

**Zuckerbrot v Lande**

2023 NY Slip Op 31029(U)

March 30, 2023

Supreme Court, New York County

Docket Number: Index No. 655110/2020

Judge: Joel M. Cohen

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 03M

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TANYA ZUCKERBROT MS RD, TANYA ZUCKERBROT  
NUTRITION, LLC, D/B/A/ F-FACTOR

INDEX NO. 655110/2020

Plaintiffs,

MOTION DATE 11/02/2022

- v -

MOTION SEQ. NO. 004

EMILY GELLIS LANDE,

**DECISION + ORDER ON  
MOTION**

Defendant.

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HON. JOEL M. COHEN:

The following e-filed documents, listed by NYSCEF document number (Motion 004) 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 110, 111, 113, 114, 115, 116, 117, 118 were read on this motion to STRIKE OR COMPEL AND PRECLUDE.

Plaintiffs Tanya Zuckerbrot and Tanya Zuckerbrot Nutrition, LLC, d/b/a/ F-Factor (collectively "Plaintiffs" or "Zuckerbrot") move pursuant to CPLR 3124 and 3126 to (i) conditionally strike Defendant Emily Gellis Lande's ("Defendant" or "Gellis") Answer or, in the alternative, (ii) to compel discovery and preclude Defendant from serving discovery demands. For the reasons that follow, their motion is granted in part.

Specifically, Defendant is directed to serve her long-delayed written responses to Plaintiff's discovery requests and interrogatories within twenty (20) days, complete document production within forty-five (45) days, and provide a sworn certification that her responses are complete. The remainder of the motion is denied without prejudice. Although Defendant's utter failure to participate in the discovery process is plainly sanctionable, it is unclear whether Defendant fully understood the nature of her responsibilities. The Court will therefore give

Defendant a final opportunity to correct course. If she fails to do so, significant sanctions (potentially including a default judgment against her) will follow.

### BACKGROUND

Plaintiffs assert claims for defamation and product disparagement against Defendant, an Instagram influencer (*Zuckerbrot v Lande*, 75 Misc 3d 269, 272 [Sup Ct New York County 2022]). On December 23, 2020, Defendant filed what is described on NYSCEF as an “Answer with Counterclaim,” but which in fact is only a Counterclaim seeking relief under N.Y. Civil Rights Law §70-a(1) (the “SLAPP” law) (NYSCEF 25 [“Counterclaim”]). The pleading does not admit or deny the allegations of the Complaint, other than perhaps in the *ad damnum* clause which requests that “Plaintiffs’ Complaint, and all claims asserted therein, be dismissed with prejudice, as a matter of law” (Counterclaim at 5). Defendant did file a “Chart Summarizing Defenses Statement-by-Statement Complaint Paragraph-by-Paragraph” (NYSCEF 49 [“Summary Chart”]) in opposition to Plaintiff’s motion to dismiss the Counterclaim. Defendant’s SLAPP Counterclaim was dismissed (*Zuckerbrot, supra*).

On April 15, 2022, the Court entered a Preliminary Conference Order (NYSEF 69 [“PC Order”]) providing for discovery to end on October 5, 2022. The PC Order provides that “failure to comply. . . may result in the imposition of costs or sanctions” and that while “interim deadlines” may be amended on consent, the discovery “end dates. . . may not be adjourned except with advance approval of the Court. . .”

Plaintiffs served discovery demands and interrogatories on April 25, 2022 (NYSCEF 81-82). Thereafter, Plaintiff agreed to extend the time for Defendant to respond through July 25, 2022 (NYSCEF 83) and thereafter for an additional five days (NYSCEF 84). On August 19, 2022, counsel stipulated to extend the time for Defendant to respond to discovery through

September 30, 2022 and for Defendant to serve discovery demands through September 15, 2022 (NYSCEF 71). Despite the stipulation, Defendant again failed to respond to the pending discovery requests. On October 10, 2022, Plaintiff again sought discovery responses from Defendant by letter (NYSCEF 88).

On October 19, 2022, counsel for Plaintiff filed a Commercial Division Rule 14 request for a conference (NYSCEF 73). The submission shows that, on October 13, 2022, counsel for Defendant confirmed that Defendant had not provided discovery and instead suggested that, because Plaintiff had filed multiple lawsuits, discovery be consolidated (*id.*).

Following a pre-motion conference with the Court's Principal Law Clerk, on November 2, 2022, Plaintiff filed this motion pursuant to CPLR 3124 and 3126 (NYSCEF 75). Annexed to Plaintiffs' motion papers are screen shots from Defendant's Instagram account from September-October 2022 claiming that discovery "[h]as not started" but nevertheless indicating knowledge of the discovery stipulation and describing documents sought by Plaintiffs (NYSCEF 91). In other Instagram screenshots, Defendant claims to have "thousands and thousands" of documents and that she "already turned them over to the fbi/doj/wondery/ny times the list goes on" (NYSCEF 92).

Defendant's counsel thereafter sought leave to withdraw from the case (NYSCEF 95), which was granted on December 15, 2022 (NYCEF 107), and the Court granted Defendant an additional forty days to respond to Plaintiff's motion (*id.*). Defendant's new counsel was granted another adjournment to submit opposition (NYSCEF 112). Defendant has *still* not served any discovery responses or made any discovery requests on Plaintiff (Opp. Brief [NYSCEF 115]).

## DISCUSSION

### A. The Motion to Compel is Granted in Part

CPLR 3124 provides

If a person fails to respond to or comply with any request, notice, interrogatory, demand, question or order under this article, except a notice to admit under section 3123, the party seeking disclosure may move to compel compliance or a response.

CPLR 3126 provides, in relevant part:

If any party. . . refuses to obey an order for disclosure or wilfully fails to disclose information which the court finds ought to have been disclosed pursuant to this article, the court may make such orders with regard to the failure or refusal as are just, among them:

1. an order that the issues to which the information is relevant shall be deemed resolved. . . ; or
2. an order prohibiting the disobedient party from supporting or opposing designated claims or defenses, from producing in evidence designated things or items of testimony. . . ; or
3. an order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or any part thereof, or rendering a judgment by default against the disobedient party

The Court has broad discretion in fashioning a remedy to address discovery abuses including, but not limited to, striking a pleading (*CDR Creances S.A. v Cohen*, 104 AD3d 17, 27 [1st Dept 2012], *affd as mod sub nom.* 23 NY3d 307 [2014]). Lesser sanctions include a preclusion order (*Higgs v Williams*, 178 AD3d 530, 530 [1st Dept 2019][collecting cases]) and monetary sanctions (*Maxim Inc. v Gross*, 179 AD3d 536, 537 [1st Dept 2020] [collecting cases]). The Court may, but is not required, to issue a “conditional order” before striking a pleading where conduct is “willful, contumacious and in bad faith” (*Fish & Richardson, P.C. v Schindler*, 75 AD3d 219, 222 [1st Dept 2010]).

The Court has reviewed Plaintiffs’ requests and finds that they seek relevant and discoverable information. By failing to timely respond, Defendant has waived all objections to

Plaintiff’s discovery “other than privilege or palpable impropriety” (*Khatskevich v Victor*, 184 AD3d 504, 505 [1st Dept 2020] [citations omitted]). Moreover, Defendant has publicly commented – incorrectly– about the status of discovery and indicated that she has already collected many responsive documents. Accordingly, the record demonstrates “the willful frustration of plaintiffs’ discovery efforts” for which a remedy is warranted (*U.S. Fire Ins. Co. v J.R. Greene, Inc.*, 272 AD2d 148, 149 [1st Dept 2000] [citations omitted]).

Defendant submitted an affidavit indicating that she did not understand or was not adequately informed by prior counsel of her discovery obligations (NYSCEF 113). While that position strains credulity, the Court is mindful of the strong preference to decide cases on the merits rather than by default or sanction. But Defendant and her counsel must *promptly* remedy the situation. She is directed to provide written responses to Plaintiff’s document requests and interrogatories within twenty days of this decision and order, complete document production within forty-five days, and provide a sworn certification that her responses are complete.

The Court will, for now, forego imposing sanctions pending Defendant’s compliance with this order. Defendant should assume, however, that failure to comply with this final opportunity to participate responsibly in the discovery process will result in substantial sanctions. Further, given that the time period for Defendant to seek discovery from Plaintiff has expired, Defendant will have to seek leave of Court to extend the schedule to permit her to do so.

The Court strongly encourages the parties and their counsel to resolve the issues discussed above without the need for further Court intervention.

\* \* \* \*

Accordingly, it is

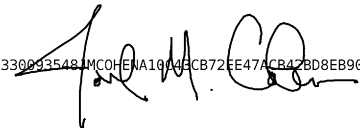
**ORDERED** that Plaintiffs’ motion is **GRANTED IN PART** and Defendant shall provide written responses to Plaintiffs’ discovery demands and interrogatories within twenty (20) days, complete document production within forty-five (45) days, and provide a sworn certification that production is complete; it is further

**ORDERED** that the branch of Plaintiff’s motion for a conditional order striking Defendant’s pleading is **DENIED WITHOUT PREJUDICE**,

**ORDERED** that Plaintiffs’ motion to preclude Defendant from serving discovery demands is **DENIED WITHOUT PREJUDICE**.

This constitutes the decision and order of the Court.

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3/30/2023

DATE

JOEL M. COHEN, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE