

Munsen v Plota

2020 NY Slip Op 32977(U)

September 8, 2020

Supreme Court, New York County

Docket Number: 656195/2018

Judge: Debra A. James

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.

This opinion is uncorrected and not selected for official publication.

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

PRESENT: HON. DEBRA A. JAMES PART IAS MOTION 59EFM

Justice

-----X

INDEX NO. 656195/2018

RALPH MUNSEN,

MOTION DATE 03/05/2020

Plaintiff,

MOTION SEQ. NO. 002

- v -

TROY PLOTA and TROY PLOTA LLC,

**DECISION + ORDER ON
MOTION**

Defendants.

-----X

The following e-filed documents, listed by NYSCEF document number (Motion 002) 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36

were read on this motion to/for STRIKE PLEADINGS

ORDER

Upon the foregoing documents, it is

ORDERED that the plaintiff's motion to the extent that it seeks an order immediately striking defendant TROY PLOTA's answer is denied; and it is further

ORDERED that to the extent that plaintiff's motion seeks a penalty against defendant TROY PLOTA, defendant TROY PLOTA, having failed to comply with the preliminary conference order dated November 14, 2019 is hereby precluded from offering any evidence in defense of plaintiff's claim of liability, unless, within thirty (30) days from service of a copy of this order with notice of entry upon defense counsel, counsel for defendant TROY PLOTA transmits to plaintiff's counsel complete verified responses to plaintiff's interrogatories and a date for his examination before trial via

virtual platform, and, within 15 days after such 30-day period, defendant files with NYSCEF an affirmation of his attorney, setting forth compliance with the aforesaid; and it is further

ORDERED that counsel are directed to submit a proposed compliance conference order or dueling proposed compliance conference orders via the IAS Part 59 mailbox (59nyef@nycourts.gov) and on NYSCEF on or before October 15, 2020.

DISCUSSION

In this breach of contract action, plaintiff RALPH MUNSEN moves to strike defendant's answer pursuant to CPLR 3124.

On May 22, 2019 plaintiff sent a set of interrogatories and a notice to take deposition to the answering defendant TROY PLOTA. On September 5, 2019, defendant answered the interrogatories in a notarized document. Plaintiff, unsatisfied with defendant's answers moved to strike defendant's answer (Motion Sequence 001). In accordance with the court rules, a preliminary conference to resolve such dispute was scheduled for November 14, 2019.

Defendant's counsel failed to attend the preliminary conference. The court issued a preliminary conference order setting a schedule for defendant to produce another set of interrogatory answers and a deadline for defendant's deposition. Such order decided motion sequence number 001.

Plaintiff filed the instant motion (sequence 002), after the dates set forth in the preliminary conference order had passed. In his opposing affidavit, defendant states that from December 2019 through February 2020, he was traveling extensively. Defendant states that many of his interrogatory objections went to the form of the questions and that he was waiting for a new set of interrogatories from plaintiff.

CPLR 3126 states that

"If any party . . . 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."

Here, defendant did not obey the preliminary conference order dated November 14, 2019. "It is within the motion court's discretion to determine the nature and degree of the penalty" to be imposed against a party who has refused to obey a court order for disclosure" (see Han v New York City Transit Authority, 169 AD3d 435 [1st Dept 2019]). However, "striking an answer is inappropriate absent a clear showing that the failure to comply is willful, contumacious or in bad faith" (Palmenta v Columbia University 266 AD2d 90, 91 [1st Dept. 2002]). In this case, since defendant responded, though allegedly insufficiently, to one set of interrogatories, and offered some excuse for failing to comply with the preliminary conference order, it would be an

improvident exercise of discretion to strike defendant's answer at this time.

09/08/2020

DATE

Debra A. James
DEBRA A. JAMES, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE