

**G. Willi-Food Intl. Ltd. v Herzfeld & Rubin, P.C.**

2016 NY Slip Op 31625(U)

August 26, 2016

Supreme Court, New York County

Docket Number: 161053/2014

Judge: Kelly A. O'Neill Levy

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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 19

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G. WILLI-FOOD INTERNATIONAL LTD.,

Plaintiff,

- against -

HERZFELD & RUBIN, P.C. and PETER J. KURSHAN,

Defendants.  
-----X

**DECISION/ORDER**

Index No. 161053/2014

Mot. Seq. 003

**KELLY O'NEILL LEVY, J.:**

Defendants Herzfeld & Rubin, P.C. and Peter J. Kurshan move, pursuant to CPLR 3126, for an order striking the pleadings, dismissing the complaint and rendering judgment against plaintiff for failure to comply with several court orders, and assessing the costs, including attorneys' fees for bringing the motion. Plaintiff opposes. After considering the papers and after oral argument, the motion is granted in part.

Plaintiff commenced this action on or about November 6, 2014. The complaint contains allegations of legal malpractice, breach of contract, and breach of fiduciary duty arising out of defendants' representation of plaintiff in a consolidated action also litigated in Supreme Court, New York County. On March 25, 2015 the parties appeared at a preliminary conference, where a preliminary conference order was signed (Singh, J.) providing that all interrogatories were to be served on or before April 9, 2015, with responses due by May 11, 2015.

On May 11, 2015, the parties agreed that plaintiff would have until May 15, 2015 to serve responses. Defendants did not receive interrogatory responses for several weeks after the extended deadline and filed a motion to compel responses and for sanctions on June 12, 2015. Plaintiff eventually provided responses to the interrogatories on August 1, 2015 which defendants contended were not particularized.

By compliance conference order signed by this court dated August 12, 2015, defendants' motion was denied without prejudice. The order provided that plaintiff was to, among other things, provide more particularized responses to the interrogatories within 60 days. At a status conference on November 4, 2015, the court ordered that plaintiff was to comply with the August 12, 2015 order within two weeks and the matter was adjourned to January 20, 2016 for further status conference. Significantly, defendants failed to appear for the January 20 status conference, without notice or excuse, and the court issued a conditional order. The order stated, "Plaintiff must comply with the 8/12/15 order, which requires more particularized responses to interrogatories, responses to D's document requests as described in the 8/12/15 order within 10 days or the complaint will be dismissed without prejudice after D notifies the court in writing." The order further provided, "If complaint not dismissed, parties to appear on 2/24/16 to schedule further discovery."

On or about January 25, 2016, plaintiff provided a second response to defendants' interrogatories. Defendants allege that the second response was still not sufficient pursuant to the order for more particularization. During the parties' subsequent status conference on February 24, the court ordered, among other things, that plaintiff to provide a copy of its verification to interrogatory responses on or before March 7, 2016 and the original on or before March 14, 2016, in recognition that the verification would be coming from overseas.

Plaintiff still has not provided a verification, and according to defendants, has failed to provide particularized responses. As a result, defendants have brought this motion to strike the pleadings, dismiss the complaint, and award attorney's fees due to plaintiff's failure to comply with numerous court orders pursuant to CPLR § 3126. Plaintiff opposes the motion and asserts that it complied with the orders for particularization and is attempting in good faith to satisfy the court's order for verification.

### Discussion

CPLR § 3126 authorizes the court to fashion an appropriate remedy if a party refuses to obey an order of disclosure, or willfully fails to disclose information. *See Tos v. Jackson Hgts. Care Ctr., LLC*, 91 AD3d 943, 944 (2d Dep't 2012). However, "[t]he drastic remedy of striking a pleading pursuant to CPLR 3126 (3) for failure to comply with court-ordered disclosure should be granted only where the conduct of the resisting party is shown to be willful and contumacious." *Pirro Group, LLC v. One Point St., Inc.*, 71 AD3d 654, 655 (2d Dep't 2010)(internal citations omitted). Willful and contumacious behavior "can be inferred from the party's repeated failure to respond to demands and/or comply with discovery orders." *Flynn v. City of New York*, 101 AD3d 803, 805 (2d Dep't 2012).

Through the affidavit of one of its officers, Yitschak Barabi, submitted in opposition to the motion, plaintiff claims that it has been searching, without success, for its former chairman, Zwi Williger, who is the only corporate officer with the requisite knowledge to verify the interrogatories. Plaintiff states that Mr. Williger left the company in late January of 2016 and either did not verify the interrogatory responses or if he did, the company cannot find it. However, interrogatory responses were first ordered to be served by May 2015, many months before Mr. Williger's departure from the company. As Plaintiff is a corporation, those responses were to be verified pursuant to CPLR § 3133(b).

Plaintiff's failure to comply with three court orders, including a conditional order issued on default, made over the course of approximately one year evidences willful and contumacious behavior. *See Bryant v. New York City Hous. Auth.*, 69 AD3d 488, 489 (1st Dep't 2010). The court provided plaintiff with numerous opportunities to remedy the deficiencies in its discovery responses and it failed to do so, warranting dismissal of the complaint. *See FDIC v. Allecity Ins. Co.*, 228 AD2d 275 (1st Dep't 1996), *Gal-Ed v. 153rd St.*

*Assoc. LLC*, 73 AD3d 438, 438-39 (1st Dep't 2010), *Gale v. Delmonico Hotel Co.*, 260 AD2d 276, 276 (1st Dep't 1999). Accordingly, the complaint is dismissed pursuant to CPLR 3126. The court declines to grant the remainder of the relief requested. Accordingly, it is hereby

ORDERED that the motion is granted to the extent that the complaint is dismissed. The Clerk is directed to enter judgment accordingly.

In light of the above, the status conference date of August 31, 2016 is vacated.

This constitutes the decision and order of the court.

Dated: August 26, 2016

  
HON. KELLY O'NEILL LEVY, J.S.C.