UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

SANG LAN,

Plaintiff,

-against-

TIME WARNER, INC., KAO-SUNG LIU A/K/A K.S. LIU, GINA HIU-HUNG LIU A/K/A HUI-HUNG SIE A/K/A GINA LIU, Individually and as Trustees or Managers of Goodwill for Sang Lan Fund, HUGH HU MO, JOHN AND JANE DOES 1–30, Unknown Defendants, Jointly and Severally,

Defendants.

11 Civ. 2870 (AT) (JCF)

MEMORANDUM AND ORDER

ANALISA TORRES, District Judge:

On October 24, 2014, Defendants, Kao-Sung Liu a/k/a K.S. Liu, Gina Hiu-Hung Liu a/k/a Hui-Hung Sie a/k/a Gina Liu, and Hugh H. Mo, moved for sanctions pursuant to Federal Rule of Civil Procedure 37 against Plaintiff, Sang Lan, based on Plaintiff's failure to appear for her deposition. ECF No. 206. Before the Court is the Report and Recommendation (the "R & R") of the Honorable James C. Francis IV, which proposes that Defendants' motion be granted as to monetary sanctions but denied as to terminating sanctions. ECF No. 216. For the reasons stated below, the Court ADOPTS the R & R to the extent that it recommends monetary sanctions, but sustains Plaintiff's objection to the imposition of joint and several liability against her counsel.

DISCUSSION[1]

I. Standard of Review

District courts may reverse a magistrate judge's order on a non-dispositive pre-trial matter only if the order is "clearly erroneous or contrary to law." 28 U.S.C. § 636(b)(1)(A); Fed.

[1] The Court presumes familiarity with the facts of the case, as detailed in Judge Francis' Report and Recommendation regarding Plaintiff's motion for voluntary dismissal without prejudice, *see* ECF No. 215, and, therefore, does not summarize them here.

R. Civ. P. 72(a); *see Thomas E. Hoar, Inc. v. Sara Lee Corp.*, 900 F.2d 522, 525 (2d Cir. 1990). "An order is 'clearly erroneous' only when the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." *Weiss v. La Suisse*, 161 F. Supp. 2d 305, 321 (S.D.N.Y. 2001) (internal quotation marks omitted). "An order is 'contrary to law' when it fails to apply or misapplies relevant statutes, case law or rules of procedure." *Id.*

Discovery matters are generally considered non-dispositive of the litigation. *See Thomas E. Hoar*, 900 F.2d at 525. And, in particular, sanctions for discovery violations are deemed non-dispositive unless the sanction employed disposes of a claim. *See id.* "It is well-settled that a magistrate judge's resolution of a non-dispositive matter should be afforded substantial deference and may be overturned only if found to have been an abuse of discretion." *Leviton Mfg. Co. v. Greenberg Traurig LLP*, 09 Civ. 08083, 2011 WL 2946380, at *1 (S.D.N.Y. July 14, 2011) (citation omitted). Because Judge Francis' order concerns non-dispositive matters, this deferential standard of review applies.[2]

II. Analysis

Plaintiff objects to the imposition of sanctions against her and her counsel on the grounds that (1) her non-compliance was substantially justified by medical complications beyond her control, and (2) Judge Francis' imposition of joint and several liability against her counsel lacks evidentiary and legal support. Pl. Obj. 15-32, ECF No. 237. Having carefully reviewed the R & R, the parties' submissions, and the record evidence, the Court affirms the R & R to the

[2] Judge Francis addressed Defendants' motion for sanctions by way of a report and recommendation because Defendants requested terminating sanctions. Ultimately, however, the R & R did not dispose of Plaintiff's claims. *See* R & R.

extent that it recommends monetary sanctions, but sustains Plaintiff's objection to the imposition of joint and several liability against her counsel.

A. Plaintiff's Non-Compliance

To the extent that Judge Francis recommends monetary sanctions against Plaintiff, the Court finds the R & R to be well reasoned and grounded in both fact and law. As Judge Francis explains, Plaintiff's claims that her ongoing health problems excused her from obeying a court order are unavailing. On May 20, 2014, Judge Francis found that Plaintiff's present medical conditions did not prevent her from participating in a "deposition by videoconference, under supervision of the appropriate medical personnel." May 20, 2014 Order, ECF No. 172. Then, on October 10, 2014, with the October 31 fact discovery deadline looming, Judge Francis ordered Plaintiff to appear at her October 14, 2014, deposition, and warned that "failure to do so [would] result in sanctions under [Rule] 37." October 10, 2014 Memorandum Endorsement, ECF No. 200. To accommodate Plaintiff's medical condition, the deposition was scheduled for three half-days in Beijing, beginning on October 14, 2014, and on dates which Plaintiff had previously represented she was available. Pl. Obj. 7. Though she urges that, by following her physician's advice to not appear for her deposition, she acted rationally and reasonably, at no point during the parties' efforts to schedule Plaintiff's October deposition did Plaintiff advise Defendants, or the Court, that medical concerns would prevent her from appearing for her deposition. *Id.* 8-9, 11-12; Defendants' Memorandum of Law in Opposition to Plaintiff's Rule 72(a) Objections to February 5, 2015 Order ("Def. Mem.") 6, ECF No. 251. In light of these facts and Judge Francis' clear and unequivocal order that Plaintiff attend her deposition, the Court finds no clear error in Judge Francis' finding that Plaintiff's non-compliance with the order was not "substantially justified," nor do other circumstances "make an award of expenses unjust." Fed.

R. Civ. P. 37(b)(2); *Chesa Int'l, Ltd. v. Fashion Assoc., Inc.*, 425 F. Supp. 234, 237-38 (S.D.N.Y. 1977).

B. Sanctions Against Counsel

The Court declines to adopt the R & R to the extent that it holds Plaintiff's counsel "jointly and severally liable for the reasonable expenses, including attorneys' fees, incurred by the defendants in scheduling and preparing for the plaintiff's deposition." R & R 8. This Court has recognized that, "[w]hile the case law makes clear that joint and several sanctions against parties and their attorneys are available when the court finds both to be equally at fault, the court has wide discretion to consider the entire record before it when selecting the appropriate sanction." *Hunt v. Enzo Biochem, Inc.*, 06 Civ. 170, 06 Civ. 213, 06 Civ. 6347, 2011 WL 4840713, at *7 (S.D.N.Y. Oct. 12, 2011); *see also Thomas E. Hoar*, 900 F.2d at 527 ("In holding [plaintiff] and [plaintiff's counsel] *jointly and severally* liable for the monetary sanction, the district court (and the magistrate) determined that [plaintiff] and its counsel were each equally responsible for the failure to comply with discovery requests and court orders. The record fully supports that determination."). Courts have held that joint and several liability is proper in cases where the obligated attorney "was the attorney advising the party failing to obey the order, . . . contributed significantly to the pattern of delay and defiance, and . . . there appear[ed] no other circumstances making such an award unfair or unjust." *Chesa Int'l*, 425 F. Supp. at 238 (internal quotation marks and citation omitted).

Judge Francis does not explain why he holds Plaintiff's counsel jointly and severally liable for Plaintiff's failure to appear for her deposition. *See* R & R 8. The Court can surmise that Plaintiff's counsel must have known that Plaintiff did not have the authority to dismiss the case without prejudice after Defendants had answered the complaint and without their consent, and thus knew that the filing of the notice—three days before Plaintiff's scheduled deposition—would further delay discovery. Moreover, Judge Francis' October 10, 2014, order explicitly warned Plaintiff and her counsel that her failure to appear at her deposition would result in sanctions under Rule 37. ECF No. 200. But, although the R & R adequately explains the award of sanctions against Plaintiff, this explanation "does not automatically operate as justification for an award against [her] attorney." *Weisberg v. Webster*, 749 F.2d 864, 873-74 (D.C. Cir. 1984).

Upon review of the parties' submissions and the record evidence, the Court finds that holding Plaintiff's counsel liable is not justified in this instance. Neither Defendants nor the R & R offer specific reasons why Plaintiff's counsel should be held liable for Plaintiff's failure to appear for her deposition. Moreover, Plaintiff attests that "[n]ever once did [her] attorneys advise [her] to disobey the court order or not to comply with the discovery requests." Sang Decl. ¶ 21, ECF No. 210. Accordingly, "the Court finds no 'coordinated effort,' between client and counsel, requiring joint and several liability," *AAIpharma Inc. v. Kremers Urban Dev. Co.*, 02 Civ. 9628, 2006 WL 3096026, at *6 (S.D.N.Y. Oct. 31, 2006) (quoting *Metro. Opera Ass'n, Inc. v. Local 100, Hotel Emp. & Rest. Empl. Int'l Union*, 00 Civ. 3613, 2004 WL 1943099, at *25 (S.D.N.Y. Aug. 27, 2004)), and "no basis to find that [] any attorney advised or condoned the [plaintiffs'] discovery violations." *U.S. ex rel. Kirk v. Schindler Elevator Corp.*, Civ. 2917, 2014 WL 1259559, at *3 (S.D.N.Y. Mar. 17, 2014).

CONCLUSION

For the reasons stated above, the Court affirms the R & R to the extent that it recommends monetary sanctions, but sustains Plaintiff's objection to the imposition of joint and several liability against her counsel. Defendants shall be awarded reasonable expenses, including attorneys' fees, incurred by them in scheduling and preparing for Plaintiff's deposition, in an amount to be determined by Judge Francis.

SO ORDERED.

Dated: February 9, 2016
New York, New York

ANALISA TORRES
United States District Judge