

UNITED STATES DISTRICT COURT  
DISTRICT OF CONNECTICUT

ELIYAHU MIRLIS,

Plaintiff,

Case No. 3:18-cv-02082 (MPS)

v.

SARAH GREER,

Defendant.

**MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR FURTHER  
SANCTIONS FOR FAILURE TO COMPLY WITH DISCOVERY ORDER**

Pursuant to Fed. R. Civ. P. 37(b)(2), the plaintiff, Eliyahu Mirlis (“Plaintiff”), hereby submits the following memorandum of law in support of his Motion for Further Sanctions for Failure to Comply with Discovery Order (the “Motion”). The defendant, Sarah Greer (“Defendant”), has failed to comply with this Court’s Order, dated October 2, 2019 (ECF No. 83) (the “Sanctions Order”), directing Defendant to respond in full to Plaintiff Eliyahu Mirlis’ First Set of Interrogatories and Requests for Production of Documents to Sarah Greer (the “Plaintiff’s Discovery Requests”). In support of the Motion, Plaintiff respectfully represents as follows:

**I. BACKGROUND**

**A. Nature of the Case**

Plaintiff commenced the above-captioned action against Defendant seeking to recover funds fraudulently transferred from Defendant’s husband, Daniel Greer (“D. Greer”), and the Yeshiva of New Haven, Inc. (the “Yeshiva”) to Defendant. Despite the fact that Plaintiff had claims against D. Greer and the Yeshiva, and D. Greer, the Yeshiva, and Defendant knew about such claims, D. Greer and the Yeshiva transferred property to Defendant in order to avoid paying the claims that Plaintiff has against D. Greer and the Yeshiva, including claims pursuant to a

judgment (the “Judgment”) obtained by Plaintiff against D. Greer and the Yeshiva based upon D. Greer’s sexual abuse of Plaintiff when he was a minor student at the Yeshiva, a school managed and controlled by D. Greer in *Eliyahu Mirlis v. Daniel Greer et al.*, 3:16-cv-00678 (MPS) (the “Underlying Action”).

Plaintiff alleges that Defendant was the recipient of three distinct types of fraudulent transfers from D. Greer and the Yeshiva. First, Defendant simply took at least \$238,000.00 from joint accounts owned with D. Greer and transferred such funds to an account or accounts in her name only, including in one instance transferring \$220,000.00 to a bank with no presence in Connecticut. In addition, for many years Defendant and D. Greer used D. Greer’s earnings to pay for their joint marital expenses while Defendant’s earnings were largely unused. The result of this was to reduce D. Greer’s assets in order to bolster those of Defendant, which had the intended effect of preventing Plaintiff from collecting on the claims that Plaintiff had against D. Greer. Last, D. Greer and Defendant are officers and directors of several related nonprofit corporations, including the Yeshiva, which are managed and controlled by D. Greer. While D. Greer received no retirement benefits from the entity that facially employs him, Defendant received and continues to receive retirement benefits from the Yeshiva in an amount nearly equal to her salary. This is part of a concerted effort by D. Greer and the Yeshiva to transfer funds to Defendant, which benefit both D. Greer and Defendant, to shield them from collection. Thus, in this action, Plaintiff seeks to avoid said fraudulent transfers and recover them to satisfy the judgment he obtained against D. Greer and the Yeshiva and to recover such transfers under a theory of unjust enrichment and/or through the imposition of a constructive trust.

**B. The Plaintiff’s Discovery Requests**

On May 21, 2019, Plaintiff served the Plaintiff's Discovery Requests upon Defendant, which included interrogatories (the "Interrogatories") and document requests (the "Document Requests"), demanding that Defendant respond to the Interrogatories and produce documents requested in the Document Requests within thirty (30) days. Thus, compliance was due on or before June 20, 2019. Plaintiff consented to Defendant's request for and thirty (30) day extension of this deadline. See Consent Motion to Extend Certain Scheduling Order Deadlines, Doc. No. 51, ¶ 1. Compliance was due, therefore, on or before July 22, 2019.

Defendant did not respond to any of the Interrogatories or produce any documents with respect to the Document requests by July 22, 2019. Therefore, after unsuccessfully conferring telephonically to resolve this dispute, the parties contacted chambers to make the Court aware of the dispute. The Court ordered that the parties submit letters to chambers setting forth their respective positions. The Court treated Plaintiff's submission as a motion to compel and ordered that Defendant serve complete responses to Plaintiff's Discovery Requests within 14 days of August 26, 2019. (Discovery Order.) Thus, compliance was due by September 9, 2019.

Defendant failed to comply with the Discovery Order on or before September 9, 2019. As a result, Plaintiff filed a Motion for Sanctions (Doc. No. 77) (the "First Motion for Sanctions") on September 17, 2019, seeking, *inter alia*, to compel compliance with the Discovery Order and an award of sanctions for Defendant's failure to comply. On October 2, 2019, the Court entered the Sanctions Order, *inter alia*, requiring Defendant to pay Plaintiff's reasonable attorney's fees relating to the First Motion for Sanctions, to respond in full to the Plaintiff's Discovery Requests by October 11, 2019, and on the same date to file an affidavit setting forth with specificity the steps that Defendant had taken to comply with the Plaintiff's Discovery Requests. In addition, the Court warned, "**Failure to comply with this order may result in a default judgment or**

**additional sanctions, including an order of contempt imposing a fine for every day of continued noncompliance.”** (Emphasis in original.) The Court also ordered Defendant to “pay to the plaintiff, by check or money order made payable to plaintiff’s counsel as trustee, the amount of \$2,512.50.” (Doc. No. 89.) To date, Defendant has not paid such sum.

On October 11, 2019, Defendant, through her counsel, served Plaintiff with unverified responses (the “Discovery Responses”) to the Plaintiff’s Discovery Requests and produced documents consisting only of thirty-three (33) pages of a handwritten checkbook ledger from an unidentified checking account. On October 16, 2019, Defendant served upon Plaintiff responses to the Plaintiff’s Interrogatories that were substantially the same as those previously served but with a signed verification page. A copy of the Discovery Responses is attached hereto as **Exhibit A**. In response to requests for the bank records of Defendant, Defendant simply stated that she believed that she had accounts at Centreville Bank, Liberty Bank, and the Bank of Newport, and that she previously had an account at Start Community Bank. (Interrogatory Response #5.) However, no records from any of those accounts were produced. Defendant’s apparent response to not producing any such records is twofold: (1) that she does not have bank records from those accounts, and (2) that she believes that the banks provided such documents pursuant to subpoenas. (Responses to Requests for Production #2-5.) In addition, Defendant claimed not to have any records of her retirement account, even though she had previously testified as to its existence. (Id., #7.) Defendant also claims not to have any documents regarding any expenses for her household or any property that she owns. (Id., #6, 8-9.)

**II. DEFENDANT SHOULD BE SANCTIONED FOR HER FAILURE TO COMPLY WITH THE SANCTIONS ORDER**

Fed. R. Civ. P. 37(b)(2)(A) provides:

If a party or a party's officer, director, or managing agent—or a witness designated under Rule 30(b)(6) or 31(a)(4)—fails to obey an order to provide or permit discovery, including an order under Rule 26(f), 35, or 37(a), the court where the action is pending may issue further just orders. They may include the following:

- (i) directing that the matters embraced in the order or other designated facts be taken as established for purposes of the action, as the prevailing party claims;
- (ii) prohibiting the disobedient party from supporting or opposing designated claims or defenses, or from introducing designated matters in evidence;
- (iii) striking pleadings in whole or in part;
- (iv) staying further proceedings until the order is obeyed;
- (v) dismissing the action or proceeding in whole or in part;
- (vi) rendering a default judgment against the disobedient party; or
- (vii) treating as contempt of court the failure to obey any order except an order to submit to a physical or mental examination.

“Instead of or in addition to the orders above, the court must order the disobedient party, the attorney advising that party, or both to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the failure was substantially justified or other circumstances make an award of expenses unjust.” Fed. R. Civ. P. 37(b)(2)(C). Factors to evaluate in considering sanctions include “(1) the willfulness of the non-compliant party or the reason for noncompliance; (2) the efficacy of lesser sanctions; (3) the duration of the period of noncompliance; and (4) whether the non-compliant party had been warned of the consequences of . . . noncompliance.” World Wide Polymers, Inc. v. Shinkong Synthetic Fibers Corp., 694 F.3d 155, 159 (2d Cir. 2012).

There is no good faith meet and confer requirement under Fed. R. Civ. P. 37(b). McCullough v. World Wrestling Entm't, Inc., No. 3:15-cv-01074 (VLB); 2018 U.S. Dist. LEXIS 135018, at \*16 (D. Conn. July 22, 2018); Amatangelo v. Nat'l Grid USA Serv. Co., No. 04-CV-

246S(F), 2007 U.S. Dist. LEXIS 92830, at \*17 (W.D.N.Y. Dec. 18, 2007); 7 Moore's Federal Practice - Civil § 37.40 (2019).

This is undoubtedly because such negotiations will already have taken place prior to the filing of a motion to compel, and because a failure to comply with an order compelling discovery is not only a serious breach of an obligation to the opposing party; it is a serious breach of an obligation to the Court and to the judicial process.

McCullough, 2018 U.S. Dist. LEXIS 135018, at \*16-17.

Here, it is difficult to believe that Defendant has no documents responsive to the Plaintiff's Discovery Requests other than the thirty-three pages of a check register that she provide. Moreover, it is obvious that Defendant has not complied with the Sanctions Order in that she has completely failed to disclose any records from her bank accounts or her retirement account. Fed. R. Civ. P. 34(a)(1) requires the production of documents, electronically stored information, and other things that are in the possession, custody, or control of the responding party. "For a party to have control over a third party's documents, all that is required is that the party have the right, authority, or practical ability to obtain the documents at issue." Alexander Interactive, Inc. v. Adorama, Inc., 2014 U.S. Dist. LEXIS 2113, at \*9 (S.D.N.Y. Jan. 6, 2014) (quotation marks omitted) (citing cases); see also Am. Rock Salt Co. v. Norfolk S. Corp., 228 F.R.D. 426, 460 (W.D.N.Y. 2005). One's own financial account records are certainly the types of documents that she has both a legal right and a practical ability to obtain. United States v. 2012 GMC Savannah Van, No. 2:13 cv 18, 2014 U.S. Dist. LEXIS 73143, at \*4 (W.D.N.C. May 29, 2014) (citing cases); Best W. Int'l, Inc. v. Bhagirath, No. 12-0121, 2013 U.S. Dist. LEXIS 69032, at \*14 (M.D. La. May 14, 2013). ". . . [T]he absence of possession, custody, and/or control of documents that have been requested pursuant to Fed. R. Civ. P. 34 must be sworn to by the responding party." Schwartz v. Mktg. Publ'g Co., 153 F.R.D. 16, 21 (D. Conn. 1994).

Here, Defendant attests that she “does not have any” of the bank records or retirement account records requested. However, she does not attest that she is without the legal right or practical ability to obtain the. This is insufficient to establish a lack of possession, custody, or control. Zervos v. S.S. Sam Hous., 79 F.R.D. 593, 595 (S.D.N.Y. 1978) (“In the present instance, although Zervos attests to having none of the requested documents in his ‘possession,’ there has been absolutely no showing that the banking records are not within his ‘control.’”). Defendant admits in the Discovery Responses that she has accounts at Centreville Bank, Liberty Bank, and the Bank of Newport, and that she had an account at Start Community Bank. She has not provided any of these records. While it is true that Plaintiff obtained certain records from Centreville Bank, Liberty Bank, and Start Community Bank, he does not have more current records. Specifically, Plaintiff has received pursuant to subpoenas (1) records from Centreville Bank through May 15, 2019; (2) records from Liberty Ban through June 11, 2019; and (3) records from Start Community Bank through August 2017. Plaintiff does not have any records from the Bank of Newport. Thus, Defendant should produce the requested bank records to the extent that Plaintiff has not obtained them by subpoena. Plaintiff has provided Defendant with the records that he has obtained so that she is fully aware of what those records are. In addition, Defendant testified as to the existence of a retirement account with MassMutual. (Deposition of Defendant, June 28, 2018, 48:1 – 50:3, excerpts attached hereto as **Exhibit B.**) Plaintiff has obtained no records from this account and Defendant has produced none.

It is clear that Defendant violated the Sanctions Order by failing to produce her bank records (to the extent not already obtained by Plaintiff) and the records from her retirement account as requested by Plaintiff even though the Court ordered compliance with the Plaintiff’s Discovery Requests. The assertion that Defendant is not in physical possession of documents does not forgive

her refusal to produce them because she has the obligation to produce documents in her possession, custody, or control. She has not done this despite being ordered to do so on two separate occasions by the Court. In addition, Defendant has been warned by the Court that her failure to comply with the Sanctions Order would result in additional sanctions such as the entry of a default judgment or an entry of an order of contempt, fining her for each day in which she continues to be in noncompliance.

It is clear that Defendant continues to ignore her discovery obligations even though she has twice been ordered to fully respond to the Plaintiff's Discovery Requests. Defendant, who has the benefit of the advice of her counsel, should be well aware of the well-settled law that she must produce not only documents that she physically possesses but also those that she has the legal right or the practical ability to obtain. This includes bank records and records from the retirement account that she has admitted to having. Therefore, because of her continued noncompliance and failure to pay the sanctions already ordered by the Court, it is appropriate for the Court to enter a default judgment against Defendant as to liability, with Plaintiff only having to prove damages. In the alternative, Plaintiff requests that the Court enter an order of contempt against Defendant and order her to pay a daily fine in an amount at the Court's discretion from the issuance of such order until she has complied in full with her discovery obligations.

**WHEREFORE**, for the foregoing reasons, Plaintiff respectfully requests that this Court enter an order (i) directing Defendant to pay the reasonable expenses associated with her noncompliance, including reasonable attorneys' fees; (ii) entering a default judgment in favor of Plaintiff, and (iii) granting such other and further relief as justice requires.

Dated at Bridgeport, Connecticut, this 26th day of November, 2019.

THE PLAINTIFF,  
ELIYAHU MIRLIS

By: /s/ John L. Cesaroni

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**CERTIFICATION OF SERVICE**

The undersigned hereby certifies that on November 26, 2019, copies of the Memorandum of Law in Support of Motion For further Sanctions for Failure to Comply with Discovery Order and Exhibits thereto were served upon all appearing parties with access to the CM/ECF System by operation of the Court's electronic notification system.

/s/ John L. Cesaroni  
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