

**Moeslein v Tong**

2023 NY Slip Op 31551(U)

May 8, 2023

Supreme Court, New York County

Docket Number: Index No. 450744/2021

Judge: Frank P. Nervo

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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. FRANK P. NERVO PART 04

*Justice*

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EMILIE MOESLEIN,

Plaintiff,

- v -

FRANCIS TONG, REVEL TRANSIT INC.

Defendant.

-----X

INDEX NO. 450744/2021

MOTION DATE 04/06/2023

MOTION SEQ. NO. 003

**DECISION + ORDER ON  
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 003) 113, 114, 115, 116, 117, 118, 119, 120, 121, 122

were read on this motion to/for STRIKE PLEADINGS.

Plaintiff moves to conditionally strike defendant Tong’s answer for his failure to appear for deposition as ordered by the Court, and for his failure to appear on a rescheduled date.

CPLR § 3126 subsection three provides that the Court may strike a pleading when it finds, inter alia, that a party has refused to obey an order for disclosure or willfully fails to disclose information that ought to have been disclosed. This remedy is drastic and should only be imposed when the movant has “clearly shown that its opponent’s nondisclosure was willful, contumacious or due to bad faith” (*Commerce v Indus. Ins. Co. v. Lib-Com Ltd.*, 266 AD2d 142 [1st Dept 1999]). A pattern of default, lateness, and failure to comply with court orders can give rise to an inference of willful and contumacious conduct (*see Merchants T v F, Inc. v. Kase v Druker*, 19 AD3d 134 [1st Dept 2005]); *see also Shah v. Oral Cancer Prevention Intl., Inc.*, 138 AD3d 722 [2d Dept 2016]). “A party that permits discovery to ‘trickl[e] in [with a] cavalier attitude should not

escape adverse consequence” (*Henderson-Jones v. City of New York*, 87 AD3d 498, 504 [1st Dept 2011] quoting *Figdor v. City of New York*, 33 AD3d 560, 561 [1st Dept 2006]).

Notably absent from defendant’s opposition is any excuse for his non-appearance at deposition. Defendant’s picayune opposition amounts to no substantive opposition at all (NYSCEF Doc. No. 119). Indeed, there can be no question that the Court’s prior order advised that “the failure to ... appear for a timely deposition ... shall result in sanctions, including but not limited to the striking of pleadings in the Court’s discretion and upon further application” (NYSCEF Doc. No. 110 at p. 3) and that defendant did not appear for deposition as ordered. To the extent that defendant’s counsel advises it has made “diligent and good faith effort to produce defendant for deposition,” such efforts are belied by defendant’s nonappearance on the Court-ordered deposition date as well as the parties’ rescheduled deposition date. Nevertheless, the Court will provide a final opportunity for defendant to appear for deposition; however, neither the Court’s patience nor forbearance is unlimited.

Accordingly, it is

ORDERED that all depositions shall proceed in-person, unless all parties agree to conduct same via electronic means; and it is further

ORDERED that defendant Tong’s answer shall be stricken and the matter shall proceed to inquest on damages as against defendant Tong unless defendant Tong appears for deposition on May 24, 2023, at 10:00am. Such

deposition shall continue without interruption until completion in accordance with the Uniform Rules; and it is further

ORDERED that any non-party depositions shall be completed no later than August 18, 2023, and shall be noticed at least 30 days prior to deposition date; and it is further

ORDERED that post-deposition demands shall be served within 20 days of deposition giving rise to demand. Responses to post-deposition demands shall be served within 20 days of receipt of demand; and it is further

ORDERED that the failure to timely serve post-deposition demands shall constitute waiver of such demand; and it is further

ORDERED that the failure to timely respond to timely post-deposition demands shall result in sanctions, including but not limited to the striking of pleadings and monetary sanctions against counsel, in the Court's discretion and upon further application; and it is further

ORDERED that plaintiff shall file a note of issue no later than October 20, 2023; and it is further

ORDERED that the parties are reminded of the Part Rules, including those requiring extension of the note of issue deadline by motion, returnable prior to the note of issue deadline date, as well as those regarding requests for


further conferences and those regarding correspondence with the Court; and it is further

ORDERED that plaintiff shall serve a copy of this decision and order, as well as the decision and order under motion sequence 002, upon the Motion Support office of the Clerk’s Office so as to mark the Court’s records to reflect that the matter is actively pending; and it is further

ORDERED that such service upon the County Clerk and the Clerk of the General Clerk’s Office shall be made in accordance with the procedures set forth in the *Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases* (accessible at the “E-Filing” page on the court’s website).

ORDERED the dates, deadlines, and directives set forth herein may not be adjourned or otherwise modified absent Court order.

THIS CONSTITUTES THE DECISION AND ORDER OF THE COURT.

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|-----------------------|---|---|--|
| 5/8/2023<br>DATE      |   |   | <br>HON. FRANK P. NERVO |
| CHECK ONE:            | <input type="checkbox"/> CASE DISPOSED              | <input checked="" type="checkbox"/> NON-FINAL DISPOSITION | J.S.C.   |
|                       | <input checked="" type="checkbox"/> GRANTED         | <input type="checkbox"/> DENIED                           | <input type="checkbox"/> OTHER   |
| APPLICATION:          | <input type="checkbox"/> SETTLE ORDER               | <input type="checkbox"/> SUBMIT ORDER                     |  |
| CHECK IF APPROPRIATE: | <input type="checkbox"/> INCLUDES TRANSFER/REASSIGN | <input type="checkbox"/> FIDUCIARY APPOINTMENT            | <input type="checkbox"/> REFERENCE   |