

Hollander v Faber

2012 NY Slip Op 33162(U)

December 12, 2012

Sup Ct, NY County

Docket Number: 650183/09

Judge: Charles E. Ramos

Republished from New York State Unified Court System's E-Courts Service.
Search E-Courts (<http://www.nycourts.gov/ecourts>) for any additional information on this case.

This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

PRESENT: Ramos
Justice

PART 53

Hollander
-v-
Faber

INDEX NO. 650183/09

MOTION DATE _____

MOTION SEQ. NO. 11

The following papers, numbered 1 to _____, were read on this motion to/for _____

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). _____

Answering Affidavits — Exhibits _____ | No(s). _____

Replying Affidavits _____ | No(s). _____

Upon the foregoing papers, it is ordered that this motion is

Motion is decided in accordance with
accompanying Memorandum Decision.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

Dated: 12/12/12



_____, J.S.C.
HON. CHARLES E. RAMOS

- 1. CHECK ONE: CASE DISPOSED NON-FINAL DISPOSITION
- 2. CHECK AS APPROPRIATE: MOTION IS: GRANTED DENIED GRANTED IN PART OTHER
- 3. CHECK IF APPROPRIATE: SETTLE ORDER SUBMIT ORDER
- DO NOT POST FIDUCIARY APPOINTMENT REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION

-----X
NOELLE B. HOLLANDER, as Executrix of the
Estate of Frank O. Braynard,

Plaintiff,

Index No. 650183/09

-against-

RICHARD FABER, KERRY MCCAFFERY, and
THOMAS CASSIDY,

Defendants.

-----X

Charles E. Ramos, J.S.C.:

In motion sequence 011, plaintiff Noelle Hollander moves for an order (1) striking defendant Richard Faber's (Faber) answer, (2) entering a default judgment against Faber, (3) imposing monetary sanctions against Faber, and (4) precluding Faber from introducing evidence at a hearing on plaintiff's damages.

The long history of this action will not be repeated, except as relevant to this motion. Plaintiff asserts that Faber has continuously violated this Court's orders of June 23, 2009, January 25, 2010, August 10, 2010, and December 21, 2010 by destroying emails in his possession, selling items belonging to plaintiff's father's collection of maritime memorabilia (the Braynard Collection), and submitting false affidavits to the Court regarding his compliance with discovery orders.

Since 2010, this Court has issued various sanctions against Faber. On May 19, 2010, the Court enjoined Faber from tampering

with a witness after hearing evidence that he sought to suborn perjury from a defense witness (Stuart L. Shapiro's Affidavit, Exhibit 12, at 22). At the hearing, Faber's counsel was warned that this conduct must cease immediately, or he would suffer the severest consequences that the law permits (*id.*). On December 10, 2010, the Court sanctioned Faber \$15,000 for failure to produce documents, and ordered him to produce all items in his possession from the Braynard Collection and video record or photograph all such items (Stuart L. Shapiro's Affidavit, Exhibit 4). On April 27, 2011, this Court granted another motion for sanctions against Faber for his failure to produce tax returns (Stuart L. Shapiro's Affidavit, Exhibit 11, at 17). Faber was also precluded from testifying at trial as to any information he claims he does not possess (Stuart L. Shapiro's Affidavit, Exhibit 11, at 23).

Faber has acted in bad faith and has engaged in willful non-disclosure.

"[I]t is well settled that the drastic remedy of striking a party's pleading pursuant to CPLR 3126 for failure to comply with a discovery order ... is appropriate only where the moving party conclusively demonstrates that the non-disclosure was willful, contumacious or due to bad faith'" (*Henderson-Jones v City of New York*, 87 AD3d 498, 504 [1st Dept 2011], quoting *McGilvery v New York City Tr. Auth.*, 213 AD2d 322, 324 [1st Dept 1995]).

"Willful and contumacious behavior can be inferred by a failure to comply with court orders, in the absence of adequate excuses" (*id.*, citing *Johnson v City of New York*, 188 AD2d 302 [1st Dept 1992])).

Faber's repeated violations of this Court's orders is inexcusable, and can only be characterized as bad faith. For instance, on April 14, 2009, the Court issued a temporary restraining order (the Preservation Order) enjoining Faber from destroying and erasing emails and attachments¹ (Stuart L. Shapiro's Affidavit, Exhibit 2). Despite this order, Faber admittedly deleted emails from his America Online email account from April 2009 through April 2011. In his December 2011 deposition, Faber testified that "deleting from my computer, in my interpretation, did not mean destroying. I was under the impression that AOL, whoever was handling them, would keep them in an archive if it was deleted off my computer ... I assumed that on my own" (Stuart L. Shapiro's Affidavit, Exhibit 5, at 13, ¶¶ 2-3; Faber Dep Tr 9-13). When asked if the Court's order to preserve emails "wasn't that important to you," Faber responded "No" (Faber Dep Tr 13:12-14). This excuse for destroying emails subject to a Preservation Order of the Court is wholly unreasonably and inadequate, and Faber's deposition response,

¹ On June 23, 2009, the Court entered a permanent injunction.

recited herein, reveals an evident disdain for the numerous orders issued in this action. Sadly, this is just one instance of Faber's malfeasance during this litigation.

Faber violated this Court's order of January 25, 2010, which required Faber to completely and precisely answer Interrogatories 1f and 1g by identifying sales of items in the Braynard Collection relating to his eBay production records (Exhibit 3, annexed to the Shapiro Aff.). Plaintiff acknowledges that Faber's counsel obtained and produced Faber's eBay records, but Faber's deposition testimony demonstrates that he, personally, never reviewed the responses and did not actually identify the sales of items on eBay as required.

In Faber's December 2011 deposition, he was specifically asked about whether he profited from certain items that he purchased from the plaintiff's father in December 2005, and then subsequently sold (Exhibit 5, annexed to the Shapiro Aff.). In response, Faber answered that he believed he did, but he did not know. Plaintiff's counsel then asked if Faber could check his eBay records to see how much he made. Faber testified that he did not have the eBay records in his possession. When plaintiff's counsel asked if his lawyer had the records, Faber responded he did not know. Plaintiff's counsel then informed Faber that his attorney had produced the records (Exhibit 5, annexed to the Shapiro Aff., at 50-52).

This Court has twice ordered Faber, in absolute and unequivocal terms, to answer the plaintiff's interrogatories fully, completely, and precisely. He was specifically ordered to answer Interrogatories 1f and 1g by identifying sales of items in the Braynard Collection on his eBay production records, which he still has not complied with. Although defense counsel has produced the eBay records to plaintiff, it is clear from his deposition testimony that he never took the time to identify the sales of items in the Braynard Collection in these records despite being ordered to do so.

It is also apparent that Faber has submitted a false affidavit to the Court, insofar as he attested to conducting a "thorough, diligent, and good-faith search[es] of items in his maritime memorabilia collection," and that he produced "all of the items that [he] could find that were responsive to plaintiff's requests and interrogatories" (Exhibit 8, annexed to the Shapiro Aff., ¶ 2).

Faber also contradicted his own sworn affidavit when he testified in his deposition that when he searched his inventory he did a "cursory look around" (Stuart L. Shapiro's Affidavit, Exhibit 5, at 18). Faber testified that he "searched where [he] thought the items could be" and that it was "too voluminous an inventory to search everything" (*id.*). A cursory look does not equate to the thorough, diligent, and good faith search he swore

to. Faber's lack of diligence in attempting to comply with this Court's orders and the plaintiff's discovery demands can only be characterized as willfully designed to thwart the discovery process.

It is hard to believe that a collector and seller of maritime memorabilia does not keep any inventory lists and records, especially with such a "voluminous" inventory. If Faber could not provide plaintiff with certain records and documents, his affidavit regarding the unavailability of documents should have detailed "'where the subject records were likely to be kept, what efforts, if any, were made to preserve them, whether such records were routinely destroyed, [and] whether a search [was] conducted in every location where the records were likely to be found'" (*Henderson-Jones*, 87 AD3d at 504, quoting *Jackson v City of New York*, 185 AD2d 768, 770 [1st Dept 1992]). Here, Faber has repeatedly failed to detail the method, location or timing of his searches. Compounded by Faber's intentional deletion of emails subject to a Preservation Order and his own admission that he merely took a "cursory look around," his conduct simply does not reflect a good faith effort to comply with the Court's orders.

Plaintiff also asserts that Faber again violated the Preservation Order by selling items in the Braynard Collection after he was restrained from doing so. Plaintiff affirms that, based on her identification of Braynard Collection items in

Faber's selling records, she discovered that certain items were sold by Faber. However, Faber affirms that the items to which plaintiff refers were either sold before the Preservation Order was issued or are items that belonged to other parties and were not part of the Braynard Collection. Neither plaintiff nor Faber submits any conclusive proof to support their statements. While the Court is wary of Faber's affidavit, plaintiff's proof supporting these allegations is insufficient.

Nonetheless, Faber concedes that he may have "inadvertently" sold one item in the Braynard Collection after the issuance of the Preservation Order, which implies that he most likely did violate the Preservation Order once again. The Court notes that the likelihood of such a sale is inexcusable, to the extent that Faber knew of the existence of the Preservation Order, and based on such, should have put all Braynard Collection items aside to avoid such an "inadvertent" sale.

Faber's behavior in this action, his repeated violations of this Court's orders without reasonable excuse and his subversion of the discovery process, clearly exhibit wilfulness and contumaciousness conduct. Because of his conduct, no meaningful progress has been made toward a resolution of this matter. Consequently, the Court is persuaded that striking Faber's answer and entering a default judgment of liability against him is appropriate. In fact, his inadequate and/or destroyed records

would prevent him from asserting much of a credible defense, in any event. A continuation of the discovery process would only delay judgment, which appears to be Faber's strategy. That portion of the motion that seeks additional sanctions and preclusion is denied. The parties shall appear for a hearing to determine plaintiff's damages.

Accordingly, it is

ORDERED that plaintiff Noelle Hollander's motion to strike Richard Faber's answer is granted and the answer is stricken and the matter shall be set down for an assessment of damages; and it is further

ORDERED that, upon the filing by the plaintiff with the Trial Support Office (Room 158) of a copy of this order with notice of entry, the Clerk shall place this matter upon my trial calendar for the assessment of damages.

Dated: December 12, 2012

ENTER:



J.S.C.

HON. CHARLES E. RAMOS