

**Min Yoon v Costello**

2005 NY Slip Op 30112(U)

April 28, 2005

Supreme Court, New York County

Docket Number: 0601893/2003

Judge: Barbara Kapnick

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HON. BARBARA R. KAPNICK

PART 12

Justice

Yoon, Min

INDEX NO. 601893/03

- v -

MOTION DATE \_\_\_\_\_

COSTELLO, SARA

MOTION SEQ. NO. 03

MOTION CAL. NO. \_\_\_\_\_

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

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits \_\_\_\_\_

Replying Affidavits \_\_\_\_\_

PAPERS NUMBERED  
**FILED**

Cross-Motion:  Yes  No

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

**MOTION IS DECIDED IN ACCORDANCE WITH  
ACCOMPANYING MEMORANDUM DECISION**

FOR THE FOLLOWING REASON(S):

Dated: 4/28/05

  
BARBARA R. KAPNICK  
J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 12

-----X  
MIN YOON,

Plaintiff,

-against-

SARA COSTELLO, "JOHN" and "JANE"  
COSTELLO and PHARMA, INC.,

Defendants.  
-----X

**DECISION/ORDER**

Index No. 601893/03  
Motion Seq. Nos. 003  
and 004

**BARBARA R. KAPNICK, J.:**

Motion sequence numbers 003 and 004 are consolidated for disposition.

Plaintiff moves (under motion sequence number 003) for an order:

(1) pursuant to CPLR §§ 3124 and 3126 striking defendants' Answer for their repeated failures and willful refusals to comply with Orders of this Court, including an Order dated September 29, 2004 which directed defendants to produce any financial records, including American Express records, relating to the business of defendant Pharma, Inc. in defendants' accountant's possession within one week;

(2) directing a default judgment against defendants and an immediate inquest on the issue of damages; or, alternatively,

(3) prohibiting defendants from opposing any and all of plaintiff's claims and from producing in evidence any document(s), evidence, item or thing concerning plaintiff's Complaint or

defendants' Answer, for their failure and refusal to comply with court orders and plaintiff's discovery demands; and

(4) compelling defendants to pay plaintiff's attorneys' fees of \$5,000.00 incurred in connection with this motion.

Defendants failed to submit papers or timely appear in the Motion Submission Part on November 9, 2004 and the motion was submitted without opposition.

Defendants then brought on an order to show cause on or about November 18, 2004 which was signed on November 19, 2004 (under motion sequence number 004) for an order: (i) vacating their default and allowing them to submit late papers in opposition to the plaintiff's motion on the grounds that their default was excusable, that there was no willful violation of prior court orders, and that they have now produced all the records in their possession or in the possession of their accountant; and (ii) permitting defendants to submit a cross-motion for summary judgment on liability and to set this matter down for an immediate assessment of damages.<sup>1</sup>

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<sup>1</sup> As a preliminary matter, this Court notes that this litigation has been plagued by a lack of courtesy between counsel, culminating in the unnecessarily contentious tone and inappropriate personal remarks found in both sides' papers and during the oral argument held on the record on December 22, 2004, all of which are contrary to the New York State Unified Court System's Standards of Civility adopted by Chief Judge Judith S. Kaye, Chief Administrative Judge Jonathan Lippman and the Presiding Justices of the Appellate Division in October 1997.

Defendants claim that their default on November 9, 2004 in opposing plaintiff's motion to strike their Answer pursuant to CPLR §§ 3124 and 3126 was inadvertent. Specifically, they claim that they retained a per diem attorney to request an adjournment on that date based on the fact that the attorney handling the file, Robert M. Brinen, was in California from November 2, 2004 to November 7, 2004, but the per diem attorney failed to timely appear in the Motion Submission Part because he mistakenly believed that the motion would be on a later calendar call.

The reason offered by Mr. Brinen for his need for an adjournment was the fact that he could not prepare opposition papers prior to the return date based on his determination that affidavits from the client and her accountant, Bernard Kaner, had to be prepared, signed, and returned to his office.

Mr. Brinen further notes that plaintiff's counsel was previously provided with an authorization to obtain records directly from Mr. Kaner, and suggests that plaintiff's counsel never received the records because he failed to process those authorizations.

However, Mr. Kaner has now submitted an affidavit stating that contrary to the representations of defendants' counsel, he has never served as defendants' accountant and has never been in possession of any of their documents.

Mr. Brinen claims in a reply affirmation that he first learned from his client on December 14, 2004 that she mistakenly believed that she had retained Mr. Kaner as her accountant but that, in fact, defendants had never retained Mr. Kaner and that he was never given any of Pharma's records.

Even if this Court accepts Mr. Brinen's representation that he did not intentionally deceive opposing counsel or this Court with respect to this issue, this Court questions the extent of counsel's efforts to accurately determine the whereabouts of the documents requested at several court conferences, and pursuant to extensive motion practice and resulting court orders.

The cavalier attitude of defendants' counsel toward responding timely to orders and seeking adjournments was again evident on December 15, 2004, the initial return date of defendants' order to show cause to vacate their default on plaintiff's prior motion, when another per diem attorney, also without any knowledge of the case, appeared before this Court with an Affidavit of Engagement from Mr. Brinen which requested that the matter be adjourned for "approximately thirty (30) days" because he was selecting a jury in Nassau County and also wished to serve and file Reply papers. This court granted a one-week adjournment over plaintiff's objection, directed that no per diem attorney was to appear, and further directed defendants to serve any Reply Papers and file them with the Clerk in Part 12 by December 20, 2004. The Reply Papers were

never filed with the Clerk in advance, but were first handed up to the Court during the oral argument on December 22, 2004.

The Appellate Division, First Department, has specifically held that

[u]nconditionally striking a pleading pursuant to CPLR 3126 is appropriate where the resisting party's default is deliberate and contumacious (citation omitted). Disobedience of a court order and frustration of the disclosure scheme provided by the CPLR warrant imposition of the sanction (CPLR 3126; see *Zletz v Wetanson*, 67 NY2d 711, and cases cited therein).

Pimental v. City of New York, 246 A.D.2d 467, 468 (1st Dep't 1998).

Although defendants contend that they were in full compliance with the September 29, 2004 Order as of October 18, 2004, when they allegedly served all of the American Express records from the date of the inception of Pharma Inc. in April 2003 through August 31, 2004, the documents annexed to defendants' papers appear to be bank records and not American Express records. Moreover, defendants fail to offer any excuse why these documents were not produced within one week of this Court's September 29, 2004 Order, as was directed.

Defendants' consistent failure to timely comply with numerous disclosure orders (see, Aviles v. San Rafael Cooperativa De Ahorro Y Credito, 7 A.D.3d 431 [1st Dep't 2004]; Dweck Law Firm v. Mann, 2 A.D.3d 188 [1st Dep't 2003]; John R. Suoto, Co., Inc. v. Coratolo, 293 A.D.2d 288 [1st Dep't 2002]), constitutes "precisely the sort of dilatory and obstructive, and thus contumacious,

conduct warranting the striking of their answers." (Kutner v. Feiden, Dweck & Sladkus, 223 A.D.2d 488 [1st Dep't 1996], lv. to app. denied, 88 N.Y.2d 802 [1996]; see also, Reidel v. Ryder TRS, Inc., 13 A.D.2d 487 [1st Dep't 2004]; Merchants T & F, Inc. v. Fisher, 11 A.D.3d 277 [1st Dep't 2004]).


Accordingly, based on all the papers submitted and the oral argument held on the record on December 22, 2004, this Court finds that defendants have failed to show a reasonable excuse for their default in timely opposing plaintiff's motion to strike their Answer or properly seeking an adjournment of the motion. (See, Grieco v. Walker, 8 A.D.3d 66 [1st Dep't 2004]). Thus, defendants' motion is in all respects denied and plaintiff's motion is granted to the extent of striking defendants' Answer.

That portion of plaintiff's motion seeking an award of attorneys' fees is denied in the discretion of the Court, based on all the circumstances presented.

Plaintiff's counsel is directed to file a Note of Issue for a trial on the issue of damages only within thirty days of entry of this order.

This constitutes the decision and order of this Court.

Dated: April 28, 2005

  
\_\_\_\_\_  
Barbara R. Kapnick  
J.S.C.