

**Morillo v Bear Gallery, Inc.**

2017 NY Slip Op 31631(U)

August 2, 2017

Supreme Court, New York County

Docket Number: 161550/2013

Judge: Robert D. Kalish

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**SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY**

**PRESENT: Hon. Robert D. Kalish  
*Justice***

**PART 29**

**Michelle L. Morillo,**

**INDEX NO. 161550/2013**

**Plaintiff**

**SEQ NO. 002**

**- v -**

**Bear Gallery, Inc. D/b/a Hubert Gallery,  
Gregory L. Hubert, in his corporate capacity  
as CEO of Bear Gallery Inc. and in his  
individual capacity, and Julie Hubert, in her  
corporate capacity as President of Bear  
Gallery Inc. and in her individual capacity,**

**DECISION AND ORDER**

**Defendants**

The following papers, numbered 1 were read on the Defendants' motion to strike the Plaintiff's verified complaint and / or to compel discovery.

**Notice of Motion -----**

**No(s). 1**

**— Affirmation — Exhibits — Memorandums of Law**

Motion by Defendant pursuant to CPLR 3126(3) to strike the Plaintiff's verified complaint for willful failure to comply with discovery demands or, in the alternative, for an order pursuant to CPLR §§ 3126(3) and 3124 striking Plaintiff's verified complaint unless the Plaintiff fully responds to the Defendants' discovery demands is granted to the extent as follows:

In the underlying action, the Plaintiff alleges causes of action for breach of contract, quantum meruit, unjust enrichment and pursuant to Labor Law §§ 190, 191, 193 and 215 arising from the Plaintiff's alleged employment with Bear Gallery Inc. The Plaintiff filed a summons and complaint on or about December 16, 2013 and the Defendants served their answer on or about February 10, 2014.

The Defendants argue in support of the instant motion that the underlying action proceeded with discovery and that all of the parties' depositions were completed on or about December 14, 2015. Defendants argue that to date, the Plaintiff has not provided the Defendants with copies of the deposition transcripts.

On February 22, 2015, the parties appeared for a compliance conference before the Honorable Justice Hagler. Justice Hagler issued a Compliance conference order indicating that post-EBT demands were outstanding and requiring that "[a]ll parties shall serve post-EBT demands within 20 days, and all parties will respond within 30 days of receipt of demands."

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

The Defendants attach with their moving papers a copy of a Notice for Discovery and Inspection dated March 3, 2016.<sup>1</sup> The Defendants argue that the Plaintiff did not respond to said discovery demands within 30 days.

On May 2, 2016 the parties appeared before Justice Hagler and entered into a so-ordered stipulation wherein the Plaintiff was required to respond to the Defendants' March 3, 2016 Notice of Discovery and Inspection within 45 days of May 2, 2016, to the extent that the Plaintiff had not already done so. Defendants argues that the Plaintiff again failed to respond.

On August 1, 2016, the parties appeared before Justice Hanger, who issued a compliance conference order again requiring that the Plaintiff respond to the Defendants' March 3, 2016 discovery request within 30 days.

Thereafter, the matter was referred to this Court and the parties appeared for a compliance conference before this Court on December 13, 2016. On said date, this Court discussed with the parties the Defendants' specific outstanding demands and directed the Plaintiff to respond to certain specific discovery requests within 30 days, and other specific discovery requests within 14 days. In addition, the Court struck the note of issue that the Plaintiff had filed in the underlying action.

On or about April 10, 2017, the Defendants served interrogatories upon the Plaintiff.

On April 11, 2017, this Court held another conference in the underlying action, at which time only the Defendants' attorney was present. Plaintiff's attorney was not present, however, the Court called the attorney and conferenced the case with Plaintiff's attorney via telephone. This Court was informed that there were some settlement discussions pending in the underlying action. This Court indicated to Plaintiff's attorney that if the case was not settled, the Court's prior discovery order must be complied with. The Court adjourned the matter to June 13, 2017 and informed Plaintiff's attorney that he had an additional 30 days to respond to the Defendants' prior discovery requests.

On June 13, 2017, the parties appeared before the Court, and Plaintiff's attorney indicated that he had not responded to the Defendants' prior discovery requests as ordered by the Court. At said conference, Plaintiff's counsel was informed that Defendants had made the instant motion to strike the complaint. The Court directed Plaintiff's attorney to respond to the motion, believing that the Plaintiff would respond to the motion by including the appropriate responses to Defendants' prior discovery demands.

It would appear that Plaintiff's attorney has not responded to the instant motion, nor has Plaintiff provided discovery responses as ordered by this Court.

The Defendants attach with their moving papers an affirmation of good faith.

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<sup>1</sup> The Court notes that the Defendants include with said Notice of Discovery and Inspection an affirmation of service that does not refer to the Notice of Discovery and Inspection, but instead refers to an "Affirmation in Opposition to Summary Judgment and Affidavit". However, there is no dispute that the Defendants served the Plaintiff with Notice of Discovery and Inspection, and the subsequent procedural history confirms that the Defendants served the Plaintiff with the Notice of Discovery and Inspection.

CPLR 3126 reads as follows:

Penalties for refusal to comply with order or to disclose

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.

“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. Indeed, the Legislature, recognizing the need for courts to be able to command compliance with their disclosure directives, has specifically provided that a ‘court may make such orders ... as are just,’ including dismissal of an action” (*Kihl v Pfeffer*, 94 NY2d 118, 123 [1999] *citing* CPLR 3126).

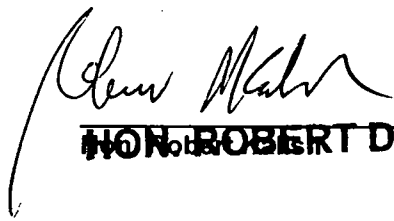
In the underlying action, the Plaintiff has failed to comply with multiple discovery orders issued by two different justices over a span of two years. Further, the Plaintiff has been given repeated opportunities and extensions of time to respond to the Defendants’ discovery demands. Under these circumstance, due to the Plaintiff’s repeated failures to comply with prior orders of the Court and the Plaintiff’s failure to respond to the instant motion, the Court finds that striking the Plaintiff’s pleadings and dismissing the underlying action is appropriate.

Accordingly it is hereby

ORDERED that the Plaintiff's underlying action is dismissed in its entirety and with prejudice.

The foregoing constitutes the Order and Decision of the Court.

Dated: August <sup>✓</sup>, 2017  
New York, New York

  
**HON. ROBERT D. KALISH** JSC  
J.S.C.

- 1. Check one: .....  CASE DISPOSED  NON-FINAL DISPOSITION
- 2. Check as appropriate: MOTION IS:  GRANTED  DENIED  GRANTED IN PART  OTHER
- 3. Check as appropriate: .....  SETTLE JUDGEMENT  SUBMIT ORDER  
 DO NOT POST  FIDUCIARY APPOINTMENT  REFERENCE