Nassau Lawyer

MARCH 2015 | VOL. 64 | NO. 8 | WWW.NASSAUBAR.ORG

Dangers of Dilatory Discovery Practice

In recent weeks, both the State and Federal bench in New York reminded practitioners that gamesmanship and unnecessary delays during discovery will not be tolerated. Indeed, on January 6, 2015 the Chief Administrative Judge of the Courts of New York State, the Honorable A. Gail Prudenti, amended Rule 202.7(g) of the Uniform Rules for the Supreme and County Courts (Rules of Practice for the Commercial Division), effective April 1, 2015, to breathe new life into sanctions for discovery violations. The new preamble reads as follows:

Kathryn C. Cole

Preamble. The Commercial Division understands that the businesses, individuals and attorneys who use this court have expressed their frustration with adversaries who engage in dilatory tactics, fail to appear for hearings or depositions, unduly delay in producing relevant documents, or otherwise cause the other parties in a case to incur unnecessary costs. The Commercial Division will not tolerate such practices. The Commercial Division is mindful of the need to conserve client resources, promote efficient resolution of matters, and increase respect for the integrity of the judicial process. Litigants and counsel who appear in this court are directed to review the Rules regarding sanctions, including the provisions in Rule 12 regarding failure to appear at a conference, Rule 13(a) regarding adherence to discovery schedules, and Rule 24(d) regarding the need for counsel to be fully familiar with the case when making appearances. Sanctions are also available in this court under Rule 3126 of the Civil Practice Law and Rules and Part 130 of the Rules of the Chief Administrator of the Courts. The judges in the Commercial Division will impose appropriate sanctions and other remedies and orders as is warranted by the circumstances. Use of these enforcement mechanisms enables the Commercial Division to function efficiently and effectively, and with less wasted time and expense for the court, parties and counsel. Nothing herein is intended to expand or alter the scope and/or remedies available under the above-cited sanction rules.

A similar sentiment was recently voiced by a Western District of New York magistrate judge. In *Armstrong Pump, Inc. v. Hartman*,[1] Magistrate Judge Scott made clear that parties are to conduct themselves "honestly" and in "good faith" or run the risk of both sanctions and the need for judicial micromanagement of discovery.

Armstrong Pump was a breach of contract case where discovery was contentious, protracted, and resulted in two prior motions to compel, the first of which the court granted in favor of the defendant. At that time, the court warned Plaintiff "not to engage in piecemeal production of materials it has located that are responsive to [its adversary's] unobjectionable requests." Not heeding the court's warning, Plaintiff subsequently produced documents on nine separate occasions. At that time, Defendant learned, for the first time, of a "five-step development process," that it believed was highly relevant to its claims in the case, and which caused it to believe that the plaintiff was withholding relevant documents from production. Accordingly, Defendant filed a second motion to compel and sought sanctions based on Plaintiff's discovery behavior, including its delayed production of relevant information.

The court granted in part Defendant's second motion to compel. During the history of the case, the parties generated hundreds of pages of motion papers relating to discovery obligations and their failure to fulfill them. The court's frustration with the parties' behavior should come as no surprise given that four and a half years after the case was commenced, discovery is far from complete, depositions have barely begun, and the case is "nowhere near ready for trial."

In deciding the motion, the court expressed its frustration with "the continual and growing animosity between the parties, an animosity that has slowed the progress of the case and that has required repeated judicial intervention," and noted that neither party has ever "foregone passive-aggressive snarking and filed a formal motion under Rule 11 or 28 USC § 1927 to complain about material misrepresentations in motion papers." "Instead," the court continued, "the parties would prefer that the court forget what the actual claims are in this case and start obsessing over details ..."

The court went on to identify 13 specific terms and phrases that it believed referred to the at-issue technology and So Ordered Plaintiff to search all corporate files, communications, and recordings for a period of ten years for each of the terms and phrases identified by the court in order to "open the door to a more objective discovery process that leaves Armstrong no room for gamesmanship." The court also ordered Plaintiff and all counsel of record to file a sworn statement confirming its "good-faith effort to identify sources of documents; that a complete search of those sources for each of the [identified] phrases occurred; and that the search results [were] furnished to [Defendant]." Finally, the court ordered that sanctions would be issued under Rule 37(b)(2)(A) for Armstrong's failure to comply with its order.

In light of these judicial reminders that courts favor a collaborative and efficient resolution of matters, and that Judges can, and will impose sanctions for egregious discovery violations, counsel should take seriously their obligations to be cooperative, diligent and timely during the discovery process irrespective of the courthouse in which we practice.

Kathryn Cole is Counsel in the Commercial Litigation Department of Farrell Fritz and the co-founder of the Firm's Electronic Discovery practice group, which assists practitioners and firms in meeting their electronic discovery obligations. Ms. Cole is a former clerk to the Honorable Richard C. Wesley of the United States Court of Appeals for the Second Circuit.

1. 10-CV-446S, 2014 WL 6908867 (W.D.N.Y. Dec. 9, 2014).