaintiff filed his note of issue. Note of issue indicates that “[d]iscovery now know (sic) to be necessary completed”, “[t]here are no outstanding requests for discovery” and “[t]here has been a reasonable opportunity to complete the foregoing proceedings.”

“At any time, the court ... may vacate a note of issue if it appears that a material fact in the certificate of readiness is incorrect, or that the certificate of readiness fails to comply with the requirements of this section in some material respect” (22 NYCRR 202.21[e]; *Gomes v. Valentine Realty LLC*, 32 AD3d 699 [1st Dept 2006] citing *Simon v. City of Syracuse Police Dept.*, 13 AD3d 1228 [4th Dept 2004]). It is well established that “a party who serves and files a note of issue and a certificate of readiness must indicate that discovery proceedings now known to be necessary have been completed; that there are no outstanding requests for discovery; and that there has been a reasonable opportunity to complete the proceedings” (*Grant v. Wainer*, 179 AD2d 364 [1st Dept 1992]).

Plaintiff’s counsel cannot seriously represent to the court that discovery was complete when note of issue was filed when plaintiff was still in the process of turning over documents responsive to defendants’ demands. Plaintiff’s counsel’s decision to file note of issue while a discovery motion was pending required defendants to make another motion to vacate note of issue, wasting both defense counsel’s and this court’s resources. Moreover, defense counsel explains in his motion:

Most egregiously, after failing for months to respond to written discovery demands and produce requested documents (which failure, in part, forced the Bachner firm to file a motion to preclude or, in the alternative, compel that is still pending before this Court), plaintiff rejected the Bachner firm’s request to extend the note of issue filing deadline, served a limited document production two hours later (which included some of the materials sought in the motion to preclude/compel), responded to a written discovery demand two hours after that, and then filed the Note of Issue one hour later. Needless to say, plaintiff’s last minute discovery dump failed to remedy his discovery deficiencies and, in fact, confirmed the need for additional party and nonparty discovery. Of course, because the Bachner firm first learned of the need for additional discovery mere hours before the Note of Issue was filed, the Bachner firm had no opportunity to pursue same or address plaintiff’s deficiencies prior to the filing of the Note of Issue. As

such, for the reasons set forth more fully below, the Bachner firm is entitled to an Order vacating the Note of Issue

On this record, the court must grant plaintiff's motion sequence 3 to the extent that within 10 days, plaintiff is directed to turn over to defendants all decisions, orders and rulings in the Maryland Action and motion sequence 4 is granted to the extent that plaintiff's note of issue is vacated. Defendant is also entitled to a further deposition of plaintiff regarding the Maryland Action and the documents produced by plaintiff's employers as defense counsel reserved the right to take such limited deposition at plaintiff's deposition and such testimony is otherwise material and relevant in this action. Said deposition shall be held on or before March 30, 2022. Finally, the parties shall meet and confer as to plaintiff's belated production in response to defendants' post-EBT demands on or before March 30, 2022 and to the extent that they cannot resolve a dispute, they shall file an appropriate motion within 20 days thereafter.

The court must now consider defendants' applications for costs and sanctions. Pursuant to CPLR 3126, discovery abuses may warrant the imposition of a monetary sanction (*see Maxim, Inc. v. Feifer*, 161 AD3d 551 [1st Dept 2018]). "[T]he imposition of a monetary sanction under CPLR 3126 may be appropriate to compensate counsel or a party for the time expended and costs incurred in connection with an offending party's failure to fully and timely comply with court-ordered disclosure" (*Lucas v. Stam*, 174 AD3d 921 [2d Dept 2017]). The court may also award to any party or attorney in any civil action or proceeding the costs in the form of reimbursement for actual expenses reasonably incurred and reasonable attorney's fees resulting from frivolous conduct as under 22 NYCRR 130-1.1. Frivolous conduct is defined as conduct which: [1] is completely without merit in law and cannot be supported by a reasonable argument for an extension, modification or reversal of existing law; (2) is undertaken primarily to delay or prolong the resolution of the litigation, or to harass or maliciously injure another; or (3) asserts material factual statements that are false.

Throughout this litigation, plaintiff has demonstrated a pattern of failing to timely provide discovery. This is not the first discovery-related motion (see decision/order dated April 20, 2021). Plaintiff's MO is to choose not to respond to defendants' proper demands for inordinate periods of time: 22 months before a partial response to defendants' demand for documents relating to the Maryland Action; 10 months to respond to defendants' January 17, 2020 discovery demand; 6.5 months to respond to defendants' interrogatories; 2 months to respond to defendants' post-EBT demands (and more than a month after plaintiff's counsel agreed to respond as per stipulation dated August 20, 2021 and so ordered by the court on September 14, 2021).

Further, plaintiff's opposition to his motion to vacate note of issue is without merit and thus frivolous within the meaning of Part 130. That documents from the Maryland Action are public record has no bearing on the fact that plaintiff should not have filed note of issue while defendant's motion sequence 3 was pending. Plaintiff's counsel's argument that he did not agree to a limited deposition misses the point; defendants needed the documents from the Maryland Action to determine whether they were going to seek a further deposition. Therefore, motion sequence 3 should have been decided before plaintiff could have any good faith basis to believe that discovery was indeed complete.

Thus, defendant's motions for costs and sanctions are granted to the extent that plaintiff shall reimburse defendants for making motion sequence 3 pursuant to CPLR 3126 and motion sequence 4 pursuant to 22 NYCRR 130-1.1. The issue of defendants' reasonable attorneys fees incurred in making motion sequences 3 and 4 is hereby referred to a Special Referee or JHO to hear and **report**.

CONCLUSION

In accordance herewith, it is hereby:

ORDERED motion sequences 3 and 4 are granted to the following extent:

[1] within 10 days, plaintiff is directed to turn over to defendants all decisions, orders and rulings in the Maryland Action;

[2] plaintiff's note of issue is vacated;

[3] on or before March 30, 2022, plaintiff shall appear for a further deposition regarding the Maryland Action and the documents produced by plaintiff's employers; and

[4] plaintiff is sanctioned pursuant to CPLR 3126 and 22 NYCRR 130-1.1 for frivolous conduct and shall reimburse defendants for their reasonable attorneys fees incurred in making both motion sequences 3 and 4.

And it is further **ORDERED** that the parties shall meet and confer as to plaintiff's belated production in response to defendants' post-EBT demands on or before March 30, 2022 and to the extent that they cannot resolve a dispute, they shall file an appropriate motion within 20 days thereafter; and it is further

ORDERED that the new deadline to file note of issue is April 29, 2022 and note of issue may not be filed before the meet and confer ordered herein; and it is further

ORDERED that the issue of defendants' reasonable attorneys fees incurred in making motion sequences 3 and 4 is hereby referred to a Special Referee or JHO to hear and **report**; and it is further

ORDERED that defendants shall, within 60 days from entry of this decision/order, serve a copy of this order with notice of entry, together with a complete Information Sheet¹, upon the Special Referee Clerk in the Motion Support Office (Room 119M), who is directed to place this matter on the calendar of the Special Referee's Part and/or assign this matter to a JHO for the earliest convenient date; and it is further

ORDERED that any motion to confirm or disaffirm the Report of the JHO/Special Referee shall be made within the time and in the manner specified in CPLR 4403 and section 202.44 of the Uniform Rules for the Trial Courts.

Any requested relief not expressly addressed herein has nonetheless been considered and is hereby expressly rejected and this constitutes the decision and order of the court.

Dated: February 24, 2022
New York, New York

So Ordered:



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

¹ Copies are available in Room 119M at 60 Centre Street and on the Court's website at www.nycourts.gov/supctmanh (under the "References" section of the "Courthouse Procedures link).