

Kaufman v Bachman
2007 NY Slip Op 34549(U)
April 12, 2007
Supreme Court, New York County
Docket Number: 110033/05
Judge: Debra A. James
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Handwritten initials and numbers: 'S', '12/19/06', and '12/19/06'.

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

PRESENT: DEBRA A. JAMES
Justice

PART 59

LEE KAUFMAN,
Plaintiff,
- v -
JAMISON BACHMAN,
Defendant.

Index No.: 110033/05
Motion Date: 12/19/06
Motion Seq. No.: 03
Motion Cal. No.: OSC

The following papers, numbered 1 to 1 were read on this motion to strike the answer.

Notice of Motion/Order to Show Cause -Affidavits -Exhibits _____
Answering Affidavits - Exhibits _____
Replying Affidavits - Exhibits _____

PAPERS NUMBERED
1

FILED
APR 20 2007
NEW YORK COUNTY CLERK'S OFFICE

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Cross-Motion: Yes No

Upon the foregoing papers,

The court shall grant plaintiff's motion pursuant to CPLR 3126 (3), strike defendant's answer and direct the plaintiff to file a note of issue for an inquest on damages.

Defendant appears pro se in this action. By Order dated July 11, 2006, this court directed defendant to provide handwriting samples to plaintiff in aid of plaintiff's claims that defendant signed certain promissory notes which defendant denies. The court also directed that the depositions of the parties were to take place on or before September 29, 2006. Defendant failed to comply with the court's Order.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Check One: FINAL DISPOSITION NON-FINAL DISPOSITION
Check if appropriate: DO NOT POST REFERENCE

Handwritten initials: MJT

By further Compliance Conference Order dated October 17, 2006, following extended colloquy before the court, the court again directed the defendant to "deliver by overnight mail addressed to plaintiff's counsel 15 or more original signature exemplars for the period 6/03 - 6/04 as follows (1) cancelled checks in sequential order, and/or (2) employment or DMV applications, (3) medical forms/requests, and/or (4) unlined stationary, each written in ballpoint pens." The court also directed defendant to appear for deposition at the courthouse on November 30, 2006, at 10:00 A.M. and to produce at that time relevant documents for use in connection with the deposition. The court directed the plaintiff to appear for deposition at the courthouse on December 7, 2006, at 10:00 A.M. and to produce at that time relevant documents for use in connection with the deposition.

By letter dated October 24, 2006, defendant provided plaintiff with "photo static copies" of sixteen checks in sequential order from August and September 2004 as provided by defendant's bank. Defendant in the cover letter asserted that his bank did not return checks and therefore he did not have the originals and that he had no other records responsive to the court's Order. The parties pursuant to the court's Order appeared for the defendant's deposition on the morning of November 30, 2006. The deposition transcript sets forth

defendant's testimony that he did not bring any relevant documents to the deposition hearing in violation of the court's Order. Following the morning session, the parties returned from lunch to discover that the court reporter's computer malfunctioned and the deposition would be unable to proceed. The parties then agreed that defendant's deposition would conclude on December 7, 2006. However, subsequent correspondence between the parties reveals that defendant decided not to go forward with the conclusion of his deposition despite the parties' prior agreement.

The plaintiff now moves to strike defendant's answer for the willful failure to comply with the discovery orders of this court. The court notes that defendant did not submit responsive papers on this motion. Instead, defendant attempted to submit a purported "cross-motion" to renew, to resettle and to correct the record" and a purported "motion for sanctions." The court declined to consider defendant's applications as they were not properly made before the court. However, the court, in light of defendant's pro se status, considered the documents submitted as attempted opposition to plaintiff's motion. But as the court noted on the record at the argument of this motion, nothing in the defendant's papers is responsive to the allegations made by the plaintiff regarding defendant's failure to comply with discovery and during oral argument the defendant further failed

to provide any grounds for denying the plaintiff the relief sought.

Defendant's failure to provide the handwriting exemplars renders him unable to prove his defense of forgery as there is no evidence of defendant's signature at the time the documents were allegedly forged. The court notes that the transcript of the status conference held before the court on October 17, 2006, submitted by the plaintiff as an appendix to the papers in opposition to Motion Sequence No. 4, reveals that the court explained the discovery order that was being issued and extensively cautioned the defendant as to the penalties that could result from a lack of compliance. Defendant although appearing pro se indicated a full understanding of his responsibilities under the Order the court issued on that date.

On this motion, the defendant's failure to justify non-compliance with the court's Order and respond to the allegations of willful and abusive conduct set forth in plaintiff's papers by plaintiff's counsel require this court, even in light of defendant's pro se status, to grant the relief sought. In upholding the dismissal of complaints where there has been a failure to comply with discovery orders of the court, the First Department has stated

The motion court providently exercised its discretion in dismissing the complaint because of plaintiffs' long continued pattern of noncompliance with court orders and discovery demands (CPLR 3126), which gave rise to an

inference of willful and contumacious conduct. We note that plaintiffs failed to offer any excuse, much less a reasonable one.

Jones v Green, 34 AD3d 260, 261 (1st Dept 2006) (citations omitted). Similarly, the Court has stated

A self-executing order having been issued, requiring production of a witness on a date certain, defendants were cognizant of the repercussions of their failure to produce. Rather than produce a witness, or contact the court for a protective order for their anticipated noncompliance, defendants simply took no action. Notwithstanding their claimed good faith belief that the deposition of their witness should await the outcome of their appeal of the January 13, 2005 order compelling document production, defendants took this position at their peril. Their conduct of flouting the court order, without good cause and without contacting the court for relief therefrom, was willful and contumacious conduct, warranting sanction. If the credibility of court orders and the integrity of our judicial system are to be maintained, a litigant cannot ignore court orders with impunity.

Rampersad v New York City Dept. of Educ., 30 AD3d 218, 219 (1st Dept 2006).

Accordingly, it is

ORDERED that plaintiff's motion is GRANTED and defendant's Answer is stricken pursuant to CPLR 3126 (3), and judgment by default entered upon; and it is further

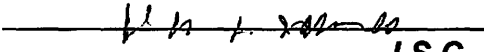
ORDERED that plaintiff is directed to serve a copy of this Order with notice of entry upon defendant and file a note of issue to set this matter down for an inquest on damages; and it is further

ORDERED that the court declines to consider the improperly filed "cross-motion" of defendant and instead considered such papers merely as opposition to plaintiff's motion.

This is the decision and order of the court.

Dated: April 12, 2007

ENTER:


_____ J.S.C.

DEBRA A. JAMES
J.S.C.

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