

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

D15211
O/gts

_____AD3d_____

Submitted - April 11, 2007

WILLIAM F. MASTRO, J.P.
DAVID S. RITTER
PETER B. SKELOS
EDWARD D. CARNI
WILLIAM E. McCARTHY, JJ.

2006-07330

DECISION & ORDER

Gateway Title and Abstract, Inc., respondent,
v Your Home Funding, Inc., et al., appellants.

(Index No. 15849/05)

Harvey M. Goldstein, Medford, N.Y. for appellants.

In an action to recover damages for breach of contract and based upon an account stated, the defendants appeal from a judgment of the Supreme Court, Suffolk County (Weber, J.), entered August 15, 2006, which, upon an order of the same court dated June 26, 2006, granting the plaintiff's motion to strike their answer pursuant to CPLR 3126 for failure to respond to its first set of interrogatories and awarding damages in the principal sum of \$7,000, is in favor of the plaintiff and against them in the principal sum of \$7,000.

ORDERED that on the court's own motion, the notice of appeal from the order dated June 26, 2006, is deemed a premature notice of appeal from the judgment entered August 15, 2006; and it is further,

ORDERED that the judgment is reversed, on the law, without costs or disbursements, the plaintiff's motion is denied, and the order is modified accordingly.

The drastic remedy of striking the defendants' answer was not warranted because, among other things, there was no clear showing that the defendants' failure to timely answer the plaintiff's first set of interrogatories was willful and contumacious (*see* CPLR 3126[3]; *Nieves v City of New York*, 35 AD3d 557, 558; *Faulkner v City of New York*, 32 AD3d 452; *Kuzmin v Visiting*

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Nurse Serv. of N.Y., 22 AD3d 643, 643-644; *Cestaro v Chin*, 20 AD3d 500, 501; *Pascarelli v City of New York*, 16 AD3d 472; *Diel v Rosenfeld*, 12 AD3d 558, 599). Accordingly, the court should have denied the plaintiff's motion. Moreover, the court erred in awarding damages in favor of the plaintiff and against the defendants in the absence of any evidence as to damages.

MASTRO, J.P., RITTER, SKELOS, CARNI and McCARTHY, JJ., concur.

ENTER:



James Edward Pelzer
Clerk of the Court