

Kennedy Lewis Inv. Mgt., LLC v StimQ Med. LLC

2024 NY Slip Op 32527(U)

July 15, 2024

Supreme Court, New York County

Docket Number: Index No. 653767/2022

Judge: Arlene P. Bluth

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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. ARLENE P. BLUTH PART 14

Justice

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INDEX NO. 653767/2022

KENNEDY LEWIS INVESTMENT MANAGEMENT, LLC,

MOTION DATE N/A

Plaintiff,

MOTION SEQ. NO. 007

- v -

STIMQ MEDICAL LLC, LAURA TYLER PERRYMAN, LTP
LIMITED LLC,

**DECISION + ORDER ON
MOTION**

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 007) 229, 230, 231, 232, 233, 234, 239, 240, 241

were read on this motion to/for STRIKE PLEADINGS.

Plaintiff’s motion to strike defendant Perryman’s answer for failure to appear for a deposition is decided as described below.

Background

Plaintiff explains that it initially noticed defendant Perryman’s deposition for January 17, 2024 but that following a court conference, the parties agreed to permit Ms. Perryman to amend her document production. Thereafter Ms. Perryman’s attorney withdrew as her counsel and the Court imposed a stay until April 16, 2024. Plaintiff contends that it subsequently noticed another deposition for May 16, 2024. Plaintiff’s counsel sent an email to Ms. Perryman the day before this deposition to inquire about the deposition but she did not respond or show up for the deposition the following day. Plaintiff demands that Ms. Perryman’s answer be stricken unless she appears for a deposition on July 24, 2024 at plaintiff’s offices in New York.

In opposition, Ms. Perryman contends that she has no obligation to appear for a deposition in New York (as she lives in Florida) nor does she have the means to travel to New York. She insists she has never objected to being deposed in this matter. Ms. Perryman, who was recently sentenced after a federal conviction, contends that she will “have to report to confinement on July 25, 2024” and so “it would be impossible to attend a deposition on July 24, 2024.” She observes that any deposition thereafter would have to be coordinated with the Bureau of Prisons if she does not receive bail pending her appeal of her criminal conviction.

In reply, plaintiff contends that Ms. Perryman has not demonstrated any interest in appearing for a deposition. It also insists that she must appear in New York for a deposition under the relevant CPLR section.

Discussion

As an initial matter, the Court declines to grant plaintiff’s request for a conditional order striking defendant Perryman’s answer if she fails to appear for a July 24 deposition. Striking an answer is drastic remedy and this is simply not a situation in which Ms. Perryman has ignored multiple Court orders. Instead, plaintiff admits that it agreed to postpone the initial deposition while document disputes were handled. On this record, plaintiff cites to a single deposition notice that defendant ignored. It is axiomatic that in this state, cases should be decided on their merits and so this Court will refrain from threatening the striking of answer where defendant has not yet ignored a Court order.

However, the Court stresses that Ms. Perryman must eventually appear for a deposition—and her opposition papers appear to acknowledge this fact. The question for this Court is where and when this deposition should take place in light of the fact that defendant is scheduled to report to prison.

“While the preferred practice, except in cases where hardship is shown to exist, is to proceed with examinations here [in New York], a preferred practice is not the same as an inflexible rule” (*Gryphon Dom. VI, LLC v APP Intern. Fin. Co., B.V.*, 52 AD3d 219, 219 [1st Dept 2008] [internal quotations and citations omitted]).

In light of this standard, the Court must recognize the unique circumstances at issue here. While the record does not show whether Ms. Perryman is subject to any travel restrictions, it makes little sense to require her to travel to New York the day before she is to turn herself in for a 72 month criminal sentence. Perryman observes that she will be incarcerated following her criminal conviction if she does not obtain bail pending her appeal. Her report date is apparently July 25, 2024, the day before the proposed deposition in New York at which plaintiff demands she appear. For that reason, the Court declines to make Ms. Perryman travel to New York for a deposition when there has not been any prior court order requiring her deposition.

There are three likely possibilities – (1) Ms. Perryman is taken into custody on July 25, or (2) she is not taken into custody but has certain travel restrictions and cannot travel to New York or (3) she is not taken into custody and does not have travel restrictions to New York while she is out on bail pending appeal. If (1) Ms. Perryman is taken into federal custody on July 25, then this Court directs plaintiff to utilize the proper procedures with the Federal Bureau of Prisons to conduct a deposition.

If (2) Ms. Perryman is granted bail pending her appeal and the relevant court imposes travel restrictions that would prevent her from traveling to New York, then the deposition may proceed virtually in the month of August; if plaintiff would prefer an in-person deposition, then plaintiff may send an attorney to Florida and have an in-person deposition in a court reporter’s

office or a law office in Florida in the month of August. If Ms. Perryman fails to appear for this deposition in Florida her answer may be stricken.

And if (3), Ms. Perryman is granted bail pending her appeal and she does not immediately go to prison, and the Federal Court imposes no travel restrictions to New York, then the deposition may proceed in person during the month of August at plaintiff's attorney's office in New York County. If Ms. Perryman fails to appear, then her answer may be stricken.

In short, if she goes to prison on July 25, then plaintiff must follow the Bureau of Prison's rules to depose her. If she is still not incarcerated in August and the Federal Judge says she cannot travel to New York, then the deposition will proceed virtually, or, if plaintiff sends a lawyer to Florida, the deposition will be in person. If she is still not incarcerated in August and the Federal Judge has not said she cannot travel to New York, then Perryman must come to New York for her deposition in August.

The Court warns that should Ms. Perryman not cooperate with the virtual or in person deposition (assuming she receives bail pending appeal), the Court will not hesitate to strike her answer. The burden on showing any travel restrictions imposed by the Federal Court is on Ms. Perryman. To be clear, unless she is incarcerated, she will have to come to New York absent a showing that she cannot leave the state of Florida. As noted above, the general rule is that a deposition should take place where the case was commenced. That Ms. Perryman lives in Florida is not a reason to require that she be deposed in Florida. However, the Court finds that a virtual or in-Florida deposition is warranted if the Federal Court imposes a travel restriction upon her; certainly, this Court does not expect Ms. Perryman to violate federal travel restrictions to be deposed in this civil case.

The Court also orders that the deposition should go forward on or before August 30, 2024. If she is not incarcerated, that is plenty of time to find a mutually agreeable date. If she is incarcerated, then the deadline is extended to September 30, 2024 which should be enough time to organize a deposition with the Bureau of Prisons. Of course, extensions for good cause will be considered if she is incarcerated.

Accordingly, it is hereby

ORDERED that plaintiff's motion for a conditional order striking defendant Perryman's answer is denied; and it is further

ORDERED that Ms. Perryman shall appear for a deposition as described above on or before August 30, 2024 unless she is incarcerated, and (if that is the case) then by September 30, 2024 unless good cause shown.

7/15/2024

DATE



ARLENE P. BLUTH, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE