SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. KELLY O'NEILL LEVY **PART** 19
Justice

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G.WILLI-FOOD INTERNATIONAL LTD.,

Plaintiff,

- v -

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

Defendants.

INDEX NO. 159040/2016

MOTION DATE

MOTION SEQ. NO. 001

DECISION AND ORDER

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The following e-filed documents, listed by NYSCEF document number 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 45

were read on this application to/for

Defendants Herzfeld & Rubin, P.C. and Peter Kurshan move, pursuant to CPLR § 3126, to strike and dismiss the complaint filed against it by plaintiff G. Willi-Food International Ltd. Plaintiff opposes.

BACKGROUND

Defendants were Plaintiff's former attorneys and represented Plaintiff in a suit previously litigated in Supreme Court, New York County. That case ultimately settled and Plaintiff thereafter commenced its first action against Defendants (the "Prior Action") on November 6, 2014 alleging legal malpractice, breach of contract, and breach of fiduciary duty. Plaintiff alleged in its complaint that when Defendants represented Plaintiff, they failed to comply with

the court's ruling to provide adequate records resulting in the preclusion of such records as evidence and forcing Plaintiff to settle the case, thereby losing millions of dollars.

In the Prior Action, Plaintiff unsuccessfully attempted to locate Zwi Williger, its former chairman and corporate officer with personal knowledge of the relevant underlying facts, to verify certain interrogatories. Mr. Williger departed the company in late January 2016. However, the interrogatory responses were ordered to be served by May 2015. After having already issued two court orders, including a conditional order issued on default, the court issued a third order during a subsequent status conference on February 24, 2016, in which Plaintiff was to, *inter alia*, provide a copy of its verification to interrogatory responses on or before March 7, 2016 and the original on or before March 14, 2016. Plaintiff failed to comply with all three court orders, and, accordingly, the Prior Action was dismissed by this court on August 26, 2016.

Plaintiff has now commenced the instant action and makes the same claims. Defendants move to strike and dismiss the complaint with prejudice pursuant to CPLR § 3126. According to Defendants, Plaintiff has still not provided a proper verification of its interrogatory responses. Despite naming an additional former employee, Gill Hochboim, former CEO and CFO of the company who purportedly has personal knowledge of the underlying facts, Plaintiff's answers to Defendants' interrogatories in the instant action are verified by a current corporate officer, Yitschak Barabi, "upon information and belief." Defendants argue that Mr. Barabi's verification is insufficient because he does not have personal knowledge of the facts. Defendants further claim that the defense is prejudiced by such insufficiently verified interrogatory responses and accordingly, the court should dismiss Plaintiff's complaint with prejudice.

STANDARD

Under CPLR § 3126, "the nature and degree of the penalty to be imposed . . . lies within the sound discretion of the trial court." *McArthur v. N.Y.C. Hous. Auth.*, 48 A.D.3d 431, 431 (2d

Dep't 2008). The court may strike a pleading if a "party refuses to obey an order for disclosure or willfully fails to disclose information." *Sony Corp. of Am. v. Savemart, Inc.*, 59 A.D.2d 676, 677 (1st Dep't 1977); *Henry Rosenfeld, Inc. v. Bower & Gardner*, 161 A.D.2d 374 (1st Dep't 1990). However, "in furtherance of the policy favoring resolution of actions on the merits, the drastic remedy of striking a party's pleadings should only be imposed when the discovery noncompliance was willful, contumacious or in bad faith." *Postel v. N.Y. Univ. Hosp.*, 262 A.D.2d 40, 42 (1st Dep't 1999); *Moon 170 Mercer, Inc. v. Vella*, 146 A.D.3d 537, 538–39 (1st Dep't 2017); *Corner Realty 30/7, Inc. v. Bernstein Mgmt. Corp.*, 249 A.D.2d 191, 193 (1st Dep't 1998).

The moving party has the "initial burden of coming forward with evidence clearly showing that the failure to comply with disclosure orders or discovery demands was willful, contumacious or in bad faith." *Heins v. Pub. Storage*, 36 Misc. 3d 1217(A), at *8 (Sup. Ct., Suffolk County 2012); *see Shapiro v. Kurtzman*, 32 A.D.3d 508, 510 (2d Dep't 2006); *Reidel v. Ryder TRS, Inc.*, 13 A.D.3d 170, 171 (1st Dep't 2004). "Willful and contumacious conduct can be inferred from a party's repeated failure to comply with court-ordered discovery, coupled with inadequate explanations for the failures to comply or a failure to comply with court-ordered discovery over an extended period of time." *Gutman v. Cabrera*, 121 A.D.3d 1042, 1042 (2d Dep't 2014). *See also Brown v. Astoria Fed. Sav.*, 51 A.D.3d 961, 962 (2d Dep't 2008); *Bodine v. Ladjevardi*, 284 A.D.2d 351, 352 (2d Dep't 2001). "Mere lack of diligence in furnishing some of the requested materials is not grounds for dismissal of the action though a monetary sanction is warranted by the repeated delays and plaintiffs' counsel's repeated failure to comply with discovery orders" without an adequate excuse. *Postel v. N.Y. Univ. Hosp.*, 262 A.D.2d 40, 42 (1st Dep't 1999); *Elias v. City of New York*, 71 A.D.3d 506, 507 (1st Dep't 2010).

In *Bodine v. Ladjevardi*, the plaintiff acted willfully and contumaciously when it adjourned scheduled depositions, failed to produce requested documents, and failed to comply with the court's order directing compliance with discovery without an adequate excuse, 284 A.D.2d at 352. Similarly, in *Studer v. Newpointe Estates Condo.*, the defendant's willful and contumacious conduct was inferred from its repeated delays in complying with discovery demands without an adequate excuse and providing inadequate discovery responses that "did not evince a good-faith effort to address the requests meaningfully." No. 2015-01191, 2017 WL 2855257, at *2 (2d Dep't 2017).

Pursuant to CPLR § 3133, if a party is a corporation, interrogatories must be under oath and in writing "by an officer, director, member, agent or employee having the information." *Heins v. Pub. Storage*, 36 Misc. 3d 1217(A), at *8 (Sup. Ct., Suffolk County 2012). A corporation has the right at first instance to designate the employee who will be examined. *See Nunez v. Chase Manhattan Bank*, 71 A.D.3d 967, 968 (2d Dep't 2010); *Pisano v. Door Control, Inc.*, 268 A.D.2d 416, 416 (2d Dep't 2000). Responses to interrogatories from a party's attorney that is not made under oath by an employee or officer of the party with personal knowledge of the facts "lacks evidentiary and probative value." *Karl's Plumbing & Heating Co. Inc. v. Yevool, Inc.*, 41 Misc. 3d 1223(A), at *2 (Sup. Ct., Queens County 2012); *see also Heins*, 36 Misc. 3d 1217(A), at *8 (holding that interrogatories answered by an attorney "upon information and belief" do not comply with CPLR § 3133). However, an agent of a corporation may verify interrogatory responses pursuant to § 3133 "upon information and belief." *Optic Plus Enterprises, Ltd. v. Bausch & Lomb Inc.*, 35 A.D.3d 1263, 1263 (4th Dep't 2006).

ANALYSIS

Defendants argue that Plaintiff's complaint should be dismissed with prejudice because Plaintiff's conduct is "willful and contumacious." Defendants claim that this court in the Prior

Action dismissed Plaintiff's complaint because Plaintiff "failed to provide interrogatory responses verified by a person with knowledge of the facts as required by CPLR § 3133(b)." According to Defendants, in the instant action, Plaintiff has failed to remedy the deficiencies from the Prior Action because Plaintiff's responses are nearly identical to those of the Prior Action except that they add that each answer is provided "upon information and belief."

Plaintiff argues that the court's reason for dismissing the Prior Action was Plaintiff's failure to provide a verification by the court mandated deadline, not because the verification was made by an individual without personal knowledge. Additionally, Plaintiff claims that it has complied with its discovery obligations in good faith, has provided nearly 100,000 pages of discovery, and has provided verified and particularized interrogatory responses. Therefore, Plaintiff asks the court to deny Defendants' motion.

Here, Defendants have not met their burden evidencing willful and contumacious conduct from Plaintiff. Although Plaintiff has not complied with numerous court orders in the Prior Action, the same is not true of the instant action. Because Plaintiff has not failed to comply with any court orders in the instant action, it has not acted willfully or contumaciously. Here, Plaintiff has sufficiently demonstrated good faith by adding to its responses "upon information and belief" and citing *Optic Plus Enterprises, Ltd. v. Bausch & Lomb Inc.*, 35 A.D.3d 1263, 1263 (4th Dep't 2006) in support. *See New York Timber, LLC v. Seneca Cos.*, 133 A.D.3d 576, 577-78 (2d Dep't 2015) (finding that the plaintiff's conduct was not willful and contumacious because it complied with Defendant's discovery requests and "made a good faith effort to locate certain items requested by the defendants, even though it was unable to locate them"); *Corner Realty 30/7 v. Bernstein Mgt. Corp.*, 249 A.D.2d 191, 193 (1st Dep't 1998) (holding that the "extreme sanction of dismissal is warranted only where a clear showing has been made that the

noncompliance with a discovery order was willful, contumacious or due to bad faith"). Notwithstanding, Plaintiff has not properly verified its interrogatory responses.

Defendants argue that Plaintiff's verification of its interrogatory responses by Mr. Barabi "upon information and belief" fails to comply with CPLR § 3133(b) because Mr. Barabi admitted in an affidavit that he has no knowledge of the facts. Defendants claim that despite identifying a former employee of Plaintiff that has the requisite knowledge, Plaintiff submitted another invalid verification from Mr. Barabi, who lacks knowledge of the facts. Additionally, Defendants argue that Plaintiff's claims concern the nature of oral communications between the parties, and therefore, sworn testimony is necessary to support its claims. Therefore, Defendants argue that their inability to obtain valid interrogatory responses is highly prejudicial to their defense.

Plaintiff argues that interrogatory responses may be verified "upon information and belief" according to the court's holding in *Optic Plus Enterprises, Ltd.* 35 A.D.3d at 1263. Plaintiff claims that because Mr. Hochboim is a former employee of the corporation, his verification would not be in accordance with CPLR § 3133, which requires a current officer of the corporation to verify—but that it would nonetheless provide his verification should the court require and accept it. Therefore, Plaintiff claims that Mr. Barabi's verification "upon information and belief" is the only appropriate course of action under the present circumstances given that the only individuals with personal knowledge of the facts are former employees of the corporation. Further, Plaintiff argues that because this is a legal malpractice action due to Defendants' failure to comply with a court order leading to preclusion of evidence, all evidence is contained in documentary form and testimony from Plaintiff's witness is not required.

The Fourth Department in *Optic Plus Enterprises, Ltd* held that "under the circumstances of this case, the agent could properly verify certain responses upon information and belief." 35

A.D.3d 1263. The circumstances of the instant case do not permit an officer's verification of responses upon information and belief, and are distinguishable from the situation presented by Plaintiff where an assault victim was not able to see an attacker. However, the court will allow Plaintiff an opportunity to verify the interrogatory responses through Mr. Hochboim since he was an officer who has personal knowledge of the underlying facts. Accordingly, it is hereby

ORDERED that defendants Herzfeld & Rubin, P.C. and Peter Kurshan's motion, pursuant to CPLR § 3126, to strike and dismiss the complaint filed against it by plaintiff G. Willi-Food International Ltd. is denied; and it is further

ORDERED that plaintiff G. Willi-Food International Ltd. is to submit an affidavit from Mr. Gil Hochboim within 20 days in which he verifies Plaintiff's interrogatory responses in its complaint and that failure to do so will result in dismissal of the instant action with prejudice.

This constitutes the decision and order of the court.

9/13/2017
DATE

Kelly O'Neill Levy
KELLY O'NEILL LEVY, J.S.C.

CHECK ONE:		CASE DISPOSED			X	NON-FINAL DISPOSITION	
		GRANTED	X	DENIED		GRANTED IN PART	OTHER
APPLICATION:		SETTLE ORDER				SUBMIT ORDER	
CHECK IF APPROPRIATE:		DO NOT POST				FIDUCIARY APPOINTMENT	REFERENCE