

To commence the statutory time period for appeals as of right [CPLR 5513(a)], you are advised to serve a copy of this order, with notice of entry upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER - COMPLIANCE PART

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CHERLENE CHASE-MORRIS,

Plaintiff,

DECISION & ORDER

Index No.: 65927/2019

-against-

Seq. No.: 1

RICHARD D. TUBBY, LTL EXPRESS LINES,
INC., and RYDER TRUCK RENTAL, INC.,

Defendants.

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LEFKOWITZ, J.

The following papers were read on this motion by plaintiff for an order pursuant to CPLR 3126 striking the defendants’ answer, or in the alternative, for an order pursuant to CPLR 3124 compelling all parties to appear for depositions, and for such other relief as this Court may deem just and proper under the circumstances:

- Notice of Motion - Affirmation in Support - Exhibits A-G
- Affirmation in Opposition
- Reply Affirmation
- Affidavit of Service

Upon the foregoing papers, this motion is determined as follows:

Plaintiff commenced this action for personal injuries on October 2, 2019 by the electronic filing of a Summons and Verified Complaint. Issue was joined via the defendants’ service and electronic filing of a Verified Answer on October 30, 2019.

On this motion, plaintiff’s counsel alleges that the parties’ depositions have not been held in accordance with the terms of the preliminary conference stipulation and order which directed that all party depositions were to take place by May 5, 2020. Several days prior to May 5, 2020, plaintiff’s counsel alleges that defendants’ counsel informed him that the deposition of plaintiff would not go forward. The virtual deposition was adjourned to June 9, 2020. On June 8, 2020, plaintiff’s counsel states he was informed by defendants’ counsel that the deposition would not go forward because the defendants had not received the plaintiff’s medical records, although authorizations therefor had been exchanged in January, 2020. Plaintiff’s counsel states he immediately made a good faith effort to reschedule the virtual deposition by correspondence to defendants’ counsel, and further agreed to transmit plaintiff’s medical records to defendants’ counsel as a courtesy. Nevertheless, defendants’ counsel allegedly was unwilling to provide a new date, and stated that the deposition should wait until the COVID-19 health emergency was over and in-person depositions could be held. Plaintiff’s counsel disagrees that this is an

appropriate resolution given the terms of the preliminary conference stipulation and order and the risks of appearing in person, and seeks an order either striking the defendants' answer or compelling the parties' depositions to proceed by video conference.

Defendants oppose the motion. Defendants' counsel submits that the virtual deposition was adjourned twice at his request because a complete set of plaintiff's medical records had not been received. As such, counsel argues that the defendants' conduct in twice adjourning the plaintiff's deposition was not willful and contumacious and should not subject the defendants to the drastic relief of striking their answer. Defendants' counsel alleges he now is in possession of the plaintiff's records and is ready to proceed with the deposition, but only if held in-person. To that end, defendants' counsel argues that most businesses in New York State have reopened, that some court appearances are being scheduled, and that mediation sessions are again being conducted in-person. Defendants' counsel did not raise any specific objections to video depositions and did not explain why a video deposition would not suffice in this case. Further, defendants did not address the case law holding that virtual depositions are appropriate and warranted as a result of the COVID-19 health crisis.

Legal Analysis/Discussion

CPLR 3101(a) requires "full disclosure of all matter material and necessary in the prosecution or defense of an action." The phrase "material and necessary" is "to be interpreted liberally to require disclosure, upon request, of any facts bearing on the controversy which will assist preparation for trial by sharpening the issues and reducing delay and prolixity. The test is one of usefulness and reason" (*Allen v Crowell-Collier Publishing Co.*, 21 NY2d 403 [1968]; see *Matter of Kapon*, 23 NY3d 32 [2014], *Foster v. Herbert Slepoy Corp.*, 74 AD3d 1139 [2d Dept 2010]). Although the discovery provisions of the CPLR are to be liberally construed, "a party does not have the right to uncontrolled and unfettered disclosure" (*Merkos L'Inyonei Chinuch Inc. v Sharf*, 59 AD3d 408 [2d Dept 2009]; *Gilman & Ciocia, Inc. v Walsh*, 45 AD3d 531 [2d Dept 2007]). "It is incumbent on the party seeking disclosure to demonstrate that the method of discovery sought will result in the disclosure of relevant evidence or is reasonably calculated to lead to the discovery of information bearing on the claims" (*Foster v Herbert Slepoy Corp.*, 74 AD3d at 1139). The trial court has broad discretion to supervise discovery and to determine whether information sought is material and necessary in light of the issues in the matter (see *Auerbach v Klein*, 30 AD3d 451 [2d Dept 2006]; *Feeley v Midas Properties, Inc.*, 168 AD2d 416 [2d Dept 1990]). If the information sought is sufficiently related to the issues in litigation so as to make the effort to obtain it in preparation for trial reasonable, then discovery should be permitted (see *Allen v Crowell-Collier Publishing Co.*, 21 NY2d at 406-407; *In re Beryl*, 118 AD2d 705 [2d Dept 1986]). It is immaterial that the information sought may not be admissible at trial as "pretrial discovery extends not only to proof that is admissible but also to matters that may lead to the disclosure of admissible proof" (*Twenty Four Hour Fuel Oil Corp. v Hunter Ambulance Inc.*, 226 AD2d 175 [1st Dept 1996]; *Polygram Holding Inc. v Cafaro*, 42 AD3d 339 [1st Dept 2007]).

On a CPLR 3126 motion to strike a pleading as a consequence of a party's failure to

proceed with discovery, “the nature and degree of the penalty . . . is a matter generally left to the discretion of the Supreme Court” (*Carbajal v Bobo Robo, Inc.*, 38 AD3d 820 [2d Dept 2007]). To invoke the drastic remedy of striking a pleading or of preclusion, a court must determine that the party’s failure to disclose is willful and contumacious (*see Greene v Mullen*, 70 AD3d 996 [2d Dept 2010]; *Kingsley v. Kantor*, 265 AD2d 529 [2d Dept 1999]). Willful and contumacious conduct can be inferred from repeated noncompliance with court orders or a failure to comply with court-ordered discovery over an extended period of time, coupled with the lack of an adequate excuse for the failure (*see Mei Yan Zhang v Santana*, 52 AD3d 484 [2d Dept 2008]; *Carbajal*, 38 AD3d at 820; *Prappas v Papadatos*, 38 AD3d 871 [2d Dept 2007]).

Here, although defendants’ counsel adjourned plaintiff’s deposition on two occasions, his conduct cannot be said to be willful and contumacious, warranting the striking of the defendants’ answer. Defendants’ counsel asserts, and plaintiff’s counsel ostensibly concedes, that defendants’ counsel was not in possession of a complete set of plaintiff’s medical records at the time the depositions originally were scheduled, despite the fact that authorizations were provided in January, 2020. It is unknown to the court whether the failure to obtain the records resides with defendants’ counsel by failing to timely serve the authorizations, whether the delay resulted from the closure or under-staffing of businesses due to the COVID-19 pandemic, or for some other reason. The court acknowledges and thanks plaintiff’s counsel for voluntarily providing copies of the medical records to defendants’ counsel.

To the extent that defendants’ counsel indicates he is ready to proceed with depositions but only if held in-person, the court notes that the defendants do not have a motion before the court seeking such relief. Even if the defendants had filed a motion, however, such would be denied. It is settled law in New York that the court’s discretion to compel a virtual deposition can be invoked upon a showing of “undue hardship” (*see Yu Hui Chen v Chen Li Zhi*, 81 AD3d 818 [2d Dept 2011]) (deposition by electronic means may be ordered when undue hardship is established); *Rogovin v Rogovin*, 3 AD3d 352 [1st Dept 2004]) (video deposition ordered where witness’ appearance in New York would cause hardship); *Matter of Singh*, 22 Misc3d 288, 290, [Sur Ct, Bronx County 2008] (remote depositions permissible if undue hardship established). In its discretion, the court can also order that the parties travel to a witness located remotely, or permit interrogatories in lieu of a deposition (*see Hoffman v Kraus*, 260 AD2d 435 [2d Dept 1999]) (due to “undue hardship,” the examination of the defendant may either be done in person in Hungary or by written question); *Fielding v S. Klein Dep’t Stores, Inc.*, 44 AD2d 668 [1st Dept 1974]) (to avoid undue hardship, deposition of the defendant shall either take place in California, or in lieu thereof, by written questions).

While neither party cited case law specifically addressing the COVID-19 pandemic and its effects on pending litigation, the court notes that a majority of recent cases addressing COVID-19 issues have denied a party’s attempt to have in-person depositions or proceedings. The cases reject arguments commonly made, including that in-person examinations are needed to assess a witness’ demeanor, and that cases with voluminous documents cannot be held by video conference. The case law recognizes the reality that if depositions are held in-person, the witness must wear a mask, while the witness would not need to wear a mask if video depositions are

conducted.

By way of example, in *Rouviere v Dupuy Orthopaedics, Inc.* (2020 US Dist. LEXIS 122184 [SDNY July 11, 2020]), the plaintiffs filed a motion seeking to compel the defendant's representative to appear for a deposition in-person or to extend the deadline to conduct the deposition. The plaintiffs claimed that they needed an in-person deposition because the deposition will be "document intensive" and that they needed to observe the demeanor of the witness. The court rejected these arguments. Initially, the court explained that since the advent of COVID-19, conducting court proceedings and depositions remotely has become the "new normal" and that the technology used for conducting depositions by video has improved significantly over time. The court explained that the COVID-19 virus presents significant health risks to everyone and that the recommended social distancing minimum of six feet is often difficult to obtain in a deposition setting. And, significantly, even if social distancing could be obtained, given the length of depositions and given that they are held indoors, even social distancing "does not guarantee a safe deposition environment" (*Id.*, 2020 US Dist. LEXIS 122184, at *5-*9).

In *Reynard v Washburn Univ. of Topeka* (2020 US Dist. LEXIS 118631 [D. Kans. July 7, 2020]) the plaintiff sought to have her deposition conducted by remote video. The defendant opposed, arguing that it needed an in-person deposition since the plaintiff was a significant person with a significant damages claim and that it would be impossible to conduct the deposition remotely given the large number of deposition exhibits. The defendant also argued that the threat of COVID-19 had been reduced, noting that Kansas had just entered Phase 3 of its reopening plan. The court rejected these arguments. The court noted that the mere fact that Kansas had entered Phase 3 did not lessen the health risk posed by COVID-19. The court also explained that depositions by video have become the "new normal" and that in light of recent technological advances, the defendant's claim about the number of documents was not persuasive. The court further explained how conducting the deposition remotely would actually enhance the defendant's counsel's ability to observe the plaintiff's demeanor since the plaintiff would not have to wear a mask. In addition, the court found that the mere possibility that there would be technical problems if the deposition was held remotely was not a basis to hold the deposition in-person (*see Joffe v King & Spalding LLP* (2020 US Dist. LEXIS 111188 [SDNY, June 24, 2020]); *Gould Elecs. Inc. v Livingston Cty. Rd. Comm'n* (2020 U.S. Dist. LEXIS 118236 [E.D. Mich. June 30, 2020]) (holding that a party's credibility can undeniably be assessed via video testimony and rejecting concerns regarding technical glitches); *In re Broiler Chicken Antitrust Litig.* (2020 U.S. Dist. LEXIS 111420 [N.D. Ill. June 25, 2020]) (holding that technological problems which can arise during in-person as well as remote depositions is not a reason to prevent remote depositions from occurring); *Lundquist v First Nat'l Ins. Co. of Am.* (2020 U.S. Dist. LEXIS 106124 [W.D. Wash. June 17, 2020]) ("While the Court is sympathetic to the challenges to the legal community during this pandemic, attorneys and litigants are adapting to new ways to practice law, including preparing for and conducting depositions

remotely”).

New York’s trial level courts are in accord with the above rulings and appear to conclude that virtual depositions do not cause undue hardship in light of the technology currently available and the serious health risks posed by the COVID-19 virus (*see Johnson v Time Warner Cable New York City, LLC*, Sup Ct, New York County, May, 28, 2020, Kalish, J., index No. 155531/2017) (remote depositions ordered where the defendant refused to proceed remotely, with the court noting, “to delay discovery until a vaccine is available or the pandemic has otherwise abated would be unacceptable.”); (*Arner v Derf Cab Corp.*, Sup Ct, New York County, May 14, 2020, Silvera, J., index No. 151731/19) (defendants ordered to appear for virtual depositions); (*Ai Bee Lim v James Jian Cui*, Sup Ct, Queens County, May 7, 2020, O’Donoghue, J., index No. 714516/2018) (defendant required to appear at a videotape deposition within 45 days in a medical malpractice case); (*Macdonald v Pantony*, Sup Ct, Nassau County, May 28, 2020, McCormack, J., index No. 612715/17) (remote depositions ordered unless all parties agree to face to face depositions with the appropriate social distancing); (*Stern as Executrix of Stern v New York Presbyterian Hospital*, Sup Ct, Kings County, June 1, 2020, Edwards, J., index No. 510384/2018) (virtual depositions ordered in a medical malpractice case).

In light of the above, the branch of the plaintiff’s motion to strike the defendants’ answer is denied. Defendants’ counsel’s cancellation of two deposition dates in order to complete discovery is not willful and contumacious conduct warranting the striking of defendants’ answer. To the extent plaintiff seeks to compel the depositions of all parties, the motion is granted. All depositions shall be held by video conference. As noted above, defendants’ counsel, in opposing the motion, failed to present specific reasons why video depositions would be insufficient in this matter. As in the cases cited above, this court is of the opinion that in-person depositions would impose undue hardship on the parties at this time due to the COVID-19 pandemic. In addition, the parties’ interests are sufficiently protected through the use of video depositions. Credibility can be determined without the obstruction of the witness’ face through the use of a mask and documents may be presented and examined during the examinations with relative ease. Finally, and perhaps most importantly, video depositions provide the benefit of added protection from possible exposure to the COVID-19 virus.

All other arguments raised on this motion and evidence submitted by the parties in connection thereto have been considered by this court, notwithstanding the specific absence of reference thereto.

Accordingly, it is

ORDERED that the branch of the plaintiff’s motion to strike the defendants’ answer is denied; and it is further

ORDERED that the branch of the motion seeking to compel the depositions of all parties is granted. Party depositions shall be completed by September 11, 2020. It is further ordered that in light of the continuing health risk posed by the COVID-19 pandemic, all depositions shall be held by video conference; and it is further

ORDERED that due to the COVID-19 health emergency, the parties are directed to use their best efforts to proceed with this action in accordance with the Administrative Order of the Chief Administrative Judge issued on June 22, 2020; and it is further

ORDERED that all parties shall appear for a virtual conference to be held by Skype Business in accordance with the Virtual Courtroom Protocol implemented in the Ninth Judicial District on **August 19, 2020 at 3:00 P.M.**; and it is further

ORDERED that plaintiff shall serve a copy of this decision and order upon defendants with notice of entry within 10 days of entry.

The foregoing constitutes the Decision and Order of this Court.

Dated: White Plains, New York
August 3, 2020

Joan B.
Lefkowitz

Digitally signed by Joan B. Lefkowitz
DN: CN=Joan B. Lefkowitz,
E=jlefkowi@nycourts.gov
Reason: I am the author of this document
Date: 2020-08-03 14:45:18
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HON. JOAN B. LEFKOWITZ, J.S.C.

TO:

All Counsel by NYSCEF

cc: Compliance Part