

Milton v Queens Daily Eagle

2022 NY Slip Op 30609(U)

February 25, 2022

Supreme Court, New York County

Docket Number: Index No. 151740/2019

Judge: John J. Kelley

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This opinion is uncorrected and not selected for official publication.

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

PRESENT: HON. JOHN J. KELLEY PART 56M

Justice

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INDEX NO. 151740/2019

JACOB MILTON and LEGAL NETWORK INTERNATIONAL,
LLC,

MOTION DATE 01/05/2022

Plaintiffs,

MOTION SEQ. NO. 001

- v -

QUEENS DAILY EAGLE, DAVID BRAND, CHRISTINA
CARREGA, JONATHAN SPERLING, and VICTORIA
MERLINO

**DECISION + ORDER ON
MOTION**

Defendants.

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51 were read on this motion to/for DISMISS.

In this action to recover damages for defamation, the defendants move pursuant to CPLR 3126 to dismiss the complaint as a sanction for the plaintiffs' failure to respond to outstanding discovery requests or comply with discovery orders. The plaintiffs oppose the motion. The motion is granted to the extent that the complaint is conditionally dismissed unless, on or before March 31, 2022, the plaintiffs provide full and complete responses to the defendants' August 21, 2020 demands for a supplemental bill of particulars and discovery and inspection, and comply with this court's September 29, 2021 status conference order, in accordance herewith. This conditional order will become absolute upon the plaintiffs' failure to provide such responses by that date. The motion is otherwise denied.

The plaintiffs commenced this action on February 15, 2019. Between October 16, 2019 and September 29, 2021, this court conducted a preliminary conference, a compliance conference, and five status conferences. In the most recent status conference order, dated September 29, 2021, the court directed the plaintiffs, on or before November 3, 2021, to

“serve a supplemental bill of particulars fully, completely, and properly responding to the defendant's 8/21/20 demand for a bill of particulars, as to the following demands: (1) residence address of plaintiff, (2) identification of each and every statement in the subject newspaper article alleged to be false, with specificity, and without asserting that the "entire" article is false or that "every" statement in the article is false, (3) identification, with specificity, of each person, OTHER THAN THE PLAINTIFF, who allegedly has knowledge of the falsity of any statement set forth in the subject newspaper article, (4) nature of the business operated by the plaintiffs that allegedly sustained economic loss as a consequence of the purportedly defamatory statements, and the length of time that said business has been in operation, (5) both the gross and net earnings of the individual and corporate plaintiffs for each year beginning in 2016 and ending in 2020, . . . (7) the amount of income that both the individual and corporate plaintiffs claimed to have lost or foregone as a consequence of the allegedly defamatory statements, (8) a calculation showing how the plaintiffs computed that they lost \$5 million as a consequence of the allegedly defamatory statements, and (9) the date when the plaintiffs made a request to the defendant to retract the contents of the subject article, the manner in which the request was made, and the person to whom the request was made. The supplemental bill of particulars shall be verified by the plaintiff.”

The order further directed the plaintiffs, on or before November 3, 2021, to

“serve a supplemental response to the defendant's 8/21/20 demand for discovery and inspection as to special damages, which shall consist of actual documents that include copies of both personal and corporate tax returns for the tax years 2016 through 2020, inclusive, and any other documents in the plaintiffs' possession referable to proof of special damages, that is, economic loss, allegedly sustained as a consequence of the subject newspaper article, including correspondence indicating cancellation of business requests, requests for refunds from the plaintiffs, or similar documentation. If the plaintiff is not in possession of such documentation, or cannot locate it after a diligent search, he shall serve a Jackson affidavit (*Jackson v City of NY*, 185 AD2d 768 [1st Dept 1992]) describing the search and the results thereof on or before November 3, 2021.”

In addition, the court directed that the plaintiffs' depositions were to be conducted on or before November 30, 2021 and the defendants' depositions were to be conducted on or before January 18, 2022. The order further provided that “[r]egardless of the sufficiency of plaintiff's supplemental responses, EBTs shall proceed as scheduled above, subject to defendant's right to recall plaintiff for follow-up EBT to address such insufficiencies.”

Notwithstanding these directives, the plaintiffs neither complied with the order in a timely fashion, nor appeared for a deposition. During the pendency of the motion, the plaintiffs did

provide a partial supplementation to the bill of particulars, but the supplementation was completely inadequate and did not satisfy the directives of this court's discovery orders.

"If the credibility of court orders and the integrity of our judicial system are to be maintained, a litigant cannot ignore court orders with impunity" (*Kihl v Pfeffer*, 94 NY2d 118, 123 [1999]). CPLR 3126 authorizes the court to sanction a party who "refuses to obey an order for disclosure or willfully fails to disclose information which the court finds ought to have been disclosed" (*Kutner v Feiden, Dweck & Sladkus*, 223 AD2d 488, 489 [1st Dept 1998] [emphasis added]). A party's failure to satisfy his or her discovery obligations, particularly after a series of court orders has been issued, "may constitute the dilatory and obstructive, and thus contumacious, conduct" (*id.* at 489; see *CDR Creances S.A. v Cohen*, 104 AD3d 17 [1st Dept 2012]; *Reidel v Ryder TRS, Inc.*, 13 AD3d 170 [1st Dept 2004]). Contrary to the defendants' contention, the mere fact that the plaintiffs served discovery materials during the pendency of their motion to strike his complaint does not render their prior failure to make discovery willful or contumacious (see *Chamberlain, D'Amada, Oppenheimer & Greenfield v Beauchamp*, 247 AD2d 858, 859 [4th Dept 1998]; see also *Butler v Knights Collision Experts, Inc.*, 165 AD3d at 407). Nonetheless, where, as here, the disclosure that was served during the motion's pendency is completely inadequate, and

"a party is found to have engaged in a protracted pattern of delay and noncompliance with numerous court orders, willful and contumacious conduct may be inferred, and it is a provident exercise of discretion under such circumstances to reject the party's excuse for such conduct"

(*Transasia Commodities Inv. Ltd. v NewLead JMEG, LLC*, 169 AD3d 591, 592 [1st Dept 2019]).

Other than providing a residence address and names of other persons with knowledge of the subject newspaper article, the plaintiffs did not properly respond to the remaining six court directives concerning the supplementation of the bill of particulars and response to the defendants' August 21, 2020 demand for discovery and inspection, referable to proof of special damages. They did not provide copies of their tax returns or submit any proof that they

attempted to obtain copies from the Internal Revenue Service. Nor did the plaintiffs provide a *Jackson* affidavit concerning documentation that they could not locate.

The defendants' motion is thus granted to the extent of conditionally dismissing the complaint unless, on or before March 31, 2022, the plaintiffs provide proper responses in accordance herewith to the defendants. The court fixes that as the deadline to give the plaintiffs time to secure their tax returns from the IRS. This conditional order shall become absolute upon the plaintiffs' failure to comply with its provisions (*see Trabanco v City of New York*, 81 AD3d 490 492 [1st Dept 2011]; *Rampersad v New York City Dept. of Educ.*, 30 AD3d 218, 219 [1st Dept 2006]).

In light of the foregoing, it is

ORDERED that the defendants' motion is granted to the extent that the complaint is conditionally dismissed unless,

(a) on or before March 31, 2022, the plaintiffs serve a supplemental bill of particulars, verified by Jacob Milton and not by his attorney, fully, completely, and properly responding to the defendants' August 21, 2020 demand for a bill of particulars,

- (1) identifying each and every statement in the subject newspaper article alleged to be false, with specificity, by quoting the statements directly, without asserting that the "entire" article is false or that "every" statement in the article is false or simply referring to sentence numbers or other potential identifiers; and
- (2) identifying the length of time that the plaintiffs' business has been in operation; and
- (3) specifying both the gross and net earnings of Jacob Milton and Legal Network International, LLC, for each year beginning in 2016 and ending in 2020; and
- (4) specifying the amount of income that both Jacob Milton and Legal Network International, LLC, claimed to have lost or foregone as a consequence of the allegedly defamatory statements, without a simple bulk approximation; and
- (5) calculating how the plaintiffs computed that they lost \$5 million, as set forth in the complaint, or \$500,000, as set forth in their first supplemental bill of particulars, as a consequence of the allegedly defamatory statements, specifically identifying the persons or entities that were the potential sources of income, without vague statements such as "that was the amount of income that would have been earned"; and

(6) specifying the date on which the plaintiffs made a request to the defendant Queens Daily Eagle to retract the contents of the subject article, the manner in which the request was made, and the person or persons to whom the request was made, AND

(b) on or before March 9, 2022, the plaintiffs submit requests to the Internal Revenue Service to obtain their own tax returns, and provide proof to the defendants, on or before March 31, 2022, that they have timely submitted such requests; AND

(c) on or before March 31, 2022, the plaintiffs serve a supplemental response to the defendants' August 21, 2020 demand for discovery and inspection as to special damages, which shall consist of

(1) actual documents that include copies of both personal and corporate tax returns for Jacob Milton and Legal Network International, LLC, for the tax years 2016 through 2020, inclusive, or a verified statement that either no such tax returns were filed or that the plaintiffs are still awaiting a response to their request to the IRS; and

(2) any other documents in the plaintiffs' possession referable to proof of special damages, that is, economic loss, allegedly sustained as a consequence of the subject newspaper article, including correspondence indicating cancellation of business requests, requests for refunds from the plaintiffs, or similar documentation, or, if the plaintiffs are not in possession of such documentation, or cannot locate it after a diligent search, a Jackson affidavit (*Jackson v City of NY*, 185 AD2d 768 [1st Dept 1992]) describing the search and the results thereof; AND

(d) the plaintiffs appear for a deposition on May 4, 2022, or on any earlier date agreed upon by the parties; and the motion is otherwise denied; and it is further,

ORDERED that this conditional order shall become absolute upon the defendants' submission of proof that the plaintiffs failed timely to comply with any of the provisions hereof.

This constitutes the Decision and Order of the court.

2/25/2022
DATE

JOHN J. KELLEHER, JR.

CHECK ONE:	<input type="checkbox"/> CASE DISPOSED	<input checked="" type="checkbox"/> NON-FINAL DISPOSITION
	<input type="checkbox"/> GRANTED <input type="checkbox"/> DENIED	<input checked="" type="checkbox"/> GRANTED IN PART <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