

Rafaeli v Day A
2012 NY Slip Op 32699(U)
October 23, 2012
Supreme Court, New York County
Docket Number: 602905/07
Judge: Joan A. Madden
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: **HON. JOAN A. MADDEN**

PART 11

Index Number : 602905/2007

RAFAELI, BENJI BEN ZION

VS.

DAY A

SEQUENCE NUMBER : 001

STRIKE ANSWER

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

this motion to/for _____

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: ☒ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion *to strike defendants*
Answer is determined in accordance with
the annexed decision and order.

FILED

OCT 26 2012

COUNTY CLERK'S OFFICE
NEW YORK

Dated: October 23, 2012

[Signature]
J.S.C.

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

☐ SUBMIT ORDER/ JUDG.

☐ SETTLE ORDER/ JUDG.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 11

-----X

BENJI BEN ZION RAFAELI,

INDEX NO. 602905/07

Plaintiff,

-against-

DAY A and JOSHUA SHLOMY a/k/a
YEHOASHUA SHLOMY.

Defendants.

-----X

JOAN A. MADDEN, J.:

Plaintiff's motion to strike defendants' answer for failure to comply with court orders and for failure to appear, is granted to the extent indicated below, and defendants' cross-motion to compel is denied.

Since February 10, 2011, this motion has been adjourned approximately ten times, in large part due to defendants' requests, including a motion by defendants' counsel to be relieved. In a decision dated November 21, 2011, Daniella Levi & Associates, P.C. (the "Daniella firm"), the second firm that has appeared on defendants' behalf, was relieved, and the action adjourned to January 12, 2012 for defendant Joshua Shlomy to appear *pro se* or by counsel, and for defendant Day A to appear by counsel. The order states that non-appearing defendants would be held in default.

On January 12, 2012, with permission of this court, prior counsel for defendants, the Daniella firm, appeared by telephone and asked for additional time for defendants to appear. In

considering this request, the court noted that plaintiff's counsel argued that defendants had failed to appear fourteen times and that the record reflected a history of defendants' failure to appear. Notably, the transcript of January 6, 2011 reflects that this court found both defendants in default for failure to appear on that date, and the November 18, 2010 order directed Day A to appear by counsel or be held in default. Notwithstanding such history, the court granted an adjournment until March 8, 2012, marking the adjournment final. Moreover, the order provided that if defendants Day A or Joshua Shlomy failed to appear, the non-appearing defendant or defendants would be in default.

Day A failed to appear on March 8, 2012. On March 7, 2012, Joshua Shlomy sent an email alleging that one of the banks in Israel where he resides "had applied to the court in Israel to prevent me from leaving Israel. Please have attached Israel court decision." Mr. Shlomy sent a copy of a document written in Hebrew, and requested that he participate in the March 8, 2012 appearance by conference call or Skype.

Based on Joshua Shlomy's history of failure to appear in this action, his discharge of two attorneys, and the lack of significant discovery in this 2007 index number, where a preliminary conference was held on October 2, 2008, the court concludes that defendants' actions have been intended to delay and obstruct this matter from proceeding and that defendant Shlomy's request to appear by telephone or Skype shall not be granted. Significantly, Mr. Shlomy has not presented any proof that an Israeli court order prevents him from leaving Israel, as the document he submits is illegible, is not translated into English and is not certified as authentic; nor on its face does it appear to be an order of a court.

It is undisputed that defendant Day A is in default by failing to appear by an attorney, and has consistently failed to comply with numerous court orders directing it to appear for discovery conferences. Defendant Day A's willfulness may be inferred from such conduct, warranting the striking of its answer pursuant to CPLR 3126(3) and Rule 202.27 of the Uniform Rules for Trial Courts. See Grgurovic v. Controlled Combustion Co., 82 AD3d 669 (1st Dept 2011); Youni Gems Corp v. Bassco Creations Inc., 70 AD3d 454 (1st Dept), lv app dismiss 15 NY3d 863 (2010); Johnson v. Sam Minskoff & Sons, Inc., 287 AD2d 233 (1st Dept 2001); Lopez v. Imperial Delivery Service, Inc., 282 AD2d 190 (2nd Dept), lv app dismiss 96 NY2d 937 (2001). Thus, plaintiff's motion to strike defendant Day A's answer is granted, and plaintiff is entitled to a default judgment against defendant Day A, and an inquest and assessment of damages.

As to defendant Shlomy, the court order dated January 12, 2012 warned that he would be in default if he failed to appear on March 8, 2012, and thus, the court finds that defendant Shlomy has defaulted. Even though defendant Shlomy sent an email to the court on March 7, 2012, as discussed above, he failed submit sufficient documentary proof to support his claimed excuse that an order of the Israeli court prevented him from leaving the country. Defendant Shlomy's wilfulness may be inferred from his consistent failure to comply with numerous court orders directing him to appear for discovery conferences, and such conduct warrants the striking of his answer pursuant to CPLR 3126(3) and Rule 202.27 of the Uniform Rules. See Grgurovic v. Controlled Combustion Co., *supra*; Youni Gems Corp v. Bassco Creations Inc., *supra*; Johnson v. Sam Minskoff & Sons, Inc., *supra*; Lopez v. Imperial Delivery Service, Inc., *supra*. Thus, plaintiff's motion to strike defendant Shlomy's answer is granted, and plaintiff is entitled to a

default judgment against defendant Shlomy, and an inquest and assessment of damages.

In view of the foregoing, defendants' cross-motion to compel discovery is denied.

Accordingly, it is

ORDERED that plaintiff's motion is granted, and the answer of defendants Day A and Joshua Shlomy a/k/a Yehoshua Shlomy is stricken, and plaintiff is entitled to a default judgment against said defendants, and an inquest and assessment of damages; and it is further

ORDERED that defendants' cross-motion is denied; and it is further

ORDERED that on or before November 30, 2012, plaintiff shall serve a copy of this order with notice of entry, a note of issue and a statement of readiness upon the Clerk of the Trial Support Office (Room 158), and shall pay the proper fees, if any, and said Clerk shall there upon place this action on the appropriate trial calendar for the inquest and assessment herein above directed; and it is further

ORDERED that if plaintiff fails to comply with the immediately preceding paragraph, the action will be dismissed.

The Court is mailing copies of this decision and order.


DATED: October 23, 2012

ENTER:

FILED

OCT 26 2012

**COUNTY CLERK'S OFFICE
NEW YORK**



J.S.C.