

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

D33767
C/kmb

_____AD3d_____

Argued - January 10, 2012

RUTH C. BALKIN, J.P.
JOHN M. LEVENTHAL
ARIEL E. BELEN
SHERI S. ROMAN, JJ.

2010-10152

DECISION & ORDER

Eva Orgel, appellant, v Stewart Title Insurance
Company, respondent.

(Index No. 46873/07)

Robert Teitelbaum & Associates, P.C., Brooklyn, N.Y., for appellant.

Solomon & Siris, P.C., Garden City, N.Y. (Stuart Siris and Keith S. Garret of
counsel), for respondent.

In an action for a judgment declaring that the defendant is obligated to defend and indemnify the plaintiff in an underlying action entitled *Sudit v Lefferts Homes, Inc.*, pending in the Supreme Court, Kings County, under Index No. 22592/01, the plaintiff appeals, as limited by her brief, from so much of an order of the Supreme Court, Kings County (Schack, J.), dated August 16, 2010, as denied those branches of her motion pursuant to CPLR 3126 which were to strike the answer or direct the defendant to provide additional discovery, and granted that branch of the defendant's cross motion pursuant to CPLR 3126 which was to strike the complaint.

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

“The determination whether to strike a pleading for failure to comply with court-ordered disclosure lies within the sound discretion of the trial court” (*Giano v Ioannou*, 78 AD3d 768, 770, quoting *Fishbane v Chelsea Hall, LLC*, 65 AD3d 1079, 1081; see *Kihl v Pfeffer*, 94 NY2d 118, 123). However, “the ‘drastic remedy’ of striking a pleading pursuant to CPLR 3126 should not be imposed unless the failure to comply with discovery demands or orders is clearly willful and contumacious” (*Rock City Sound, Inc. v Bashian & Farber, LLP*, 83 AD3d 685, 686 [citation omitted], quoting *Friedman, Harfenist, Langer & Kraut v Rosenthal*, 79 AD3d 798, 801 [internal quotation marks omitted]; see *Commisso v Orshan*, 85 AD3d 845; *Morgenstern v Jeffsam Corp.*, 78 AD3d 913, 914; *Giano v Ioannu*, 78 AD3d at 770; *Jenkins v Proto Prop. Servs., LLC*, 54

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AD3d 726, 726-727; *Carabello v Luna*, 49 AD3d 679). “Willful and contumacious conduct may be inferred from a party’s repeated failure to comply with court-ordered discovery, coupled with inadequate explanations for the failures to comply or a failure to comply with court-ordered discovery over an extended period of time” (*Rock City Sound, Inc. v Bashian & Farber, LLP*, 83 AD3d at 686-687 [internal quotation marks and citations omitted]; see *Commisso v Orshan*, 85 AD3d at 845; *Friedman, Harfenist, Langer & Kraut v Rosenthal*, 79 AD3d at 800; *Morgenstern v Jeffsam Corp.*, 78 AD3d at 914; *Giano v Ioannou*, 78 AD3d at 771; *Savin v Brooklyn Mar. Park Dev. Corp.*, 61 AD3d 954, 954-955).

“The nature and degree of the penalty to be imposed pursuant to CPLR 3126 rests within the discretion of the motion court” (*Rock City Sound, Inc. v Bashian & Farber, LLP*, 83 AD3d at 686; see *Commisso v Orshan*, 85 AD3d at 845; *Friedman, Harfenist, Langer & Kraut v Rosenthal*, 79 AD3d at 800; *Morgenstern v Jeffsam Corp.*, 78 AD3d at 914; *Savin v Brooklyn Mar. Park Dev. Corp.*, 61 AD3d at 954). Thus, although “[s]trong public policy . . . favors the resolution of cases on the merits” (*Friedman, Harfenist, Langer & Kraut v Rosenthal*, 79 AD3d at 800), “[a] determination to impose sanctions for conduct which frustrates the disclosure scheme of the CPLR should not be disturbed absent an improvident exercise of discretion” (*Savin v Brooklyn Mar. Park Dev. Corp.*, 61 AD3d at 954 [internal quotations and citations omitted]).

Here, the court, which has “broad discretion to oversee the discovery process” (*Maiorino v City of New York*, 39 AD3d 601, 601, quoting *Castillo v Henry Schein, Inc.*, 259 AD2d 651, 652), determined that the defendant had produced all the discovery to which the plaintiff was entitled. The record supports the court’s determination that the defendant made “a good-faith effort to address the [plaintiff’s] requests meaningfully” (*Kihl v Pfeffer*, 94 NY2d at 123). Accordingly, the court providently exercised its discretion in denying those branches of the plaintiff’s motion pursuant to CPLR 3126 which were to strike the defendant’s answer or direct it to provide additional discovery.

By contrast, the plaintiff’s refusal, over a period of nine months and despite three court orders, to appear for a deposition, coupled with her failure to proffer a reasonable excuse for that refusal, supports an inference that her conduct was willful and contumacious (see *Rock City Sound, Inc. v Bashian & Farber, LLP*, 83 AD3d at 686-687; *Commisso v Orshan*, 85 AD3d at 845; *Morgenstern v Jeffsam Corp.*, 78 AD3d at 914; *Giano v Ioannu*, 78 AD3d at 771; *Savin v Brooklyn Mar. Park Dev. Corp.*, 61 AD3d at 954-955). Accordingly, the court providently exercised its discretion in granting that branch of the defendant’s cross motion which was pursuant to CPLR 3126 to strike her complaint (see *Rock City Sound, Inc. v Bashian & Farber, LLP*, 83 AD3d at 686; *Commisso v Orshan*, 85 AD3d at 845; *Morgenstern v Jeffsam Corp.*, 78 AD3d at 914; *Savin v Brooklyn Mar. Park Dev. Corp.*, 61 AD3d at 954).

BALKIN, J.P., LEVENTHAL, BELEN and ROMAN, JJ., concur.

ENTER:



Aprilanne Agostino
Clerk of the Court