

New Gold Equities Corp. v Valoc Enters., Inc.

2018 NY Slip Op 30030(U)

January 8, 2018

Supreme Court, New York County

Docket Number: 652528/2013

Judge: Kelly A. O'Neill Levy

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This opinion is uncorrected and not selected for official publication.

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

PRESENT: HON. KELLY O'NEILL LEVY
Justice

PART 19

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NEW GOLD EQUITIES CORP.,
Plaintiff,

INDEX NO. 652528/2013

MOTION DATE _____

- v -

MOTION SEQ. NO. 005

VALOC ENTERPRISES, INC., NORMAN R. BERKOWITZ, IN
HIS INDIVIDUAL CAPACITY, IN HIS CAPACITY AS THE
EXECUTOR OF THE ESTATE OF RHODA MILLER GOLDMAN
A/K/A RHODA MILLER AND IN HIS CAPACITY AS AN OFFICER
AND DIRECTOR OF VALOC ENTERPRISES, INC., THE
ESTATE OF RHODA MILLER A/K/A RHODA MILLER, BALLON
STOLL BADER & NADLER, P.C.

DECISION AND ORDER

Defendants.

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The following e-filed documents, listed by NYSCEF document number 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 179, 180, 181, 182

were read on this application to/for strike and dismiss the answer

Plaintiff New Gold Equities Corp. ("New Gold") moves, pursuant to CPLR 3126, for an order striking and dismissing the answer of defendants Valoc Enterprises, Inc. ("Valoc"), Norman R. Berkowitz ("Berkowitz"), not in his individual capacity, but solely in his capacity as the executor and trustee of the estate of Rhoda Miller Goldman a/k/a Rhoda Miller, and the estate of Rhoda Miller Goldman a/k/a Rhoda Miller (collectively, "defendants") with prejudice.

BACKGROUND

According to the verified amended complaint, Valoc leased real estate property located at 212-223 East 43rd Street and 212-226 East 44th Street in Manhattan, from New Gold and its

predecessor on a triple-net basis. Valoc sublet the properties to various subtenants and transferred the funds it collected to Rhoda Miller Goldman (“Miller”), the late sole shareholder of Valoc, as well as to its Secretary and Treasurer, Berkowitz. Berkowitz is also the executor and trustee of Miller’s estate, which is now the owner of Valoc. New Gold alleges that Berkowitz and Miller sanctioned the transfers, leaving Valoc unable to pay various debts to New Gold as well as to several municipal authorities.

On July 18, 2013, New Gold commenced this action against Valoc, Berkowitz acting in his capacity as executor of Miller’s estate, and the estate itself. Defendants answered on or about August 22, 2013.¹ On or about July 19, 2013, after serving its initial complaint, New Gold served upon defendants its first discovery request. The request sought all relevant documents regarding Valoc, Miller and Berkowitz. Defendants failed to respond and on December 11, 2013, the court (Singh, J.) entered an order directing that defendants produce all documents requested without objection on or before January 11, 2014.

Over approximately a two-year period, the court issued three more discovery orders—March 2014 (Singh, J.), September 2015, and February 2016. Defendants produced documentation in piecemeal fashion but never fully complied with the court’s orders. Accordingly, in its Decision and Order dated August 23, 2016, this court found defendants’ response to the prior discovery orders inadequate and untimely, but nevertheless afforded defendants a final opportunity. Defendants were given twenty days from service of that order with notice of entry to respond to the interrogatories, without objection, on the condition that, in the event defendants failed to respond, defendants’ answer would be stricken. In compliance

¹ New Gold later filed an amended complaint on April 14, 2014, which defendants answered on or about May 15, 2014.

with the Decision and Order, defendants produced additional documentation and responded to the interrogatories.

Thereafter, New Gold delivered Supplemental Document Demands to the defendants by email and FedEx on May 17 and May 18, 2017, respectively. New Gold argues that, pursuant to CPLR 3122(a)(1) and CPLR 2103(b)(6), defendants were required to respond to said demands by June 7, 2017, and further claims that defendants failed to respond by the statutory deadline. New Gold subsequently moved to strike defendants' answer for failure to timely respond to its Supplemental Document Demands on or about June 23, 2017.

On June 27, 2017, four days after New Gold's motion was filed, defendants complied with New Gold's Supplemental Document Demands. As a result, defendants contend that the instant motion is moot. Moreover, defendants contend that New Gold failed to comply with Uniform Rule 202.7(c) to make a good faith effort to resolve the issues raised in the motion, as well as with Local Rule 10 and Part 19's Rule 2(B) to consult one another in a good faith effort to resolve any discovery disputes.

Defendants explained that the delay in producing the requested documents resulted from difficulties with respect to searching an old laptop computer which contained the remaining responsive emails. Defendants could not access said emails through their newer computers because of incompatibility issues. In addition, the old laptop was constantly freezing and could no longer access the internet.

New Gold contends that defendants' explanation does not establish good reason for the untimely production of the emails, and maintains that the emails produced fall within the scope of its original discovery demands. New Gold argues that, therefore, defendants' failure to timely

produce the emails without good reason for delay constitutes a violation of the court's prior orders, thus requiring this court to strike defendants' answer.

New Gold also contends that in compliance with any good faith requirements, it made three separate good faith inquiries into the status of the discovery documents, including speaking with defendants by phone on or about June 8, 2017 and reminding defendants to comply with the Supplemental Document Demands, emailing defendants on June 9, 2017 to remind them a second time, and emailing defendants a third time on June 14, 2017, when New Gold stated it would seek judicial intervention unless defendants complied by June 19, 2017.

DISCUSSION

The determination whether to strike a pleading is a matter of discretion with the trial court. *Walter B. Melvin, Architects, LLC v. 24 Aqueduct Lane Condo.*, 51 A.D.3d 784, 785 (2d Dep't 2008); CPLR 3126. However, striking a pleading is a drastic remedy and should only be granted where there is a clear showing that failure to comply with court-ordered disclosure was willful and contumacious *Id.*; *Pimental v. City of New York*, 246 A.D.2d 467, 468 (1st Dep't 1998); *Martin v. City of New York*, 46 A.D.3d 635, 635-36 (2d Dep't 2007). Moreover, a monetary sanction may be appropriate under CPLR 3126 for failure to fully and timely comply with court-ordered disclosure. *Lucas v. Lawrence Stam, Susan Gordon, Martin Clearwater & Bell, LLP*, 147 A.D.3d 921, 926 (1st Dep't 2017); *Pimental v. City of New York*, 246 A.D.2d 467, 468 (1st Dep't 1998). The degree of the monetary sanction imposed is within the sound discretion of the trial court. *Martin v. City of New York*, 46 A.D.3d 635, 635-36 (2d Dep't 2007).

Here, in light of the totality of the circumstances, the court is not persuaded that striking defendants' answer is the appropriate remedy. Rather, defendants' inexcusably slow production of documentation over the last four years merits sanctions equal to the attorneys' fees and costs

and expenses necessary to bring the instant motion. *See, e.g., Figdor v. City of New York*, 33 A.D.3d 560 (1st Dep't 2006) (award of attorney fees was warranted as sanction for defendant's failure to comply with court-ordered discovery); *see Shapiro v. Fine*, 102 A.D.2d 735 (1st Dep't 1984) (failure to promptly produce documents directed by court order does not justify striking defendant's answer but merits monetary sanction); *see also Young v. City of New York*, 104 A.D.3d 452, 454 (1st Dep't 2013) (proportionate sanctions appropriate where defendants were inexcusably slow to produce documents over a period of three years in response to several court orders); *Postel v. New York Univ. Hosp.*, 262 A.D.2d 40, 42 (1st Dep't 1999) (explaining that monetary sanction is warranted by the repeated delays and repeated failure to comply with discovery orders); *Messer v. Keyspan Energy Delivery, Inc.*, 56 A.D.3d 738, 738-39 (2d Dep't 2008) (finding that it was within the trial court's discretion to impose a monetary sanction against defendant in lieu of striking its answer); *Makris v. Westchester Cty.*, 21 A.D.3d 931 (2d Dep't 2005) (monetary sanction, rather than striking of defendants' answers, was appropriate sanction for willful and contumacious refusal to comply with order for disclosure).

Defendants did not seek an extension from this court, and their explanation for the most recent delay comes only after the instant motion was made and does not prevent this court from awarding monetary relief. *See De Socio v. 136 E. 56th St. Owners, Inc.*, 74 A.D.3d 606, 608 (1st Dep't 2010) (defendant's belated explanation for nonproduction of requested materials warranted monetary sanction).

CONCLUSION AND ORDER

For the forgoing reasons, it is hereby

ORDERED that plaintiff New Gold Equities Corp.'s motion, pursuant to CPLR 3126, is granted to the extent that defendants Valoc Enterprises, Inc., Norman R. Berkowitz, and the

estate of Rhoda Miller Goldman a/k/a Rhoda Miller are to pay plaintiff's reasonable attorneys' fees and costs and expenses associated with the instant motion accruing since June 7, 2017; and it is further

ORDERED that plaintiff New Gold Equities Corp. is directed to provide documentation establishing such fees, costs and expenses by submission of an affirmation, within thirty (30) days of the date of this order.

This constitutes the decision and order of the court.

January 8, 2018

DATE

Kelly O'Neill Levy

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

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

CHECK ONE:

CASE DISPOSED
GRANTED
SETTLE ORDER
DO NOT POST

DENIED

NON-FINAL DISPOSITION
GRANTED IN PART
SUBMIT ORDER
FIDUCIARY APPOINTMENT

OTHER

REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: