AMENDED ORDER

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. GERALD LEBOVITS** **PART** **IAS MOTION 7EFM**

Justice

----------X **INDEX NO.** 651748/2016

MADONNA CICCONE,

Plaintiff,

- v - **DECISION + ORDER**

ONE WEST 64TH STREET, INC.,

Defendant.

----------X

Shaw & Binder, P.C., New York, NY (Stuart F. Shaw of counsel), for plaintiff.
Holland & Knight LLP, Philadelphia, Pa. (Benjamin R. Wilson of counsel), for defendant.

This court's order in this matter filed on September 4, 2020 (NYSCEF No. 184), is hereby amended; the order in its amended form appears below.

Gerald Lebovits, J.:

This is the latest in a series of orders relating to defendant One West 64th Street's entitlement to collect legal fees it incurred in this action. This court in July 2019 first held that defendant is entitled to fees from plaintiff Madonna Ciccone and referred the matter to a Special Referee to hear and report on an appropriate fee award. (*See Ciccone v One W. 64th St., Inc.*, 2019 WL 3429393 [Sup Ct, NY County July 26, 2019].) It is now September 2020—yet through no fault of the Special Referee assigned to this matter, the fee hearing still remains in its initial stages.

Plaintiff now suggests that only an in-person hearing will adequately vindicate her due-process rights—and thus that the fee hearing should be stayed over defendant's objection for some indefinite period until it is safe for in-person hearings and trials to resume in the New York City courts. Ordinarily, an in-person hearing is preferable to conducting the hearing remotely, whether by video or by telephone. But given the continuing risks posed by the COVID-19 pandemic, these are no ordinary times.

The court concludes, upon considering the parties' submissions, that in the present, extraordinary circumstances, the fee hearing in this case must go forward by videoconference. Holding the hearing in this manner will permit the Special Referee to make a proper, informed recommendation on the fees to be awarded, will sufficiently protect the parties' due-process rights, and will prevent the fees issue in this case from continuing to languish for months to come. This court exercises the authority conferred upon it by Judiciary Law § 2-b (3) to direct the parties to appear for further hearing dates on the issue of attorney fees, with the hearing to be

conducted by videoconference. A failure by plaintiff to appear for the hearing will result in entry of default against her and the matter being set down for an inquest before the Special Referee.

BACKGROUND

This action began in 2016 over a dispute between plaintiff and her residential cooperative apartment building about restrictions imposed under the co-op's proprietary lease. Plaintiff challenged certain actions taken by the co-op as ultra vires and sought the co-op's books and records in support of that claim. In September 2017, this court held that plaintiff's challenge to the co-op's actions was time-barred. (*See Ciccone v One W. 64th St.*, 2017 NY Slip Op 32001[U] [Sup Ct, NY County Sept. 21, 2017], *affd* 171 AD3d 481 [1st Dept 2019].) Yet plaintiff did not drop her distinct books-and-records claim intended to support that challenge. Rather, plaintiff went so far as to move (unsuccessfully) for summary judgment on that claim in the spring of 2018. (*See Ciccone v One W. 64th St.*, 2018 NY Slip Op 31372[U] [Sup Ct, NY County June 29, 2018].) And she continued to maintain the claim until this court dismissed it in November 2018. (*See Ciccone*, 2019 WL 3429393, at *2.) In July 2019, this court determined that plaintiff had "brought and continued to pursue her claims in this action in bad faith" within the meaning of the co-op lease—and therefore that defendant was entitled to its reasonable attorney fees incurred in defending the action. (*Id.*) The court referred the amount of defendant's attorney fees to a Special Referee to hear and report.

After the matter was referred to the Special Referee's Part, the parties differed about the nature and scope of the proceeding before the Special Referee. Defendant took the position that the matter could be adequately dealt with on papers. (*See* NYSCEF No. 135.) Plaintiff, on the other hand, contended that a 3-to-5-day oral hearing was required, involving testimony from up to *20* witnesses—evidently all attorneys from defendant's retained law firm (Holland & Knight LLP) who had billed any time on the matter. (*See* NYSCEF No. 133 at 2, 4.)

A hearing was scheduled by the Special Referee's Part for October 10, 2019. On October 9, plaintiff brought on a motion by order to show cause to enable plaintiff to take the deposition in Connecticut of a former Holland & Knight partner who had worked on this case when he was still with the firm. Plaintiff also sought to adjourn the hearing date until after that attorney's deposition was completed. (*See* NYSCEF Nos. 138-144.) Given this OSC, the parties stipulated to adjourn the hearing date from October 10 to October 28, 2019. (NYSCEF No. 137.) This court heard argument on the motion on October 11 and issued a decision on the record that day resolving the dispute over the former partner's deposition. The court declined, however, to stay the fee hearing pending completion of the deposition. (*See* NYSCEF No. 152.)

On October 25, the parties wrote to the court to inform it that in light of this court's October 11 ruling, the parties had entered into settlement negotiations. The parties requested that in light of these negotiations the fee hearing be adjourned further, to December 6, 2019. (*See* NYSCEF No. 157.) This court so-ordered the parties' adjournment stipulation. (*See* NYSCEF No. 159.) The parties' settlement negotiations were unsuccessful.

In early October 2019, in addition to seeking to take the deposition of the former Holland & Knight partner, plaintiff had also served subpoenas on every current and former Holland & Knight attorney who had worked on this action. The subpoenas sought not only these attorneys' testimony at the fee hearing, but also the production of all their "notes, time records, emails, and other correspondence or documents regarding this action," including "unredacted time records" and "unredacted intra-office communications" with other Holland & Knight attorneys. (*See* NYSCEF No. 162 [attaching subpoenas].)

In late November 2019, after settlement negotiations broke down, defendant moved by order to show cause for a protective order. Defendant sought to quash all of plaintiff's subpoenas directed to all Holland & Knight attorneys (current and former) other than Benjamin R. Wilson, Esq., who is the firm partner handling the case. Following oral argument on the motion, this court granted defendant's requested protective order in full. (*See Ciccone v One W. 64th St.*, 2019 NY Slip Op 33595[U] (Sup Ct, NY County Dec. 5, 2019].)

After this court's ruling, the fee hearing was calendared for January 13, 2020. The parties stipulated to adjourn that hearing date until February 13, 2020. (*See* NYSCEF No. 175.) The hearing began on February 13 as scheduled, before Special Referee Hon. Phyllis Sambuco. The hearing proved contentious, and as a result was not completed that day. The next scheduled hearing date was March 12, 2020. Unfortunately, due to the advent of COVID-19 (and the resultant disruptions to the normal operations of the New York State courts), the hearing did not go forward in March. In effect, the hearing was stayed for several months on account of COVID-19. (*See* NYSCEF No. 177 at 1-2.)

At the end of July 2020, Referee Sambuco contacted counsel for the parties about resuming the hearing on a "virtual" basis by videoconference. Defendant indicated that it was willing to proceed virtually. Plaintiff objected vehemently to a virtual hearing, and the parties exchanged several emails on the subject in August. Given the parties' disagreement on this point, Referee Sambuco submitted an interim report and recommendation to this court, referring "the issue of whether this matter should continue by virtual hearing" to the court for resolution. (NYSCEF No. 177 at 3.) Upon receiving the referee's interim report, this court sought and received further submissions from the parties on this issue. (*See* NYSCEF Nos. 178-182.) The current disagreement between the parties over how to conduct the hearing going forward is thus ripe for resolution.

DISCUSSION

I. Factors to be Considered in Deciding Whether to Direct a Virtual Hearing

The current dispute requires this court to balance weighty considerations. The judicial system traditionally prefers to conduct proceedings in person—a point that has particular force in a fact-finding hearing such as the one at issue here, for which credibility could conceivably prove relevant. The parties and the court each have vital and complementary interests in seeing actions resolved expeditiously and fairly after a proper opportunity for all sides to be heard. And, of course, in light of the COVID-19 pandemic (and the havoc it has wreaked worldwide), the New

York court system owes a responsibility to avoid putting lives at risk by resuming in-person proceedings court prematurely.

Plaintiff proposes one way to balance these various factors. This proposal takes into account the need for safety in this time of COVID-19 and emphasizes the value of holding hearings in person rather than virtually. Plaintiff would have this court adjourn the fee hearing without date until such time as the Unified Court System determines that it is safe for the courts in New York City again to hold in-person hearings and trials in civil cases—whenever that should be.[1]

This court is reluctant to adopt plaintiff's proposed course. To be sure, plaintiff is correct that the matter before this court and Referee Sambuco is limited to the issue of appropriate attorney fees to be awarded—a collateral matter limited to a dispute over money. Yet although this issue may be less pressing than some (questions, for example, about litigants' personal liberty, or their shelter, or their parental rights), that does not make it trivial. Defendant is entitled to collect legal fees because this court squarely held, more than a year ago, that plaintiff brought and continued this action in bad faith. The prosecution of a vexatious and harassing lawsuit over several years is no small matter. This court is loath to permit plaintiff to continue to drag out proceedings to avoid paying the costs of the legal work that she forced defendant and its counsel to undertake needlessly. Indeed, but for the time spent litigating and adjudicating plaintiff's repeated efforts to obtain extensive and burdensome discovery in an *attorney-fee proceeding*, the fee hearing would likely have been completed before COVID-19 even became an issue.

This court's reluctance to wait for in-person hearings to resume, though, does not end the inquiry. The question remains whether conducting the fee hearing in this case virtually is a viable alternative—*i.e.*, whether this mode of proceeding is not only safe and expeditious but also fair to the parties, and whether this court has the authority to require the parties to participate even over objection.

This court is aware of only one New York case addressing the issue of virtual hearings since the beginning of the pandemic. In *A.S. v N.S.*, Justice Tandra L. Dawson of Supreme Court, New York County, carefully considered the issue and held that under the circumstances of the case before her (a contentious custody dispute), holding a virtual hearing was feasible, fair, and preferable to further postponing trial. (*See* 2020 NY Slip Op 20161 [Sup Ct, NY County July 1, 2020].) For the reasons below, this court agrees with Justice Dawson.[2]

---

[1] The Unified Court System recently concluded that it is safe to restart jury trials in September, on a pilot basis, in judicial districts outside New York City. (*See* Message from Chief Judge Janet DiFiore, Aug. 31, 2020, *available at* https://www.nycourts.gov/whatsnew/pdf/August31-CJ-Message.pdf [last visited Sept. 3, 2020].) But it remains unclear when it will be possible to hold jury trials, and other in-person hearings in civil cases, in New York City itself—let alone to schedule and conduct the many in-person proceedings, like this one, that were put on hold due to COVID-19.

[2] A number of New York trial courts have also required parties to appear for virtual depositions during COVID-19 over their objections. (*See Fineman v Qureshi*, Index No. 805290/2019, 2020 WL 5088199 [Sup Ct, NY County Aug. 25, 2020] [George J. Silver, J.]; *Fields v MTA Bus Co.*,

II. This Court's Authority to Direct a Virtual Hearing

Judiciary Law § 2-b (3) confers power on this court "to devise and make new process and forms of proceedings, necessary to carry into effect the powers and jurisdiction possessed by it." This statutory provision "explicitly authorize[s] the courts' use of innovative procedures where "necessary to carry into effect the powers and jurisdiction possessed by" the court. (*People v Wrotten*, 14 NY3d 33, 37 [2009] [internal quotation marks omitted].) And the Court of Appeals and the Appellate Division, First Department, have repeatedly held that one such procedure that courts may employ, albeit in exceptional circumstances, is the use of video testimony—including by a complainant in a criminal trial (*see Wrotten*, 14 NY3d at 37-38[3]); by an expert witness at a civil-commitment hearing (*see State v Robert F.*, 25 NY3d 448, 454 [2015][4]); and by defendants at a jurisdictional hearing before a Special Referee (*see Am. Bank Note Corp. v Daniele*, 81 AD3d 500, 501-502 [1st Dept 2011]).[5]

In considering whether this case presents exceptional circumstances warranting the exercise of this court's authority under § 2-b (3), this court is guided not only by the decision in *A.S. v N.S.* but also by rulings from federal trial courts across the country that consider how to proceed during the COVID-19 pandemic. These courts have consistently determined that given the pandemic, it is necessary, appropriate, and fair to hold bench trials entirely by videoconference.[6]

2020 NY Slip Op 20203, at *2-*4 [Sup Ct, Westchester County Aug. 17, 2020] [Joan B. Lefkowitz, J.] [collecting cases].) And Justice Richard B. Meyer of Supreme Court, Essex County, held oral argument virtually in a CPLR article 70 proceeding that sought to release the petitioners from jail pending trial in light of COVID-19. (*See People ex rel. Gregor v Reynolds*, 67 Misc 3d 662, 663 [Sup Ct, Essex County Apr. 17, 2020].)

[3] *See also People v Giurdanella* (144 AD3d 479, 480-481 [1st Dept 2016] [same], *lv denied* 29 NY3d 948 [2017]); *cf. People v Krieg* (139 AD3d 625, 626-627 [1st Dept 2016] [in criminal prosecution, reversing under § 2-b [3] the trial court's ruling that it lacked discretion to permit the defendant to attend his trial by videoconference]).

[4] In *Robert F.*, the Court of Appeals, though holding that the trial court did not sufficiently justify its determination to admit the expert's video testimony, emphasized that upon a sufficient finding of necessity the trial court could properly have allowed such testimony. (*See* 25 NY3d at 454.)

[5] Plaintiff's contention that there is "no New York procedural . . . statute requiring or permitting a virtual trial in the extant circumstances" is thus incorrect. (NYSCEF No. 178 at 6.)

[6] *See e.g. Flores v Town of Islip* (2020 WL 5211052 [ED NY Sept. 1, 2020]); *Xcoal Energy & Resources v Bluestone Energy Sales Corp.* (2020 WL 4794533 [D Del Aug. 18, 2020]); *Sunoco Partners Mkting. & Terminals L.P. v Powder Springs Logistics, LLC* (2020 WL 3505623 [D Del July 2, 2020]); *Gould Elec. Inc. v Livingston County Rd. Commn.* (2020 WL 3717792 [ED Mich June 30, 2020]); *Vitamins Online, Inc. v HeartWise, Inc.* (2020 WL 3452872 [D Utah June 24, 2020]); *Argonaut Ins. Co. v Manetta Enters., Inc.* (2020 WL 3104033 [ED NY June 11, 2020]); *Centripetal Networks, Inc. v Cisco Sys., Inc.* (2020 WL 3411385 [ED Va Apr. 23, 2020]); *Matter of RFC & RESCAP Liquidating Trust Action* (444 F Supp 3d 967 [D Minn Mar. 13, 2020]); *see*

III. Recent Federal Precedents Analyzing Whether to Direct Virtual Trials and Hearings

The federal trial courts considering the issue have acknowledged that "[c]onducting a trial by videoconference is certainly not the same as conducting a trial where witnesses testify in the same room as the factfinder," and that "[c]ertain features of testimony useful to evaluating credibility and persuasiveness, such as the immediacy of a living person can be lost with video technology." (*Matter of RFC & RESCAP Liquidating Trust Action* (444 F Supp 3d 967, 970 [D Minn Mar. 13, 2020] [internal quotation marks omitted].) At the same time, these courts have found that given "advances in technology," the "near-instantaneous transmission of video testimony" permits the court "to see the live witness along with his hesitation, his doubts, his variations of language, his confidence or precipitancy, and his calmness or consideration." (*Id.* [internal quotation marks and alteration omitted]; *accord Gould Elec. Inc. v Livingston County Rd. Commn.* (2020 WL 3717792, at 6 [ED Mich June 30, 2020] [same]); *United States v Donziger* (2020 WL 5152162, at *3 n 4 [SD NY Aug. 31, 2020] [noting that "the Court has used video technology in several other criminal matters, and it has proven to be 'highly-effective' in allowing viewers to 'observe the speaker in real-time and visually assess his or her demeanor'"] [quoting prior order].)

Federal courts have also found that given the "unprecedented nature of the circumstances faced by our society at present" due to the COVID-19 pandemic, compelling reasons exist to conduct trials virtually. (*Flores v Town of Islip* (2020 WL 5211052, at *2 [ED NY Sept. 1, 2020]; *accord RFC*, 444 F Supp 3d at 972 [concluding that "COVID-19's unexpected nature, rapid spread, and potential risk establish good cause for remote testimony"].) And given the court closures required by the pandemic, "the months' long delay" that has resulted," and the continuing lack of clarity about when it will be safe to resume normal in-person operations, the courts have concluded that "it is 'absolutely preferable' to conduct the bench trial via such 'contemporaneous transmission' . . . rather than to delay the trial indefinitely." (*Argonaut Ins. Co. v Manetta Enters., Inc.* (2020 WL 3104033, at *2 [ED NY June 11, 2020], quoting *RFC*, 444 F Supp 3d at 927.)

This court finds the conclusions and reasoning of these courts to be persuasive. We are in the midst of the worst pandemic in a century—a pandemic that has inflicted devastating harm on New York City and has halted most in-person court operations in civil cases in this city for going on six months now. And as noted above, although the New York courts have continued to operate and ably discharge their judicial functions in these difficult times, it remains unclear when state courts in New York City hearing civil cases will be able safely to resume doing so in person, rather than remotely.

---

also United States v Donziger (2020 WL 5152162 [SD NY Aug. 31, 2020] [permitting video testimony by a witness in a criminal trial]).

Additionally, current technology enables the court and litigants to participate in reliable, real-time videoconferencing with high image quality using readily available computer programs. A hearing conducted virtually by videoconference will allow for cross-examination of witnesses and for both counsel and the court to assess the witnesses' demeanor and credibility through seeing them up close on-screen.[7] Such a hearing may not be equivalent to hearing testimony and cross-examination in person. But it is more than adequate to ensure that both sides have a full opportunity to be heard and that Referee Sambuco can make a properly informed report and recommendation following the hearing.

Indeed, the particular context of this hearing makes it especially amenable to being conducted virtually. The issue before Referee Sambuco, namely the amount of defendant's reasonable attorney fees, is discrete and straightforward. That issue will be heavily based on documentary evidence in the form of defendant's counsel's invoices and billing records, and—as this court concluded in quashing plaintiff's testimonial subpoenas—will require comparatively little testimony from live witnesses.

This court therefore concludes, in the exercise of its discretion under Judiciary Law § 2-b (3), that this case presents extraordinary and compelling circumstances in which it is both necessary and appropriate to require the parties to participate in a hearing conducted by videoconference.

IV. Plaintiff's Objections to a Virtual Hearing

Plaintiff raises several objections to conducting the hearing in this manner.[8] (*See* NYSCEF No. 178 at 3-6, 9-10; NYSCEF No. 182.) None is persuasive.

As an initial matter, there is no merit to plaintiff's attacks on Benjamin Wilson's veracity and credibility. Plaintiff asserts that Wilson sought to mislead Referee Sambuco during the February 13, 2020, hearing date; and also that going forward, Wilson might deceive both opposing counsel and the referee about the content of exhibits he is submitting as evidence. (*See* NYSCEF No. 178 at 3-4, 9.) Suffice to say that this court, having reviewed the relevant hearing transcript for itself, does not agree with plaintiff's characterization of the statements made by Wilson (and by Referee Sambuco) during the February 13 hearing date. And this court does not discern any basis in the record for plaintiff's suggestion that Wilson would lie to plaintiff's

[7] As noted above, in requiring parties over their objection to participate in virtual depositions since the beginning of the pandemic, New York trial courts have concluded that "virtual depositions do not cause undue hardship in light of the technology currently available and the serious health risks posed by the COVID-19 virus." (*Fields*, 2020 NY Slip Op 20203, at *4 [collecting cases].)

[8] Plaintiff also raises several arguments going to the merits of the amount of defendant's reasonable fees. (*See* NYSCEF No. 178 at 1-3.) These arguments are not germane to the narrow procedural issue that Referee Sambuco has referred back to this court.

counsel about whether he was submitting the same exhibit to the court that he had provided to opposing counsel.[9]

Plaintiff suggests that proceeding by video will preclude her counsel and the court from meaningfully assessing the demeanor and credibility of witnesses, and hinder any cross-examination, to such a degree as to violate due process. For the reasons set forth above, this court does not agree.[10] Nor does the court agree that proceeding by video will sacrifice the "ceremony of trial and the presence of the factfinder" as a "powerful force for truthtelling." (NYSCEF No. 178 at 6 [quotation marks omitted].) As noted by the district court in *Gould*, the "formalities . . . will be observed, and the [Special Referee], as well as counsel, will be visible to witnesses." That "witnesses will be testifying remotely does not render them unaccountable for the veracity of their statements, as they will be under oath." (2020 WL 3717792, at *6.)

Plaintiff asserts that no particular exigent circumstances require going forward with the fee hearing now. (*See* NYSCEF No. 178 at 4.) But as discussed above, this court first rejected plaintiff's principal claim for relief nearly three years ago. This court held that plaintiff was proceeding in bad faith, awarded defendant fees, and directed a fee hearing more than a year ago. The fee hearing has still not been completed. And on plaintiff's position, the hearing cannot be completed until some indefinite time months in the future. The court declines to countenance further needless delay.

Finally, plaintiff says that her counsel "does not presently have skype capabilities" and apparently cannot obtain such capabilities without incurring meaningful costs. (NYSCEF No. 178 at 3, 9.) This court is not persuaded by this argument. As the district court noted in *Argonaut Insurance*, the "technology used for video-conferencing is straightforward [and] easy to use"; and "[a]ll that is required to participate in a trial by video-conference is a computer and Internet access," which should be readily available to counsel. (2020 WL 3104033, at *2.) To the extent that plaintiff's counsel perceives any technical obstacles to participating in a virtual hearing, this court sees no reason why counsel cannot fully address those obstacles through consultation with Wilson and Referee Sambuco.

For all these reasons, this court concludes that the fee hearing before Referee Sambuco should go forward by videoconference, rather than by submission on papers or being adjourned without date until it is possible to conduct the hearing in person. Both sides must participate in

---

[9] Plaintiff's counsel's further assertion that Wilson is "vehemently reluctant to give testimony subject to cross examination" misrepresents defendant's position. (*Compare* NYSCEF No. 182 at 1 [plaintiff's reply submission], *with* NYSCEF No. 181 at 2-3 [defendant's submission] [noting that a virtual hearing will permit plaintiff's counsel to refer to and publish documents during his examination of defendant's witnesses].) And counsel's insinuation that Wilson is (assertedly) opposed to giving testimony subject to cross-examination so as to avoid exposure of false or misleading statements is simply groundless. (*See* NYSCEF No. 182 at 1.)

[10] Plaintiff's suggestion that due process does not permit hearing witness testimony and conducting cross-examination by video is also foreclosed by the Court of Appeals' decisions in *Wrotten* and *Robert F.*—at least absent particular circumstances presented here that might distinguish this case from those. Plaintiff has not identified any such circumstances.

the hearing. Failure to participate will result in the denial of the fee application (if defendant does not appear) or entry of a default and resolution of the fee issue at an inquest (if plaintiff does not appear), with any inquest to be conducted by Referee Sambuco.

Accordingly, it is hereby

ORDERED that Referee Sambuco's interim recommendation dated August 18, 2019, is accepted and adopted by this court; and it is further

ORDERED that the fee hearing being conducted by Referee Sambuco pursuant to an order of reference from this court shall proceed virtually by videoconference, going forward, and that Referee Sambuco shall preside over future virtual hearing dates; and it is further

ORDERED that all parties are required to appear for future virtual hearing dates (and to participate in the hearing), and that a party's failure to appear and participate will result in denial of the motion for fees if movant-defendant fails to appear or the entry of a default against plaintiff and the resolution of defendant's fee application at an inquest before Referee Sambuco if plaintiff fails to appear; and it is further

ORDERED that the parties shall promptly consult with Referee Sambuco to determine an appropriate further hearing date and, consistent with Unified Court System policies then in effect, a videoconference platform.

HON. GERALD LEBOVITS
J.S.C.

9/8/2020
DATE

CHECK ONE:		CASE DISPOSED			X	NON-FINAL DISPOSITION	
		GRANTED		DENIED		GRANTED IN PART	X OTHER
APPLICATION:		SETTLE ORDER				SUBMIT ORDER	
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN				FIDUCIARY APPOINTMENT	X REFERENCE