

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

D25596
H/prt

_____AD3d_____

Argued - October 27, 2009

MARK C. DILLON, J.P.
ANITA R. FLORIO
RUTH C. BALKIN
JOHN M. LEVENTHAL, JJ.

2009-02280

DECISION & ORDER

Warren S. Dank, etc., appellant, v Sears Holding
Management Corporation, et al., respondents.

(Index No. 6263/07)

Stephen I. Feder, Syosset, N.Y. (Warren S. Dank, pro se, of counsel), for appellant.

Greenberg Traurig, LLP, New York, N.Y. (Loring I. Fenton and William A. Wargo
of counsel), for respondents.

In an action to recover damages for violation of General Business Law §§ 349 and 350 and fraud, the plaintiff appeals, as limited by his brief, from so much of an order of the Supreme Court, Nassau County (Bucaria, J.), dated February 18, 2009, as denied his motion pursuant to CPLR 3126, inter alia, to strike the amended answer, pursuant to 22 NYCRR 130-1.1 for an award of an attorney's fee and costs, and pursuant to CPLR 3123 for a determination that the matters set forth in the plaintiff's first notice to admit have been admitted by the defendant Sears Holding Management Corporation.

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

The nature and degree of the penalty to be imposed pursuant to CPLR 3126 lies within the sound discretion of the Supreme Court (*see Kihl v Pfeffer*, 94 NY2d 118, 122-123). The striking of a pleading may be appropriate where there is a clear showing that the failure to comply with discovery demands is willful or contumacious (*see Howe v Jeremiah*, 51 AD3d 975; *Devito v J & J Towing, Inc.*, 17 AD3d 624). The willful or contumacious character of a party's conduct can be inferred from the party's repeated failure to respond to demands and/or to comply with discovery

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orders (*see Howe v Jeremiah*, 51 AD3d 975; *McArthur v New York City Hous. Auth.*, 48 AD3d 431). Contrary to the plaintiff's contentions, the defendants' conduct in responding to the plaintiff's interrogatories, while not always forthcoming, was not willful or contumacious because they did not repeatedly fail to respond to discovery demands.

Conduct during a litigation is frivolous and subject to sanction and/or the award of costs, including an attorney's fee, when: "(1) it is completely without merit in law and cannot be supported by a reasonable argument for an extension, modification, or reversal of existing law; (2) it is undertaken primarily to delay or prolong the resolution of the litigation, or to harass or maliciously injure another; or (3) it asserts material factual statements that are false" (22 NYCRR 130-1.1[c]). To avoid sanctions, at the least, the conduct must have a good faith basis (*see Kamruddin v Desmond*, 293 AD2d 714; *see also* 22 NYCRR 130-1.1a [b]; *Matter of Wecker v D'Ambrosio*, 6 AD3d 452, 453; *Matter of Laing v Laing*, 261 AD2d 622; *Levy v Carol Mgt. Corp.*, 260 AD2d 27).

Here, the conduct of the defendants and their counsel in responding to the plaintiff's interrogatories did not warrant the imposition of costs, including an attorney's fee.

Moreover, the defendants' cross motion, inter alia, to compel the plaintiff to answer certain questions he had refused to answer at a deposition was not frivolous under the circumstances present here.

The plaintiff's remaining contentions are without merit.

DILLON, J.P., FLORIO, BALKIN and LEVENTHAL, JJ., concur.

ENTER:



James Edward Pelzer
Clerk of the Court