

Asphalt Maintenance Servs. Corp. v Oneil
2018 NY Slip Op 33587(U)
May 11, 2018
Supreme Court, Westchester County
Docket Number: 59242/2016
Judge: Joan B. Lefkowitz
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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
ASPHALT MAINTENANCE SERVICES CORP. and
MARK REUSS,

Plaintiffs,

-against-

HENRY G. ONEIL, IMPERIAL ASPHALT AND
AGGREGATE DISTRIBUTOR INCORPORATED and
PALEEN CONSTRUCTION CORP.,

Defendants.

-----X
LEFKOWITZ, J.

DECISION & ORDER

Index No. 59242/2016
Motion Date: April 23, 2018

Motion Seq. No. 4

The following papers were read on the motion by plaintiffs for an order: (1) vacating the trial readiness order dated February 14, 2018; (2) staying these proceedings until the conclusion of defendants' appeal of a prior determination of this Court; (3) striking defendants' answer and deeming liability resolved in plaintiffs' favor or, alternatively, issuing a self-executing conditional order if defendants fail to provide the balance of discovery owed within 45 days of the date of any determination of the instant motion; and (4) for such other and further relief as this Court may deem just and proper.

Order to Show Cause – Affirmation in Support – Exhibits – Letter dated
March 19, 2018, from Robert A. Siegel, Esq.
Affirmation in Opposition – Exhibits
NYSCEF File

Upon the foregoing papers and the proceedings held on April 23, 2018, this motion is determined as follows:

Factual and Relevant Procedural Background

Plaintiffs commenced this action by filing a summons and verified complaint on July 6, 2016 (NYSCEF Doc. #1). Plaintiffs allege that defendant Henry, as a former employee, has *inter alia*, violated fiduciary obligations, misappropriated trade secrets, committed unfair competition and business practices, conversion and has tortiously interfered with plaintiffs' business relationships (NYSCEF Doc. #1). Plaintiffs seek compensatory and punitive damages

and equitable remedies (NYSCEF Doc. #1). Defendant Paleen Construction Corp. was released from this case by the filing of a partial stipulation of discontinuance on February 10, 2017 (*see* NYSCEF Doc. #52).¹ Defendants Henry and Imperial Asphalt and Aggregate Distributor Inc. filed their Answer on September 22, 2016 (NYSCEF Doc. #6).

In November of 2017, plaintiffs moved for, among other things, an order compelling defendants to provide further responses to certain demands in plaintiffs' Third Combined Demands dated October 10, 2017. These demands pertained to the following items: copies of minority certifications; copies of documents relating to child support information; the last known name and address of "Stephanie"; copies of texts, emails and electronic communications between defendant Henry and Stephanie; copies of invoices and payment records from plaintiffs' customers; a copy of defendant Henry's criminal conviction records; a copy of the dump truck lease and contract; a copy of the truck parking lease or agreement; and copies of emails or texts between defendant Henry and plaintiffs' customers.

By Decision and Order dated January 10, 2018, this Court (Lefkowitz, J.) granted plaintiffs' motion to compel to the extent that on or before January 29, 2018, defendants were to serve further and detailed responses to plaintiffs' demands numbered 1, 3, 4, 5, 7, 8, 9, 10, 14, 15, and 16 as set forth in plaintiffs' Third Combined Demands dated October 10, 2017 (NYSCEF Doc. #85). In the same Decision and Order, the Court granted plaintiffs a further limited deposition of defendant Henry Oneil and denied defendants' motion to compel copies of the retainer agreement between plaintiffs and their counsel (NYSCEF Doc. #85). On February 6, 2018, defendants appealed this Court's January 10, 2018 Decision and Order (NYSCEF Doc. #87).

The parties next appeared for a compliance conference on February 14, 2018, after which the Court issued a trial readiness order. On March 5, 2018, the parties appeared for another conference and the Court issued a briefing schedule for the instant motion.

The Instant Motion

By this motion, plaintiffs seeks an order (1) vacating the trial readiness order dated February 14, 2018; (2) staying these proceedings until the conclusion of defendants' appeal of this Court's January 10, 2018 Decision and Order; and (3) striking defendants' answer and deeming liability resolved in plaintiffs' favor or alternatively issuing a self-executing conditional order if defendants fail to provide the balance of discovery owed within 45 days of the date of the determination of the instant motion. Plaintiffs contend that the trial readiness order should be vacated because they raised the issue of this outstanding discovery at the compliance conference at which the Court issued the trial readiness order and they had reserved their right to seek judicial relief for the unproduced discovery. Next, plaintiffs argue that the Court should strike defendants' answer or, alternatively, issue a conditional order as defendants have refused to produce the discovery directed by this Court, on the grounds that they have filed an appeal of the January 10, 2018 Decision and Order. Plaintiffs note, however, that the filing of a notice of appeal does not automatically stay this Court's order and that defendants would have to apply for

¹ This action is related to a separate action entitled *Henry G. Oneil, et al v Asphalt Maintenance et al*, Supreme Court, Westchester County under Index No. 69079/2015, which has recently been discontinued.

a stay. Plaintiffs argue that, absent a stay, defendants were required to comply with this Court's order directing the production of discovery and that defendants' failure to provide the discovery warrants striking of their answer or, alternatively, the issuance of a conditional order. In the event that this Court were to deny their motion, plaintiffs also seek to stay the proceedings, including any motions for summary judgment, until such time as defendants' appeal is determined.

In opposition to the motion, defendants argue that striking of their answer is unwarranted as a further limited deposition of defendant Henry Oneil was conducted on February 6, 2018, in compliance with this Court's January 10, 2018 Decision and Order and as defendants timely and expeditiously filed an appeal of this Court's January 10, 2018 order. Defendants contend that, in any event, plaintiffs' demands, to which they were directed to respond, were beyond the scope of the litigation, were requested only to further plaintiffs' harassment of defendants, and were not intended to be used in this litigation. Next, defendants note further that this Court's January 10, 2018 Decision and Order stated, in pertinent part, that "the parties shall be precluded from offering any documents or trial testimony related to any documents which have been previously demanded and are not produced on or before February 2, 2018" and that the trial readiness order states that all discovery has been completed or waived. Defendants argue that, as a result, the parties are precluded from offering any documents or trial testimony related to any documents, which have been previously demanded and were not produced before February 2, 2018. Finally, defendants contend that plaintiffs' complaint should be dismissed as they have failed to file a note of issue as directed in the trial readiness order.²

Analysis

CPLR 3126 provides that if any party "willfully fails to disclose information which the court finds ought to have been disclosed," the court may, inter alia, issue an order of preclusion or an order striking the pleadings, dismissing the action, or rendering judgment by default against the disobedient party. "The nature and degree of the penalty to be imposed on a motion pursuant to CPLR 3126 is a matter generally left to the discretion of the Supreme Court" (*Carbajal v Bobo Robo*, 38 AD3d 820 [2d Dept 2007]). "Willful and contumacious conduct can be inferred from repeated noncompliance with court orders ... coupled with no excuses or inadequate excuses" (*Russo v Tolchin*, 35 AD3d 431, 434 [2d Dept 2006]; see also *Prappas v Papadatos*, 38 AD3d 871, 872 [2d Dept 2007]).

In the present case, the Court issued a decision and order on January 10, 2018, directing defendants to serve further and detailed responses to plaintiffs' demands numbered 1, 3, 4, 5, 7, 8, 9, 10, 14, 15, and 16 as set forth in plaintiffs' Third Combined Demands dated October 10, 2017. Defendants refused to do so because they have filed an appeal of the January 10, 2018 Decision and Order. However, the filing of a notice of appeal does not automatically stay the Court's directives in the January 10, 2018 Decision and Order. Additionally, defendants have not sought a stay of this Court's Decision and Order in the Appellate Division. Absent a stay, defendants were required to comply with this Court's order directing the production of discovery and defendants' noncompliance with this Court's January 10, 2018 Decision and Order was without proper basis and warrants the issuance of a conditional order. Accordingly, plaintiffs'

² The Court notes that defendants did not seek or obtain a pre-motion conference, and did not seek a briefing schedule for this relief.

motion is granted to the extent that defendants are directed to provide, on or before May 21, 2018, further and detailed responses to plaintiffs' demands numbered 1, 3, 4, 5, 7, 8, 9, 10, 14, 15, and 16 as set forth in plaintiffs' Third Combined Demands dated October 10, 2017, including responsive documents or a proper affidavit regarding the search conducted for such documents. If defendants fail to provide the demanded discovery in compliance with the Court's directives, plaintiffs shall submit an affidavit of noncompliance, on notice to defendants, and an order shall issue striking defendants' answer. The remaining branches of the motion are denied.

All other arguments raised and evidence submitted by the parties have been considered by this Court notwithstanding the specific absence of reference thereto.

In view of the foregoing, it is

ORDERED that plaintiffs' motion is granted to the extent that defendants are directed to provide, on or before May 21, 2018, further and detailed responses to plaintiffs' demands numbered 1, 3, 4, 5, 7, 8, 9, 10, 14, 15, and 16 as set forth in plaintiffs' Third Combined Demands dated October 10, 2017, including responsive documents. If documents sought by plaintiffs are not in defendants' possession, defendants shall provide a notarized affidavit from a person with knowledge that defendants are not in possession of the documents, describing in sufficient detail the search conducted for the documents that defendants claim not to have in their possession, including providing the particular area(s) searched, how much time was spent searching for the subject documents, whether the documents were destroyed and if so, by whom, when and for what purpose, and identifying any third parties who may be in possession of such documents; and it is further

ORDERED that in the event that defendants fail to comply with the Court's directives herein, plaintiffs shall serve and file on NYSCEF on or before May 31, 2018, an affirmation of noncompliance on notice to defendants and the Court will issue an order striking defendants' answer; and it is further

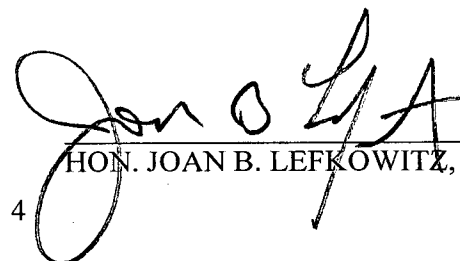
ORDERED that the remaining branches of plaintiffs' motion are denied; and it is further

ORDERED that plaintiffs are directed to serve and file a note of issue and certificate of readiness on or before May 31, 2018; and it is further

ORDERED that plaintiffs shall serve a copy of this decision and order with notice of entry upon defendants within ten (10) days of entry and shall file proof of service within five (5) days of service to the NYSCEF website.

The foregoing constitutes the decision and order of this court.

Dated: White Plains, New York
May 11, 2018


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