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| <b>Adams v 339-347 E. 12th St. Inv., LLC</b>   |
| 2018 NY Slip Op 32053(U)   |
| August 21, 2018  |
| Supreme Court, New York County   |
| Docket Number: 154453/2013   |
| Judge: Kelly A. O'Neill Levy   |
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**KELLY O'NEILL LEVY  
JSC**

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

-----X

VICTOR ADAMS,

Plaintiff,

- v -

339-347 EAST 12TH STREET INVESTOR, LLC, SARITA'S  
MACARONI & CHEESE MH, LLC, & SARITA'S MACARONI &  
CHEESE, INC.,

Defendants.

INDEX NO. 154453/2013

MOTION DATE 07/25/2018

MOTION SEQ. NO. 003

**DECISION AND ORDER**

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The following e-filed documents, listed by NYSCEF document number (Motion 003) 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 98

were read on this motion to/for

DISMISSAL

HON. KELLY O'NEILL LEVY:

This is a personal injury action for injuries allegedly sustained by plaintiff Victor Adams on the premises owned by defendant 339-347 East 12<sup>th</sup> Street Investor, LLC (hereinafter, East 12<sup>th</sup>). East 12<sup>th</sup> moves for an order, (1) pursuant to CPLR § 3126, dismissing this action based on the grounds that plaintiff Victor Adams failed to comply with the discovery process and court orders, (2) pursuant to CPLR § 3212, granting summary judgment to East 12<sup>th</sup> on the basis that there are no issues left to be resolved, and (3) pursuant to CPLR § 3126, imposing sanctions against plaintiff's counsel. There is no opposition to this motion.

**PROCEDURAL BACKGROUND**

There was a myriad of futile discovery notices, demands, and court orders imposed on plaintiff. On November 15, 2017, the court issued an order directing plaintiff to respond to all outstanding discovery, appear for an IME on February 28, 2018, and stated that preclusion applications would be entertained at the next conference [November 15, 2017 Order (ex. M to the O'Bryan aff.)]. Plaintiff failed to appear for the scheduled IME. On March 14, 2018, the

court ordered that plaintiff's IME be rescheduled to March 28, 2018 and should plaintiff again fail to appear he shall be precluded from offering medical evidence at trial [March 14, 2018 Order (ex. N to the O'Bryan aff.)]. On April 11, 2018, the court issued a partial preclusion order stating, "Pursuant to the March 14, 2018 Order and plaintiff's continued failure to appear for an IME on numerous occasions the plaintiff is now precluded from offering medical evidence at trial..." [April 11, 2018 Order (ex. P to the O'Bryan aff.)]. On May 23, 2018, the court granted plaintiff's counsel's application to be relieved as attorney of record and ordered a stay to commence upon plaintiff's counsel's compliance with the order [May 23, 2018 Decision and Order (ex. S to the O'Bryan aff.)]. Plaintiff's counsel failed to comply with the service requirements of the March 23, 2018 decision and order.

## DISCUSSION

### *CPLR § 3126 Motion to Dismiss*

CPLR § 3126 (Penalties for refusal to comply with order or to disclose) states, in pertinent part:

"If 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 under a party's control, 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, 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

...

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."

"[I]t is well settled that the drastic remedy of striking a party's pleading pursuant to CPLR 3126 for failure to comply with a discovery order or request is appropriate only where the

moving party conclusively demonstrates that the non-disclosure was willful, contumacious or due to bad faith.” *McGilvery v. New York City Transit Authority*, 213 A.D.2d 322, 324 (1st Dep’t 1995).

Here, plaintiff repeatedly failed to comply with discovery requests and this court’s orders. Plaintiff misused the discovery process in an egregious fashion by failing to provide discovery in any manner for more than one year. Plaintiff never sought an order extending the time in which to provide discovery, to modify the terms of any discovery demand, or seek any alternative relief. The court finds that plaintiff willfully and contumaciously failed to provide discovery in this matter, and thus, it grants East 12<sup>th</sup>’s motion for an order dismissing this action based on plaintiff’s failure to comply with the discovery process and court orders.

*CPLR § 3212 Motion for Summary Judgment*

East 12<sup>th</sup> moves, pursuant to CPLR § 3212, for summary judgment in its favor. Because of the court’s above dismissal of this action based on plaintiff’s failure to comply with the discovery process and court orders, East 12<sup>th</sup>’s motion for summary judgment is denied as moot.

*Motion for Sanctions*

East 12<sup>th</sup> moves for an order imposing sanctions and costs on plaintiff’s counsel due to his willful refusal to respond to discovery demands and notices. The court denies this motion for sanctions due to plaintiff’s non-cooperation with his counsel throughout the pendency of this action.

The court has considered the remaining arguments and finds them to be without merit.

For the foregoing reasons, it is hereby

**ORDERED**, that defendant 339-347 East 12<sup>th</sup> Street Investor, LLC’s motion for an order, pursuant to CPLR § 3126, dismissing this action based on plaintiff Victor Adams’ failure

to comply with the discovery process and court orders is granted and this action is dismissed in its entirety; and it is further

**ORDERED**, that defendant 339-347 East 12<sup>th</sup> Street Investor, LLC's motion for an order, pursuant to CPLR § 3212, for summary judgment in its favor is denied; and it is further

**ORDERED**, that defendant 339-347 East 12<sup>th</sup> Street Investor, LLC's motion for an order, pursuant to CPLR § 3126, imposing sanctions on plaintiff's counsel is denied.

The Clerk is directed to enter judgment accordingly.

This constitutes the decision and order of the court.

8/21/18  
DATE

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

**KELLY O'NEILL LEVY**

|                       |                                     |               |                          |                            |                                     |                       |                          |           |
|-----------------------|-------------------------------------|---------------|--------------------------|----------------------------|-------------------------------------|-----------------------|--------------------------|-----------|
| CHECK ONE:            | <input checked="" type="checkbox"/> | CASE DISPOSED | <input type="checkbox"/> | DENIED                     | <input type="checkbox"/>            | NON-FINAL DISPOSITION | <b>JSC</b>               |           |
| APPLICATION:          | <input type="checkbox"/>            | GRANTED       | <input type="checkbox"/> | DENIED                     | <input checked="" type="checkbox"/> | GRANTED IN PART       | <input type="checkbox"/> | OTHER     |
| CHECK IF APPROPRIATE: | <input type="checkbox"/>            | SETTLE ORDER  | <input type="checkbox"/> | INCLUDES TRANSFER/REASSIGN | <input type="checkbox"/>            | SUBMIT ORDER          | <input type="checkbox"/> | REFERENCE |
|                       | <input type="checkbox"/>            |               |                          |                            | <input type="checkbox"/>            | FIDUCIARY APPOINTMENT | <input type="checkbox"/> |           |