

Kaufman v Frankel

2024 NY Slip Op 32903(U)

August 16, 2024

Supreme Court, New York County

Docket Number: Index No. 653822/2020

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

-----X

WILLIAM D KAUFMAN,

Plaintiff,

- v -

ADY GLUCK FRANKEL, HANA FINANCIAL
INC., NECESSARY OBJECTS LTD.

Defendant.

-----X

INDEX NO. 653822/2020

MOTION DATE 8/15/2024

MOTION SEQ. NO. 008

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 008) 150, 151, 152, 153, 154, 155, 156, 157, 158

were read on this motion to/for RENEW/REARGUE/RESETTLE/RECONSIDER .

Plaintiff’s motion to renew and reargue is denied.

Background

In this case, plaintiff was an employee and chief financial officer of defendants’ branded business for decades and they are now suing each other for all sorts of alleged nefarious activities. In a prior decision, this Court struck plaintiff’s complaint and reply to defendants’ counterclaims on the ground that plaintiff repeatedly ignored Court orders to appear for a deposition (NYSCEF Doc. No. 142). The Court observed that plaintiff’s deposition had not gone forward despite the fact that he commenced this case in 2020 and four separate orders directed the deposition to occur (*id.* at 2).

Plaintiff now moves to reargue on the ground that this Court overlooked various communications and that the Court misapprehended the reasons for why he has failed to show up

for a deposition. He moves to renew on the basis of letters between counsel for the parties in this case in which plaintiff allegedly requested a virtual deposition and medical documentation.

In opposition, defendants contend that there is no basis for reargument or renewal. They insist that the “new” evidence that supports plaintiff’s renewal argument was readily available to plaintiff and that the instant motion is another delay tactic. Defendants contend that the various communications between counsel do not contain any mention by plaintiff’s attorney about a physical ailment or any medical evidence to support such a request.

In reply, plaintiff again focuses on email exchanges between counsel for the parties and asserts that it shows his failure to appear for a deposition was neither willful nor contumacious.

Discussion

As an initial matter, the Court denies the branch of the motion to reargue.

“An application for leave to renew must be based upon additional material facts which existed at the time the prior motion was made, but were not then known to the party seeking leave to renew, and, therefore, not made known to the court. Renewal should be denied where the party fails to offer a valid excuse for not submitting the additional facts upon the original application” (*Foley v Roche*, 68 AD2d 558, 568, 68 AD2d 558 [1st Dept 1979]).

The Court denies the branch of the motion that seeks renewal. The purportedly “new” evidence is neither new nor would it change the Court’s conclusion. Exhibits B, C and D (NYSCEF Doc. Nos. 153-155) to plaintiff’s papers are various medical documents. Two (NYSCEF Doc. Nos. 153 and 155) are unsworn letters detailing plaintiff’s medical ailments. Of course, these documents were not submitted in admissible form and so they cannot be considered. NYSCEF Doc. No. 153 is dated November 15, 2023, which is well before the prior

motion was submitted; even if it could be considered, plaintiff did not cite a sufficient reason for why he did not include it in the prior motion.

NYSCEF Doc. No. 155 is another letter that suggests plaintiff is “functionally debilitated” and is dated June 26, 2024. But plaintiff’s deposition was supposed to take place by May 10, 2024 (the latest deadline) and so this document, even if the Court could consider it for the truth of the facts asserted, does not cite a reasonable excuse for ignoring multiple prior directives to appear for a deposition.

And, finally, NYSCEF Doc. No. 154 is a printout of an “after visit” summary for plaintiff, apparently in connection with a June 11, 2024 visit. As noted above, this printout was not submitted in admissible form and so it cannot be considered for the truth of the content - but it does show that the plaintiff is able to leave the house and go to an office and communicate.

Similarly, the email exchanges between the parties’ attorneys in NYSCEF Doc. No. 152 would not change the Court’s determination. These communications detail that defendants’ counsel suggested two dates for the deposition in May 2024 to which counsel for plaintiff responded he was not available (and without suggesting another date, which shows a lack of interest in actually complying with the court order). The Court had ordered that the deposition take place before May 10, 2024.

Counsel for plaintiff then demanded a remote deposition and counsel for defendants responded that he preferred an in-person deposition given the number of documents that would need to be authenticated by plaintiff. Plaintiff’s attorney then demanded that the deposition only be for four hours at a time, a request which counsel for defendants accepted. Counsel then engaged in more back and forth, including about the issue of a remote deposition over the next

few weeks but no date was ever agreed upon and the deposition never occurred. Thus, plaintiff has continued to delay.

These email communications do not change anything about the underlying facts. They demonstrate that counsel for defendants, as is his right, insisted on an in-person deposition because of the number of documents at issue. It is entirely reasonable to prefer to question a witness in-person when there are many, many documents to discuss. Taking the deposition in person ensures that the witness can review the document and removes the possibility of technical issues, such as sharing the documents electronically. And plaintiff's counsel, although he demanded a remote deposition, did not include any substantive information about why a remote deposition was necessary nor did he make a motion for a remote deposition (which presumably would have included medical documentation to support the request).

Summary

This Court has routinely ordered that depositions take place remotely for a variety of reasons. And attorneys will often accede to another party's request for a remote deposition. Here, counsel for defendants raised a completely understandable objection to doing a remote deposition and he was under no obligation to accept the numerous conditions imposed by plaintiff's counsel. Once it became clear that this was an issue upon which the parties could not agree, plaintiff decided to ignore the Court's May 10, 2024 deadline and did not make an appropriate motion for an extension or for a remote deposition. Instead, he delayed and delayed taking the deposition, missed the Court-ordered deadline, and still has not cited a reasonable excuse for his failure to appear. Nothing in the newly submitted documents explains plaintiff's intransigence to comply with the Court's deadline; simply asserting that he is ready and willing


to appear for a deposition does make it so. Plaintiff was supposed to be deposed and he was not, due to his refusal to commit to a date or seek the appropriate relief.

Plaintiff started this case and has still not been deposed even though this action was commenced in 2020 and despite four court orders. Plaintiff can certainly appear at the inquest and challenge damages if he so chooses, but this Court will not allow further delays.

Accordingly, it is hereby

ORDERED that plaintiff's motion to reargue and renew is denied.

Inquest: September 10, 2024 at 10 a.m.

<u>8/16/2024</u>			
DATE			ARLENE P. BLUTH, J.S.C.
CHECK ONE:	<input type="checkbox"/> CASE DISPOSED	<input checked="" type="checkbox"/> DENIED	<input checked="" type="checkbox"/> NON-FINAL DISPOSITION
APPLICATION:	<input type="checkbox"/> GRANTED	<input type="checkbox"/> SETTLE ORDER	<input type="checkbox"/> GRANTED IN PART <input type="checkbox"/> OTHER
CHECK IF APPROPRIATE:	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/> FIDUCIARY APPOINTMENT	<input type="checkbox"/> REFERENCE