

Lou Halperin's Stations, Inc. v Cross Petroleum Corp.

2011 NY Slip Op 33655(U)

July 14, 2011

Supreme Court, Nassau County

Docket Number: 011019-10

Judge: Timothy S. Driscoll

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**SUPREME COURT-STATE OF NEW YORK
SHORT FORM ORDER**

Present:

HON. TIMOTHY S. DRISCOLL
Justice Supreme Court

-----x
LOU HALPERIN'S STATIONS, INC.,

Plaintiff,

-against-

TRIAL/IAS PART: 20

NASSAU COUNTY

Index No: 011019-10

Motion Seq. No: 1

Submission Date: 5/24/11

**CROSS PETROLEUM CORP., MARK HENEIN
and MARIA HENEIN,**

Defendants.

-----x

The following papers have been read on this motion:

Notice of Motion, Affirmation in Support and Exhibits.....x,

This matter is before the Court for decision on the motion filed by Plaintiff Lou Halperin's Stations, Inc. ("Plaintiff") on May 10, 2011 and submitted on May 24, 2011. For the reasons set forth below, the Court denies the motion but directs that the deposition of Defendant Mark Henein shall take place, until completion, on August 2, 2011 at 9:30 a.m., and August 3, 2011 at 9:30 a.m. if necessary, at the Supreme Court of Nassau County, or on another date that is mutually agreeable with counsel for the parties on or before August 16, 2011. If Defendant Mark Henein fails to appear for his deposition as directed herein by the Court, the Court will entertain an application by Plaintiff, at the trial of this matter, for an Order precluding Defendants Cross Petroleum Corp. and Mark Henein from giving evidence at the trial of this matter.

A. Relief Sought

Plaintiff moves for an Order, pursuant to CPLR § 3126, precluding Defendants Cross Petroleum Corp. (“Cross”) and Mark Henein (“Mark”) from giving evidence at the trial of the above-captioned action in light of their failure to appear at a deposition, in violation of the Court’s Preliminary Conference Order dated November 24, 2010 (“PC Order”).

B. The Parties’ History

Counsel for Plaintiff affirms as follows in support of Plaintiff’s motion:

Plaintiff is a wholesale gasoline distributor, and Cross was a customer that operated a gas station and purchased fuel from Plaintiff. Mark, the sole owner of Cross, and Maria Henein (“Maria”) are individual guarantors of the fuel purchased by Cross. The Verified Complaint (“Complaint”) (Ex. 1 to Kruman Aff. in Supp.) seeks payment of unpaid invoices in the amount of \$208,163.24.

On November 5, 2010, an attorney (“Defendants’ Counsel”) filed a Notice of Appearance on behalf of the Defendants. On November 24, 2010, Plaintiff’s Counsel and Defendants’ Counsel appeared for a Preliminary Conference before the Court, at which time the Court signed the PC Order (Ex. 2 to Kruman Aff. in Supp.).

Pursuant to the PC Order, depositions of the parties (“Depositions”) were to take place on January 20, 2011. Due to the parties’ scheduling conflicts, the Depositions were adjourned to March 3, 2011. On March 3, 2011, Maria appeared for a deposition, and two employees of Cross were also deposed. Mark did not appear on that date, and Defendants’ Counsel provided no explanation for Mark’s absence.

On March 9, 2011, counsel for the parties appeared before the Court for a conference. At that time, it was agreed that Mark’s deposition would be conducted on April 5, 2011. On April 4, 2011, Defendants’ Counsel advised Plaintiff’s Counsel by telephone and email (Ex. 3 to Kruman Aff. in Supp.) that, due to Mark’s “ongoing back problems and upcoming medical procedure,” Mark would be unavailable for his Deposition, and Defendants’ Counsel would contact Plaintiff’s counsel by the end of the week regarding rescheduling the Deposition. To date, Defendants’ Counsel has not contacted Plaintiff’s Counsel to reschedule the Deposition, despite numerous efforts by Plaintiff’s Counsel to resolve this matter. Plaintiff’s Counsel sent a letter dated April 27, 2011 to Defendants’ Counsel (*id.* at Ex. 4) in which he advised Defendants’ counsel of Plaintiff’s intention to file the instant motion. Defendants’ Counsel did not respond

to that letter.

C. The Parties' Positions

Plaintiff submits that the Court should issue an Order, pursuant to CPLR § 3126, precluding Defendants Mark and Cross from giving evidence at the trial of this action, in light of Mark's failure to be deposed as directed by the Court.

Defendants have submitted no opposition or other response to the instant motion.

RULING OF THE COURT

CPLR § 3126 provides as follows:

If any party, or a person who at the time a deposition is taken or an examination or inspection is made is an officer, director, member, employee or agent of a party or otherwise under a party's control, refuses to obey an order for disclosure or wilfully fails to disclose information which the court finds ought to have been disclosed pursuant to this article, the court may make such orders with regard to the failure or refusal as are just, among them:

1. an order that the issues to which the information is relevant shall be deemed resolved for purposes of the action in accordance with the claims of the party obtaining the order; or
2. an order prohibiting the disobedient party from supporting or opposing designated claims or defenses, from producing in evidence designated things or items of testimony, or from introducing any evidence of the physical, mental or blood condition sought to be determined, or from using certain witnesses; or
3. an order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or any part thereof, or rendering a judgment by default against the disobedient party.

The nature and degree of the penalty to be imposed pursuant to CPLR § 3126 lies within the sound discretion of the trial court. *Workman v. Town of Southampton*, 892 N.Y.S.2d 481, 482 (2d Dept. 2010), quoting *McArthur v. New York City Hous. Auth.*, 48 A.D.3d 431 (2d Dept. 2008). The court has broad discretion to supervise disclosure to prevent unreasonable annoyance, expense, embarrassment, disadvantage or other prejudice. *Eber Bros. v. Ribowsky*, 266 A.D.2d 499, 500 (2d Dept. 1999).

The Court is concerned that Mark's Deposition has not taken place, and that Defendants have not provided the Court with an explanation for Mark's failure to be deposed. The Court, however, declines to grant Plaintiff's motion at this juncture, in part due to Defendants' Counsel's reference to Mark's medical condition as discussed *supra*. Accordingly, the Court

denies the motion but directs that the deposition of Defendant Mark Henein shall take place, until completion, on August 2, 2011 at 9:30 a.m., and August 3, 2011 at 9:30 a.m. if necessary, at the Supreme Court of Nassau County, or on another date that is mutually agreeable with counsel for the parties on or before August 16, 2011. If Defendant Mark Henein fails to appear for his deposition as directed herein by the Court, the Court will entertain an application by Plaintiff, at the trial of this matter, for an Order precluding Defendants Cross Petroleum Corp. and Mark Henein from giving evidence at the trial of this matter.

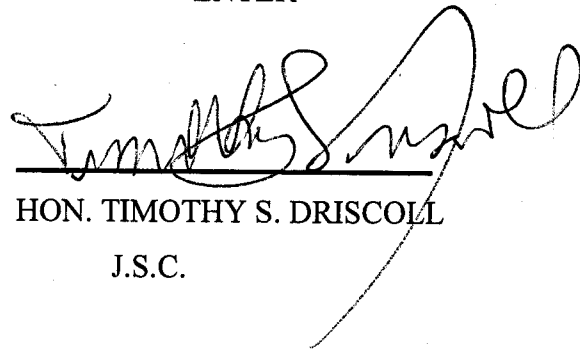
All matters not decided herein are hereby denied.

This constitutes the decision and order of the Court.

The Court reminds counsel for the parties of their required appearance before the Court on September 15, 2011 at 9:30 a.m.

DATED: Mineola, NY
July 14, 2011

ENTER



HON. TIMOTHY S. DRISCOLL
J.S.C.

ENTERED
JUL 22 2011
NASSAU COUNTY
COUNTY CLERK'S OFFICE