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First Dept. Upholds Adverse Inference in Discovery Dispute

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BY LARA FLATH, JUDY FLUMENBAUM AND NICK IACONO

A recent First Department decision reflects a continued post-pandemic trend of New York courts cracking down on delays in producing discovery materials—including by levying harsh penalties not sought by the complaining party.

In *Barlow v. Skroupa*, the First Department affirmed a Commercial Division order precluding defendants from (i) "presenting documents that they failed to timely produce during discovery" and (ii) "offering evidence pertaining to interrogatories that they failed to answer" after defendants refused to comply with the court's discovery deadlines for a year. No. 2022-02318, 2023 WL 4239667 (1st Dept. June 29, 2023).

But the First Department went a step further, finding that plaintiffs "[were] also entitled to an adverse inference charge, to be formulated by the trial judge." The decision should serve as a caution for litigants, as production delays may come at a cost—even where a party believes that the law, or savvy litigation strategy, favors delay.

In *Barlow*, employees and contractors of a conference services company sued for breach of contract and fraud based on the company's alleged failure to pay. Investor and equity holder defendants moved to dismiss, and plaintiffs cross-moved to amend the complaint. *See Barlow v. Skroupa*, 173 N.Y.S.3d 98, 102 (N.Y. Sup. Ct. 2022). After filing their initial complaint, plaintiffs served defendants with multiple discovery requests for emails and documents.

For nearly a year, defendants ignored plaintiffs' requests and a deposition notice, despite two court orders compelling disclosure. Pls.' Notice of Mot. to Strike Answers 1-2. Before the production deadline, defendants sought to remove the case to the Southern District of New York, an

LARA FLATH *is a complex litigation and trials partner in Skadden, Arps, Slate, Meagher & Flom, representing clients in complex commercial, securities and antitrust litigation in federal and state courts.* JUDY FLUMENBAUM *and* NICK IACONO *are complex litigation and trials associates at the firm.*

effort ultimately rejected by the federal court. In response, plaintiffs moved "to strike defendants' answer and to enter judgment against them."

In their opposition, defendants maintained they withheld production in anticipation of plaintiffs' amended complaint. *See* Decl. in Opp. to Mot. to Strike 3-6. Commercial Division Justice Lucy Billings denied plaintiffs' motion to strike and for judgment, but precluded defendants from offering any of the documents or evidence responsive to plaintiffs' repeated demands. *Barlow*, 2021 WL 5304247.

Plaintiffs appealed, arguing that Justice Billings' order afforded "no effective remedy" for Defendants' willful failure to produce disclosure after almost three years of litigation. Pls.-Appellants Reply Br., 2023 WL 4446770 (1st Dept. May 5, 2023).

In sum, New York litigants should heed the Commercial Division's and First Department's 'Barlow' decisions when fielding discovery requests.

The First Department affirmed the order, reasoning that, "[a]lthoughdefendants were slow in producing documents, they [had] not engaged in the type of 'extreme conduct' warranting the imposition of the 'ultimate penalty' of striking their answer or rendering judgment against them." *Barlow*, No. 2022-02318, 2023 WL 4239667, at *1. But even though plaintiffs did not explicitly seek an adverse inference charge—and the trial court did not order one—a unanimous panel determined, *sua sponte*, that plaintiffs were entitled to that remedy. *Id.*

The *Barlow* decisions are noteworthy for several potential reasons. First, the decisions demonstrate that, as a general matter, New York courts may—in certain circumstances—take a harder line against traditionally unpoliced discovery delays and production noncompliance.

Indeed, as the New York State Bar Association noted, "in the state courts of New York, getting an opposing party to comply with discovery demands has been a notoriously long and challenging process.

However, recent trends suggest that appellate and lower court judges have become much more willing to impose sanctions against recalcitrant litigants under CPLR §3126." *See* Peter S. Sanders *et al.*, *The Courts and Late Discovery: The Honeymoon Is Over*, N.Y. St. B.J., July/August 2022, at 35.

Further, as Justice Billings admonished, production deadlines and discovery orders entered by a state trial court are not abated simply because a party has moved for federal removal. *See Barlow*, 2021 WL 5304247, at *1 ("While an order by this court during any period of removal might have been ineffective, 28 U.S.C. §1446(d), the orders setting deadlines for disclosure were entered when the action was in [New York state] court and remained effective. The federal court received the removed action in the same procedural posture as when the action was in this court and then undertook to give effect to this court's orders entered before the removal.").

Billings further emphasized that, "[u]pon removal, the orders entered by the state court are treated as though they have been entered by the federal court" and "if defendants sought to relieve themselves from the disclosure deadlines set by [the state] court, defendants needed to *move to extend, modify, or vacate those deadlines*." *Id.*, at *3 (emphasis added).

Second, parties delaying or withholding production risk not only those remedies expressly sought by their adversaries, but also potential sanctions and penalties imposed by the court in its broad statutory discretion.

Indeed, the First Department's *sua sponte* adverse inference charge is particularly notable, as New York courts have typically permitted adverse inference charges only upon a showing of (1) willful spoliation, i.e., that a party deliberately destroyed—or negligently failed to preserve—evidence or (2) failed to preserve evidence in direct violation of a court order. *See Sarach v. M & T Bank Corp.*, 140 A.D.3d 1721 (4th Dept. 2016) (granting adverse inference charge because defendants deleted video surveillance data in violation of an order to preserve).

To be sure, the First Department's grant of an adverse inference instruction in *Barlow* is not entirely unique, as some courts have penalized litigants with an adverse inference charge without a finding of willful deletion or spoliation. *See,* e.g., *Horizon Inc. v. Wolkowicki*, 55 A.D.3d 337, 338 (1st Dept. 2008) (favoring adverse inference charge against defendant "because the evidence [was] peculiarly within defendants' custody" and "defendants' fail[ed], despite four orders, to produce checks and other financial documents essential to proving the [plaintiffs'] claim").

Nonetheless, while *Barlow* did not apply a wholly novel remedy, it may signal that courts will not hesitate to impose adverse inference charges even without a finding of willful or negligent destruction. Revised comments to New York's model civil jury instructions also appear to favor this trend. *Compare* N.Y. Pattern Jury Instr.—Civil, Vol. 1A, PJI 1:77.1 (2011) (Counsel should note that New York State Pattern Jury Instructions allow an adverse inference *only when* "no reasonable explanation for the [destruction, alteration, disappearance] has been offered") *with* N.Y. Pattern Jury Instr.—Civil, Vol. 1A, PJI 1:77.1 (2022) ("The charge, therefore, incorporates the three elements that must be demonstrated before the jury may draw an adverse or negative inference: that the evidence exists at the time of trial; that the party who allegedly failed to produce the evidence possessed or controlled it; and that the party who allegedly failed to produce the evidence offered no reasonable explanation for not producing it.").

In sum, New York litigants should heed the Commercial Division's and First Department's *Barlow* decisions when fielding discovery requests. Although the Appellate Division concluded that the "ultimate penalt[ies]"—i.e., striking pleadings and entering adverse judgment—are not warranted for mere unexcused delay, ignoring production orders and stonewalling opposing counsel's requests could result in a variety of unfavorable results and punitive sanctions.