

**SUPREME COURT OF THE STATE OF NEW YORK, APPELLATE DIVISION,
FIRST DEPARTMENT**

PF2 Securities Evaluations, Inc. v. Fillebeen

2019 NY Slip Op 00581 (App. Div. 2019) · No. 8256N 151776/14; 8255N · Decided January 29, 2019

SUMMARY

The Appellate Division, First Department modified an order to require the defendants to appear for previously noticed depositions within 60 days and otherwise affirmed the discovery-related orders. The court held that defendants' late objections to palpably improper interrogatories were not waived, denied discovery sanctions, and rejected PF2's laches argument.

CASE DETAILS

COURT	Supreme Court of the State of New York, Appellate Division, First Department
WRITING FOR THE COURT	Renwick, J.P.; Richter, J.; Mazzairelli, J.; Webber, J.; Kern, J.
JURISDICTION	New York
DECIDED	January 29, 2019
DOCKET	8256N 151776/14; 8255N
DISPOSITION	other
PROCEDURAL POSTURE	Appeal from two discovery orders of Supreme Court, New York County. PF2 appealed the denial of its motion to compel discovery and obtain sanctions, and the order compelling PF2 to respond to defendants' discovery demands and denying PF2's cross motion for sanctions.
STANDARD OF REVIEW	The discovery orders were reviewed on the law and the facts; sanctions for discovery conduct were reviewed under whether the conduct was willful or contumacious, and appellate sanctions under whether the appeal was frivolous.
PRECEDENTIAL VALUE	Published New York Appellate Division opinion
PARTIES	PF2 Securities Evaluations, Inc., PF2 Securities Evaluations, Inc., et al., Counterclaim-Defendants-Appellants v. Guillaume Fillebeen, et al., Defendants-Respondents, Guillaume Fillebeen, et al., Counterclaim-Plaintiffs-Respondents

TOPICS

discovery dispute

sanctions

waiver

appellate procedure

civil procedure

PRACTICE AREAS

civil procedure

commercial litigation

appellate procedure

QUESTIONS PRESENTED

1. Whether defendants' discovery conduct warranted sanctions as willful or contumacious conduct.
2. Whether defendants waived objections to PF2's interrogatories by serving those objections one month late.
3. Whether PF2 was entitled to compel defendants to appear for previously noticed depositions.
4. Whether defendants' motion to compel PF2's discovery responses was barred by laches or waiver.
5. Whether sanctions should be imposed against PF2 for pursuing the appeal.

HOLDINGS

1. Discovery sanctions were properly denied because defendants' conduct was neither willful nor contumacious.
2. Defendants did not waive their objections because PF2's interrogatory requests were palpably improper.
3. PF2 was entitled to compel defendants to appear for the previously noticed depositions.
4. Defendants' motion to compel was not barred by laches or waiver.
5. Appellate sanctions against PF2 were denied because its arguments were not so lacking in merit as to be frivolous.

KEY QUOTATIONS

*“Defendants' service of objections to PF2's 150 interrogatories one month late does not constitute a waiver of the objections, because the interrogatory requests were palpably improper” (*1)*

*“In view of the fact that PF2 timely noticed depositions and defendants did not object to the notices, PF2 is entitled to the depositions.” (*1)*

FACTUAL BACKGROUND

The parties were engaged in ongoing discovery, including document requests, interrogatories, and depositions. PF2 served 150 interrogatories, although the assigned part's then-effective rules limited interrogatories to 25, including subparts, and restricted their subject matter. Defendants served objections one month late, delayed depositions on a basis originally advanced by PF2, and had not objected to PF2's timely deposition notices. Defendants also sought documents and interrogatory responses from PF2, including materials that PF2 had agreed to produce in so-ordered stipulations.

PROCEDURAL HISTORY

Supreme Court, New York County, denied PF2's motion to compel defendants to produce documents and interrogatory responses, appear for depositions, and pay discovery sanctions. On a later motion by defendants, Supreme Court directed defendants to serve a second discovery request, directed PF2 to respond, and denied PF2's cross motion for sanctions. The Appellate Division modified the first order to require defendants to appear for previously noticed depositions within 60 days, otherwise affirmed both orders, and denied sanctions for the appeal.

DISPOSITION

other

REMAND INSTRUCTIONS

Defendants must produce their witnesses for the previously noticed depositions within 60 days after entry of the Appellate Division order. The first order was otherwise affirmed, and the second order was affirmed in full.

CASES CITED

- Pimental v. City of New York, 246 AD2d 467, 468-69 [1st Dept 1998]
- Aetna Ins. Co. v. Mirisola, 167 AD2d 270, 271 [1st Dept 1990]
- GoSMILE, Inc. v. Levine, 112 AD3d 469, 470 [1st Dept 2013]
- Remark Elec. Corp. v. Manshul Constr. Corp., 242 AD2d 694 [2d Dept 1997]

OPINION

PER CURIAM.

PF2 Sec. Evaluations, Inc. v Fillebeen (2019 NY Slip Op 00581) PF2 Sec. Evaluations, Inc. v Fillebeen 2019 NY Slip Op 00581 Decided on January 29, 2019 Appellate Division, First Department Published by New York State Law Reporting Bureau pursuant to Judiciary Law § 431. This opinion is uncorrected and subject to revision before publication in the Official Reports.

Decided on January 29, 2019 Renwick, J.P., Richter, Mazzarelli, Webber, Kern, JJ. 8256N 151776/14 8255N [*1] PF2 Securities Evaluations, Inc., Plaintiff-Appellant, vGuillaume Fillebeen, et al., Defendants-Respondents. Guillaume Fillebeen, et al., Counterclaim/Plaintiffs-Respondents, vPF2 Securities Evaluations, Inc., et al., Counterclaim/Defendants-Appellants.

Carmel, Milazzo & DiChiara LLP, New York (Christopher P. Milazzo of counsel), for appellants. Law Office of Robert Steckman, P.C., New York (Robert M. Steckman of counsel), for respondents. Order, Supreme Court, New York County (Ellen M. Coin, J.), entered November 8, 2017, which, to the extent appealed from as limited by the briefs, denied plaintiff and counterclaim defendants' (collectively, PF2) motion to compel defendants to produce documents and interrogatory responses and to sit for depositions, and for discovery sanctions, unanimously modified, on the law and the facts, to grant the motion to the extent of compelling defendants to

appear for their previously noticed depositions within 60 days after entry of this order, and otherwise affirmed, without costs.

Order, same court (Tanya R. Kennedy, J.), entered April 20, 2018, which, to the extent appealed from as limited by the briefs, upon defendants' motion to compel PF2 to produce documents and interrogatory responses, directed defendants to serve a second request for discovery and inspection and directed PF2 to respond thereto, and denied PF2's cross motion for discovery sanctions, unanimously affirmed, without costs.

PF2's motion for sanctions was properly denied, as defendants' conduct in discovery was neither wilful nor contumacious (see *Pimental v City of New York*, 246 AD2d 467, 468—69 [1st Dept 1998]). In particular, defendants asserted a reasonable basis for delaying depositions — a basis originally advanced by PF2. Further, the motion court closely monitored discovery through five compliance conferences, and PF2 consented to extensions of the discovery schedule and the resolutions of other disputes.

Defendants' service of objections to PF2's 150 interrogatories one month late does not constitute a waiver of the objections, because the interrogatory requests were palpably improper (*Aetna Ins. Co. v Mirisola*, 167 AD2d 270, 271 [1st Dept 1990]). Notably, the then-in-effect rules of the part to which the case was assigned limited interrogatories to 25, including subparts, and to the identification of witnesses and documents and the calculation of damages, and PF2's requests were in gross violation of the rules in both number and subject matter.

In view of the fact that PF2 timely noticed depositions and defendants did not object to the notices, PF2 is entitled to the depositions. Defendants shall produce their witnesses for the previously noticed depositions within 60 days after entry of this order. PF2 contends that defendants' motion to compel it to produce documents and interrogatory responses is barred by "laches."

None of the cases cited by PF2 applies laches to motions to compel. Cases in which the court found that the right to compel had been waived generally involved situations in which discovery — including motions to compel — had concluded, either by rule or by court order (see e.g. *GoSMILE, Inc. v Levine*, 112 AD3d 469, 470 [1st Dept 2013] [motion to compel made after referee resolved all the parties' stated discovery disputes]; *Remark Elec.*

Corp. v Manshul Constr. Corp., 242 AD2d 694 [2d Dept 1997] [motion to compel made after note of issue was filed]). In the instant case, defendants made their motion before the date by which the court ordered all discovery motions to be made (September 30, 2017). While PF2 asserts conclusorily that it produced all documents requested, it failed to show that it produced the documents that defendants identified as missing.

Moreover, defendants demonstrated that at least some of the documents sought on their motion had been ordered produced in "so ordered" stipulations to which PF2 agreed. We deny defendants'

request for sanctions against PF2 for pursuing this appeal. PF2's arguments are not so lacking in merit as to be deemed frivolous. THIS CONSTITUTES THE DECISION AND ORDER OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: JANUARY 29, 2019 DEPUTY CLERK

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