Barr v. Bentley Motors Ltd.

Supreme Court of New York, Nassau County

December 5, 2017, Decided

INDEX # 601718/16

Reporter
2017 N.Y. Misc. LEXIS 5275 *

THOMAS BARR IV, Plaintiff(s), v. BENTLEY MOTORS LIMITED, LUKE VUKSANAJ, BESPOKE MOTOR GROUP LLC, BESPOKE MOTOR GROUP LLC d/b/a BESPOKE MOTOR GROUP, BESPOKE MOTOR GROUP LLC d/b/a BENTLEY LONG ISLAND, BENTLEY LONG ISLAND, LLC, BENTLEY LONG ISLAND LLC d/b/a BENTLEY LONG ISLAND, MANHATTAN MOTORCARS, INC. d/b/a BENTLEY MANHATTAN, BENTLEY MOTORCARS, INC., JOSEPH L. BUCKLEY, ASIF A. SIDDIQI, the NASSAU COUNTY POLICE DEPARTMENT, KATHLEEN RICE, the DISTRICT ATTORNEY OF NASSAU COUNTY and the COUNTY OF NASSAU, Defendant(s).

Notice: NOT APPROVED BY REPORTER OF DECISIONS FOR REPORTING IN STATE REPORTS.

Core Terms

message, discovery, defense counsel, communications, Movants, e-mail, deposition, sanctions, hole, former attorney, continues, abusive, parties, notice, plaintiff's claim, documents, fail to comply, requests

Counsel: [*1] Thomas Barr IV, Esq., Plaintiff, Pro se, Sag Harbor, NY.

For Bentley Motors Ltd., Bespoke Motor Group, LAX Bentley Long Island Manhattan Motorcars d/b/a Bentley Manhattan, Defendants: Bentley Motors Inc., Joseph L. Buckley, Esq., William Tellado, Esq., Sills Cummis & Gross, PC, Newark, NJ.

For Bentley Long Island, Vuksanaj, Defendants: Stevan H. LaBonte, Esq., Garden City, NY.

For Asif Siddiqui, NCPD; Kathleen Rice, as District Attorney for Nassau County; County of Nassau: John Hanley, Esq., Deputy County Attorney, Office of the County Attorney of Nassau County, Mineola, NY.

Judges: HON. JEFFREY S. BROWN, J.S.C.

Opinion by: JEFFREY S. BROWN

Opinion

Defendants Bentley Motors, Inc. (BMI) and Manhattan Motorcars, Inc. d/b/a Bentley Manhattan and Manhattan Motorcars, Inc. (Bentley Manhattan) move for an order (i) dismissing plaintiff's complaint in its entirety, or in the alternative for an adverse inference, based on plaintiff's failure to comply with discovery obligations pursuant to *CPLR § 3126* and for willful violations of the October 25, 2016 decision and order of Justice Karen Murphy of this court and (ii) awarding sanctions against the plaintiff pursuant to *22 NYCRR § 130-1.1*, including reimbursement of the moving defendants' costs and attorneys' **[*2]** fees in responding to numerous communications from the plaintiff. Movants allege that the plaintiff, a registered attorney, has repeatedly sent harassing, profane, and ethnically offensive e-mail communications to movants' counsel, often late at night and on weekends.

This action arises out of the plaintiff's September 2013 purchase of a new Bentley vehicle from Bentley Manhattan. Plaintiff alleges the vehicle is defective because it cannot be safely driven at temperatures below 45°F as it is equipped only with summer tires and because the vehicle does not meet road force specifications when the tires are inflated to certain

recommended pressures. This action was commenced in Suffolk County on February 11, 2015 against the Bentley defendants and others asserting causes of action in fraud and contract relating to the vehicle, and tort claims relating to plaintiff's arrest following hostile communications sent by the plaintiff to a Bentley employee. The resulting criminal charges were later dismissed. The action was transferred to Nassau County by order dated January 26, 2016.

On October 25, 2016, Justice Murphy granted the Bentley defendants' motion for a protective order. Justice Murphy **[*3]** noted that a series of e-mails sent by the plaintiff both pre-suit and continuing after suit used "profane language . . . freely and repeatedly, as well as sexual innuendo, numerous insults, ethnic slurs . . . and threats of violence." In addition, Justice Murphy considered the affidavit of a receptionist at Bespoke Motor Group d/b/a Bentley Long Island, which recounted a call to the showroom from the plaintiff wherein he implied that there was an explosive in the trunk of his vehicle as a ruse to be connected with the service department. Justice Murphy, although denying monetary sanctions at that time, ordered that the plaintiff:

> (1) is prohibited from contacting or communicating, or causing another to contact or communicate with the moving defendants, and requiring that all contact or communication from plaintiff to the moving defendants be made through counsel of record for such parties; and
>
> (2) that plaintiff is prohibited from contacting or communicating with counsel for the moving defendants by or through the use of profane, vile, threatening, harassing, and/or ethnically offensive language.

Justice Murphy's order cautioned that "Mr. Barr's failure to comply as directed will result **[*4]** in appropriate sanctions, including but not limited to an adjudication of contempt and/or fine, and/or imprisonment, upon notice." The Appellate Division, Second Department, dismissed plaintiff's appeal of Justice Murphy's October 25, 2016 order, stating "no appeal lies from an order entered upon the default of the appealing party."

On November 3, 2016, pursuant to a *CPLR § 3211* motion to dismiss, Justice Murphy dismissed plaintiff's claims against Bentley Motors Limited (BML) for lack of personal jurisdiction; dismissed plaintiff's claims for breach of implied warranty against BML, BMI, and Bentley Manhattan; dismissed plaintiff's claims for breach of express warranty against Bentley Manhattan; and dismissed plaintiff's claims sounding in strict products liability, fraud, plaintiff's claims for punitive damages, and his claims for conversion (as against defendant BMI). In addition, Justice Murphy dismissed the plaintiff's claims for false arrest, false imprisonment, malicious prosecution, assault, battery, and civil right violations pursuant to *42 U.S.C. § 1983* as against defendants BMI and Buckley. However, Justice Murphy continued the third cause of action against defendant BMI under an express three-year **[*5]** limited warranty for the vehicle.

At the outset, plaintiff contends that no less than four documents comprise his opposition to this motion on procedural grounds, to wit NYSCEF documents numbered 275, 280, 291[1] , and 301 (wherein each of the other documents is discussed)[2]. Significantly, the plaintiff does not deny writing, or causing to be written, and sending any of the communications forming the basis of the instant motion. In fact, plaintiff acknowledged writing the subject communications during the court's June 14, 2017 conference. (Tr. at 9, 20). Rather, the prominent theme of plaintiff's opposition is his contention that Justice Murphy's protective order and any adverse action taken by this court on plaintiff's conduct during the course of this litigation constitute a clear violation of his *First Amendment* right to freedom of speech. Nonetheless, the court will address plaintiff's procedural objections.

By his June 8, 2017 communication to the court (NYSCEF # 275), the plaintiff contends that the motion is defective for failure to comply with the court's individual part rules and procedures, which require a court conference on all motions pertaining to discovery. Contrary to plaintiff's contentions, **[*6]** this motion was adjourned at plaintiff's request and a conference was held in open court on June 14, 2017. That the motion could not be resolved at the conference does not render it procedurally defective.

In NYSCEF #280, plaintiff again raises his objection concerning a motion conference and states that "[t]here is no Exhibit 37." Plaintiff then indicates that he would be providing a formal opposition by stating that [a]nwers to these questions (or no answers) are vital as to how I

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[1] The court notes that although each of these docket entries is signed, none is notarized or affirmed by the plaintiff in accordance with *CPLR § 2106*.

[2] On this motion, the court has not considered any documents submitted by any party after October 31, 2017.

approach my Opposition, for obvious reasons." Contrary to plaintiff's contention, the absence of an Exhibit 37 from the motion papers is not a "jurisdictional" defect. "Exhibit 37" is cited once in the moving attorney's affirmation in connection with a statement that is actually found in Exhibit 36. The reference to "Exhibit 37" is an apparent typographical error. However, although not raised by the plaintiff, Motion Exhibit 17 has not been loaded to the electronic docket in this action. Accordingly, the court does not consider Exhibit 17 on this motion.

By his objection raised in NYSCEF # 291, plaintiff states, without elaboration, that the prayer for relief contained in the notice of motion differs from **[*7]** the prayer for relief contained in counsel's supporting affirmation. Upon review of the notice and affirmation, the court finds the relief requested is not substantively different, and the notice of motion includes a request for "such other and further relief that the Court deems just and proper." (*Frankel v. Stavsky, 40 AD3d 918, 838 N.Y.S.2d 90 [2d Dept. 2007]*).

Accordingly, because none of the plaintiff's objections mandate denial, the court turns to the merits of the motion.

Vexatious Conduct

Movants contend that plaintiff's course of conduct throughout this litigation violates Justice Murphy's October 25, 2016 protective order as well as the Rules of Professional Conduct 3.3(f), 4.2 and 8.4. Most relevant here, Rule of Professional Conduct 3.3 (f) provides that "[i]n appearing as a lawyer before a tribunal, a lawyer shall not: (2) engage in undignified or discourteous conduct [or] (4) engage in conduct intended to disrupt the tribunal." Rule 8.4 (d) states that "[a] lawyer or law firm shall not: engage in conduct that is prejudicial to the administration of justice."

As a initial matter, "not all speech is of equal *First Amendment* importance . . . and where matters of purely private significance are at issue, *First Amendment* protections are often less rigorous. . . ." (*Snyder v. Phelps, 562 U.S. 443, 452, 131 S. Ct. 1207, 179 L. Ed. 2d 172 [2011]* [internal quotations **[*8]** and citations omitted]). That is because restricting speech on purely private matters does not implicate the same constitutional concerns as limiting speech on matters of public interest. . . ." (*id.*). Words that "by their very utterance inflict injury or tend to incite an immediate breach of the peace" "are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality." (*Chaplinsky v. State of New Hampshire, 315 U.S. at 572* (citing *Cantwell v. Connecticut, 310 U.S. 296, 309-310, 60 S. Ct. 900, 84 L. Ed. 1213 [1940]*)). And context matters. (*See Frisby v. Schultz, 487 U.S. 474, 108 S. Ct. 2495, 101 L. Ed. 2d 420 [1988]*; *Bethel School Dist. No. 403 v. Fraser, 478 U.S. 675, 106 S. Ct. 3159, 92 L. Ed. 2d 549 [19861]*).

Courts of this state have not hesitated to issue sanctions, including the dismissal of actions, where litigants demonstrate a pattern of behavior clearly disruptive to the judicial process. Such offenses are pronounced where, as here, the litigant is a registered attorney. For example, in an analogous case, *Corsini v. U-Haul International, Inc., 212 AD2d 288, 630 N.Y.S.2d 45 [1st Dept 1995]*, the plaintiff, an attorney appearing *pro se* undertook a campaign of harassment on opposing counsel, which included following defense counsel through the hallways of the courthouse and into a courtroom. (*Id. at 289*). In addition, during the course of his deposition, plaintiff made personal attacks on defense counsel and his **[*9]** firm stating, among other things "[y]ou're so scummy and slimy and such a perversion of ethics or decency because you're such a scared little man, you're so insecure and so frightened and the only way you can impress your client is by being a nasty, mean-spirited and ugly little man. . (*id.)* The First Department, in reversing the trial court's decision denying dismissal, explained:

> "Discovery abuse, here in the form of extreme incivility by an attorney with respect to an adversary, prior to and during a deposition, is not to be tolerated. Although the deposition was not held in a courtroom, and there was no Judge present, it was, nonetheless, part of a judicial proceeding in the Supreme Court. A lawyer's duty to refrain from uncivil and abusive behavior is not diminished because the site of the proceeding is a deposition room, or law office, rather than a courtroom. (*Matter of Schiff; 190 AD2d 293, 599 N.Y.S.2d 242 [1st Dept 1993]*; *Paramount Communications v QVC Network, 637 A2d 34 [Del 1994]*; *Hall v Clifton Precision, 150 FRD 525 [ED Pa 1993]*.)
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> "*CPLR 3126* provides various sanctions for such misconduct, the most drastic of which is dismissal of the offending party's pleading. Dismissal is appropriate when the movant conclusively

establishes that the frustration of discovery was willful, contumacious, or due to bad faith (*CPLR 3126 [3]*; *Zletz v Wetanson, 67 NY2d 711, 490 N.E.2d 852, 499 N.Y.S.2d 933*; *Sony Corp. v Savemart, Inc., 59 AD2d 676, 398 N.Y.S.2d 539*). Because of the strong public policy **[*10]** in this State against limiting audience before the court, and in favor of resolving disputes on the merits (*see, Ackerson v Stragmaglia, 176 AD2d 602, 604, 575 N.Y.S.2d 44)*, courts have reserved dismissal for rare cases where the extreme nature of the abuse warrants depriving a party of the opportunity to litigate the claim.

"It is generally within the discretion of the trial court to determine an appropriate penalty (*Spira v Antoine, 191 AD2d 219, 596 N.Y.S.2d 1*). Upon review of this record, however, we find that plaintiff's behavior, preceding and during a pretrial deposition, was so lacking in professionalism and civility that dismissal is the only appropriate remedy (*CPLR 3126 [3]*; *Zletz v Wetanson, supra*).

"Plaintiff's *pro se* status distinguishes this case from those in which we declined to dismiss a complaint on grounds that a party to an action should not be punished for the misconduct of its attorney (*see, Lowitt v Burton I. Korelitz, MD., P. C., 152 AD2d 506, 507-508, 544 N.Y.S.2d 14*; *Bako v V. T Trucking Co., 143 AD2d 561, 532 N.Y.S.2d 767*). Allowances are normally made for pro se litigants. Plaintiff, however, was an officer of the court, with a duty to comport himself accordingly. He is subject to the New York Code of Professional Responsibility."

(*Corsini v. U-Haul Intl, Inc., 212 AD2d at 290-91*).

More recently, in *Freidman v. Yakov (138 AD3d 554, 30 N.Y.S.3d 58 [1st Dept 2016])*, the First Department affirmed the trial court's order granting attorneys' fees and costs against an attorney/counter-claim defendant and appearing at another's deposition as an **[*11]** observer who "launched a profanity-laden attack on the lawyer conducting the deposition." (*Id. at 555-556*).

In *Jermosen v. New York (178 AD2d 810, 577 N.Y.S.2d 706 [3d Dept 1991])*, the Third Department found, upon plaintiff's sending the state's attorney communications "couched in the most scurrilous, foul, filthy and threatening language possible," that such conduct was "so vituperative, debasing, insulting and threatening as to infect the integrity of the judicial process." (*Id. at 811*). The Court determined that the most appropriate remedy was to dismiss the complaint under the court's inherent powers. (*Id.*).

Finally, in *Sassower v. Signorelli (99 AD2d 358, 472 N.Y.S.2d 702 [2d Dept 1984])*, the Second Department noted that the action before it was the "latest in a series of frivolous and repetitious claims, motions, petitions, collateral proceedings and appeals" arising from the requirement by the defendant, the Surrogate of Suffolk County, of an accounting by the plaintiff of his activities as a fiduciary (*Id. at 359*). In determining that the plaintiff was properly enjoined from bringing further suit in connection with the same matter, the Court reasoned that "when, as here, a litigant is abusing the judicial process by hagriding an individual solely out of ill will or spite, equity may enjoin such vexatious litigation" and that "attorneys who participate **[*12]** in such manipulation of the legal process are subject to strong disciplinary sanctions." (*Id. at 359-360*). "In short," the Court concluded, "Special Term acted properly in putting an end to plaintiffs' badgering of the defendant and the court system." (*Id.; see also DiSilvio v. Romanelli, 150 AD3d 1078, 56 N.Y.S.3d 162 [2d Dept 2017]*; *Capogrosso v. Kansas, 60 AD3d 522, 874 N.Y.S.2d 376 [1st Dept 2009])*.

Here, the moving defendants annex a multitude of exhibits illustrating communications from the plaintiff, which direct numerous epithets and personal abuse at defense counsel and others. Some significant excerpts are provided below.

Motion Exhibit 36 is an e-mail from the plaintiff to defense counsel dated August 23, 2016 stating "Totally, Totally Unacceptable—damn sure predictable though. Sorry, I did not have time to properly respond to your e-mail before (but my demands still stand, elsewise how do I know you are not lying, and I could give a good goddamed about your "managing clerk" and what he did and did not receive—I only care about ME, you idiot)." The message then continues with complaints about defense counsel, remarking, "I am so tired of conducting remedial legal classes but have you lot of absolute legal geniuses bothered to look at the f*****g[3] Rules—you know, the Rules. Once again, I am tired of being a teacher so I am **[*13]** not going to, as usual, lay it out for you, I just—strongly suggest you just do that. To repeat the obvious, but how's about a copy of what you say the court sent out-and the accompanying order calling for the preliminary conference-remember those

[3] Censoring supplied throughout.

pesky details? The rules you geniuses-the f*****g rules. Still waiting. The message continues in the same abusive manner, with plaintiff referring to himself as "your worst f*****g nightmare" who "could give a f**k about who gets destroyed in the process (me included)."

Motion Exhibit 23 is a message from plaintiff to defense counsel dated November 3, 2016, which notes that his notice of appeal had been filed and stating that "not wanting to let one more f*****g (I am anxiously awaiting the contempt charge—in fact, I am praying for it) day to go by without spoiling it for you, here is what it says (see attached)" and continues "you and your clients—and this court—are now embroiled in one F*****G monstrous law suit involving the *First Amendment* and the NY Constitution which is going to take years—which even you box of rocks ought to be able to grasp you are going to lose and loose [sic] badly."

Motion Exhibit 33 is a November 30, 2016 message from plaintiff **[*14]** to defense counsel addressed to "A**holes" and remarking, "Now, the two bitches also have something to worry about —big time." Attached is a letter addressed to Justice Murphy and her clerk stating that they "made this all too easy—I did not even have to ask— you voluntarily took the cowards way out of having to defend your unconstitutional and other illegal and prejudicial and bullying and retaliatory actions by ex parte -resigning . . . ." and quoting "two famous American Negroes" in making "you can run, but you can't hide" type-statements.

Motion Exhibit 24 is a message from the plaintiff to defense counsel and his own former attorney dated December 2, 2016 and addressed to "Lordship, Princeishness, Commoner and Supreme A**hole" and continues, "Have you contacted your various clients and conveyed my interest in settling this matter? Particularly you Stevie since but for your insistence on committing suicide, they would not be part of this train wreck you boys find yourselves in."

Motion Exhibit 26 is a message from plaintiff to defense counsel and his former attorney dated December 6, 2016, stating, "ok F**k heads—there it is on the E-file Doc—The Big Surprise. Now you can make of **[*15]** it what you will— but with a little bit of luck—this is the beginning of the end— for you a* *holes." The message continues "AHH—ok—one small hint—forget this automobile s**t—that is ancient history—old and cold—never going to get to it In my lifetime" and explains that the next ten years will be consumed with costly litigation for allegedly violating the plaintiff's constitutional rights and remarks, "I cannot thank you boys enough for the marvelous opportunity —what with your prior restraint order gift—and your hiding the ball—you have given me a golden opportunity to FOBAR ("F**k Up Beyond All Recognition" - a term which you should know if you have been in Viet Nam or the East) this molehill and turn it into a Constitutional mountain."

Motion Exhibit 18 contains an e-mail dated January 26, 2017 from plaintiff to counsel for the defendants and his former attorney addressing them as "you lot of ignorant, stupid, dishonest, lying, dimwitted, a**hole 'Arrogant Bastard Aggressive Powerhouses.'" The message then references a letter to the Suffolk County Court on January 18, 2017 by someone the plaintiff calls "the Tar Baby." The plaintiff remarks, "I am awaiting everyone's response to **[*16]** my two filings with Nassau and Suffolk made yesterday . . . . I cannot wait because that dumb as a box of rocks Tar Baby will no doubt give me more lethal ammo to turn on him-and the rest of you lot of volunteers. Have you lot formed a lynch party for Smith [plaintiff's former attorney] yet??"

Motion Exhibit 19 is a message dated January 27, 2017 addressed to "You lot, but particularly the ignorant dumb as a box of rocks" and proceeds with language that could only be described as offensive to certain classes of minorities, especially African-Americans. The message then proceeds with threat of an action for attorney deceit and states "[l]ook you dumb motherf*****s— "F**K, A**HOLE, ETC" ARE PROTECTED—"RACIST ain't— Jesus, f*****g Christ, for just f*****g ONCE—act like semi-competent lawyers . . . ." Motion Exhibit 20 is a January 28, 2017 message of the same kind and contains a copy of an early 20th century book cover of "The Ten Little N*****s," by Agatha Christie from which plaintiff quotes a rhyme and assigns corresponding roles to defense counsel and members of the court. Plaintiff further states that "to each of you, let me see now, how did that go?: 'Rip your f*****g heads right **[*17]** f*****g off Show them to you Then stuff them down the hole' (Did I get that right? Or do I need to look at my arrest record?)." Plaintiff continues "as part of your figurings', please also do consider this—what is this going to cost your poor, hapless and unfortunate clients in terms of obscene legal fees that involve such things as me defending my *first amendment* rights that they have no business being involved in—far, far removed from a simple lemon law case—but that only your incompetence and arrogance has gotten them involved in . . . . The days of talking settlement are f*****g over the f**k with— now, a fight to the f*****g, end—last little n****r standing . . . ." The

post-script includes a recommendation that the recipients "connect the dots—make the obvious conclusion as to why it is exactly, you lot are in this unbelievable f*****g nightmare—you and your clients—and do what you have to do to get you and your clients out of this mess—which I swear is only going to get worse— and f**k anybody that gets in your way."

Motion Exhibit 21 contains a message from the plaintiff to defense counsel and others dated March 10, 2017 and is signed, "Pig and one crazed f*****g Rabbit who is out for blood." **[*18]** Another message in the chain dated March 9, 2017 is addressed to "dgoldsmith" and cc'd to movant's counsel, stating, " I will be coming after you same as I am coming after Brer Fox and the Tar Baby—and the Aggressive Powerhouse itself—with the same single minded purpose, dedication and zeal." The message continues with the same type of abusive language.

Motion Exhibit 32 contains an e-mail addressed to defense counsel and plaintiff's former attorney and is dated March 9, 2017. It attaches a message uploaded to the electronic docket. The cover message states "here me loud and clear: You N****r f*****g a**hole Brer Fox—sees ows yous like des dem der ap—ples (find your Ebonics translator). You may quote me. And I trust and have not doubt that you actually that stupid to do so." Motion Exhibit 32 further contains a host of messages from the plaintiff to a Bentley employee, defense counsel, as well as his former attorney all reflecting similar vulgar and abusive language as employed in plaintiff's other messages.

Motion Exhibit 22 is a message from plaintiff to defense counsel with the subject line "grow a pair" and dated March 16, 2017. The message states, "I see you are in early. Not to **[*19]** worry, I am gonna kick yo a** today, same as every day. Now, take that to 'yo mamma. Grow a pair, a**hole. And then meet me on the schoolyard, without yon mamma."

Motion Exhibit 28 contains a message from plaintiff using an assumed name "Fankston Winston" to a Bentley employee couched in the same profanity-laden tone upon the employee's comment that earlier communications were believed to be from the plaintiff in an effort to obtain discovery for use in this litigation. Exhibits 29 and 30 are follow-up messages to the same employee threatening additional litigation and adverse publicity for the company.

This motion was filed on May 22, 2017. By letter dated August 25, 2017, counsel for Bentley attaches a host of additional e-mails demonstrating that the plaintiff has continued to convey messages of similar abusive tone. For example, a August 20, 2017 message from plaintiff to two of counsel for Bentley states "you lot are a true—'credit and honor' to your profession and all that the Litigation Bar stands for—which this dishonest and deceitful bull s**t is a perfect example of and "[y]ou two legal geniuses are true members of—and a credit to—the s**m bag litigation bar—through and through." **[*20]**

The court finds this collection of communications most shocking and concludes that they have interfered with the adjudication of this matter. This is not an instance of a singular inappropriate outburst but, rather, part of a persistent course of conduct on the part of the plaintiff.

Failure to Participate in Discovery

On May 23, 2016, Justice Murphy signed a preliminary conference stipulation and order (PC Order) following the appearance of counsel, including plaintiff's then-attorney, at a preliminary conference. The PC Order was filed to the docket on May 26, 2016. The PC Order states that all parties "shall" exchange "names and addressed of all eyewitnesses and notice witnesses, statements of opposing parties and photographs" by June 23, 2016. The PC Order also provides that demands for discovery and inspection, as well as interrogatories, were to be served by all parties on or before July 11, 2016 with responses to be served by August 11, 2016. Moreover, the subject vehicle was to be produced for inspection by July 25, 2016 and the plaintiff was to appear for deposition on August 15, 2016. Notably, the PC Order stated that "[p]ursuant to *CPLR 3214(b)*, service of a notice of motion under *rule 3211*, *3212* or **[*21]** *3213* shall **NOT** stay disclosure pending the determination of that motion." (Mot. Exh. 9, NYSCEF # 23). Accordingly, discovery was not stayed during the pendency of Bentley's motion to dismiss.

The moving defendants contend that on June 23, 2016, they served their list of eyewitnesses but, to date, plaintiff has served none. In addition, the movants aver that they served a first set of document requests and a first set of interrogatories on July 11, 2016, as contemplated by the PC Order. Movants annex an e-mail dated July 12, 2016, wherein plaintiff's assistant advised that "[a]s you are aware, Mr. Barr was not informed of the Preliminary Conference, nor the Preliminary Conference Order, which Tom has explained to you, therefore the First Set of Interrogatories and First Request for the Production of

Documents will be ignored." (Mot. Exh. 11). A further e-mail from the plaintiff bearing the same date states, in relevant part, "[s]ince you have no jurisdiction over me, not only am I going to ignore the order—but everything I get from you on this matter goes into the garbage—where it clearly belongs." (Mot. Exh. 12).

By e-mail dated July 26, 2016, movants' counsel, in addition to requesting **[*22]** plaintiff's consent to the adjournment of then-pending motions, expressed a willingness to enter into a stipulation and consent order to adjust the dates set forth in the PC Order. This suggestion was met with a resounding "NO," wherein plaintiff stated, among other things, his desire to make "GO AWAY— not just 'modif[y]'— that stupid Conference Order— which is totally illegal and you damn well know it and in fact caused it-as I trust the Court and the Ethics Committee will see right through also. . . ." (Mot. Exh. 14).

Counsel for the moving defendants states that plaintiff failed to appear for deposition on August 15, 2016 as ordered. On September 8, 2016, the movants sent a letter sent to plaintiff noting his failure to provide responses to discovery requests by August 11, 2016 and requesting exchange of the outstanding discovery responses by September 23, 2016. The letter further advises that "we remain willing as a courtesy to enter into a new PC Order and Stipulation, subject to Court approval, but this does not relieve you of your obligations to furnish discovery in response to the foregoing requests." (Mot. Exh. 13). No motion to modify or to vacate the PC order was made. Proceedings **[*23]** in this action were stayed from December 9, 2016 until April 17, 2017 during the pendency of a motion to withdraw by plaintiff's former attorney. The moving defendants contend that they have been severely prejudiced by plaintiff s failure to participate in discovery in this matter and the passage of time, particularly by their inability to inspect the vehicle that is the subject of this action.

"[T]he failure to comply with deadlines and provide good-faith responses to discovery demands impairs the efficient functioning of the courts and the adjudication of claims.'" (*Arpino v. F.J.F. & Sons Elec. Co., Inc., 102 AD3d 201, 207, 959 N.Y.S.2d 74* quoting *Gibbs v. St. Barnabas Hosp., 16 NY3d 74, 81, 942 N.E.2d 277, 917 N.Y.S.2d 68 [2010]* [internal quotations omitted]). The nature and degree of the penalty to be imposed pursuant to *CPLR 3126* for such failure lies within the sound discretion of the trial court." (*HR. Prince, Inc. v. Elite Environmental Systems, Inc., 107 AD3d 850, 968 N.Y.S.2d 122 [2d Dept 2013]*; *see also Arpino v. F.J.F. & Sons Elec. Co., Inc., 102 AD3d 201, 209, 959 N.Y.S.2d 74 [2012]*[citation omitted]).

"'Before a court invokes the drastic remedy of striking a pleading, or even of precluding evidence, there must be a clear showing that the failure to comply with court-ordered discovery was willful and contumacious' (*Zakhidov v. Boulevard Tenants Corp., 96 AD3d 737, 739, 945 N.Y.S.2d 756*; *see Arpino v F.J.F. & Sons Elec. Co., Inc.,102 AD3d at 210*; *Commisso v. Orshan, 85 AD3d 845, 925 N.Y.S.2d 612*)" (*Neenan v Quinton, 110 AD3d 967, 974 N.Y.S.2d 73 [2d Dept 2013]*). From the plaintiff's communications to defense counsel, it is clear that his failure to participate in discovery has been both willful and contumacious.

The issue then becomes the appropriate **[*24]** sanction for plaintiff's course of conduct during this litigation. A retired attorney is still an officer of the court and subject to the Rules of Professional Conduct. (*See In re Sullivan, 140 AD3d 1391, 32 N.Y.S.3d 748 [3d Dept 2016]*). It is evident from uploaded e-file documents that he holds himself out as a member of the bar. For example, plaintiff signs his name Thomas Barr IV, Esq. (*See, e.g.* NYSCEF # 301; NYSCEF #296 [plaintiff identifies himself as Thomas Barr, Esq., pro se Attorney-at-Law]; NYSCEF # 24 [letterhead identifying plaintiff as Thomas Barr, Esq., Admitted NY (Retired) Pro Se.]). Plaintiff is thus charged with a duty to comport himself accordingly before the court. (*See Corsini, 212 AD2d 288, 630 N.Y.S.2d 45*).

Plaintiff, a registered attorney, has made numerous personal attacks against counsel for the movant. Plaintiff was warned by Justice Murphy in her October 25, 2016 order that this type of conduct would not be condoned. However, plaintiff's pattern of abusive conduct continued. In addition, plaintiff has made clear that he had no intention of complying with the court's PC order and has made no effort to meaningfully participate in discovery with the moving defendants. (Mot. Exh. 11; Mot. Exh. 12 [stating to defense counsel "everything I get from you on this **[*25]** matter goes into the garbage— where it clearly belongs."]).

It is generally within the discretion of the trial court to determine the appropriate remedy. Upon review of the record, and in light of plaintiff's status as a registered attorney, this court finds that plaintiff's behavior was so lacking in professionalism and civility that dismissal of plaintiff's complaint as against the moving defendants is commensurate with his misconduct. (*See CPLR*

3126[3]). Monetary sanctions are, at this time, denied in the discretion of the court.

For the foregoing reasons, it is hereby

ORDERED, that the motion to dismiss by Bentley Motors Inc. and Manhattan Motorcars, Inc. d/b/a Bentley Manhattan and Manhattan Motorcars is **GRANTED**; and it is further

ORDERED, that the remaining parties are directed to appear for a discovery conference on January 8, 2018 at 9:30 a.m. No adjournments of this conference will be permitted absent the permission of or order of this court. All parties are forewarned that failure to attend the conference may result in judgment by default, the dismissal of pleadings (see *22 NYCRR 202.27*) or monetary sanctions (*22 NYCRR 130-2.1 et seq.*).

This constitutes the decision and order of this court. All applications not specifically addressed **[*26]** herein are denied.

Dated: Mineola, New York

December 5, 2017

/s/ Jeffrey S. Brown

HON. JEFFREY S. BROWN

J.S.C.

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