SUPREME COURT OF THE STATE OF NEW YORK **Index No.: 11961/2003**
COUNTY OF RICHMOND **PART DCM 3** **Motion No.: 4&5**

STEPHEN RAVNIKAR,

Plaintiff

DECISION & ORDER
HON. JOSEPH J. MALTESE

against

SKYLINE CREDIT-RIDE, INC.,

Defendants

The following items were considered in the review of this motion to compel and dismiss.

Papers	**Numbered**
Notice of Motion and Affidavits Annexed	**1**
Answering Affidavits/Cross Motion	**2**
Replying Papers	**3**
Exhibits	**Attached to Papers**

Upon the foregoing cited papers, the Decision and Order on this Motion is as follows:

The defendant seeks an order pursuant to CPLR § 3126 striking the plaintiff's verified complaint; or in the alternative, precluding the plaintiff from presenting evidence at trial; or in the alternative, compelling the plaintiff to submit to an examination before trial. Additionally, the defendant is seeking costs and sanctions against the plaintiff. The plaintiff cross-moves to amend the their verified complaint to add a cause of action under NY Business Corporation Law § 624 and to strike the defendant's pleadings for their "failure to participate in discovery."

The Defendant's Motion:

On March 22, 2004, the defendant served upon the plaintiff discovery demands consisting of a Notice for Discovery Inspection, interrogatories, demand for statements, demand for names and addresses of witnesses, demand for names and addresses of expert witness and a notice of examination before trial. Shortly thereafter, a Preliminary Conference was held where it was ordered that the plaintiff was to submit to a deposition on or before July 30, 2004, with the plaintiff serving discovery responses prior to the examination before trial. The plaintiff never responded to the demands for discovery and the defendant's attorney sent three letters to the plaintiff's attorney in an attempt to resolve the situatio as the plaintiff did not serve any responses to the discovery demands, the deposition of the plaintiff did not occur.

On September 22, 2004, a compliance was held at which the parties entered into a so-ordered stipulation that states in pertinent part that the "plaintiff shall serve responses ... within thirty (30) days of the date of this stipulation, upon penalty of being precluded from introducing evidence sought in said discovery demands at trial." On October 21, 2004 another compliance conference was held at which the parties entered in a second so-ordered stipulation and agreed to conduct depositions within 30 days. Thereafter, the defendant filed a motion to comply with the so-ordered discovery stipulations and the plaintiff served responses. Accordingly, the motion was withdrawn.

On January 27, 2005 a compliance conference was held at which, once again, the parties entered into a so-ordered stipulation agreeing that the plaintiff was to be "deposed on or before March 31, 2005 at the law offices of Robert Prignoli, or in the alternative, a court reporting office located in Richmond County. No adjournment without the Court's permission." That date came and went, and the plaintiff was not deposed. Additionally, no party requested and/or received permission from the court to adjourn the court ordered deposition of the plaintiff.

To date, the plaintiff, and his attorneys, have violated three orders of this court. Specifically, the preliminary conference order dated March 30, 2004, the so-ordered stipulation dated October 21, 2004, as well as the order dated January 27, 2005. At the compliance conference held on April 28, 2005, the defendant's attorney was instructed to file the current motion.

NY CPLR § 3126(3) states that the court may strike the pleadings of a party who "refuses to obey an order for disclosure or willfully fails to disclose information which the court finds ought to have been disclosed." It is well settled that "the nature and degree of penalty to be imposed on a motion pursuant to CPLR §3126 is a matter generally left to the discretion of the trial court (*Patterson v. New York City Health & Hosp. Corp.*, 284 AD2d 516 [2d Dept 2001]). Where a party disobeys a court order, and by his conduct "frustrates the disclosure scheme provided by the CPLR," dismissal of a complaint is well within the discretion of the court. The Court of Appeals has noted that "if the credibility of court orders and the integrity of our judicial system are to be maintained, a litigant cannot ignore court orders with impunity." (*Kihl v. Pfeffer*, 94 NY2d 118 [1999]).

While this court is reluctant to strike a party's pleading for the failure to comply with discovery orders, this court will not tolerate lengthy delays in discovery. The striking of a party's pleading is a drastic remedy and is appropriate only where there is a showing that the failure to comply with discovery demands is willful, contumacious, or in bad faith. (*Frias v. Fortini*, 240 AD2d 467 [2d Dept 1997].) Furthermore, willful and contumacious conduct can be inferred by a party's "repeated failure to adequately respond to discovery demands and court directives to comply with the demands" (*Schwarts v. Suebsanguan*, 15 AD3d 565 [2d Dept 2005]).

In *Devito v. J & J Towing, Inc.*, the Appellate Division, Second Department upheld the Supreme Court's decision to strike the plaintiff's complaint when he had refused to submit to an examination before trial. In *Devito*, the plaintiff failed to comply with three court orders directing discovery as well as the deposition and the plaintiff did not comply. The Supreme Court struck the plaintiff's complaint and found that his conduct was both willful and contumacious. In the case at bar, the plaintiff has likewise failed to comply with at least three orders of this court spanning over a year and a half and to date, has not submitted to a deposition. Similar to *Devito*, this court finds the plaintiff's conduct not only willful and contumacious, but calculating in the frustration of the disclosure provisions of the

CPLR which are to be liberally construed (*Wood v. NYCHA*, 228 AD2d 235 [2nd Dept 1996]).

This court, however, is inclined to give the plaintiff one last additional chance to comply. Specifically, the plaintiff shall submit to an examination before trial within twenty days of being served with a copy of this order with notice of entry or the plaintiff's verified complaint shall be stricken and this case dismissed.

The defendant also moves for costs and sanctions to be imposed upon the plaintiff for his actions in this case. It is within the trial courts discretion to award costs and legal fees incurred in making discovery motions (*Golden v. Transport Taxi & Limousine Svc., Inc.* 80 AD2d 870 [2d Dept 1981]). That part of the motion is granted. The defendant's attorney is to submit an affidavit of costs to the court within fifteen (15) days.

Plaintiff's Cross-Motion

Without opposing the defendant's motion, the plaintiff cross-moves for an order striking the defendant's answer pursuant to CPLR §3126; and for an order to amend the plaintiff's complaint to include a cause of action under NY's Business Corporation Law §624, as the plaintiff alleges that he was not permitted to inspect the books and records of the defendant.

The defendant's argument for moving under CPLR § 3126 is that the "defendant has not produced one piece of paper requested pursuant to plaintiff's Request for Document Production." (*Affirmation in support of the cross-motion of Steven Ravnikar,* ~ 3). Article 31 of the CPLR does not require the production of every item demanded, it simply requires a response to discovery demands, which may include objections. If the response does include objections, a party may make a motion to compel pursuant to CPLR §3124.

Here the plaintiff argues that the defendant did not produce any document requested in its November 1, 2004 demand. However, the defendant served its response with objections on November 14, 2004 and again at the request of counsel on March 7, 2005. Plaintiff's counsel has never responded to any of the defendant's objections, nor did the plaintiff serve additional or revised demands. Additionally, the plaintiff did not make a motion to compel pursuant to CPLR § 3124. Asserting this argument, in response to the defendant's motion to strike the complaint, where no attempts have been made to remedy the situation by the plaintiff's attorney is frivolous and will not be tolerated by this court. Accordingly, that part of the plaintiff's motion is denied.

The plaintiff also cross-moved for an order granting leave to amend their complaint to include a cause of action under BCL § 624. This section states in pertinent part that "(b) Any person who shall have been a shareholder of record of a corporation upon at least five days' written demand shall have the right to examine in person or by agent or attorney, during usual business hours, its minutes of the proceedings of its shareholders and record of shareholders and to make extracts therefrom for any purpose reasonably related to such person's interest as a shareholder."

BCL §624(c) states that "An inspection authorized by paragraph (b) may be denied to such shareholder or other person upon his refusal to furnish to the corporation, its transfer agent or registrar an affidavit that such inspection is not desired for a purpose which is in the interest of a business or object other than the business of the corporation and that he has not within five years sold or offered for sale any list of shareholders of any corporation of any type or kind, whether or not formed under the laws of this state, or aided or abetted any person in procuring any such record of shareholders for any such purpose."

On June 10, 2004, a written demand seeking to inspect the defendant's books was submitted to the defendant. Thereafter, defendant's attorney responded to the demand and noted that the books would be made available to the plaintiff upon the furnishment of an affidavit pursuant to BCL § 624(c). "It is well settled that absent prejudice or surprise, leave to amend the pleadings is to be freely given" (*Faracy v. McGraw Edison Corp*., 229 A.D.2d 463, 464 [2nd Dept 1996]). However, if no cause of action has accrued in favor of the plaintiff, this court cannot possibly grant the plaintiff's motion. In this case, the plaintiff lacks a legitimate cause of action under the Business Corporation Law as he has not been denied access to the books and records of the defendant's corporation. Accordingly, this part of the plaintiff's motion is also denied.

Accordingly, it is hereby:

ORDERED, that the defendant's motion is granted to the extent that the defendant is to serve a copy of this order with notice of entry upon the plaintiff within 30 days; and it is further

ORDERED, that upon service of the order, the plaintiff shall appear for an examination before trial within 20 days of receipt of this order; and it is further

ORDERED, that if the plaintiff fails to appear at an examination before trial within the prescribed time limit, the plaintiff's verified complaint is stricken and this case is dismissed; and it is further

ORDERED, that the defendant's attorney shall submit an affidavit of costs associated with this motion within fifteen (15) days; and it is further

ORDERED, that the plaintiff's cross motion is denied in its entirety; and it is further

ORDERED, that the conference currently scheduled for October 27, 2005 is adjourned until **December 1, 2005.** All parties must appear in DCM 3 at 9:30 AM on that date for a compliance conference.

Enter,

Dated: September 15, 2005

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Joseph J. Maltese
Justice of the Supreme Court