

Citicorp Trust Bank, FSB v Makkas
2007 NY Slip Op 34524(U)
September 13, 2007
Supreme Court, Orange County
Docket Number: 1263/03
Judge: William J. Giacomo
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To commence the statutory time for appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

FILED
AND
ENTERED
ON _____ 2007
ORANGE
COUNTY CLERK

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ORANGE
PRESENT: HON. WILLIAM J. GIACOMO, J.S.C.

-----X
CITICORP TRUST BANK, FSB f/k/a TRAVELERS
BANK AND TRUST, FSB,

Plaintiff,

Index No. 1263/03

-against-

Motion Date: 8/31/07

LIGERIE L. MAKKAS, KONSTANEINOUS G. MAKKAS,
LESHOLD REALTY CORP., NORSTAR MORTGAGE
COMPANY, A DIVISION OF FLEET REAL ESTATE
FUNDING CORP.,

Defendants.

-----X
The following papers numbered 1 to 11 were read on plaintiff's motion for relief related to pretrial discovery.

PAPERS NUMBERED

Notice of Motion/Affirmation	_____	1-2
Affirmation in Opposition	_____	8
Reply Affirmation	_____	10
Exhibits	_____	3-7,9,11

Upon the foregoing papers it is ordered that the motion is conditionally granted.

Plaintiff commenced this mortgage foreclosure action against defendants Ligerie L. Makkas and Angelo Makkas based upon its claim that those defendants have defaulted on a loan secured by a mortgage on real property located in Goshen, New York (the Subject Property). Now before the Court is plaintiff's motion to strike the

* 2]
answer of defendant Leshold Realty Corp. (Leshold) for failure to provide discovery that has been demanded by plaintiff.

Following the restoration of this action to the calendar by decision and order of former Justice Lawrence I. Horowitz, a preliminary conference was conducted on February 9, 2007. At that conference, Justice Horowitz directed the parties to: (1) serve their discovery demands by February 23, 2007; (2) respond to discovery demands by March 23, 2007; and (3) conduct depositions by March 28, 2007 (hereinafter "the PC Order"). Pursuant to the PC Order, on February 23, 2007, plaintiff served Leshold with a Notice for Discovery and Inspection (the Document Demand) seeking the production of numerous documents identified in the Document Demand. Because it received no response to the Document Demand by March 23, 2007, on March 27th plaintiff sent a letter (the March 27 Letter) to Leshold stating:

"We have not received any Responses to the Discovery Demands previously served upon you. Please let me know when we can expect responses. As you know, we cannot go forward with the Court-ordered depositions without Responses." (Krellen Affirm., Exh.5).

According to plaintiff, Leshold failed to respond to the March 27 Letter.

Faced with the lack of discovery from Leshold, plaintiff filed the instant motion. In plaintiff's view, because Leshold has wilfully violated the PC Order and has ignored the March 27 Letter, this Court should strike Leshold's answer.

In opposition to the motion, Leshold relies upon its discovery response in a separate action that it has commenced with respect to the Subject Property. That action (the Fraud Action) seeks to set aside a transfer of the Subject Property from defendant Angelo Makkas to defendant Konstanteinous G. Makkas, and a subsequent transfer of that property from Konstanteinous G. Makkas to Ligerie Makkas. As represented to the Court by Leshold, in the Fraud Action, in which plaintiff at bar is also named as a defendant, it has provided plaintiff with the document discovery which is now sought in this action.

Notwithstanding that it may have provided certain documents to plaintiff in the Fraud Action, since that action has not been

[* 3]

joined or consolidated with this lawsuit¹, any discovery provided in the Fraud Action is without significance to the present discovery dispute. To the contrary, upon being served with the Document Demand, it was Leshold's obligation to provide the discovery sought by plaintiff, or to respond to that demand with appropriate objections, thereby putting plaintiff on notice that it would have to move to compel the production of any discovery not provided by Leshold. Since it is conceded that no discovery was provided in response to the Document Demand, the question to be answered is what remedy should follow.

The striking of an answer is a "drastic remedy" for a discovery violation (*DeJoy v. L&T Tavern Corp.*, 89 A.D.2d 613,614 [2d Dept. 1982]). However, "disobedience of a court order and frustration of the disclosure scheme provided by the CPLR warrant imposition of the sanction" of "[u]nconditionally striking a pleading pursuant to CPLR 3126 where the resisting party's default is deliberate and contumacious" (*Pimental v. City of New York*, 246 A.D.2d 467,468 [1st Dept. 1998]).

Here, if Leshold believed that it had a good-faith basis to take the position that the discovery served upon plaintiff as defendant in the Fraud Action satisfied its discovery obligations in this action, Leshold could have sought an appropriate determination by the Court. Instead, it chose to ignore the PC Order and the subsequent effort made by plaintiff to obtain compliance with that order through the March 27 Letter. Given those circumstances, the Court could determine that Leshold's failure to respond to the Document Demand was wilful, thereby supporting the striking of its answer in this case (*see ibid.*).

Nevertheless, pretrial discovery has not yet been closed by the Court in this action. In view of the current posture of the case and the representation by Leshold's counsel that his client believed that it had met its discovery obligations at bar by providing documents in the Fraud Action, the Court shall exercise its discretion by giving Leshold one final opportunity to provide the discovery demanded by plaintiff. However, if Leshold fails to provide discovery as directed below, its answer shall be stricken without further motion practice (*cf. Spataro v. Ervin*, 186 A.D.2d 793,794 [2d Dept. 1992] [Affirming order striking answer where defendant failed to appear for deposition after being afforded one final opportunity to appear by issuance of conditional order]).

¹ Leshold's earlier motion to consolidate the Fraud Action with this action was denied by Justice Horowitz.

Accordingly, it is

ORDERED that the motion is conditionally granted; and it is further

ORDERED that by no later than October 11, 2007 defendant Leshold Realty Corp. shall produce all documents demanded by plaintiff in its Notice for Discovery and Inspection dated February 23, 2007; and it is further


ORDERED that if Leshold Realty Corp. fails to produce all documents as directed above, its answer shall be stricken without the need for further motion practice; and it is further

ORDERED that the parties shall conduct all depositions by no later than October 31, 2007; and it is further

ORDERED that all parties shall appear before this Court for a status conference at **9:30 a.m. on November 7, 2007.**

The foregoing shall constitute the decision and order of the Court.

Dated: White Plains, New York
September 13, 2007


HON. WILLIAM J. GIACOMO, J.S.C.

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For Court purposes only: Final Disp: No
Appearance: Yes (11/7/07 Status Conf)
Number of Motions: 1