

## **RULE 4:23. Failure To Make Discovery; Sanctions**

### **4:23-1. Motion for Order Compelling Discovery**

A party, upon reasonable notice to other parties and all persons affected thereby, may apply for an order compelling discovery as follows:

- **(a) Motion.** If a deponent fails to answer a question propounded or submitted under R. 4:14 or 4:15, or a corporation or other entity fails to make a designation under R. 4:14-2(c) or 4:15-1, the discovering party may move for an order compelling an answer or designation in accordance with the request. When taking a deposition on oral examination, the proponent of the question may complete or adjourn the examination before applying for an order. If the court denies the motion in whole or in part, it may make such protective order as it would have been empowered to make on a motion pursuant to R. 4:10-3.
- **(b) Evasive or Incomplete Answer.** For the purposes of this subdivision an evasive or incomplete answer is to be treated as a failure to answer.
- **(c) Award of Expenses of Motion.** If the motion is granted, the court shall, after opportunity for hearing, require the party or deponent whose conduct necessitated the motion to pay to the moving party the reasonable expenses incurred in obtaining the order, including attorney's fees, unless the court finds that the opposition to the motion was substantially justified or that other circumstances make an award of expenses unjust.

If the motion is denied, the court shall, after opportunity for hearing, require the moving party to pay to the party opposing the motion the reasonable expenses incurred in opposing the motion, including attorney's fees, unless the court finds that the making of the motion was substantially justified or that other circumstances make an award of expenses unjust.

If the motion is granted in part and denied in part, the court may apportion the reasonable expenses incurred in relation to the motion among the parties and persons in a just manner.

Note: Source-R.R. 4:27-1. Former rule deleted and new R. 4:23-1 adopted July 14, 1972 to be effective September 5, 1972; paragraphs (a) and (c) amended July 13, 1994 to be effective September 1, 1994; paragraph (a) amended July 5, 2000 to be effective September 5, 2000.

### **4:23-2. Failure to Comply With Order**

- **(a) Failure to Be Sworn or Answer a Question.** If a deponent fails to be sworn or to answer a question after being directed to do so, the failure may be considered a contempt of that court.
- **(b) Other Matters.** If a party or an officer, director, or managing or authorized agent of a party or a person designated under R. 4:14-2(c) or 4:15-1 to testify on behalf of a party fails to obey an order to provide or permit discovery, including an order made under R. 4:23-1, the court in which the action is pending may make such orders in regard to the failure as are just, and among others the following:
  - **(1)** An order that the matters regarding which the order was made or any other designated facts shall be taken to be established for the purposes of the action in accordance with the claim of the party obtaining the order;
  - **(2)** An order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting the introduction of designated matters in evidence;

- **(3)** An order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or proceeding or any part thereof with or without prejudice, or rendering a judgment by default against the disobedient party;
- **(4)** In lieu of any of the foregoing orders or in addition thereto, an order treating as a contempt of court the failure to obey any orders.

In lieu of any of the foregoing orders or in addition thereto, the court shall require the party failing to obey the order to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust.

Note: Source-R.R. 4:27-2(a)(b). Former rule deleted and new R. 4:23-2 adopted July 14, 1972 to be effective September 5, 1972; paragraph (b)(2) amended July 13, 1994 to be effective September 1, 1994; paragraph (b) amended July 5, 2000 to be effective September 5, 2000; paragraph (b)(3) amended July 12, 2002 to be effective September 3, 2002.

### **4:23-3. Expenses on Failure to Admit**

If a party fails to admit the genuineness of any document or the truth of any matter as requested under R. 4:22, and if the party requesting the admissions thereafter proves the genuineness of the document or the truth of the matter, that party may apply to the court for an order requiring the other party to pay the reasonable expenses incurred in making that proof, including reasonable attorney's fees. The court shall make the order unless it finds that

- **(a)** The request was held objectionable pursuant to R. 4:22-1, or
- **(b)** The admission sought was of no substantial importance, or
- **(c)** The party failing to admit had reasonable ground for not making the admission.

Note: Source-R.R. 4:27-3. Former rule deleted and new R. 4:23-3 adopted July 14, 1972 to be effective September 5, 1972; introductory paragraph amended July 13, 1994 to be effective September 1, 1994.

### **4:23-4. Failure of Party to Attend at Own Deposition**

If a party or an officer, director, or managing agent of a party or a person designated under R. 4:14-2(c) or 4:15-1 to testify on behalf of a party fails to appear before the officer within this State who is to take his deposition, after being served with a proper notice, the court in which the action is pending on motion may make such orders in regard to the failure as are just, and among others it may take any action authorized under paragraphs (1), (2) and (3) of R. 4:23-2(b). In lieu of any order or in addition thereto the court shall require the party failing to act to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust. The failure to act described in this rule may not be excused on the ground that the discovery sought is objectionable unless the party failing to act has applied for a protective order as provided by R. 4:10-3.

Note: Source - R.R. 4:27-4. Former rule deleted and new R. 4:23-4 adopted July 14, 1972 to be effective September 5, 1972; amended July 5, 2000 to be effective September 5, 2000; caption amended July 27, 2006 to be effective September 1, 2006.

### **4:23-5. Failure to Make Discovery**

- **(a) Dismissal.**
  - **(1) Without Prejudice.** If a demand for discovery pursuant to R. 4:17, R. 4:18, or R. 4:19 is not complied with and no timely motion for an extension or a

protective order has been made, the party entitled to discovery may, except as otherwise provided by paragraph (c) of this rule, move, on notice, for an order dismissing or suppressing the pleading of the delinquent party. The motion shall be supported by an affidavit reciting the facts of the delinquent party's default and stating that the moving party is not in default in any discovery obligations owed to the delinquent party. Unless good cause for other relief is shown, the court shall enter an order of dismissal or suppression without prejudice. Upon being served with the order of dismissal or suppression without prejudice, counsel for the delinquent party shall forthwith serve a copy of the order on the client by regular and certified mail, return receipt requested, accompanied by a notice in the form prescribed by Appendix II-A of these rules, specifically explaining the consequences of failure to comply with the discovery obligation and to file and serve a timely motion to restore. If the delinquent party is appearing pro se, service of the order and notice hereby required shall be made by counsel for the moving party. The delinquent party may move on notice for vacation of the dismissal or suppression order at any time before the entry of an order of dismissal or suppression with prejudice. The motion shall be supported by affidavit reciting that the discovery asserted to have been withheld has been fully and responsively provided and shall be accompanied by payment of a \$100 restoration fee to the Clerk of the Superior Court, made payable to the "Treasurer, State of New Jersey," if the motion to vacate is made within 30 days after entry of the order of dismissal or suppression, or a \$300 restoration fee if the motion is made thereafter. If, however, the motion is not made within 90 days after entry of the order of dismissal or suppression, the court may also order the delinquent party to pay sanctions or attorney's fees and costs, or both, as a condition of restoration.

- **(2) With Prejudice.** If an order of dismissal or suppression without prejudice has been entered pursuant to paragraph (a)(1) of this rule and not thereafter vacated, the party entitled to the discovery may, after the expiration of 60 days from the date of the order, move on notice for an order of dismissal or suppression with prejudice. The attorney for the delinquent party shall, not later than 7 days prior to the return date of the motion, file and serve an affidavit reciting that the client was previously served as required by subparagraph (a)(1) and has been served with an additional notification, in the form prescribed by Appendix II-B, of the pendency of the motion to dismiss or suppress with prejudice. In lieu thereof, the attorney for the delinquent party may certify that despite diligent inquiry, which shall be detailed in the affidavit, the client's whereabouts have not been able to be determined and such service on the client was therefore not made. If the delinquent party is appearing pro se, the moving party shall attach to the motion a similar affidavit of service of the order and notices or, in lieu thereof, a certification as to why service was not made. Appearance on the return date of the motion shall be mandatory for the attorney for the delinquent party or the delinquent pro se party. The moving party need not appear but may be required to do so by the court. The motion to dismiss or suppress with prejudice shall be granted unless a motion to vacate the previously entered order of dismissal or suppression without prejudice has been filed by the delinquent party and either the demanded and fully responsive discovery has been provided or exceptional circumstances are demonstrated.
- **(3) General Requirements.** All motions made pursuant to this rule shall be accompanied by an appropriate form of order. All affidavits in support of relief under paragraph (a)(1) shall include a representation of prior consultation with or notice to opposing counsel or pro se party as required by R. 1:6-2(c). If the attorney for the delinquent party fails to timely serve the client with the original order of dismissal or suppression without prejudice, fails to file and serve the affidavit and the notifications required by this rule, or fails to appear on the return date of the motion to dismiss or suppress with prejudice, the court shall, unless

exceptional circumstances are demonstrated, proceed by order to show cause or take such other appropriate action as may be necessary to obtain compliance with the requirements of this rule. If the court is required to take action to ensure compliance or the motion for dismissal or suppression with prejudice is denied because of extraordinary circumstances, the court may order sanctions or attorney's fees and costs, or both. An order of dismissal or suppression shall be entered only in favor of the moving party.

- **(b) Failure to Furnish Expert's Report.** The court at trial may exclude the testimony of a treating physician or of any other expert whose report is not furnished pursuant to R. 4:17-4(a) to the party demanding the same.
- **(c) Motion to Compel.** Prior to moving to dismiss pursuant to subparagraph (a)(1) of this rule, a party may move for an order compelling discovery demanded pursuant to R. 4:14, R. 4:18, or R. 4:19. An order granting a motion to compel shall specify the date by which compliance is required. If the delinquent party fails to comply by said date, the aggrieved party may apply for dismissal or suppression pursuant to subparagraph (a)(1) of this rule by promptly filing a motion to which the order to compel shall be annexed, supported by a certification asserting the delinquent party's failure to comply therewith.

Note: Source -- R.R. 4:23-6(c)(f), 4:25-2 (fourth sentence); paragraph (a) amended July 29, 1977 to be effective September 6, 1977; paragraph (a) amended July 16, 1981 to be effective September 14, 1981; paragraph (a) amended November 5, 1986 to be effective January 1, 1987; paragraph (a) caption amended and subparagraphs (a)(1) captioned and amended, and (a)(2) and (3) captioned and adopted, June 29, 1990 to be effective September 4, 1990; paragraph (a)(3) amended July 13, 1994 to be effective September 1, 1994; paragraph (a)(1) amended June 28, 1996 to be effective September 1, 1996; paragraph (a) amended July 10, 1998 to be effective September 1, 1998; caption amended, paragraphs (a)(1) and (a)(2) amended, and new paragraph (a)(4) adopted July 5, 2000 to be effective September 5, 2000; paragraph (a)(1) amended and new paragraph (c) added July 12, 2002 to be effective September 3, 2002; paragraph (a)(1) amended and paragraph (a)(4) deleted July 27, 2006 to be effective September 1, 2006; paragraphs (a)(1) and (a)(2) amended July 9, 2008 to be effective September 1, 2008; subparagraphs (a)(1) and (a)(3) amended July 23, 2010 to be effective September 1, 2010; paragraph (c) amended July 19, 2012 to be effective September 4, 2012; paragraphs (a)(1) and (c) amended July 22, 2014 to be effective September 1, 2014.

#### **4:23-6. Electronically Stored Information**

Absent exceptional circumstances, the court may not impose sanctions under these rules on a party for failing to provide electronically stored information lost as a result of the routine, good faith operation of an electronic information system.

Note: Adopted July 27, 2006 to be effective September 1, 2006.