

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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JORGE ALVAREZ

Case No.: 1:18-cv-04841

Plaintiff,

-against-

Assigned Judge:
Hon. Cathy Seibel

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██████████ ██████████ ██████████ ██████████
██████████

Defendants.

-----X

**DEFENDANTS' MEMORANDUM OF LAW IN SUPPORT OF
THEIR MOTION TO DISMISS PLAINTIFF'S COMPLAINT
FOR FAILURE TO PROSECUTE**

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Dated: January 21, 2020
New York, New York

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PRELIMINARY STATEMENT

Defendants [REDACTED] (together, the “**Defendants**”), by and through the undersigned counsel, respectfully submit this Memorandum of Law together with the supporting declaration of Jason Mizrahi, Esq. (the “**Mizrahi Decl.**”) and the exhibits annexed thereto, in support of Defendants’ motion to dismiss the complaint dated September 23, 2019 (the “**Complaint**”) of Plaintiff Jorge Alvarez (“**Plaintiff**”), with prejudice, for failure to prosecute pursuant to Fed. R. Civ. P. 41(b), due to Plaintiff’s failure to fulfill his discovery obligations, and as grounds thereto respectfully states as follows:

STATEMENT OF FACTS

Plaintiff brought the instant action by Complaint dated May 31, 2018 alleging violations of the Fair Labor Standards Act and the New York Labor Law against Defendants. [Dckt. No. 1]. On February 19, 2019, Defendants’ counsel filed their notices of appearance, recording their representation of both Defendants. [Dckt. Nos. 22-23]. On March 8, 2019, Defendants filed their Answer. [Dckt. No. 26]. On March 12, 2019, the Court proceeded with an initial conference, entering a Civil Case Discovery Plan and Scheduling Order, setting, *inter alia*, deadlines for the parties to serve initial requests for the production of documents and interrogatories and for the completion of depositions by, respectively, May 22, 2019 and August 20, 2019. [Dckt. No. 28].

Thereafter, the parties engaged in paper discovery in accordance with those deadlines.

Plaintiff’s deposition was noticed once on May 14, 2019 for July 29, 2019. *See* Mizrahi Decl. at ¶¶ 3-5, **Exhibit “A”** [May 14, 2019 Notice of Deposition], **Exhibit “B”** [May 14, 2019 Affidavit of Service]. On July 30, 2019, Defendants, on behalf of the parties, submitted a joint letter requesting that the Court extend the deposition completion deadline through October 20, 2019, as Plaintiff failed to appear for his July 29, 2019 deposition. [Dckt. No. 30]. Later that same

day, still on July 30, 2019, the Court granted the parties' requested extension and further ordered that Plaintiff's deposition must occur by no later than September 6, 2019. [Dckt. No. 31].

Upon receipt of the Court's order, still on July 30, 2019, Plaintiff's former counsel, Danielle Elizabeth Mietus of Borrelli & Associates, P.L.L.C., called and spoke to Plaintiff in order to inform him of the deadline and gather his availability to fly cross-country to sit for his deposition. During this call, Plaintiff informed Attorney Mietus that he needed to speak with his employer and would subsequently advise her of his availability. [Dckt. No. 32-1 at ¶ 13].

Thereafter, Attorney Mietus lost contact with Plaintiff. *Id.* at ¶¶ 14-21.

On September 5, 2019, Borrelli & Associates, P.L.L.C. filed an Order to Show Cause to Withdraw as counsel of Record for Plaintiff. [Dckt. Nos. 32-33].

On October 10, 2019, the Court held a telephonic hearing on Borrelli & Associates, P.L.L.C.'s Order to Show Cause. During the telephonic hearing, the Court cited Plaintiff's failure to prosecute this case, and directed Defendants' to make an application to dismiss the Complaint should Plaintiff's failure continue. The Court subsequently granted Borrelli & Associates, P.L.L.C.'s Order to Show Cause. [October 10, 2019 Dckt. Entry].

On October 16, 2019, Plaintiff's deposition was re-noticed to November 18, 2019. *See* Mizrahi Decl. at ¶¶ 7-9, **Exhibit "C"** [October 16, 2019 Notice of Deposition], **Exhibit "D"** [October 16, 2019 Affidavit of Service].

On October 18, 2019, the undersigned filed a letter motion requesting an extension of the deposition completion deadline of October 20, 2019 to, through and including, November 20, 2019, on the basis that Plaintiff failed to appear for his initially scheduled deposition. [Dckt. No. 37]. Defendants' request was subsequently granted. [Dckt. No. 38].

Plaintiff failed to appear for his November 18, 2019 deposition despite having two (2) months of notice. *See Mizrahi Decl.* at ¶ 10.

On December 16, 2019, Defendants filed a letter motion requesting a pre-motion conference on their anticipated Motion to Dismiss for Failure to Prosecute. [Dckt. No. 41]. The Court subsequently directed Defendants to file the instant motion. [Dckt. No. 42].

ARGUMENT

I. Legal Standard

Fed. R. Civ. P. 41(b) provides that “[i]f the plaintiff fails to prosecute or to comply with these rules or a court order, a defendant may move to dismiss the action or any claim against it.” The Second Circuit has acknowledged that dismissal for failure to prosecute is “a harsh remedy to be utilized only in extreme situations” but such measure is “vital to the efficient administration of judicial affairs and provides meaningful access for other prospective litigants to overcrowded courts.” *Lyell Theatre Corp. v. Lowes Corp.*, 682 F.2d 37 (2d Cir. 1982) (quoting *Theilmann v. Rutland Hospital, Inc.*, 455 F.2d 853, 855 (2d Cir. 1972)).

Plaintiff’s *pro se* status is not a bar to dismissal of his action for failure to prosecute. *See, e.g., Hibbert v. Apfel*, 2000 U.S. Dist. LEXIS 9791, at *3 (S.D.N.Y. 2000) (“Although sympathetic to the plight of the unrepresented, strong policy concerns further support dismissal. Delays have dangerous ends, and unless district judges use the clear power to [dismiss] when appropriate, exhortations of diligence are impotent.”) (internal quotation omitted). Instead, dismissal for lack of prosecution pursuant to Rule 41(b) is within the sound discretion of the Court and is governed by five factors set forth in *Lucas v. Miles*, 84 F.3d 532, 535 (2d Cir. 1996):

(1) the duration of plaintiff’s delay; (2) whether plaintiff was on notice that failure to prosecute his case would result in dismissal; (3) whether the defendants are likely to be prejudiced by further delay in the proceedings; (4) a balancing of the court’s interest in managing its docket with the plaintiff’s interest in receiving a fair chance to be heard; and (5) whether the judge has adequately considered a sanction less drastic than dismissal.

Id.; see also *McAllister v. Garrett*, 2015 U.S. Dist. LEXIS 48131, at *5-6 (S.D.N.Y. 2015).

II. Plaintiff's Claim Should Be Dismissed for Failure to Prosecute Pursuant to Fed. R. Civ. P. 41(B)

Each of the factors from *Lucas* weighs in favor of dismissal in this case. First, Plaintiff's delay has lasted several months, beginning with his failure to appear for his July 29, 2019 deposition, and again with his failure to appear for his November 18, 2019 deposition. See Mizrahi Decl. at ¶¶ 6, 10. This failure already has resulted in Defendants having to request multiple extensions of the discovery deadline and, because the discovery deadline has now expired, any further attempt to depose Plaintiff would require Defendants to seek another.

Second, on December 16, 2019, Defendants' put Plaintiff on notice that his continued failure to appear for his deposition could result in dismissal. See Mizrahi Decl. at ¶¶ 11-12, **Exhibit "E"** [December 17, 2019 Affidavit of Service]. See *Cross v. Sullivan County Jail Adm'r*, 171 F.R.D. 68, 71 (S.D.N.Y. 1997). Moreover, the Court's December 16, 2019 Order granted Defendants leave to so move. [Dckt. No. 42]. Per the Court's docket, a copy of the December 16, 2019 Order was delivered to Plaintiff on December 17, 2019 by email and certified mail, return receipt requested. See Mizrahi Decl. at ¶ 12, Ex. E.

Third, "[w]here, as here, Plaintiff has caused unreasonable delay in the prosecution of an action, prejudice to the defendant may be presumed." *Cross*, 171 F.R.D. at 72 (citing *Lyell Theatre Corp.*, 682 F.2d at 34). But even absent such presumption, Defendants are prejudiced because they do not have the information necessary to file any dispositive motions due to Plaintiff's repeated failure to appear for his depositions. Defendants additionally "face[] the increased likelihood of lost evidence, making discovery and trial preparation more difficult." See *Edmonds v. City of New York*, 2013 U.S. Dist. LEXIS 52007, at *7 (E.D.N.Y. 2013).

Fourth, Plaintiff has had sufficient opportunity to advance this litigation. Denying the instant motion, however, and continuing the action would burden the Court's docket with a case that Plaintiff has demonstrated no interest in prosecuting. Moreover, "[i]t is not the function of this Court to chase dilatory plaintiffs while other litigants in this district seek access to the courts." *Hibbert*, 2000 U.S. Dist. LEXIS 9791 at *7.

Finally, by its October 18, 2019 Order, the Court extended the discover deadline giving Plaintiff a second opportunity to fulfill his discovery obligations. Nonetheless, Plaintiff continued to shirk that responsibility and there has been a complete lack of communication between Plaintiff and the Court (or Defendants' counsel) regarding Plaintiff's failure to fulfill his discovery obligations. Plaintiff's inaction demonstrates his indifference to this action and his unwillingness to take the steps necessary to advance this litigation. Plaintiff's failure to take any steps to meet his obligations and his "evident abandonment of his claims suggests that a sanction less than dismissal would be ineffective." *See Edmonds*, 2013 U.S. Dist. LEXIS 52007 at *7; *Samman v. Conyers*, 231 F.R.D. 163, 166 (S.D.N.Y. 2005).

There is ample precedent supporting dismissal of an action for failure to prosecute where plaintiffs repeatedly fail to appear for depositions and/or comply with discovery orders. *See e.g., Dove v. City of New York*, 2006 U.S. Dist. LEXIS 93392, (S.D.N.Y. 2006) (dismissing action with prejudice for failure to prosecute where plaintiff failed to appear for scheduled deposition and final pre-trial conference); *Segers v. Dep't of Corr.*, 1996 U.S. Dist. LEXIS 15552 (S.D.N.Y. 1996) (dismissing action under Fed. R. Civ. P. 41(b) and Fed. R. Civ. P. 37 where plaintiff twice failed to appear for scheduled deposition and ignored court order to appear for the third scheduled deposition); *Civil v. New York City Dep't of Corr.*, 1993 U.S. Dist. LEXIS 1918 (S.D.N.Y. 1993) (dismissing case where plaintiff failed to appear for deposition and court conferences). While the

Court in this case has not explicitly ordered Plaintiff to appear for his deposition on a date certain, the Court's October 18, 2019 Order granted Defendants' motion to extend the discovery deadline specifically so that Plaintiff may be deposed. [Dckt. No. 37]. Moreover, the December 16, 2019 Order granted Defendants leave to move to dismiss the action for failure to prosecute. The Court's Order, therefore, made Plaintiff's obligations clear; that it was imperative for Plaintiff to appear for his deposition and that his failure to appear may result in dismissal of his action.

Plaintiff's failure to appear for two scheduled depositions, and his failure to communicate with Defendants' counsel or the Court more than two months beyond the extended deadline for close of discovery indicates that Plaintiff has effectively abandoned his action. Accordingly, the Court should grant Defendants' motion and dismiss the instant action for failure to prosecute.

CONCLUSION

For the foregoing reasons, Defendants respectfully request that the Court dismiss Plaintiff's action for lack of prosecution pursuant to Fed. R. Civ. P. 41(b), and that she be awarded such other and further relief as the Court deems just and proper.

Dated: January 21, 2020
New York, New York

By: /s/ Jason Mizrahi
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Via Email, and Certified Mail, Return Receipt Requested

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5. A true and correct copy of Defendants' Affidavit of Service of the May 14, 2019 Notice of Deposition of Plaintiff is annexed hereto as **Exhibit "B"**.

6. Plaintiff failed to appear for his July 29, 2019 deposition.

7. Plaintiff's deposition was re-scheduled for 11:00 a.m. on November 18, 2019 via notice served on October 16, 2019.

8. A true and correct copy of Defendants' October 16, 2019 second Notice of Deposition is annexed hereto as **Exhibit "C"**.

9. A true and correct copy of Defendants' Affidavit of Service of the October 16, 2019 Notice of Deposition of Plaintiff is annexed hereto as **Exhibit "D"**.

10. Plaintiff failed to appear for his November 18, 2019 deposition, despite having two (2) months of notice.

11. On December 17, 2019, the undersigned sent a copy of the Court's December 16, 2019 Order to Plaintiff at his last known address by email and certified mail, return receipt requested.

12. A true and correct copy of Defendants' Affidavit of Service of the December 16, 2019 Court Order is annexed hereto as **Exhibit "E"**.

Dated: New York, New York
January 21, 2020

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