

Mahland v Noor Staffing Group, LLC

2023 NY Slip Op 34485(U)

December 20, 2023

Supreme Court, New York County

Docket Number: Index No. 657384/2020

Judge: Arlene P. Bluth

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. ARLENE P. BLUTH PART 14

Justice

-----X

ROBIN MAHLAND,

Plaintiff,

- v -

NOOR STAFFING GROUP, LLC, NOOR STAFFING D/B/A
PROMPT PERSONNEL, JOHN DOES 1 - 10

Defendant.

-----X

INDEX NO. 657384/2020

MOTION DATE 12/15/2023

MOTION SEQ. NO. 003

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 003) 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85

were read on this motion to/for DISMISS.

Defendants' motion to strike plaintiff's complaint is denied.

Background

Plaintiff brings this employment dispute to recover purportedly unpaid commissions she earned while working as a recruiter. She insists that in August 2017, defendants revised the terms of plaintiff's employment contract and in September 2017 she secured placements from key entities including NYU, Bellevue Hospital, Elmhurst Hospital and Lincoln Hospital. She claims that she was fired soon thereafter and did not get commissions for these placements. Plaintiff alleges that she seeks placements for the period from October 2017 through about May 2018.

In this motion, defendants detail what they insist is a history of repeated discovery failures by plaintiff. They point to numerous missed deadlines and inadequate responses. For instance, in an August 29, 2023 letter, counsel for defendants explain that plaintiff failed to

provide adequate response to defendants' demand for witnesses, interrogatories, and failed to verify her response to the interrogatories, among other deficiencies.

Defendants argue that plaintiff has still failed to comply with a September 2023 order, which required her to produce a verification for her interrogatory responses, additional responses to defendants' interrogatories, additional documents or a Jackson affidavit, and revised responses to defendants' demand for witnesses.

In opposition, plaintiff contends that she has complied with all of her discovery obligations and that any additional questions should be addressed at a deposition. She insists that she has produced every document in her custody, possession, and control. Plaintiff argues that she has not acted in a willful or contumacious manner and there is therefore no reason to strike her complaint.

In reply, defendants complain that plaintiff filed her opposition a day late despite defendants granting an adjournment and plaintiff turned over a substantial number of responses the day her opposition was due. They detail how these responses were insufficient. For instance, defendants complain that the response to interrogatory 8, which asked plaintiff to "Set forth each commission for which Plaintiff claims that Defendants failed to compensate Plaintiff" (NYSCEF Doc. No. 82) was insufficient. Defendants insist that plaintiff merely recited damages amounts for each placement and did not include a breakdown of how these totals were calculated.

Defendants acknowledge that plaintiff has now verified her responses to the interrogatories and submitted a Jackson affidavit. However, they insist that they did a search for plaintiff's Hotmail email account in their system and found that there were 632 hits and plaintiff has only produced a few of those emails. Defendants also insist that a search of plaintiff's work email produced 1,638 emails that were forwarded from the work email account to plaintiff's

Hotmail account from March 24, 2015 through September 13, 2017. Defendants question how plaintiff's production of only a few emails is inadequate in light of these results.

Discussion

As a preliminary matter, the Court recognizes defendants' frustration. Plaintiff has seemingly ignored multiple deadlines and taken advantage of defendants' willingness to extend courtesies and deadlines. But the fact is that plaintiff has now, belatedly, responded to all of defendants' demands. And the Court finds that defendants' continued dissatisfaction with those responses can be remedied, at least initially, at a deposition.

“It is well settled that actions should be resolved on their merits whenever possible, and that the drastic remedy of striking a pleading is inappropriate absent a clear showing that the failure to comply with discovery demands was willful and contumacious” (*Jenkins v City of New York*, 13 AD3d 342, 342, 788 NYS2d 117 [2d Dept 2004]). The Court declines to impose the drastic remedy of striking a complaint where plaintiff has finally complied with outstanding discovery obligations even though defendants remain dissatisfied.

In this Court's view, much of defendants' arguments in reply, although understandable, really go to the merits of this case. Plaintiff will have to meet her burden to show that she is entitled to each commission for which she seeks recovery. If defendants believe that plaintiff does not have the requisite evidence to show that she is entitled to recover the subject commission or proof to substantiate her damages, then, presumably, defendants will ultimately prevail or substantially limit the amount plaintiff says she is owed.

But simply because defendants believe that plaintiffs should have more documents is not a basis to strike the complaint and dismiss this case. There is nothing on this record to show that plaintiff has deliberately withheld relevant and material documents.

The Court finds, however, that because plaintiff has now submitted a Jackson affidavit dated December 4, 2023 (NYSCEF Doc. No. 84), she may not rely upon or cite any other documents that she has not already produced. In other words, plaintiff may not cite (either at trial or in a dispositive motion) a document that she did not produce before December 4, 2023. Of course, plaintiff may rely upon documents produced by defendants.

The Court observes that defendants sought preclusion as alternative relief in the moving papers (NYSCEF Doc. No. 51, ¶ 48).

Summary

The Court recognizes that often, a party (such as the defendants here) suspect that the other side has not fully complied with their discovery obligations. In this case, defendants' main complaint is that plaintiff has not shown how she came up with her damages. That frustration is not a basis to strike a complaint – if she can't prove her damages, she will not recover the full amount she seeks. Plaintiff argues that she has produced everything she possesses. But it will, of course, be her obligation to prove not only that she is entitled to the commissions that form the basis of this action but also the amount of damages arising from those unpaid commissions. If defendants choose, they can explore those issues at a deposition and in subsequent motion practice.

Accordingly, it is hereby

ORDERED that defendants' motion to strike the complaint is denied, however, plaintiff may not cite or rely upon any documents she did not produce by December 4, 2023. (Plaintiff may rely on any documents produced by defendants).

See NYSCEF Doc. No. 49 concerning the next conference.

12/20/2023

DATE



ARIENE P. BLUTH, J.S.C.

CHECK ONE:

CASE DISPOSED

GRANTED

SETTLE ORDER

INCLUDES TRANSFER/REASSIGN

DENIED

NON-FINAL DISPOSITION

GRANTED IN PART

SUBMIT ORDER

FIDUCIARY APPOINTMENT

OTHER

REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: