

Supreme Court of the State of New York
Appellate Division: Second Judicial Department

D13794
Y/cb

_____AD3d_____

Submitted - January 10, 2007

STEPHEN G. CRANE, J.P.
FRED T. SANTUCCI
ANITA R. FLORIO
MARK C. DILLON
RUTH C. BALKIN, JJ.

2006-04406

DECISION & ORDER

Nicolia Ready Mix, Inc., respondent, v Augusto
Fernandes, appellant.

(Index No. 488/05)

Lawrence Buscemi, Lake Grove, N.Y., for appellant.

Pinks, Arbeit & Nemeth, Hauppauge, N.Y. (Robert S. Arbeit of counsel), for
respondent.

In an action, inter alia, to recover damages for fraudulent transfer of corporate assets, the defendant appeals, as limited by his brief, from so much of an order of the Supreme Court, Suffolk County (Tanenbaum, J.), dated March 27, 2006, as granted the plaintiff's cross motion pursuant to CPLR 3126 to strike the answer.

ORDERED that the order is affirmed insofar as appealed from, with costs.

A court is authorized to strike the pleadings of a party who "refuses to obey an order for disclosure or willfully fails to disclose information which the court finds ought to have been disclosed" (CPLR 3126[3]). Striking a pleading is appropriate where a party's conduct in resisting disclosure is shown to be willful and contumacious (*see Mendez v City of New York*, 7 AD3d 766, 767; *Alto v Gilman Mgt. Corp.*, 7 AD3d 650; *Ranfort v Peak Tours*, 250 AD2d 747). Here, the defendant refused to produce relevant business records of a corporation of which he was a corporate officer, despite court orders directing him to comply with the plaintiff's notice of discovery and inspection. The defendant did not deny that he had possession, custody, or control of the demanded

February 13, 2007

Page 1.

NICOLIA READY MIX, INC. v FERNANDES

items and failed to set forth any facts in evidentiary form to substantiate his claim that he did not have the authority to disclose this information. Accordingly, the Supreme Court providently exercised its discretion in striking the defendant's answer since the defendant's refusal to comply with the court-ordered discovery was willful and contumacious.

CRANE, J.P., SANTUCCI, FLORIO, DILLON and BALKIN, JJ., concur.

ENTER:

A handwritten signature in black ink, reading "James Edward Pelzer". The signature is written in a cursive, flowing style.

James Edward Pelzer
Clerk of the Court