

| |
|--|
| Le-Cadre v Lockwood Realty, LLC |
| 2013 NY Slip Op 34150(U) |
| July 22, 2013 |
| Supreme Court, Westchester County |
| Docket Number: 56875/2012 |
| Judge: Joan B. Lefkowitz |
| Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office. |
| This opinion is uncorrected and not selected for official publication. |

To commence the statutory time period for appeals as of right [CPLR 5513(a)], you are advised to serve a copy of this order, with notice of entry upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER – COMPLIANCE PART

-----X
YANIQUE D. Le-CADRE, DDS, MS,

Plaintiff,

-against-

LOCKWOOD REALTY, LLC, GREENRIDGE
MANAGEMENT CORP, and MALKA SHALIT,

Defendants.
-----X

LEFKOWITZ, J.

DECISION & ORDER

Index No. 56875/2012
Decision Date: Jul. 22, 2013

Mot. Sequence: #2

The following papers were read on this motion by defendants for an order pursuant to CPLR 3126 dismissing plaintiff's complaint, pursuant to CPLR 3124 precluding plaintiff from offering evidence of damages, and/or compelling plaintiff to comply with discovery orders:

Order to Show Cause, Affirmation in Support, Exhs. A-N
Affirmation in Opposition

Upon the foregoing papers and proceedings held on July 22, 2013, the motion is determined as follows:

Plaintiff, Dr. Yanique Le-Cadre, an orthodontist, commenced this action by summons and complaint dated April 25, 2012, alleging that defendants, Lockwood Realty, LLC, Greenridge Management Corp., and Malka Shalit (hereinafter "defendants"), breached the lease between the parties for medical office space at 110 Lockwood Avenue, New Rochelle, New York. Plaintiff's complaint alleges that defendants allowed another orthodontist to practice in the medical complex notwithstanding a restrictive covenant in the lease that plaintiff would be the only orthodontist practicing there. Accordingly, plaintiff demands specific performance of the lease condition, compensatory and consequential damages arising from defendants' alleged breach, and the costs of this action. After defendants timely answered, this Court (Giacomo, J.), by Decision and Order dated September 4, 2012, denied plaintiff's motion for a preliminary injunction to restrain defendants' alleged violation, holding that such injunction would be tantamount to mandating specific performance of the lease rather than preserve the status quo pending final adjudication. Discovery thereafter ensued, and defendants allege that plaintiff failed to comply with multiple orders of this Court pertaining to depositions and document discovery. Accordingly, defendants now move pursuant to a briefing schedule to dismiss plaintiff's complaint pursuant to CPLR 3126, preclude plaintiff from offering evidence of damages pursuant to CPLR 3124, or compel plaintiff to comply with discovery obligations.

The gravamen of defendants' instant application is that plaintiff violated multiple Orders of this Court by repeatedly failing to submit to a deposition and failing to provide documentary discovery in relation to plaintiff's monetary losses allegedly arising from defendants' breach. Defendant demonstrates that the Preliminary Conference Order directed plaintiff to be deposed on or before January 7, 2013, under which mandate plaintiff cancelled a date-certain deposition citing a schedule conflict. Thereafter, this Court entered a Compliance Conference Order on April 8, 2013, directing that plaintiff be deposed on April 29, 2013. In the same Order, this Court directed that plaintiff, on or before April 15, 2013, either supply proof of lost income responsive to defendants' prior demands for discovery thereon, or amend her Bill of Particulars to limit her monetary damage to loss of good will on the breach of contract action. Defendants aver, and plaintiff does not dispute, that plaintiff failed to comply and again failed to appear for a deposition. At the next Compliance Conference, plaintiff's counsel failed to appear, citing illness. Defendant asserts that both before and since, plaintiff failed to respond to multiple defense attempts to procure plaintiff's compliance or schedule a deposition. Accordingly, defendants assert, plaintiff has evinced purposeful disregard of its discovery obligations herein and defendants therefore are entitled to the demanded relief.

Plaintiff opposes defendants' motion. Plaintiff concedes that plaintiff bears the burden to prove (and provide pre-trial discovery concerning) damages but asserts that calculating business damages has been difficult owing to the legal impossibility, consistent with medical privacy laws, of obtaining the client list of the other orthodontist. In service of that goal, plaintiff asserts, plaintiff has been working in good faith with her accountant, but has not succeeded in calculating damages in a non-speculative manner. Plaintiff also asserts that she repeatedly informed adverse counsel that plaintiff voluntarily withdrew the claims for loss of business and unfair competition, and is limiting her action to enforcing the restrictive covenant in the lease, loss of good will, attorney's fees and costs. Plaintiff also asserts that the law firm associate working on plaintiff's matter left the firm without notice and without satisfying certain obligations herein, and that plaintiff is willing and available to be deposed.

Under CPLR 3126, striking a pleading as a remedy for discovery violation is a "drastic" remedy predicated on a showing that the failure comply with discovery obligations was willful and contumacious (*see Greene v Mullen*, 20 AD3d 996 [2d Dept 2010]; *Maiorino v City of New York*, 39 AD3d 601 [2d Dept 2007]; *Kingsley v Kantor*, 265 AD2d 529 [2d Dept 1999]). A willful and contumacious derogation of discovery obligations may be inferred from a substantial pattern of noncompliance over time, coupled with the noncomplying party lack of excuse for these failures (*see e.g. Estaba v Quow*, 101 AD3d 940 [2d Dept 2012]; *Dokaj v Ruxton Tower Ltd. Partnership*, 91 AD3d 812 [2d Dept 2012]). While this Court is concerned that plaintiff violated a Compliance Conference Order and failed to appear for a remedial conference, plaintiff proffered a non-trivial and reasonable excuse for these failures and reiterated both willingness and availability to be deposed. Accordingly, plaintiff's violations do not appear to be "willful and contumacious" so as to justify the drastic remedy of dismissal. Moreover, on the instant facts, it appears that plaintiff's failure to come forward with proof of economic damages does not impede defendants' ability to defend against so much of plaintiff's complaint as seeks

specific performance of the restrictive covenant. Accordingly, in the exercise of this Court's discretion, so much of defendants' motion as seeks to dismiss plaintiff's complaint pursuant to CPLR 3126 is denied with leave to renew the same in accordance with this Decision and Order.

As to the branch of defendants' motion pursuant to CPLR 3124 to preclude plaintiff from adducing evidence at trial, such application is granted to the extent of plaintiff's claims for loss of business and unfair competition. Defendants are entitled to liberal discovery of "all matters material and necessary in the prosecution" of his action (CPLR 3101[a]). The determination of what is "material and necessary" is within the sound discretion of the trial court (*see e.g. Andon v 302-304 Mott Assocs.*, 94 NY2d 740 [2000]). It is beyond cavil that defendants are entitled to a clear and plain statement of the economic damages that plaintiff allegedly sustained. Plaintiff has had many months to calculate these damages but failed to do so. Plaintiff also failed to amend the bill of particulars, move to amend the complaint to narrow the damages pleaded, or otherwise submit proof that plaintiff, in fact, voluntarily withdrew these economic damage claims as plaintiff now alleges. Because "a litigant cannot ignore [discovery] orders with impunity" (*Kihl v Pfeffer*, 92 NY2d 118, 123 [1999]), and so as to avoid prejudice to defendants arising from plaintiff's protracted noncompliance, plaintiff shall be precluded from adducing evidence, at trial or otherwise, of damages for loss of business or unfair competition arising from defendants' alleged breach. This preclusion, however, shall not bar plaintiff from adducing other evidence appurtenant to the breach of contract action, or to support her demand in equity for specific enforcement of the restrictive covenant.

As to the branch of defendants' motion to compel pursuant to CPLR 3124, such application is granted to the extent that plaintiff shall submit to a deposition to be noticed by defendants and conducted in accordance with this Decision and Order. If plaintiff shall fail timely to comply, then defendants may renew this application to dismiss plaintiff's complaint pursuant to CPLR 3126, on notice to plaintiff, within 15 days of plaintiff's failure to comply. Accordingly, it is hereby

ORDERED that defendants' motion to dismiss pursuant to CPLR 3126 is denied, with leave to renew in accordance herewith; and it is further

ORDERED that defendants' motion to preclude pursuant to CPLR 3124 is granted to the extent that plaintiff shall be precluded from adducing, at trial or otherwise, evidence of damages for loss of business or unfair competition herein; and it is further

ORDERED that defendants' motion pursuant to compel to CPLR 3124 is granted to the extent that plaintiff shall submit to an examination before trial at a time and place in Westchester County that defendants shall designate, such designation to occur not less than seven and not more than 14 days after the date on which defendants shall cause a copy of this Decision and Order, with Notice of Entry thereof, to be served on plaintiff by NYSCEF, and such examination shall occur not less than 14 and not more than 28 days after the date of such designation; provided, that if plaintiff fail to comply after designation in accordance with this Decision and Order, then defendants may renew their application to dismiss plaintiff's complaint pursuant to

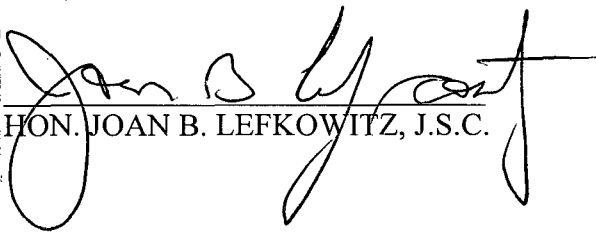
CPLR 3126, upon submission to this Court of an affidavit of noncompliance on notice to plaintiff by NYSCEF; and it is further

ORDERED that defendants shall cause this Decision and Order, with Notice of Entry, to be served on plaintiff by NYSCEF within seven days of the date hereof; and it is further

ORDERED that counsel for all parties are directed to appear in the Compliance Part, Room 800, of this Courthouse, at 9:30am on Tuesday, September 10, 2013.

The foregoing constitutes the Decision and Order of this Court.

Dated: White Plains, New York
July 22, 2013


HON. JOAN B. LEFKOWITZ, J.S.C.

TO: Peter Freiberg, Esq.
Denlea & Carton LLP
Attorneys for Defendants
One North Broadway, Suite 509
White Plains, New York 10601
[By NYSCEF]

Harry Levin, Esq.
Levin Cyphers
Attorneys for Plaintiff
700 Hooper Avenue
Toms River, NJ 08753
[By NYSCEF]

CC: Conference Part Clerk