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1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF NEW YORK

3 PETER BRIAN TORRES,

4 Plaintiff,

5 v.

17 Civ. 2825 (GBD)

6 THE AMERICAN MUSEUM
7 OF NATURAL HISTORY
and JUAN MONTES,

8 Defendants.

9
10 New York, N.Y.
11 July 12, 2017
12 10:15 a.m.

13 Before:

14 HON. GEORGE B. DANIELS

15 District Judge

16 APPEARANCES

17 THE HARMAN FIRM PC
18 Attorneys for Plaintiff
19 BY: WALKER GREEN HARMAN, JR.

20 LITTLER MENDELSON PC
21 Attorneys for Defendants
22 BY: IVIE A. GUOBADIA
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24
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1 (Case called)

2 (In open court)

3 MR. HARMAN: Walker Harman, The Harman Firm, for the
4 plaintiff. Good morning, your Honor.

5 THE COURT: Good morning.

6 MS. GUOBADIA: Good morning, your Honor. Ivie
7 Guobadia representing the defendants, from Littler Mendelson.

8 THE COURT: Good morning, Ms. Guobadia.

9 Let me start with you, Mr. Harman. How far have you
10 gotten? What's the status?

11 MR. HARMAN: Your Honor, we haven't really done
12 anything. I early on received a call from Ms. Hogan, the
13 partner on the case -- she is not here today -- and we
14 discussed generally what might happen, and as part of that
15 discussion I raised the issue of early ADR, and she said she
16 would get back to me. That was a couple of months ago, and she
17 never did.

18 As this conference was approaching, I again reached
19 out to her and raised the issue again so that we could inform
20 the court whether that was going to be productive or not, and
21 she followed up with an e-mail telling me that she would get
22 back to me last week, and she again never did get back to me.

23 So, that has led me to believe that we need to prepare
24 to litigate, and we have done that. We are preparing discovery
25 demands, and I have prepared subpoenas, which I'm going to

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1 disclose to Littler this afternoon, and we would be prepared to
2 serve those subpoenas on Friday.

3 And we're prepared to comply with the proposed
4 scheduling order that we provided to the court. And that's all
5 I really have to report at this juncture.

6 We have had one forensic analysis done of Mr. Torres.
7 We're prepared to have a more in-depth analysis done of him.
8 He is quite frankly really suffering, and I'm not sure when, if
9 ever, he will be able to return to work. But we are working
10 diligently to get him the help that he needs and to get his
11 psychological and mental health issues documented.

12 THE COURT: Let me hear from the other side. What's
13 the status from your perspective?

14 MS. GUOBADIA: Good morning, your Honor. I have been
15 the associate working on this matter from the inception. I
16 want on the first call he had with Ms. Hogan regarding the
17 general issues in this case. However, I did have a call at the
18 end of June with his associate to discuss this initial
19 conference, and we spoke broadly about the case.

20 My client is interested in early resolution, if that
21 is something that's possible. In matters like this, before we
22 drive up the costs with depositions and discovery, early
23 resolution is something that we always consider.

24 We are also ready to move forward with the discovery
25 schedule which we agreed to.

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1 So, I know we spoke earlier today about Ms. Hogan
2 having a call with him today or tomorrow, so after this
3 conference I will go back to Ms. Hogan and see if we can set up
4 a conference call to discuss the parameters of early
5 resolution.

6 THE COURT: Well, do you think at this point it would
7 be helpful for me to go ahead and refer you to mediation, to
8 see if mediation might be helpful?

9 MS. GUOBADIA: I am not opposed to that. I think the
10 plaintiff may have a different perspective, but our client is
11 not opposed to that.

12 MR. HARMAN: I'm a little confused, because opposing
13 counsel told me earlier in court today that they had not
14 communicated -- or she had not communicated -- with her client
15 about whether they were interested in mediation but that she
16 would do so. She is now representing that in fact her client
17 is interested in mediation.

18 I am not encouraged, your Honor. It takes a lot of
19 work to prepare for a mediation. My client is being cared for
20 by his family in Florida. For him to return for mediation,
21 when I have repeatedly tried to communicate with Ms. Hogan
22 about it, I don't think it is really a good use of a volunteer
23 mediator's time and the program.

24 THE COURT: You're giving me mixed signals. Your
25 first comments were that you were anticipating mediation or

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1 settlement discussions and they haven't gotten back to you, and
2 now you're saying you don't want them to get back to you, you
3 don't want mediation.

4 MR. HARMAN: I don't want to participate in the
5 mediation unless I have a healthy, good faith belief that the
6 defendants are really interested in meaningfully trying to
7 resolve the matter.

8 THE COURT: Well, if I only used that as a criteria
9 for mediation, most of the time I wouldn't order mediation.
10 I'm ordering mediation because obviously the parties can't do
11 it on their own.

12 So, the question is whether or not you think it's
13 worth your time, effort and expense to attempt to mediate this
14 and settle this with the assistance of a magistrate judge or
15 mediation, or whether you just want to grind out discovery and
16 not attempt an early settlement.

17 MR. HARMAN: At this point, your Honor, I have no
18 sense that defendants are interested or willing to participate
19 meaningfully, so we do not want to --

20 THE COURT: All right. Well, you're doing it the
21 opposite way and the way I don't encourage lawyers to do it.
22 Don't tell me what you think they want to do. Tell me what you
23 want to do. If you want to resolve this early, and you want to
24 mediate, then if they say they want to resolve this early and
25 they want to mediate it, then it's worth doing.

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1 If you don't want to take that position, and you don't
2 want to sit down and try to early resolve this, then you should
3 say so. But don't make your decision based on what you think
4 they want to do.

5 MR. HARMAN: It's not what I think they want to do;
6 it's that opposing counsel has told me that they haven't even
7 gotten word from their client whether their client is
8 interested.

9 THE COURT: Except opposing counsel has just told me
10 that they're willing to try to settle this with the mediator or
11 a magistrate judge.

12 MR. HARMAN: In all fairness --

13 THE COURT: If they're willing to do that, and you're
14 willing to do that, I'm willing to move that forward.

15 MR. HARMAN: That is not --

16 THE COURT: If they say they're willing to do that and
17 you're not willing to do that, then it's not going to happen
18 because they're not willing; it's not going to happen because
19 you're not willing.

20 MR. HARMAN: Your Honor, that's not what she told me
21 this morning.

22 THE COURT: Well, I don't care what she told you this
23 morning; I'm going on what she told me just now. She said that
24 they are willing to mediate, and they're willing to go forward
25 in good faith and try to mediate this case. If you want to do

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1 that, then we will do that. If you think they're not moving in
2 good faith, and for some reason you want to say that it's a
3 waste of your time, then it may be a waste of your time, and we
4 can forego that and move forward on another basis.

5 But you can't come in and tell me that, you know,
6 you've been waiting for them to tell you for months if they're
7 willing to mediate or settle, and now they just said to me in
8 front of you that they're willing to do that, and now you say,
9 well, I don't want to do that.

10 You know, either that's something that you have been
11 anxiously awaiting and hopefully hoping they would say yes to
12 it, and now they that they say yes to it, it's a little
13 inconsistent for you to say now, well, I don't want to do it
14 but I've been blaming them for not wanting to do it.

15 Do you want to do it or don't want to do it? Do you
16 want to settle this case or not, assuming they in good faith at
17 this point want to sit down and they want to with the
18 assistance of a mediator or magistrate judge they want to see
19 if they can come to a resolution?

20 MR. HARMAN: I would prefer to have a conversation, a
21 candid conversation with Ms. Hogan, about the viability of
22 settlement at this juncture, and report back to the court.

23 THE COURT: All right. Well, the viability of
24 settlement is that you're not going to be able to settle unless
25 you get some assistance. I know what the viability of

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1 settlement is.

2 MR. HARMAN: That's not always the case.

3 THE COURT: You have not been able to do that on your
4 own, and so I don't think there is anything you can say to me
5 at this point that's going to convince me that you are going to
6 be able to do it on your own.

7 The only thing I want to do is get you two in the same
8 room at the same time. If you don't want to do that, then say
9 you don't want to do that, and I'm not going to waste any more
10 time.

11 But if you want to try to settle this early, and you
12 are in good faith ready with some flexibility to sit down with
13 a mediator and try to settle this case so you don't have to go
14 forward with litigation, then tell me, and let's do it.

15 They say they're willing to do that. All right? I
16 take them at their word, as I will take you at your word. If
17 you're not willing to do that, then the settlement process is
18 not broken down because they have broken it down; it's broken
19 down because you have broken it down, because now that they say
20 they want to do, now you take the opposite position you took
21 before and now you don't want to do.

22 Do you want to did it or don't you want to do it?

23 MR. HARMAN: Well, I'm a little blindsided, quite
24 frankly, your Honor, because she has conveyed something in
25 court that I haven't heard yet. If her client legitimately

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1 wants to participate in mediation, we almost always want to
2 participate in mediation.

3 THE COURT: All right. Well --

4 MR. HARMAN: I have been in the program, your Honor --

5 THE COURT: I assume that's the representation that
6 I've just gotten, that they legitimately intend to move forward
7 and would like to mediate. If you don't want to do that --
8 again, don't make the decision on what you think they're going
9 to do. Make the decision on whether you want to -- do you want
10 to mediate or not?

11 MR. HARMAN: Like I just said, your Honor, we always
12 want to mediate.

13 THE COURT: Then let me refer it to mediation. Go
14 have a session. If that session is not productive, then you
15 have wasted half a day, and you can move forward and spend your
16 time, effort and expense on further litigating this case.

17 But if there is any possibility that the two of you
18 can sit down in a mediation session and resolve this case, then
19 I think you should not forgo that possibility.

20 If you wish to forgo that possibility, then tell me
21 you don't want to mediate. Don't tell me what you think they
22 want to do; tell me you don't want to mediate.

23 MR. HARMAN: Your Honor, I've heard you. I've heard
24 you.

25 THE COURT: Well, tell me whether you want to mediate

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1 or not.

2 MR. HARMAN: I said we always want to mediate.

3 THE COURT: Then always want to mediate means that I'm
4 going to send you to mediation, because this is part of always.

5 MR. HARMAN: Thank you. That's fine, your Honor. I'm
6 not trying to make this difficult; I'm just trying to give you
7 my perspective. Because we go to the mediation program
8 approximately once a week. I have extensive experience
9 mediating cases and at the mediation program, and what I find
10 is that if there is not a clear indication from the other side
11 that there is a willingness, we have a defendant that shows up
12 and says I was court ordered here, and we have no interest in
13 settling; we consider it a no pay case; or whatever it is they
14 convey; and yet we've spent, you know, a couple of days
15 preparing and prepped the client, and it's a frustrating
16 experience for us, and I think it's a waste of time.

17 THE COURT: It can be or it can be productive. So
18 tell me what you want to do.

19 MR. HARMAN: I want to be sent out to mediation. Now
20 that opposing counsel has stated on the record that the Museum
21 and Mr. Montes are expressly willing to mediate and understand
22 what that means, then let's go forward and mediate.

23 THE COURT: Well, you know, what I don't like to get
24 involved in is the parties' strategy and tactics in terms of
25 how they want to relate to each other.

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1 This case should be decided on the merits of the case
2 or it should be settled. That's all that I care about. You
3 guys can dance any way you want to dance with each other. But
4 if you want an opportunity to settle this case early, if you go
5 to mediation and it's a total waste of time, then you know you
6 have to aggressively litigate. If you go to mediation and
7 you're pleasantly surprised that they give you what you and
8 your client are satisfied with, then it will be worth the
9 effort, and so it's worth taking the chance.

10 I hear defense saying -- and I can turn to defense.
11 If you want some other guarantee that they generally at this
12 point are willing to go to mediation and they're willing to go
13 to mediation with some flexibility, that if the two of you can
14 come to some reasonable compromise, that there is a possibility
15 that this case can be resolved at an early stage, then I will
16 try to get that further assurance for you now.

17 MR. HARMAN: I would appreciate that.

18 THE COURT: The problem is I don't even know if the
19 two lawyers have spoken to each other in the last three months,
20 and that's usually part of my problem. I'm not an interpreter
21 or translator for lawyers, and I never do think it's adequate
22 to just simply say I wrote them a letter and an e-mail and I
23 never heard back. You guys have been sitting in the courtroom
24 for the last five minute too.

25 MR. HARMAN: I said earlier on the record that I have

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1 reached out to Miss Hogan, and I asked to speak with her on the
2 phone, and about two to three weeks ago I spoke with her on the
3 phone, and I explained much of what has been conveyed in court
4 and to your Honor to Ms. Hogan on the phone, and I didn't hear
5 back. That's all I said, and I believe I was clear.

6 THE COURT: I understood what you said, but I've just
7 have been told that this is the lawyer who has primary
8 responsibility for this case, this is the lawyer whose notice
9 of appearance is here and who is here. It seems to me that
10 this is the lawyer with whom it might be the most productive
11 conversation to have. She seems to be the one who has the
12 responsibility, and Ms. Hogan -- whatever her interests are --
13 is somewhere else.

14 MR. HARMAN: I have not been told that, but I
15 appreciate that, and I will proceed forward with that in mind.

16 THE COURT: Well, I mean I'm not here to debate the
17 past; I'm trying to figure out how I can give you an efficient
18 and effective way to resolve this case. If you want that
19 cooperative process, then I will structure it for you. If you
20 don't want that process, as I always say, you have two choices:
21 You can work it out or you can fight it.

22 If you want to fight it out, then let's just go
23 forward. I'm not going to waste the mediator's time or your
24 time to send you to mediation if you're not going to be in a
25 position -- if you feel you're not going to be in a position to

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1 have at least some chance of settling the case.

2 But, as I say, make that determination based on what
3 you want to do, not on what you anticipate their position is.
4 Because if they're willing to go, then at least you will have a
5 better idea of what their position might be with regard to
6 their overall review of this case just by sitting down with one
7 hour with the mediator and having that discussion even if it's
8 not fruitful.

9 So, again, I don't want to waste your time if you
10 don't want to do it, and you don't do it because you don't want
11 to do it.

12 MR. HARMAN: I just said, your Honor, repeatedly that
13 we want to mediate if they're legitimately interested in
14 mediating.

15 THE COURT: Well, but there's no ifs. You see, that's
16 the problem. Stop giving me an if. Tell me whether you want
17 to do it or your don't want to do it.

18 MR. HARMAN: Yes.

19 THE COURT: OK, so that's all I've asked. This isn't
20 a trick question. You are the one debating it with me. I'm
21 not debating it. I just said do you want to mediate, and you
22 are giving me all of this argument about why you shouldn't do
23 it.

24 MR. HARMAN: I have really have no interest in
25 debating. I want to go to mediation. I called twice to raise

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1 it. I want to go to mediation.

2 THE COURT: Well, that's what I understood when you
3 first spoke with me, but now you're complicating it with all of
4 this --

5 MR. HARMAN: You know, we'll roll the dice, your
6 Honor, and if it doesn't work, it doesn't work.

7 THE COURT: Right.

8 MR. HARMAN: I honestly when we started the conference
9 and we went on the record I was confused.

10 THE COURT: OK, that's fine.

11 MR. HARMAN: And I'm sorry.

12 THE COURT: And I understand your confusion.

13 MR. HARMAN: I'm sorry if that gave your Honor the
14 appearance that I'm debating. I'm not. I'm just trying to be
15 as transparent and candid as I can be as to what happened
16 leading up to today's conference.

17 THE COURT: I understand that, but all I needed was a
18 yes or no. So the answer is yes.

19 MR. HARMAN: We are willing to mediate.

20 THE COURT: OK. Let me turn to the defense. Are you
21 going to be wasting his time, or are you going into mediation
22 with some flexibility and intent to try to settle this early if
23 you can?

24 MS. GUOBADIA: We will go into the mediation with
25 flexibility and intent to settle. At this moment in time I do

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1 not have authority, so I cannot state actually --

2 THE COURT: Well, then you should go to mediation with
3 some authority and the broadest authority that you can possibly
4 get. And if you have no authority whatsoever to settle, then
5 you should call up Mr. Harman before that time and say I have
6 no authority so let's not waste your time, let's fight this
7 out.

8 MS. GUOBADIA: Absolutely.

9 THE COURT: And I suggest that both of you have
10 further direct communication so that professionally the two of
11 you can be on the same page. I see both of you talking past
12 each other is my problem. And, as I say, I'm not an
13 interpreter or translator for lawyers. You shouldn't have to
14 go through me for the two of you to try to figure out what's
15 the most efficient way to proceed on this case or to
16 communicate with each other about how this case is going to
17 proceed.

18 MS. GUOBADIA: Understood, your Honor. I think there
19 has been some miscommunication between plaintiff's counsel and
20 my office, and we will try to rectify that. Thank you, your
21 Honor.

22 THE COURT: OK. So what I'm going to do is I'm going
23 to leave the next conference on for November 15. I'm going to
24 do a referral right way to mediation.

25 I think mediation is more appropriate in this case for

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1 a number of reasons but also because I think Magistrate Judge
2 Francis is on this case, and he's retiring. I think we got a
3 notice that he is not taking any further referrals between now
4 and his retirement.

5 So I will try for mediation. I will make that
6 referral right away. You should be contacted by the mediation
7 office within a week, ten days. If not, you can reach out to
8 them, since I will do it right away.

9 Have a sit-down or several sit-downs, if you think you
10 are making progress. If that is unsuccessful, just move
11 forward with the schedule, and then by November 16th we will
12 see where we are. If you are making progress with settlement,
13 I will be more flexible with the discovery schedule. But if it
14 breaks down, then just go ahead and move forward, and we will
15 put that behind us, and then we can move forward to litigate
16 this case.

17 I don't want either side to waste time and expense on
18 a case that might be settled 12 months from now but could have
19 been settled one month from now if both parties go into
20 mediation with a good faith approach to trying to resolve this.

21 So, Mr. Harman, did you have anything else?

22 MR. HARMAN: Just one other thing, your Honor. I just
23 want to -- I want to be clear with your Honor about our
24 expectations that both the defendants, the Museum of Natural
25 History and Mr. Montes, be present at any anticipated

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1 mediation, and that to the extent that there is insurance
2 coverage, that someone from the insurance company be available
3 at minimum by phone if not present in person.

4 I say this not having anything to do with the history
5 on this case, but because we've had consistent problems in this
6 area in other cases where we have multiple defendants and only
7 one shows up, there is insurance coverage but no one can get
8 people on the phone, and that really impede the process.

9 THE COURT: Again, that's not a conversation that you
10 should have with me; that's a conversation that you should have
11 with the other side. Make sure you understand what the ground
12 rules are going to be with regard to both of you going into
13 mediation. I don't put rules on the mediator. The mediator
14 who is assigned will determine who needs to be present and what
15 authority needs to be there, and what information needs to be
16 exchanged before the session is done, so, you know, whatever
17 the mediator believes is the most efficient process. If that
18 turns out to be the most efficient process in this case, I have
19 no problems with that.

20 But I think the two of you should talk about what you
21 expect. Obviously, the most important thing is that they have
22 authority, and that the parties are ready, willing and able to
23 approve then and there the settlement that is being proposed.

24 How that works out, and whether or not the process
25 that you just outlined is usually the most efficient process,

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1 effective process, once I put it in the hands of the mediator,
2 how the mediator will conduct it, if you want to emphasize that
3 to the mediator, if you have some disagreement about that, then
4 you should do so.

5 Is it your position that you want your client to be
6 definitely present at that mediation?

7 MR. HARMAN: Oh, absolutely.

8 THE COURT: All right. So the two of you talk that
9 out. If you have some disagreement about that, then raise it
10 with the mediator, and then see how the mediator is going to
11 resolve that if there is some dispute.

12 Is there anything else that we need to address?

13 MS. GUOBADIA: No, your Honor.

14 THE COURT: So, why don't you two communicate with
15 each other. Try to advance this in a good faith way so that
16 you will be ready for mediation, and then be prepared to figure
17 out exactly what parameters that you think would make for a
18 reasonable settlement and go to mediation. If it's
19 unsuccessful, then move forward fully with discovery, and I
20 will see you on November 15, unless I hear from you before then
21 that you have either settled or there is some dispute with
22 regard to the settlement.

23 MS. GUOBADIA: Thank you, your Honor.

24 MR. HARMAN: Thank you.

25 (Adjourned)