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

PRESENT: HON. RICHARD B. LOWE, III Justice PART 56

YM Data

- v -

Potato Farms

INDEX NO. 601004/08

MOTION DATE 6/1/10

MOTION SEQ. NO. 009

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for _____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ___ Yes X No

Upon the foregoing papers, it is ordered that this motion

MOTION IS DECIDED IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION.

Dated: 10/14/10

HON. RICHARD B. LOWE, III
J.S.C.

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

Check one: X FINAL DISPOSITION ___ NON-FINAL DISPOSITION

Check if appropriate: ___ DO NOT POST

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

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G.M. DATA CORP. D/B/A GMDC BUSINESS CONSULTANTS,

Plaintiff,

Index No. 601004/2008

-against-

POTATO FARMS, LLC D/B/A AMISH MARKET D/B/A ZEYTUNA; HYDE PARK GOURMET; D/B/A AMISH MARKET; WILTON FARMS, LLC D/B/A ZEYTINIA GOURMET MARKET, AND ATLAS PARK ZEYTINIA, LLC D/B/A AMISH FINE FOODS,

Defendants.

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Hon. Richard B. Lowe, III:

Plaintiff brings this order to show cause seeking the entry of a proposed order which strikes the Defendants' Answer, dismisses the Defendants' affirmative defenses, grants Plaintiff a default judgment as to liability against Defendants, jointly and severally on Plaintiff's first, second, third and fourth causes of action, and sets this matter down for an inquest.

Background

The grounds for this request are alleged violations by the Defendants of this court's February 25, 2010 order (the "Order") calling for Defendants' production of various discovery. Because of the extent of the violations which led to the Order, it contained self executing language whereby non compliance would result in a striking of the Defendants' answer. On April 1, 2010, this court's Special Master directed the Plaintiff to submit a proposed order striking the Defendants' answer after hearing and addressing the alleged violations of the Order

at a compliance conference. However, despite the fact that the Order was self-executing, aware of the preference that matters be resolved on the merits, this court directed an additional motion to be made in order to again review the record.

In the Order, this court found that the Defendants had "violated [a] court-ordered Stipulation by twice failing to appear for the deposition of Vitale, failed to appear at subsequent conferences to address their defaults concerning the deposition of Vitale, and failed to obey an order for disclosure" (*Brown Affidavit Ex A p 4).* The Order granted a motion filed by Plaintiff and the Defendants were directed to (1) produce Vitale for a deposition; (2) produce all communications between Defendants' counsel and Vitale concerning Vitale's deposition and the status of his legal representation since August 20, 2009; (3) and produce all relevant bank account authorizations and identifications of all Defendants. The Order was to be complied with within 20 days of service of the Order with notice of entry.[1] The Order also stated that "failure to do so shall result in striking of the defendants' answer and entry of a default judgment (*Brown Affidavit Ex A p 5).* Lastly, the Defendants were also put on notice that no further violations of the orders of the court would be tolerated (*Id at p 4).*

To date, since entry of the Order, an additional deposition of Vitale has not been taken, additional bank account authorizations have not been produced; and only a limited amount of additional communications regarding Vitale's legal representation have been provided.

Discussion

In the Order, the Defendants were reminded of the Court of Appeals statement that "[i]f

[1] Defendants were served with notice of entry on March 2, 2010 thereby requiring compliance no later than March 22, 2010.

the credibility of court orders and the integrity of our judicial system are to be maintained, a litigant cannot ignore court orders with impunity" *(See Order dated February 25, 2010, quoting Kihl v Pfeffer* 94 NY2d 118123 [1999]). While recently citing the holding in *Kihl*, the Appellate Division has recognized that

> "[a]lthough actions should be resolved on the merits whenever possible, the efficient disposition of cases is not advanced by hindering the ability of the trial court to supervise the parties who appear before it and to ensure they comply with the court's directives"

(*Fish & Richardson, P.C. v Schindler* 75 AD3d 219 [1 st Dept 2010]). Continued non compliance with court orders gives rise to an inference of wilful and deliberate behavior (*Jones v Green* 34 AD3d 260 [1st Dept 2006]).

Since this action was initiated, numerous hours have been spent by this court addressing the Defendants' repeated failures to produce court ordered discovery. As the Order had previously discussed, such failures by Defendants include non appearances for depositions, failures to produce various documents, and failure to send counsel with authority to scheduled appearances. Most recently, in compliance with the terms of the self executing Order, this court's Special Master directed the Plaintiff's to submit a proposed order striking the answer because he determined that the Defendants failed to comply with the Order's terms.

With respect to the failures to comply with the Order, the Defendants acknowledge that Vitale's deposition has not been taken since the Order's entry. The Defendant explains that after a hearing was held on October 29, 2009, while the underlying motion was sub judice, the deposition of Vitale was taken on two full days in November of 2009. Therefore, according to

Defendant, there is no need to produce Vitale again pursuant to the subsequently issued Order because the Plaintiff had an adequate amount of time with the witness.

While Defendants may have produced Vitale in November, 2009 for a deposition, they did so knowing that various documents which were subject of the motion heard on October 29, 2009 were being withheld. Plaintiff conducted the deposition, yet reserved its right to continue it after production of additional documents which had been requested, some of which were the subject of the underlying motion (*Brown Affidavit Ex D* p 9-15). Plaintiff reserved its rights because at the time of the taking of the deposition, a great number of documents had not yet been produced. Indeed, during the November 2009 deposition, Vitale testified that he had lost his computer and all of the relevant documents on it.[2] Defendants did not object to the Plaintiff's reservation of rights.

After the Order was issued in February 2010, it was not until a compliance conference was held by this court on April 1, 2010, that the defendants produced *for the first time* limited and partially responsive emails between Vitale and Defendants' counsel regarding the status of Vitale's legal representation since August 20, 2009. Defendants' counsel was well aware that this production was well past the March 22, 2010 deadline set within the Order as it acknowledged in a letter to the court dated March 17, 2010 that "compliance with the Order is not required until March 22, 2010" (*See letter from Daniel Gershberg, March 17, 2010, electronically filed with the court as Doc. No. 79).*

The Defendants have also failed to produce the relevant bank account identifications and

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[2] This alleged loss occurred after the Plaintiff had provided written notice to the Defendants dated January 25, 2008 for the preservation of all relevant data and information (*Brown Affirmation* p 2 FN 2).

authorizations for all Defendant accounts as required by the Order. It was only at the April 1, 2010 compliance conference that Defendants suggested there were no additional accounts. However, as of the date of the conference, Defendant failed to either produce the information, if any, or an affidavit that there were no additional accounts. The Defendants made it necessary for the Special Master to again direct a response in the form of an affidavit.

While the Defendants expect the Court to accept their assertions that "Plaintiff [makes] numerous, baseless claims that Defendants violated various Orders and failed to provide outstanding discovery" (*Gershburg Affirmation* ¶ 8), they fail to recognize that this Court has spent hours addressing these claims, found them to have merit, and has witnessed the Defendants' repeated failures.[3] Now, Defendants have taken it upon themselves to determine that compliance with the Order direcing an additional deposition of Vitale is not necessary because he had been deposed in November 2009. They expect their representations that their actions were warranted because they purportedly fully complied with the Order even before it had been issued to be accepted. Defendants also want the Court to agree that Plaintiff got all that was needed via production of Vitale for a deposition even though there had not been a full document production.

In all, to date, subsequent to the issuance of the Order the Defendants have failed to (1) produce Vitale for a deposition; (2) make a timely and full production of communications between Vitale and Defendants' counsel regarding his representation; and (3) produce bank

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[3] The Defendants also assert that it would be improper to execute the proposed order while an appeal of the Order is pending (Gershburg Affirmation ¶ 12). However, the Defendants do not assert that they sought or received any sort of interim relief from the Appellate Division staying enforcement of the Order.

account identifications and authorizations.

This Court is aware that it is always the preference that a matter be decided on its merits and that "[e]ven in cases where the proffered excuse is less than compelling, there is a strong preference in our law that matters be decided on their merits" (*See Delgado v City of New York* 47 AD3d 550 [1st Dept 2008] *quoting Caterine v Beth Israel Med. Ctr.*, 290 AD2d 90,91 [1 st Dept 1999]). However, after numerous conferences and hours being spent by this court issuing directives to Defendants to comply with court orders, the Defendants conduct can only be viewed as wilful and contumacious. This Court does not accept Defendants attempts to argue the appropriateness of their refusal to produce Vitale for an additional deposition. The refusal is nothing less than another violation of an order of this court. Furthermore, the failure to timely produce any of the documents directed by the Order is an additional violation. The fact that there had only been a limited production made on April 1, 2010, *after* the March 22, 2010 deadline, despite the clear warnings in the Order that full compliance was mandated is an affront to this court and the integrity of its orders.

Where a discovery order expressly states that it must be complied with by a date certain or the pleadings will be stricken, then it becomes an absolute when a party fails to comply within the stated time period (*McKanic v Amigos del Museo del Bario* 74 AD3d 639 [1st Dept 2010]). The court again notes that the Order was self executing and striking the answer was warranted even without this additional motion practice. Regardless, even if the order had not been self executing, the Defendants' willful and bad faith conduct warrants striking the answer.

Conclusion

Therefore, based on the foregoing, it is hereby

ORDERED that the motion to strike the Defendants' answer and to dismiss the Defendants' affirmative defenses is granted and the Plaintiff is awarded judgement as to liability against Defendants, jointly and severally on Plaintiff's first, second, third, and fourth causes of action and it is further

ORDERED that the issue of damages is hereby referred to a Special Referee to hear and determine.

It is directed that a copy of this order with notice of entry be served upon the clerk of Motion Support who shall set this matter down before the Referee.

Dated: October 14, 2010

ENTER:

HON. RICHARD B. LOWE, III

J.S.C.