

Lazar Sanders Thaler & Assoc., LLP v Lazar
2013 NY Slip Op 33998(U)
October 9, 2013
Supreme Court, Nassau County
Docket Number: 3736/12
Judge: Denise L. Sher
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SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK

PRESENT: HON. DENISE L. SHER
Acting Supreme Court Justice

LAZAR SANDERS THALER & ASSOCIATES, LLP,

Plaintiff,

- against -

TRIAL/IAS PART 33
NASSAU COUNTY

Index No.: 3736/12
Motion Seq. No.: 04
Motion Date: 08/27/13

TERRY LAZAR, LAZAR BRODER, LLP, PURES SAFE
WATER SYSTEMS, INC. f/k/a WATER CHEF, INC.,
AMERICANA PROPERTIES, MITCH MEISNER d/b/a
MEISNER GALLERY, SPORTS IMAGE
INTERNATIONAL, LLC, BROOKLYN AMBULATORY
CENTER, AMBULATORY SURGERY PHYSICIANS
ASSOC., AMERICAN FRIENDS OF TZOHAR, DAVID
JOHANSEN, ISLAND BOYS MOMBO, INC., MOSHE
GRANIT, NAOMI GRANIT, GRANIT MEDICAL
INNOVATIONS, LLC, DR. ROBERT HAAR and
RHA REALTY,

Defendants.

The following papers have been read on this motion:

	Papers Numbered
Notice of Motion, Affirmation and Exhibits	1
Affirmation in Opposition and Exhibits	2
Reply Affirmation and Exhibits	3

Upon the foregoing papers, it is ordered that the motion is decided as follows:

Plaintiff moves, pursuant to CPLR § 3216 and NYCRR § 130-4.1, for an order striking the Answers of defendants Terry Lazar, Lazar Broder LLP, Puresafe Water Systems Inc. f/k/a Water Chef, Mitch Meisner d/b/a Meisner Gallery, Brooklyn Ambulatory Center, Ambulatory

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Surgery Physicians Associates, Robert Haar and RHA Realty Associates for failing to (a) comply with the Preliminary Conference Order in this action dated September 24, 2012, the Court's February 28, 2013 Order and the Court's April 26, 2013 So Ordered Stipulation and (b) respond to plaintiff's Demand for a Bill of Particulars dated July 31, 2012 and plaintiff's Notice for Discovery and Inspection dated July 31, 2012; and move for an order awarding attorneys' fees, costs and sanctions. Defendants Terry Lazar, Lazar Broder LLP, Puresafe Water Systems Inc. f/k/a Water Chef, Mitch Meisner d/b/a Meisner Gallery, Brooklyn Ambulatory Center, Ambulatory Surgery Physicians Associates, Robert Haar and RHA Realty Associates oppose the motion.

The instant action was commenced by the filing and service of a Summons and Verified Complaint on or about March 22, 2012. *See* Plaintiff's Affirmation in Support Exhibit A. Issue was joined by the aforementioned defendants on or about June 21, 2012. *See* Plaintiff's Affirmation in Support Exhibit B.

On July 31, 2012, plaintiff served its Demand for a Verified Bill of Particulars on the aforementioned defendants' counsel. *See* Plaintiff's Affirmation in Support Exhibit C. Also on July 31, 2012, plaintiff served the aforementioned defendants' counsel with its first Notice for Discovery and Inspection. *See* Plaintiff's Affirmation in Support Exhibit D. Counsel for plaintiff submits that, notwithstanding the requirements of CPLR §§ 3042 and 3120, the aforementioned defendants have failed to reply to either plaintiff's Demand for a Verified Bill of Particulars or its Notice for Discovery and Inspection.

Counsel for plaintiff further submits that, on September 24, 2012, the aforementioned defendants' counsel failed to appear for the scheduled Preliminary Conference in this matter.

Counsel for plaintiff asserts, "I nevertheless contacted defendants' non appearing counsel, Mark Goldstein, who advised that he was unable to attend the Preliminary Conference. With Mr. Goldstein's consent, we agreed upon dates for the Preliminary Conference Order. Among other things, the order provided that the defendants would serve their responses to Plaintiff's discovery demands and Demand for Bill of Particulars on or before November 22, 2012." *See* Plaintiff's Affirmation in Support Exhibit E. However, the aforementioned defendants failed to serve their Verified Bill or Particulars or reply to plaintiff's discovery demands, and, as of date, have continued to fail to do so.

On February 28, 2013, this Court issued a Decision and Order relieving Mark Goldstein, Esq. as counsel for the aforementioned defendants. Said Decision and Order stated that it was "**ORDERED**, that all proceedings in this matter shall be and are stayed until April 1, 2013, and all parties shall appear in IAS Part 33, on April 1, 2013, at 9:30 a.m., at which time this matter shall proceed. The Certification Conference scheduled for March 19, 2013 is hereby adjourned to the April 1, 2013 date. **ORDERED**, that upon the failure of the defendants to appear on April 1, 2013, at 9:30 a.m., defendants' Answer shall be stricken." *See* Plaintiff's Affirmation in Support Exhibit I.

Counsel for plaintiff submits that only defendant Terry Lazar appeared in court on April 1, 2013, at which time he requested additional time to retain new counsel. On April 17, 2013, Steven G. Legum, Esq. served a Notice of Appearance on behalf of defendants Terry Lazar and Lazar Broder LLP. On April 25, 2013, Steven G. Legum, Esq. served a second Notice of Appearance on behalf of defendants Robert Haar, RHA Realty Associates LLC, Mitch Meisner, Brooklyn Ambulatory Center, Ambulatory Surgery Physicians Assoc. and Pure Safe Water

Systems. See Plaintiff's Affirmation in Support Exhibit J.

On April 26, 2013, Steven G. Legum, Esq., appearing for the aforementioned defendants, entered into a Court Ordered Stipulation stating, amongst other things, "[a]ll defendants appearing herein shall comply with all outstanding discovery requests and demand for B/P on or before May 10, 2013." See Plaintiff's Affirmation in Support Exhibit L.

Counsel for plaintiff argues that, "[d]espite the terms of the April 26, 2013 Court Ordered Stipulation and my continued requests to Mr. Legum for his client's (*sic*) compliance with Plaintiff's discovery requests the Lazar Defendants have continued to fail to comply with Plaintiff's outstanding discovery requests and demand for bill of particulars."

Counsel for plaintiff adds that "[o]n May 3, 2013, Mr. Legum sent me a letter stating that he was sending me 'all records in Terry Lazar's possession.' However, the records sent by Mr. Legum were not responsive to Plaintiff's discovery requests, and did not address the relevant issue, i.e. the accounts receivable due the Plaintiff from the Lazar Defendants, and Terry Lazar's obligations to collect and pay over to Plaintiff those receivables under the parties December 31, 2008 separation agreement. Moreover, at no time has Lazar or any of the Lazar Defendants served Plaintiff with a written response to Plaintiff's discovery requests of a Bill of Particulars, as required by the April 26, 2013 So Ordered Stipulation."

Counsel for plaintiff contends that "[s]ince Mr. Legum's belated appearance in this action on behalf of the Lazar Defendants, this matter has appeared on the Court's calendar for a certification conference no fewer than six (6) times. The Lazar Defendants have violated the April 26, 2013 Court Ordered Stipulation, have continued to fail to respond to Plaintiff's July 31, 2012 Discovery Requests and Demand for Bill of Particulars, in further violation of the preliminary (*sic*) Conference Order, have not made themselves available for their depositions as

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required by the Preliminary Conference order (*sic*), and have required Plaintiff's counsel to appear at a myriad of unproductive and wasteful compliance conferences."

In opposition to the motion, counsel for defendants Terry Lazar, Lazar Broder LLP, Puresafe Water Systems Inc. f/k/a Water Chef, Mitch Meisner d/b/a Meisner Gallery, Brooklyn Ambulatory Center, Ambulatory Surgery Physicians Associates, Robert Haar and RHA Realty Associates submits "[d]efendant Lazar has now provided formal responses to the outstanding discovery. Annexed hereto as exhibit 'A' is such defendant's bill of particulars; annexed hereto as exhibit 'B' is the response to the 3120. The only discovery now outstanding is that served by the defendants upon the plaintiff, exhibit 'C,' annexed hereto." *See* Defendants Terry Lazar, Lazar Broder LLP, Puresafe Water Systems Inc. f/k/a Water Chef, Mitch Meisner d/b/a Meisner Gallery, Brooklyn Ambulatory Center, Ambulatory Surgery Physicians Associates, Robert Haar and RHA Realty Associates' Affirmation in Opposition Exhibits A, B and C.

In reply to the opposition, counsel for plaintiff argues, "[o]n August 27, 2013, the return date of this motion, counsel for the Lazar Defendants submitted a three paragraph Affirmation, a purported Bill of Particulars and a purported Responses to Plaintiff's Demand for Discovery and Inspection of Documents. However, the Lazar Defendants do not submit any opposition to the motion, and nowhere do they respond to the substance of Plaintiff's Motion to Strike, or offer any excuse of justification for their failure to timely respond to Plaintiff's discovery requests or the Court's prior orders directing them to do so. Moreover, the Lazar Defendants continue to fail to produce any of the requested documents relating to the main issue in this action, i.e., (a) the amounts paid by the Lazar Defendants to Terry Lazar and/or Lazar Broder for work performed, billed and owing to Plaintiff, and (b) Terry Lazar's failure to pay to Plaintiff those amounts as required by the parties December 31, 2008 agreement. As demonstrated below, at least two Lazar

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Defendants, Americana Property and Mitch Meisner, were billed by Lazar Broder for fees due to LST and paid Terry Lazar those fees. Nevertheless, the defendants fail to produce any documents relating to any of those payments. In fact, the only documents produced by the Lazar Defendants are a regurgitation of Plaintiff's own bank statements already in the possession of Plaintiff. Of Plaintiff's forty three (43) specific requests for documents, the Lazar Defendants fail to produce any documents in response to forty two (42) of the requests. Instead of submitting an affirmation in opposition to Plaintiff's motion seeking to strike their answer and for sanctions and costs, Defendants submit a deficient, last minute and untimely response to Plaintiff's discovery requests. More importantly, the defendant's response fails to produce any of the documents requested by Plaintiff regarding what fees were billed by Lazar Broder to LST former clients and what happened to the payments made by those clients."

Counsel for plaintiff contends that "[i]n light of the Lazar Defendants failure to (a) respond or in any way object to Plaintiff's motion to strike; (b) produce documents known to be in their possession; and (c) falsely state that they do not possess the requested documents (as demonstrated by the payments received by Lazar from Americana and Meisner), the Lazar Defendants' answer should be stricken and the Court should impose sanctions for Defendants' frivolous conduct, including, specifically, the awarding of attorney fees incurred by Plaintiff to make this motion, and monetary sanctions for defendants' continuing failure to abide by produce (*sic*) the requested documents, abide by the Court's orders, and falsely stating that they do not possess the requested documents when, as demonstrated, they in fact do."

CPLR § 3126 provides the "[p]enalties for refusal to comply with order or to disclose." It reads, "[i]f 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

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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 imposition of sanctions pursuant to CPLR § 3126 is a determination to be made within the sound discretion of the Court. Although the Court has broad discretion in determining the appropriate sanction pursuant to CPLR § 3126, the "general rule is that a court should only impose a sanction commensurate with the particular disobedience it is designed to punish and go no further." *See Rossal-Daub v. Walter*, 58 A.D.3d 992, 871 N.Y.S.2d 751 (3d Dept. 2009) *citing Landrigen v. Landrigen*, 173 A.D.2d 1011, 569 N.Y.S.2d 843 (3d Dept. 1991).

Pursuant to CPLR § 3126 when a party refuses "to obey an order for disclosure or willfully 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..." CPLR § 3126(3) authorizes the court to strike pleadings or grant a default judgment against the disobedient party. The court may certainly impose sanctions or strike pleadings where a party fails to provide disclosure pursuant to an order. *See SIEGEL, PRACTICE*

COMMENTARIES, 3126:5. It is only proper to strike a pleading, however, where it appears that the failure to obey the court's order is "deliberate and contumacious." See *Sindeband v. McCleod*, 226 A.D.2d 623, 641 N.Y.S.2d 127 (2d Dept. 1996); *Ortiz v. Weaver*, 188 A.D.2d 290, 590 N.Y.S.2d 474 (1st Dept. 1992). "[W]here a party disobeys a court order and by his conduct frustrates the disclosure scheme provided by the CPLR, dismissal of the [pleading] is within the broad discretion of the court." See *Eagle Insurance Company of America v. Behar*, 207 A.D.2d 326 (2d Dept. 1994).

The failure of attorneys to comply with court-ordered deadlines has increasingly become a problem in our court system. See *Arpino v. F.J.F. & Sons Electric Co., Inc.*, 102 A.D.3d 201, 959 N.Y.S.2d 74 (2d Dept. 2012). Compliance requires not only a timely response, but a good-faith effort to provide a meaningful response. See *id.* The failure to comply with deadlines and provide good-faith responses to discovery demands "impairs the efficient functioning of the courts and adjudication of claims." See *id.* citing *Gibbs v. St. Barnabus Hosp.*, 16 N.Y.3d 74, 917 N.Y.S.2d 68 (2012). The Court of Appeals has pointed out that "[c]hronic non-compliance with deadlines breeds disrespect for the dictates of the Civil Practice Law and Rules" (see *Gibbs v. St. Barnabus Hosp.*, *supra* at 81) and has declared that "[i]f 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 *Arpino v. F.J.F. & Sons Electric Co., Inc.*, *supra* citing *Kihl v. Pfeffer*, 94 N.Y.2d 118, 700 N.Y.S.2d 87 (1999). Although perhaps an undesirable outcome, parties, where necessary, will be held responsible for the failure of their lawyers to meet court-ordered deadlines and provide meaningful responses to discovery demands and preliminary conference orders. See *Arpino v. F.J.F. & Sons Electric Co., Inc.*, *supra*. "The willful and contumacious character of a party's conduct can be inferred from the party's repeated failure to comply with discovery

demands or orders without a reasonable excuse.” *Id. citing Commisso v. Orshan*, 85 A.D.3d 845, 925 N.Y.S.2d 612 (2d Dept. 2011).

In the instant matter, Plaintiff has demonstrated the aforementioned defendants’ “unequivocally clear, persistent, willful and intentional refusal to engage in discovery proceedings” and the aforementioned defendants’ “repeated failure to comply with discovery demands or orders without a reasonable excuse.”

Accordingly, in this Court’s discretion, the branch of plaintiff’s motion, pursuant to CPLR § 3216 and NYCRR § 130-4.1, for an order striking the Answers of defendants Terry Lazar, Lazar Broder LLP, Puresafe Water Systems Inc. f/k/a Water Chef, Mitch Meisner d/b/a Meisner Gallery, Brooklyn Ambulatory Center, Ambulatory Surgery Physicians Associates, Robert Haar and RHA Realty Associates for failing to (a) comply with the Preliminary Conference Order in this action dated September 24, 2012, the Court’s February 28, 2013 Order and the Court’s April 26, 2013 So Ordered Stipulation and (b) respond to plaintiff’s Demand for a Bill of Particulars dated July 31, 2012 and plaintiff’s Notice for Discovery and Inspection dated July 31, 2012 is hereby **GRANTED**. And it is further

ORDERED that the branch of plaintiff’s motion for an order awarding attorneys’ fees, costs and sanctions is hereby **DENIED**.

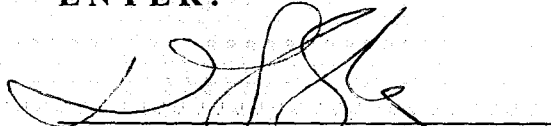
The matter is hereby set down for an Inquest on damages against said defendants to be held after the trial or resolution of this action.

The Court notes that no relief has been requested with respect to defendant Americana Properties. Accordingly, defendant American Properties remains the lone defendant in the instant action.

It is further ordered that the remaining parties shall appear for a Certification Conference on November 19, 2013, at 9:30 a.m., in IAS Part 33 of the Nassau County Supreme Court, 100 Supreme Court Drive, Mineola, New York.

This constitutes the Decision and Order of this Court.

ENTER:


DENISE L. SHER, A.J.S.C.

Dated: Mineola, New York
October 9, 2013

ENTERED
OCT 10 2013
NASSAU COUNTY
COUNTY CLERK'S OFFICE