

**SUPREME COURT-STATE OF NEW YORK  
SHORT FORM ORDER**

**Present:**

**HON. TIMOTHY S. DRISCOLL**  
**Justice Supreme Court**

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**ALLEN LIPP,**

**TRIAL/IAS PART: 22  
NASSAU COUNTY**

**Plaintiff,**

**-against-**

**Index No: 011435-05**

**ROBERT ZIGMAN a/k/a ROBERT ARONSON  
a/k/a ROBERT ARENSON, AUTO BODY CORP.,  
EPA AUTO SALES, INC. and COLLISION  
DEPOT, INC.,**

**Motion Seq. No: 3  
Submission Date: 5/17/10**

**Defendants.**

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**The following papers have been read on this motion:**

- Notice of Motion, Affirmation in Support and Exhibits.....X**
- Affirmation in Opposition.....X**
- Reply Affirmation in Further Support and Exhibits.....X**

This matter is before the Court for decision on the motion filed by Petitioner Allen Lipp on March 29, 2010, which was submitted on May 17, 2010. For the reasons set forth below, the Court grants Plaintiff’s motion to the extent that the Court strikes Defendants’ Answer, along with all affirmative defenses and counterclaims.

**BACKGROUND**

**A. Relief Sought**

Petitioner/Plaintiff Allen Lipp (“Lipp”) seeks an Order 1) striking the Answer of Defendants on the ground that Defendants have wilfully and continuously failed and refused to comply with a) an Order of the Honorable Leonard B. Austin dated September 24, 2008,

b) numerous demands for compliance thereafter, and c) prior Orders of this Court; or, in the alternative, 2) precluding Defendants from testifying or offering evidence at the time of trial or inquest as to any relevant issues; 3) directing Plaintiff to proceed to inquest; and 4) pursuant to NYCRR § 130-1.1 and CPLR § 8202, awarding Plaintiff costs and disbursements related to the making of this motion, including reasonable attorney's fees.

Defendants/Respondents Robert Zigman a/k/a Robert Aronson a/k/a Robert Arenson ("Zigman"), Auto Body Corp. ("Auto Body"), EPA Auto Sales Inc. ("EPA") and Collision Depot, Inc. ("Collision") oppose Lipp's motion.

B. The Parties' History

1. Prior Decision

The parties' history, which is outlined in detail in a prior decision of the Court dated November 6, 2009 ("Prior Decision"), is as follows:

Lipp and Zigman are equal owners of the outstanding shares of Collision, an auto body business located at the Premises. Lipp alleges that Zigman has improperly diverted Collision's assets, in part through Zigman's operation of Auto Body and EPA, whose offices are also located at the Premises. In his Verified Answer to Petition ("Answer"), Zigman denies or disputes many of Lipp's allegations. Zigman also asserts a counterclaim in which he alleges, *inter alia*, that 1) Lipp has failed to pay his share of Collision's debts and expenses; 2) Lipp failed to contribute capital, work, labor or services to Collision, in violation of the parties' agreement; 3) Zigman never deprived Lipp of his personal property at the Premises; rather, Zigman asked Lipp to remove that property, which Lipp failed to do; and 4) Zigman made a loan to Collision, for which Lipp has failed to contribute his share.

Prior to this Court's assignment to this matter, the matter was referred to a Special Referee for mediation. The parties were unable to resolve the matter and subsequently agreed to the appointment of a court-ordered accountant. Specifically, the parties executed a stipulation dated September 24, 2008, that was so-ordered by Judge Austin. That Stipulation reflects the parties' agreement "[f]or the appointment of a court selected forensic accountant to prepare and issue a report relative to this matter[.] The report shall be issued for mediation purposes only, but either or both parties may call the independent court appointed forensic accountant at trial[.] The parties will share 50/50 the costs of the court appointed forensic accountant." Judge Austin

appointed Joel Rakower (“Rakower”) as the independent forensic accountant.

Zigman failed to pay his share of Rakower’s fee, or to otherwise comply with the 2008 Stipulation, notwithstanding the efforts of the Referee to secure Zigman’s cooperation. Counsel for Lipp has extended every courtesy to counsel for Zigman in granting him extensions of time, despite an apparent lack of reciprocity of that courtesy.

In the Prior Decision, while noting that Zigman’s persistent failure to comply with the 2008 Stipulation was troublesome, this Court declined to strike the Answer. The Court concluded, further, that it would be better able to determine at trial whether Zigman’s failure to comply with the Stipulation was wilful. Accordingly, the Court referred to trial the issues of 1) Zigman’s wilfulness, and 2) any potential sanction that would be appropriate if the Court determined that Zigman had wilfully disobeyed a court order or court orders. The Court also concluded that, in light of the disputed issues of fact with respect to the merits of Petitioner’s application for dissolution, a hearing was required. Accordingly, the Court directed that Petitioner’s application for dissolution, and the other causes of action in the Petition, were referred to trial.

## 2. The Instant Motion

Counsel for Lipp submits an Affirmation in Support dated March 26, 2010 in which he affirms as follows with respect to Zigman’s conduct following the Prior Decision:

The parties appeared for a certification/compliance conference on November 24, 2009. On that date, counsel for the parties executed a stipulation, which the Court so-ordered (the “So-Ordered Stipulation”). The So-Ordered Stipulation required Defendants to provide certain documents and information to Lipp on or before December 18, 2009. The So-Ordered Stipulation further required Defendants to supply all listed documents for the years 2008 and 2009, and 2007 to the extent not already provided.

Defendants did not comply with the So-Ordered Stipulation. Rather, on December 18, 2009, the date by which Defendants were directed to produce the documents, Defendants’ counsel faxed a letter to Plaintiff’s counsel (Ex. P to Aff. in Supp.) which read as follows:

I and my client [sic] are in the process of completing this discovery pursuant to the Stipulation executed between counsels on November 24, 2009. However, I am not finished.

If you have no objection, I need to extend the stipulation's end date another two (2) weeks to complete, making all discovery due to you on or before January 8<sup>th</sup>, 2010. Further, may I ask that we adjourn Monday's court appearance to January 11, 2010, for compliance.

I greatly appreciate your courtesy herein. I am working very diligently to get you the documents you requested. Thank you.

Plaintiff's counsel affirms that he refused to consent to the requested adjournment. All counsel then appeared before the Court on December 21, 2010, at which time counsel for Defendants again said that he was in the process of amassing the requested documents, and further stated that he would serve these documents on Plaintiff's counsel by January 8, 2010. The Court, over the objection of Plaintiff's counsel, granted Defendants' counsel "significant additional time in which to produce the discovery and documentation..." (Aff. in Supp. at ¶ 40). Specifically, the Court adjourned the conference to February 4, 2010, providing Defendants with more than one (1) month to comply with the Court's Orders, and directed the parties to return to court on February 4, 2010.

Defendants again failed to produce the Documents. On February 4, 2010, counsel for Plaintiffs appeared at the conference but Defendants' counsel, who apparently had car trouble, did not appear. Instead, Defendants' counsel requested an adjournment to February 8, 2010, which the Court granted. Defendants produced none of the Documents prior to the February 8, 2010 conference. At that conference, in contrast to statements he made in his December 2009 letter, Defendants' counsel claimed for the first time that Defendants had none of the Documents. Plaintiffs' counsel again asked the Court to strike the Answer, and the Court directed Defendants' counsel to supply the 2007 Documents, as well as a detailed affidavit regarding the existence of the materials sought. The Court also granted Plaintiff leave to resubmit his motion to strike the Answer. To date, Defendants have failed to produce the Documents, or provide an affidavit regarding their existence.

In his Affirmation in Opposition, Defendants' counsel submits that intensive discovery has taken place, albeit prior to counsel's involvement in the case. Counsel asserts that discovery includes Plaintiff's examination of Defendants' records, the deposition of Zigman and the serving of eight (8) Subpoenas Duces Tecum. Defendants' counsel affirms that Plaintiff "has boxes and boxes of financial documents and most every other document associated with the

subject business, including deposition transcripts” (Aff. in Opp. at ¶ 10) and submits that Zigman’s failure to pay his share of the costs of an accountant, as provided in the 2008 Stipulation, is a function of his inability to pay rather than wilful disobedience. Defendants’ counsel affirms that Zigman “is in a very difficult place in his life” (Aff. in Opp. at ¶ 8) in that 1) he is in a difficult financial position, 2) his wife and child have abandoned him; 3) the business that is the subject of this litigation is almost defunct; 4) his house is in foreclosure; and 5) he has substantial tax arrears.

Defendants’ counsel further affirms that some of the additional documents that Plaintiff has requested are not in Defendants’ possession. As an example, his 2008 and 2009 tax returns are not completed and filed. Defendants’ counsel further submits that, if Defendants do not provide all the requested documents, the Court should consider a less drastic measure than striking the Answer, such as disallowing the introduction of certain evidence or “prohibit[ing] the relevant inferences therefrom” (Aff. in Opp. at ¶ 15).

In his Reply Affirmation, Plaintiff’s counsel outlines the numerous instances of Defendants’ and Defendants’ counsel’s failure to comply with Court Orders and directives.<sup>1</sup> There are over twenty-five examples of non-compliance, which include, but are not limited to, the failure and refusal to

- 1) comply with Justice Austin’s September 24, 2008 Order;
- 2) comply with and/or respond to the Court’s Independent Forensic Account’s letters dated November 7 and December 11, 2008, and January 23, 2009;
- 3) respond to Court-appointed mediator Thomas Dana’s inquiries regarding Defendants’ non-compliance with the September 24, 2008 Order;
- 4) comply with this Court’s November 24, 2009 Order requiring Defendants to produce the documents to Plaintiff on or before December 18, 2009, and
- 5) comply with this Court’s subsequent direction that Defendants produce the documents or provide an affidavit executed by defendant Zigman regarding the existence, or non-existence, of those documents.

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<sup>1</sup>Plaintiff’s counsel also objects to the untimeliness of Defendants’ opposition papers. The Court notes Plaintiff’s objection, but will, in its discretion, consider those papers. The untimeliness of the papers does, however, suggest that Defendants’ counsel — as well as Defendants — is less than diligent in following the Court’s directives.

### C. The Parties' Positions

Plaintiff submits that Defendants' wilful, contumacious and habitual refusal to provide discovery, or to comply with Court Orders and directives regarding that discovery, warrants the sanction of the striking of Defendants' Answer. Plaintiff also seeks costs and disbursements related to this motion, as well as the imposition of sanctions on Defendants.

Defendants oppose Plaintiff's motion, submitting that 1) Defendants have provided certain discovery; 2) the Court should consider Zigman's personal difficulties in evaluating the appropriate sanction; and 3) if the Court imposes a sanction, the Court should consider a less drastic sanction than striking the Answer, such as disallowing the introduction of certain evidence.

### RULING OF THE COURT

A litigant cannot ignore court orders with impunity. To do so seriously impairs the integrity and efficacy of the judicial system. *Fish & Richardson, P.C. v. Schindler*, 2010 N.Y. App. Div. LEXIS 4354 (1st Dept. May 25, 2010), quoting *Kihl v. Pfeffer*, 94 N.Y.2d 118, 123 (1999). Although actions should be resolved on the merits whenever possible, the court may, among other things, issue an order striking out pleadings or parts thereof when a party refuses to obey an order for disclosure or wilfully fails to disclose information which the court finds ought to have been disclosed. *Chen v. Fischer*, 2010 N.Y. App. Div. LEXIS 4500 (2d Dept. May 25, 2010), quoting CPLR § 3126(3) and *Ingoglia v. Barnes & Noble College Booksellers, Inc.*, 48 A.D.3d 636, 636-637 (2d Dept. 2008). Furthermore, when a party fails to comply with a court order and frustrates the disclosure scheme set forth in the CPLR, it is well within the Trial Judge's discretion to dismiss the complaint. *Id.*, quoting *Kihl v. Pfeffer*, 94 N.Y.2d at 122. Striking a pleading in its entirety may be warranted where the offending party's conduct was willful or contumacious. *Id.*

The Second Department's recent decision in *Chen* is instructive. There, the Second Department concluded that it was clear from the record that the plaintiff willfully and contumaciously defied the trial court's discovery orders by deleting from her computer's hard drive materials that she had been directed to produce. The Second Department held that the trial court had improvidently exercised its discretion in denying the branch of the defendant's motion which was to dismiss the plaintiff's remaining causes of action. *Id.*

*Fish & Richardson* followed a similar line of logic. There, the First Department concluded that the trial court did not abuse its discretion in striking defendant's answer based on

a pattern of disobeying court orders and failing to provide discovery. That pattern of disobedience included defendant's 1) initial failure to respond to a request for documents shortly after the complaint was filed, and his eventual, incomplete response to that request, 2) failure to respond to an interrogatory request and a second demand for documents, despite a court order, 3) failure to appear at a conference as directed by the court, and 4) attempt to blame his counsel for his failure to comply with his discovery obligations, although defendant never challenged his attorney's claims that defendant had ignored his discovery obligations. *Id.*

The Court concludes that Defendants here have willfully and persistently violated the Court's Orders and that sanctions are appropriate. The Defendants' consistent pattern of non-compliance includes ignoring the stipulation that was so-ordered by Justice Austin, the So-Ordered Stipulation of this Court, the mandates of the Court at a compliance conference on February 8, 2010, the directive of the Court-appointed mediator, and the requests of the Court-appointed forensic accountant. Indeed, the Defendants' violations are striking in their depth and breadth, and readily demonstrate willfulness and contumaciousness. *See Workman v. Town of Southampton*, 892 N.Y.S.2d 481 (2d Dept. 2010) (willful and contumacious conduct inferred from party's repeated failure to comply with court orders). Nor is the Court, and its affiliated entities such as the Court-appointed mediator and accountant, alone in serving as the recipient of Defendants' dilatoriness. Rather, Plaintiff has been consistently stonewalled by the Defendants' near-unmitigated failure to respond timely — if at all — to Plaintiff's attempts to move this case forward.

The Court declines to grant any further extension of time to the Defendants, as their conduct has demonstrated that any further extensions would be nothing more than a waste of the Court's attention and resources. Indeed, in its Prior Decision, this Court effectively gave Defendants an opportunity to remedy their non-compliance with Justice Austin's Order. The Court then extended discovery deadlines further in the So-Ordered Stipulation. Finally, on February 8, 2010, the Court directed Defendants either to produce the requested documents or execute an affidavit specifically delineating which documents could not be produced. By contrast, the Defendants have not taken any action to demonstrate any realization of the importance of the Court's Orders.

Finally, the First and Second Department's recent precedents appear to readily support the Court's conclusions. The *Fish & Richardson* trial court noted a pattern of non-compliance resembling the Defendants' actions here, and the trial court's decision to strike the defendant's

answer was affirmed on appeal. Moreover, *Chen* suggests (although may well not dictate, in light of the lack of allegations of spoliation here) that to deny the plaintiff's request to strike the answer could well be an improvident exercise of the Court's discretion. Indeed, aside from spoliation of evidence, it is hard for this Court to conceive of a pattern of willful violations of court orders that is more complete than the Defendants' conduct here. In sum, the Court believes that it is an appropriate exercise of discretion to strike the Defendants' Answer, along with any affirmative defenses and counterclaims.

Accordingly, it is

**ORDERED** that plaintiff's motion pursuant to CPLR § 3126 is granted to the extent that Defendants' answer is hereby stricken, and all affirmative defenses and counterclaims are dismissed and plaintiff is granted a judgment as to liability only as to the causes of action in its complaint; and it is further

**ORDERED** that the Clerk is directed to enter judgment accordingly; and it is further

**ORDERED** that the issues of damages is referred to Special Referee Thomas V. Dana to hear and determine at an inquest that shall commence on July 22, 2010 at 9:30 a.m.; and it is further

**ORDERED**, that Plaintiff's attorney shall serve upon the Defendants' attorney, by regular mail, a copy of this Order with Notice of Entry, a Notice of Inquest or a Note of Issue and shall pay the appropriate filing fees on or before July 8, 2010; and it is further

**ORDERED**, that the Clerk is directed to enter judgment in favor of the Plaintiff and against the Defendants in accordance with the decision of the Special Referee.

All matters not decided herein are hereby denied.

This constitutes the decision and order of the Court.

ENTER

DATED: Mineola, NY  
June 8, 2010

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HON. TIMOTHY S. DRISCOLL  
J.S.C.