

**Shanklin v Wilhelmina Models, Inc.**

2023 NY Slip Op 33420(U)

October 3, 2023

Supreme Court, New York County

Docket Number: Index No. 653702/2013

Judge: Margaret Chan

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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. MARGARET A. CHAN PART 49M**

*Justice*

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ALEX SHANKLIN, LOUISA RASKE, MELISSA BAKER,  
ELENI TZIMAS, MARCELLE ALMONTE, GRECIA  
PALOMARES, CARINA VRETMAN, MICHELLE TROTTER,

INDEX NO. 653702/2013

MOTION DATE 06/07/2023

MOTION SEQ. NO. 041

Plaintiffs,

- v -

WILHELMINA MODELS, INC., WILHELMINA  
INTERNATIONAL LTD., ELITE MODEL MANAGEMENT-  
NEW YORK LLC, CLICK MODEL MANAGEMENT, INC.,  
MC2 D/B/A KARIN MODELS OF NEW YORK, LLC., NEXT  
MANAGEMENT, LLC, MAJOR MODEL MANAGEMENT  
INC.,

**DECISION + ORDER ON  
MOTION**

Defendants.

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The following e-filed documents, listed by NYSCEF document number (Motion 041) 1114, 1115, 1116, 1117, 1118, 1119, 1120, 1121, 1122, 1124, 1126, 1127, 1129, 1130, 1131

were read on this motion to/for SANCTIONS.

Plaintiffs move pursuant to CPLR 3126 for discovery sanctions against defendant Next Management, LLC (Next) and its counsel, Kaufman Borgeest & Ryan LLP. Next opposes the motion.

**Background**

Plaintiffs commenced this putative class action on behalf of over 3,000 models who allegedly were employed by Next since October 2007. Class certification was granted in 2020 on claims against Next for (1) Unlawful Deductions in violation of New York Labor Law (NYLL) § 193; (2) Failure to Furnish Accurate Wage Statements in violation of NYLL § 195(3); and (3) Failure to Pay Wages Due in violation of NYLL Article 6 (NYSCEF #s 531, 998).

At issue on this motion is plaintiffs' third set of Requests for Production (RFPs) served on Next on May 6, 2022, seeking certain financial records and electronically stored information (ESI) concerning over 3,000 models for a period of fifteen years, from 2007 to 2023 (NYSCEF # 1051 – Third RFPs). For some items of the Third RFPs, plaintiffs agreed to limit production scope to a list of 100 models, as opposed to all class members of more than 3,000 models (NYSCEF # 1115, ¶¶ 4, 8).

On August 19, 2022, plaintiffs moved for an order compelling Next to produce documents requested in the Third RFPs (NYSCEF # 1058 – MS 039). On August 26,

2022, Next responded that “Next ha[d] not refused to produce” the documents plaintiffs sought, but just needed “more time to produce said documents” (NYSCEF # 1060, ¶ 21). Specifically, Next’s counsel estimated that “the e-discovery search will take approximately 2 to 3 more days” although they “[would] not know the status until after submission of this opposition” (*id.*, ¶ 20). Based on this representation, plaintiffs and Next informed the court that they had resolved most issues raised on the motion to compel (NYSCEF # 1069 at 2). Therefore, the court only addressed the branch of plaintiffs’ motion to compel on the remaining issue of Next’s production of tax documents (*id.*).

The subsequent discovery, however, took more time than plaintiffs hoped. On October 3, 2022, the court directed Next to “furnish plaintiffs with ‘hit reports’ covering certain emails and e-discovery documents by October 7, 2022” (NYSCEF # 1068 – October 3 Order). On October 7, 2022, Next produced a hit report for one out of a hundred models plaintiffs identified, asserting that “only 1 [hit report] was completed given the amount of hits it produced and that it took longer than anticipated” (NYSCEF # 1117; NYSCEF # 1115, ¶ 9). On November 9, 2022, the court extended the deadline for Next to furnish hit reports to December 12, 2022 (NYSCEF # 1075 – November 9 Order). Next failed to meet this deadline allegedly because “it [would] take weeks” to download certain ESI for searches and the search terms plaintiff specified were too common and inefficient (NYSCEF # 1119).

Plaintiffs believed Next’s production was slow because Next did not engage a litigation specific e-discovery vendor (e-vendor) to assist with the ESI production. At this point, plaintiffs had mentioned to Next several times that an e-vendor would be necessary for ESI production (NYSCEF # 1115, ¶ 11; NYSCEF # 1116). On December 13, 2022, the court issued a status conference order, directing plaintiffs to “provide Next with questions for e-vendor(s) and relevant Next personnel regarding the ‘hit reports’ ” and directing Next to respond to those questions by December 23, 2022 (NYSCEF # 1085 – December 13 Order). This order also provided that by January 6, 2023, “plaintiffs and Next shall meet and confer regarding the ‘hit reports’ ” and by January 30, 2023, plaintiffs and Next shall e-file a stipulation “regarding the ‘hit lists’ ” or, if there remained any disagreement on the hit lists, e-file letters on their respective positions (*id.*).

Next answered plaintiffs’ questions on December 23, 2022 (NYSCEF # 1097). Plaintiffs requested that Next also produce the hit reports, claiming that such reports were also due on December 23, 2022 (NYSCEF # 1098 at 2). Next refused, arguing that “[h]it reports were not due on [December] 23rd under the [December 13] Order” (*id.* at 1). On February 6, 2023, plaintiffs and Next e-filed a stipulation originally due on January 30, 2023 to have Next produce “hit counts” to plaintiff no later than March 20, 2023 (NYSCEF # 1099, ¶¶ 2, 3).<sup>1</sup> In this stipulation, Next represented that in February 2023, it “had hired a litigation discovery vendor” to

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<sup>1</sup> Before the January 30, 2023 court-ordered deadline, Next submitted a letter requesting additional time to e-file the stipulation, and plaintiffs submitted a letter in opposition (NYSCEF #’s 1094-1098). Before the court could rule on whether to grant this extension, both parties e-filed the stipulation on February 6, 2023 (NYSCEF # 1099).

replace the IT provider it previously worked with on ESI production (*id.* at 1-2). Eventually, on February 24, 2023, Next provided the full hit reports to plaintiffs (NYSCEF # 1120).

In addition to the hit reports, plaintiffs and Next disputed the scope of production under RFP 115. RFP 115 demanded that Next produce “[a]ll supporting Documents evidencing that expenses deducted from Models during the Class Period were actually incurred” (NYSCEF # 1051). In December 2022, Next submitted a letter to the court, arguing that producing documents under RFP 115 for all class members—over 3,000 models—was too burdensome (NYSCEF # 1078). Plaintiffs initially opposed but later stipulated with Next to meet and confer to reduce “document volume to alleviate any potential burdens in the . . . production of the ESI” (NYSCEF # 1079; NYSCEF # 1099, ¶ 11). Subsequently, plaintiffs and Next could not agree on this issue and both submitted letters to the court in April 2023 as to the burden and scope of document production under RFP 115 (NYSCEF #s 1107, 1108). This issue was resolved by a status conference on May 3, 2023, where it was decided that Next should produce documents responsive to RFP 115 for 60 models (NYSCEF # 1113).

Presently before the court is plaintiffs’ motion for sanctions against Next (NYSCEF 1121 – MOL). Although Next has produced the hit reports and the court has resolved the burden issue related to RFP 115, plaintiffs move for a monetary sanction against Next under CPLR 3126, arguing that Next resisted to comply with multiple court orders in producing ESI and engaged in frivolous conduct (*id.* at 1). Plaintiffs also request that they be awarded reasonable attorneys’ fees of \$10,000 for each instance of Next’s frivolous conduct under 22 NYCRR 130-1.1 and 130-1.2 and additional attorneys’ fees of \$40,000 under CPLR 3126 (*id.* at 20). In opposition, Next contends that it did not engage in frivolous conduct and has actively met and conferred with plaintiffs on ESI discovery issues (NYSCEF # 1126 – MOL in Opp).

### Discussion

CPLR 3126 provides that if a party “refuses to obey an order for disclosure or willfully fails to disclose information which the court finds ought to have been disclosed . . . , the court may make such orders with regard to the failure or refusal as are just” (CPLR 3126). “It is within the motion court’s discretion to determine the nature and degree of the penalty” (*Han v New York City Tr. Auth.*, 169 AD3d 435 [1st Dept 2019]). A sanction should be “commensurate with the particular disobedience it is designed to punish, and go no further than that” (*id.* [internal quotations and citations omitted]).

A court may impose a monetary sanction of an award of reasonable attorneys’ fees and costs 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 (*Maxim, Inc. v Feifer*, 161 AD3d 551, 554 [1st Dept 2018]). Imposition of a monetary sanction is appropriate for punishing “continued discovery abuses” (*Maxim Inc. v Gross*, 179 AD3d 536, 537 [1st Dept 2020]), and is

further justified if an offending party has a “pattern of noncompliance” that “supports an inference of willful and contumacious conduct” (*Jackson v OpenCommunications Omnimedia, LLC*, 147 AD3d 709 [1st Dept 2017]; see *Maxim, Inc.*, 161 AD3d at 554 [imposing a monetary sanction on an offending party that “intentionally did not produce documents”]).

In addition, under 22 NYCRR 130-1.1 and 130-1.2, courts may award a party reasonable attorneys’ fees and impose financial sanctions for “frivolous conduct.” A conduct is frivolous if it (i) “is completely without merit in law,” (ii) “is undertaken primarily to delay or prolong the resolution of the litigation, or to harass or maliciously injure another,” or (iii) “asserts material factual statements that are false” (22 NYCRR 130-1.1).

Here, plaintiffs move for a monetary sanction against Next and an award of reasonable attorneys’ fees under CPLR 3126 and 22 NYCRR 130-1.1 and 130-1.2, alleging that Next’s delay in producing the hit reports and other documents responsive to the Third RFPs violated multiple court orders and is therefore sanctionable (NYSCEF # 1121 at 6-8). Plaintiffs also aver that Next misrepresented its discovery status to moot plaintiffs’ August 2022 motion to compel by indicating that Next’s e-discovery search only needed a few more days (*id.* at 5-6). Plaintiffs further contend that Next has waived any burden argument as to RFP 115 by not raising it in response to plaintiffs’ August 2022 motion to compel (*id.* at 11-15). To plaintiffs, Next’s contest of production burden under RFP 115 in December 2022 is untimely and frivolous (*id.*). Next counterargues that it did not misrepresent discovery timeline to plaintiffs, violate the December 13 Order, or engage in frivolous conduct (NYSCEF # 1126 at 3, 6-9). But Next concedes that it was, “at times, unable to meet certain timelines” (*id.* at 8).<sup>2</sup> Plaintiffs in reply reiterated most of their arguments (NYSCEF # 1129 – Reply MOL).

Given the circumstances of the present case, the court denies plaintiffs’ motion for sanctions and an award of reasonable attorneys’ fees. As an initial matter, in terms of the hit reports, Next violated the October 3 and the November 9 orders, but not the December 13 order. Plaintiffs claim that the December 13 order required Next to produce the hit reports on December 23, 2022 (NYSCEF # 1115, ¶ 13). Plaintiffs’ interpretation is wrong. The December 13 Order only required Next to answer plaintiffs’ questions on e-vendors by December 23, 2022 and did not set a due date for producing the hit reports (NYSCEF # 1085). In fact, this order contemplated the hit reports to be an on-going issue in January 2023, as it directed plaintiffs and Next to meet and confer on this issue by January 6, 2023 and stipulate on this issue by January 30, 2023 (*id.*). As such, plaintiffs’ argument that Next violated the December 13 Order by not producing the hit reports on December 23, 2022 is unsupported by the record.

<sup>2</sup> Next also claims that plaintiffs’ motion for sanctions is procedurally defective under 22 NYCRR § 202.7 (a), (c), which requires an affirmation attesting to good faith efforts to resolve the issues raised in the motion (NYSCEF # 1126 at 5-6). Next’s argument fails as plaintiffs have provided such an affirmation (NYSCEF # 1115).

Further, the cases plaintiffs cite for the imposition of monetary sanctions are factually distinguishable from this case. Here, Next fully produced the hit reports on February 24, 2023, two months after the court-ordered deadline, December 12, 2022 (NYSCEF # 1075).<sup>3</sup> Such a delay is significantly less than the delays involved in the cases plaintiffs cited (*see Figdor v City of New York*, 33 AD3d 560 [1st Dept 2006] [delay of 2 years]; *see also 150 Centreville, LLC v Lin Assoc. Architects, PC*, 39 Misc 3d 513, 521 [Sup Ct, Queens County 2013] [delay of 4 years]). Additionally, Next was able to substantially comply with other court-ordered discovery deadlines or offer reasonable explanations when it failed to do so. And despite the delay, Next had engaged an e-vendor for ESI production and had produced the full hit reports months before plaintiffs made the current motion (NYSCEF #'s 1099, 1120). Thus, it is not clear that Next was willful and contumacious in causing discovery delay (*see Amos v Southampton Hosp.*, 198 AD3d 947, 948 [2d Dept 2021] [denying monetary sanctions where a movant failed to establish intentional and willful conduct that warranted sanctions]; *see Berkowitz v 29 Woodmere Blvd. Owners', Inc.*, 135 AD3d 798, 800 [2d Dept 2016] [not imposing monetary sanctions where the movants failed to demonstrate “frivolous conduct within the meaning of 22 NYCRR 130-1.1[c]”).

It is true that Next's e-discovery search ended up taking months to complete, contrary to Next's representation in August 2022 that its “e-discovery search will take approximately 2 to 3 more days” (NYSCEF # 1060, ¶ 20). However, this representation, without more, is not clearly sanctionable. In the same paragraph of the affirmation, Next's counsel explained that it did not know the status of e-discovery search at the time of that submission, except that it is “estimated that Next will need additional time to produce the documents” (*id.*). And when plaintiffs informed the court on October 3, 2022 that plaintiffs had resolved this issue with Next, a month had passed since Next made that representation and it had become clear that the “2 or 3 more days” estimation was not accurate, but plaintiffs still chose not to pursue the relevant branch of their motion to compel against Next (NYSCEF #'s 1068, 1069).

As to RFP 115, plaintiffs argue that Next has waived any burden argument in this regard by not raising it in response to plaintiffs' motion to compel. The court disagrees. Plaintiffs have not cited any case law or other authorities in support of this position (NYSCEF # 1121 at 11-13; NYSCEF # 1129 at 13). And the record does not suggest that Next's challenge of the production burden under RFP 115 is untimely or frivolous. To the extent that RFP 115 was within the scope of plaintiffs' motion to compel, plaintiffs and Next both represented to the court in October 2022 that this issue had been resolved (NYSCEF # 1069 at 2). When the dispute around RFP 115 re-emerged in November 2022, the parties were ordered to meet and confer “and efile a stipulation by November 22, 2022 providing for Next's time to respond” to RFP 115 (NYSCEF # 1075). Then the parties submitted letters to the court in December 2022 outlining their disagreement on the production scope of RFP 115

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<sup>3</sup> The original court-ordered deadline for Next to produce the Hit Reports was October 7, 2023, but the November 9 Order extended this deadline to December 12, 2023 (NYSCEF #'s 1068, 1075).

(NYSCEF #'s 1078, 1079). In February 2023, the parties were able to stipulate to potentially reduce document volumes and alleviate ESI production burden (NYSCEF # 1099, ¶ 11). In April 2023, plaintiffs and Next still could not agree on the scope of RFP 115, and wrote to the court again (NYSCEF #'s 1107, 1108). At a status conference held on May 3, 2023, the court determined the appropriate production scope for RFP 115 (NYSCEF # 1113). The record, therefore, shows a continued meet-and-confer efforts between the parties on RFP 115 and does not indicate that Next only contested this issue belatedly and frivolously in December 2022 and April 2023.

**Conclusion**

In view of the above, it is

ORDERED that plaintiffs' motion for sanctions against defendant Next Management, LLC and its counsel, Kaufman Borgeest & Ryan LLP is denied; and it is further

ORDERED that plaintiffs' request for an award of reasonable attorneys' fees is denied.

10/3/2023

DATE



MARGARET CHAN, J.S.C.

CHECK ONE:

CASE DISPOSED

GRANTED

DENIED

SETTLE ORDER

INCLUDES TRANSFER/REASSIGN

NON-FINAL DISPOSITION

GRANTED IN PART

SUBMIT ORDER

FIDUCIARY APPOINTMENT

OTHER

REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: