

**Salon at Westchester, Inc. v Equinox White Plains  
Rd., Inc.**

2014 NY Slip Op 33780(U)

September 15, 2014

Supreme Court, Westchester County

Docket Number: 63917/2012

Judge: Joan B. Lefkowitz

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.

This opinion is uncorrected and not selected for official publication.

To commence the statutory time period for appeals as of right [CPLR 5512(a)], you are advised to serve a copy of this order, with notice of entry upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF WESTCHESTER - COMPLIANCE PART

-----X  
THE SALON AT WESTCHESTER, INC.,

Plaintiff,

-against-

EQUINOX WHITE PLAINS ROAD, INC.,

Defendant.  
-----X

**DECISION & ORDER**

Index No. 63917/2012  
Motion Date: Sept. 15, 2014

Seq. No. 1

LEFKOWITZ, J.

The following papers were read on this motion by defendant for an order pursuant to CPLR 3124 and 3126 dismissing plaintiff's complaint with prejudice, or alternatively, precluding plaintiff from offering at trial any evidence relating to damages that it has not already produced, or alternatively, compelling further discovery, and granting a monetary award for legal fees and costs incurred.

Order to Show Cause - Affirmation in Support - Exhibits  
Memorandum of Law in Support  
Affirmation in Opposition

Upon the foregoing papers and the proceedings held on September 15, 2014, this motion is determined as follows:

Plaintiff alleges that on or about February 4, 1999 it entered into a long term sublease with defendant's predecessor in interest. It is alleged the building is in need of substantial repairs and defendant has failed and refused to make repairs despite plaintiff's request. Plaintiff alleges it expended \$48,000 to keep the premises in good repair and the premises are in need of additional repairs costing not less than \$26,000. Plaintiff seeks a monetary judgment and an order requiring defendant to maintain the subleased premises in good repair, and to make all necessary repairs to the premises for as long as the sublease remains in effect (Defendant's Exhibit C, Verified Complaint).

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Defendant served a notice for discovery and inspection and first set of interrogatories dated December 6, 2013 (Defendant's Exhibit G). In the notice for discovery and inspection, defendant seeks "[a]ll documents relating to the repairs made to the premises causing The Salon to expend 'not less than \$48,000' as alleged in paragraph 12 of the complaint," and "[a]ll documents that relate to or establish the Salon's claims for damages" (Defendant's Exhibit G, first notice for discovery and inspection, p.6). In the first set of interrogatories, defendant seeks "all documents in support of and upon which the Salon based said damages claims" (Defendant's Exhibit G, first set of interrogatories, p.9).

In an April 23, 2014 compliance conference order, the Court directed plaintiff to provide responses to defendant's December 6, 2013 discovery demands and interrogatories by May 1, 2014 (Defendant's Exhibit L). A May 5, 2014 compliance conference order provides that plaintiff was to serve responses to defendant's discovery demands and first set of interrogatories on or before May 16, 2014. The Court noted there would be no extensions and plaintiff was strictly admonished to comply with the directives (Defendant's Exhibit M). Defendant argues plaintiff served a response to defendant's first set of interrogatories, but has not provided sufficient documentation to support the amount of damages alleged in the complaint (Defendant's Exhibit N). Defendant argues that at a May 20, 2014 compliance conference plaintiff was directed to provide a written statement that it produced all documents in its possession relating to the alleged damages. The May 20, 2014 compliance conference order directs that plaintiff's counsel was to provide an affidavit or a letter indicating there had been complete disclosure (Defendant's Exhibit P). Plaintiff's counsel sent a May 21, 2014 email stating the documents provided in response to defendant's interrogatories "are all of the documents we have which could be responsive to those requests" (Defendant's Exhibit Q).

On June 9, 2014, Jose Munoz testified on behalf of the plaintiff. When he was questioned regarding whether there are documents showing \$48,000 in damages, he testified he believes there are more documents and they are looking for additional documents (Defendant's Exhibit R, p.133). A June 24, 2014 compliance conference order directed plaintiff to respond to post deposition discovery demands indexed in the deposition transcript, or to the extent that any such documents cannot be found or do not exist, an affidavit stating the search conducted (Defendant's Exhibit S). At an August 1, 2014 compliance conference, plaintiff reportedly indicated a search of the documents at issue had not been conducted. Defendant argues plaintiff has failed to provide a response to the notice for discovery and inspection and has not yet conducted a search for additional documents pertaining to damages.

In opposition, plaintiff argues counsel agreed that once the deposition transcript was provided to plaintiff's counsel a search would be conducted for the documents at issue. There was reportedly a delay in providing the deposition transcripts to plaintiff's counsel. Mr. Munoz, a principal of plaintiff corporation, maintains the documents at issue. Plaintiff argues it has been difficult for Mr. Munoz to locate the documents because of his poor health. Plaintiff's counsel states he has been advised that some of the requested documents have been located and will be provided to defense counsel.

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"The nature and degree of the penalty to be imposed on a motion pursuant to CPLR 3126 is a matter generally left to the discretion of the Supreme Court" (*Carbajal v Bobo Robo, Inc.*, 38 AD3d 820 [2d Dept 2007]). To invoke the drastic remedy of striking a pleading or of preclusion a court must determine that the party's failure to disclose is willful and contumacious (*Greene v Mullen*, 70 AD3d 996 [2d Dept 2010]; *Kingsley v Kantor*, 265 AD2d 529 [2d Dept 1999]). Willful and contumacious conduct can be inferred from repeated noncompliance with court orders or a failure to comply with court ordered discovery over an extended period of time, coupled with the lack of an adequate excuse for the failure (*Mei Yan Zhang v Santana*, 52 AD3d 484 [2d Dept 2008]; *Carbajal v Bobo Robo, Inc.*, 38 AD3d 820 [2d Dept 2007]; *Prappas v Papadatos*, 38 AD3d 871 [2d Dept 2007]). Plaintiff failed to provide discovery in violation of three Court orders. The compliance conference orders provide that any failure to comply strictly with the terms of the order shall be grounds for the striking of pleadings or other relief pursuant to CPLR 3126. Plaintiff failed to provide a reasonable explanation as to why discovery has not been provided. Insofar as plaintiff is in violation of three Court orders directing that the corporation provide responses to defendant's December 6, 2013 notice for discovery and inspection and conduct a search for additional documents pertaining to damages, the movant is entitled to a conditional order of preclusion.

In view of the foregoing, it is

ORDERED that the motion by defendant is granted to the extent that plaintiff shall provide on or before October 6, 2014 a response to defendant's December 6, 2013 notice for discovery and inspection; and it is further

ORDERED that on or before October 6, 2014 plaintiff shall conduct a search for any additional documents pertaining to damages and provide the documents to defendant. If no such documents are located, plaintiff shall provide a signed and notarized affidavit by a person with knowledge stating the steps taken in the search to locate the documents; and it is further

ORDERED that plaintiff is precluded from introducing at trial any document pertaining to damages that is not disclosed by October 6, 2014; and it is further

ORDERED that if plaintiff does not provide a response to the notice for discovery and inspection, defense counsel shall file on NYSCEF on or before October 14, 2014 an affirmation of noncompliance and the Court will issue an order dismissing the complaint or precluding plaintiff from offering certain evidence at trial; and it is further

ORDERED that the branch of the motion seeking a monetary award for legal fees and costs is denied; and it is further

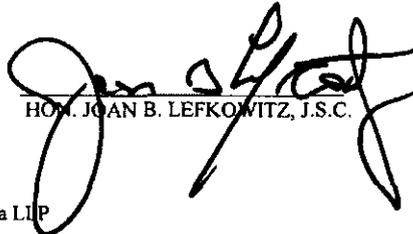
ORDERED that defense counsel shall serve a copy of this order with notice of entry on plaintiff's counsel within ten days of entry; and it is further

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ORDERED that all parties are directed to appear for a conference in the Compliance Part, Courtroom 800, on October 28, 2014 at 9:30 a.m.

The foregoing constitutes the decision and order of this Court.

Dated: White Plains, New York  
September 15, 2014



HON. JOAN B. LEFKOWITZ, J.S.C.

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cc: Compliance Part Clerk