

Failure to Comply with Discovery Obligations Can Lead to ‘Case-Killing’ Sanctions

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Factual Background

Plaintiffs are former employees of Federal Reserve Bank of New York (Federal Reserve) whose employment was terminated when they refused to comply with Defendant’s requirement that its employees be vaccinated against Covid-19. Dkt. No. 24. Plaintiffs alleged that their terminations violated the Religious Freedom Restoration Act; the Free Exercise Clause of the First Amendment; and Title VII. Federal Reserve denied that Plaintiffs’ religious beliefs prevented them from becoming vaccinated and alleged affirmative defenses that its “actions...were based solely on legitimate, non-discriminatory, business reasons.” Dkt. No. 84.

Plaintiffs’ History of Not Complying with Discovery Obligations

As the Court observed, “[a]lmost from the start, Plaintiffs delayed producing documents and information in response to Defendant’s discovery requests.” *Gardner-Alfred v. Fed. Reserve Bank of N.Y.*, 22-cv-01585 at *5 (LJL) (S.D.N.Y. May 17, 2023). In fact, Plaintiff’s original counsel moved to withdraw based upon “sharp disagreements” with his clients “over the manner in which discovery should be conducted.” *Id.* at *6. When new counsel substituted in, he represented that Plaintiffs’ past discovery failures would be “corrected.” And yet, Plaintiffs continued to disregard their discovery obligations – missing deadlines, withholding critical documents, and providing to the Court one implausible excuse after another. Indeed, Plaintiffs ignored or complied only partially with at least three Court Orders relating to discovery. Dkt. No. 119.

The Instant Motion

On April 19, 2023, Federal Reserve filed a motion (Motion) seeking sanctions because Plaintiffs failed to comply with three discovery orders (*id.*). Specifically, Defendant notes Plaintiffs (1) did not produce any document as ordered by Jan. 19, 2023; (2) did not produce any documents in response to a March 6 order; (3) produced only 198 pages of documents in response to the Court’s subsequent March 27, 2023, deadline but then proceeded to produce delinquent without warning or permission another 1,100 documents after the deadline; (4) continued to violate orders by, among other things, (a) failing to produce the full contents of the vaccine exemption package purchased by

Plaintiffs; and (b) refusing to turn over the documents responsive to Defendant's search terms on the grounds they were purportedly "spam." Dkt. No. 120 at 7.

On May 10, 2023, the Court held a hearing on the Motion where Plaintiffs were directed to provide the Court with all documents withheld to date. Plaintiffs brought boxes of documents containing approximately 2,000 emails and other "irrelevant" documents. At the hearing, the Court reviewed some of the documents and determined they were relevant.

Discussion

Against this factual backdrop Federal Reserve seeks sanctions because of Plaintiffs' repeated violations of court orders under each of Rule 16(f), Rule 37(b), and Rule 37(c)(1). Federal Reserve further argued that sanctions against Plaintiffs and Plaintiffs' counsel are appropriate under Rule 26(g) for failure to make a reasonable inquiry that their discovery responses were consistent with the Federal Rules of Civil Procedure.[1]

The Court began its analysis by noting the relevant standards. Specifically, the Court wrote that Rule 16(f) authorizes sanctions for, among other things, failing to obey a pre-trial order. The Court further noted that the only predicate to the imposition of sanctions under Rule 37(b) is a court order directing compliance with discovery requests and non-compliance with that order. Observing further that "bad faith" is not required, the Court wrote that it "need find only that there is clear and convincing evidence that counsel disregarded a clear and unambiguous scheduling or other pre-trial order." *Gardner-Alfred*, 22-cv-01585 (LJL), at *17 quoting *Shanchun Yu v. Diguojiaoyu, Inc.*, [2019 WL 6174204, at *3](#) (S.D.N.Y. Nov. 20, 2019). Finally, the Court noted that Rule 37(c) provides that if a party fails to provide information as required by Rule 26(a) or (e), the Court may, on motion and after giving an opportunity to be heard, "order payment of the reasonable expenses, including attorney's fees, caused by the failure."

The Court then concluded it "has little trouble finding that sanctions against Plaintiffs were warranted under these Rules." Specifically, the Court noted Plaintiffs repeatedly disregarded this Court's scheduling orders; unapologetically missed court-ordered deadlines; and attempted to "excuse these failures on various bases" that the Court found unpersuasive and unplausible.

In addition to Plaintiffs' repeated failures to comply with court-ordered deadlines, Plaintiffs[2] also failed to comply with their obligations under Rule 26(e)(1)(a) to supplement or correct their prior discovery responses with additional responsive material.[3]

Decision

Applying the relevant law to the facts before it, the Court determined Federal Reserve is entitled to reasonable expenses and attorneys' fees incurred in connection with (1) the Motion, (2) call and email correspondence with opposing counsel regarding Plaintiffs' discovery deficiencies; as well as (3) expenses incurred in connection with an earlier motion to compel.

Specifically, the Court held, "[t]here is little question here that Plaintiffs' repeated failures to comply with Court orders and their discovery obligations have resulted in a waste of Court time and resources as well as Defendant's time and resources. Such conduct justifies an award of attorneys' fees and expenses against Plaintiffs and Plaintiffs' attorneys, jointly and severally." (*Id.*) (collecting cases).[4]

The Court further exercised its authority under Rule 37(b) to impose more stringent sanctions, including an adverse inference based on the Court's review of the relevant evidence, including Plaintiffs' testimony. The Court found that Plaintiffs had a clear obligation to preserve and provide specific relevant documents and further held that at some point during the litigation. Plaintiffs possessed the documents. *Id.* at 39. The Court noted that Plaintiffs' failure to produce such evidence reflected culpability, as Plaintiffs' repeated refusals to produce this information demonstrated more than simple negligence. Having concluded that both Plaintiffs decided to intentionally withhold and/or destroy this information to avoid production, the Court found less stringent sanctions would be insufficient either to cure the prejudice to Defendant or to satisfy the deterrent value of sanctions. "Plaintiffs have shown a persistent disregard of their obligations and of the Court's orders in the past. There is no reason to believe that they would satisfy any court order in the future." *Id.* at 40.

Conclusion

Although this case illustrates egregious discovery misconduct, it serves as an important reminder that discovery gamesmanship and *win-at-all-costs* tactics will not be tolerated during discovery. And where, as here, the gamesmanship reflects a bad-faith approach to litigation, judges can, and will, reach into their arsenal and impose "case-killing" sanctions on parties (like adverse inferences) and fees and sanctions against parties' attorneys as well. Counsel should be mindful of Rule 26(g) and their obligation to certify the accuracy and completeness of client's discovery responses.

[1] [Rule 26\(g\)](#) requires the attorney or party producing documents to certify that "to the best of the person's knowledge, information, and belief formed after a reasonable inquiry" the discovery response is "complete and correct as of the time it is made." [Rule 26\(g\)\(1\)\(A\)](#). The rule carries with it the obligation of counsel to "monitor compliance so that all sources of discoverable information are identified and searched." *Beverly Hills Teddy Bear Co. v. Best Brands Consumer Prod., Inc.*, 2020 WL 7342724, at *13 (S.D.N.Y. Dec. 11, 2020).

[2] Plaintiff Gardner-Alfred demonstrated a flagrant disregard for her discovery obligations throughout the case. According to the Court, "[i]t is clear that if Gardner-Alfred felt free to disregard Defendant's discovery requests and the Court's orders in the past and to withhold relevant information based on her own statement that she did not believe the documents to be important, she would feel no compunction in doing so on a going forward basis."

The evidence also demonstrated to the Court that Plaintiff Diaz "cannot be trusted with respect to discovery. The evidence demonstrated that she has made repeated misrepresentations" about discovery and the documents that exist. *Gardner-Alfred*, 22-cv-01585 (LJL), at *18-30.

[3] For example, Plaintiff Gardner-Alfred received a job offer on March 20, 2023, Dkt. No. 135-1; but did not disclose this until April 29, 2023, Dkt. No. 135. This failure was prejudicial, as it was not provided until a week after the deadline for Defendant's rebuttal expert damages report and less than a week before the cutoff for expert depositions. *Id.*

[4] The Court specifically assigned to counsel certain sanctions, noting that Plaintiffs' counsel – without offset to Plaintiffs – shall be solely liable to pay the portion of those reasonable expenses and attorneys' fees that were incurred concerning (i) the communications involving Plaintiffs' non-attorney friends that Plaintiffs withheld on the basis of privilege; (ii) emails that Plaintiffs claimed were not relevant (*i.e.*, the "spam" emails) but were later produced; and (iii) communications with Defendant's counsel regarding Plaintiffs' search terms and repositories.

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