

Richard A. Kraslow, P.C. v Zeidman

2008 NY Slip Op 30254(U)

January 18, 2008

Supreme Court, Nassau County

Docket Number: 9753-05/

Judge: Michele M. Woodard

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**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU**

-----X
RICHARD A. KRASLOW, P.C.

Plaintiff,

-against-

ANDREW ZEIDMAN and SHIRLEY ZEIDMAN,
Defendants.

**MICHELE M. WOODARD,
J.S.C.**

TRIAL/IAS Part 16

Index No.: 19753/05

Motion Seq. Nos.: 02 & 03

DECISION AND ORDER

-----X
Papers Read on this Decision

Defendants' Notice of Motion	02
Plaintiff's Order to Show Cause	03
Defendants' Affidavit in Opposition	xx
Plaintiff's Affidavit in Opposition to Zeidman's Motion	xx
Plaintiff's Reply Affidavit	xx
Plaintiff's Memorandum of Law in Opposition To Defendant	xx
Plaintiff's Memorandum of Law in Support of Order to Show Cause	xx

This Motion by Defendant Andrew Zeidman for an order pursuant to 22 NYCRR 202.21(e) vacating the Note of Issue; an order pursuant to CPLR §3126 conditionally striking the Complaint should Plaintiff fail to appear for a deposition within 30 days of this court's order; and, an order pursuant to CPLR §4102(e) permitting him to file a Jury Demand *nunc pro tunc* is determined as provided herein.

This Motion by Plaintiff Richard S. Kraslow, P.C., for an order pursuant to CPLR §3126 striking the Defendant Andrew Zeidman's Answer and Counterclaim, or in the alternative, an order pursuant to CPLR §3124 compelling Ziedman to respond to his Demand for Discovery and Inspection, to provide supplemental responses to his First Set of Interrogatories, and to appear for a deposition; an order pursuant to CPLR §3122(d) compelling Zeidman to reimburse him \$951.97

for the costs he incurred copying responsive discovery documents; and, an order pursuant to CPLR §2221(a) extending his time to file a motion for summary judgment beyond the date set forth in the Certification Order dated May 1, 2007 is determined as provided herein.

The Plaintiff Kraslow law firm commenced this action on February 12, 2005, seeking to recover legal fees in the amount of \$15,835.78 allegedly owed it for its representation of the Zeidman Defendants in Zeidman and Zeidman v Montella and Dara (Nassau County Index No. 19669/01) and Zeidman and Zeidman v First Nationwide Mortgage Corporation and North Fork Bank (Nassau County Index No. 02-019822). The Zeidman Defendants answered the complaint in this action *pro se* and advanced counterclaims seeking to recover for legal malpractice.

The discovery and case history of this action insofar as it is pertinent to the determination of these applications is as follows:

The Kraslow firm was retained by the Zeidman Defendants to represent them in Zeidman v Montella and Dara in April, 2002. In that action, the Zeidmans maintained that the Defendant builders Montella and Dara had breached their agreement with them and wrongfully converted insurance proceeds in the amount of \$75,634.93 from the mortgagee of their property, First Nationwide Mortgage Corporation ("FNMC"), which held the insurance proceeds in connection with their claim for fire damage to the property in escrow. In December, 2002, the Kraslow firm brought an action on behalf of the Zeidmans against the mortgagee FNMC which had released the escrow funds to the builders and North Fork Bank which had cashed the check presented by Montella and Dara.

On May 4, 2005, the Kraslow firm was relieved from representing the Zeidmans on account of a conflict.

This action was commenced by the Kraslow firm on December 8, 2005 to recover outstanding legal fees in the amount of \$15,835.78 for its former representation of the Zeidmans. The Zeidman Defendants served Answers with counterclaims *pro se* on January 16, 2006 and January 18, 2006, respectively. A Preliminary Conference was held on September 19, 2006 which required that discovery demands be made by October 20, 2006 and responded to by November 20, 2006. In accordance with the Preliminary Conference Order, the Kraslow firm served their Demand for Discovery and Inspection and its First Set of Interrogatories, Combined Demands and Notice to Take Deposition.

A compliance conference was held on March 20, 2007. The parties were directed to respond to outstanding demands by April 26, 2007. A certification conference was held on May 1, 2007 and a Certification Order was issued, "subject to compliance [with] Conference Order dated March 20, 2007," as the Kraslow firm had not yet received Mr. Zeidman's discovery response which had only been mailed the day before. When the Kraslow firm received Zeidmans' response, it immediately objected as not a single document had been produced. In fact, while Court records indicate that Zeidman v Montella was settled and that Zeidman v North Fork Bank was decided after a bench trial, Mr. Zeidman has not produced a settlement agreement or trial decision, thus crippling the Kraslow firm's efforts to ascertain Mr. Zeidman's damages.

On July 25, 2007, the Kraslow firm filed a Note of Issue, with a reservation of rights regarding Mr. Zeidman's outstanding discovery. On or about August 20, 2007, Andrew Zeidman moved, *inter alia*, to strike the Note of Issue. The Kraslow firm maintains that it was never served with that motion but nevertheless learned of it and interposed opposition. On September 17, 2007, the Kraslow firm moved to strike Mr. Zeidman's Answer or to compel discovery and his

deposition; to recoup its copying costs; and, to extend its time to move for summary judgment.

Where a party willfully and contumaciously fails to produce court ordered discovery, striking the pleadings is warranted. Horne v Swimquip, Inc., 36 AD3d 859, 830 (2nd Dept 2007)'; DeVito v J & J Towing, Inc. 17 AD3d 624 (2nd Dept 2005); Emanuel v Broadway Mall Properties, Inc., 293 AD2d 708 (2nd Dept 2002); Yoon v Costello, 29 AD3d 407 (1st Dept 2006).

Mr. Zeidman's Answer insofar as counterclaims are asserted is stricken. His blatant failure and outright refusal to produce any documents whatsoever—particularly the closing documents from his two prior actions—clearly constitutes willful and contumacious conduct warranting such drastic relief. In addition, Mr. Zeidman's Answer in defense to this action is stricken should he fail to produce any and all responsive documents and appear for a deposition within 30 days of service of this order upon him.

Mr. Zeidman's motion to strike the Note of Issue is denied. His application is untimely and he has failed to set forth "unusual or unanticipated circumstances" which warrant an exception. 22 NYCRR § 202.21(e). His failure to demand a jury trial within 15 days of the Note of Issue constituted a waiver of his right to do so. CPLR §4102. Mr. Zeidman's motion to strike the complaint is granted only to the extent that it is stricken should Richard A. Kraslow fail to appear for a deposition within 30 days of this order.

For clarification, Mr. Zeidman is to appear for his deposition before the Plaintiff appears for his.

The Kraslow firm maintains that Mr. Zeidman was unable to visit its office to review its responsive documents consisting of the two former litigation files and so they agreed to have them copied at Mr. Zeidman's expense. Mr. Zeidman maintains that he was denied access to the file

and so was compelled to agree to pay to have those documents copied. While the Kraslow firm maintains that Mr. Zeidman agreed to pay the estimated cost of \$550, Mr. Zeidman maintains that he only agreed to pay the first estimate provided him in the amount of \$400. Ultimately, the copying cost \$951.97 and the Kraslow firm now seeks to recover that amount. The party seeking document discovery should pay the cost of its reproduction. Rubin v Alamo Rent-A-Car, 190 AD2d 661 (2nd Dept 1993); Vinings Spinal Diagnostic v Progressive Casualty Insurance Company, 15 Misc3d 270 (District Court, Nassau County 2006). Zeidman clearly agreed to have the responsive documents copied. And, the Kraslow firm never gave a clear price but only an estimate. Zeidman is directed to reimburse the Kraslow firm for its copying expenses in full.

Lastly, in its discretion, a court may extend a party's time to file a motion for summary judgment beyond the Court imposed time limitation. Rossi v Arnot Ogden Medical Center, 252 AD2d 778 (3rd Dept 1998); Clermont-Lundy v Zimbalist, 10 Misc3d 1056(A) (Supreme Court, Kings County 2005); John v Bastien, 178 Misc2d 664 (Civil Court, City of New York 1998). The time with which either party may move for summary judgment is extended for 90 days from the date of this order.

This constitutes the **DECISION** and **ORDER** of the Court.

DATED: January 18, 2008
Mineola, N.Y.

ENTER:


HON. MICHELE M. WOODARD

J.S.C.
ENTERED

JAN 25 2008

NASSAU COUNTY
COUNTY CLERK'S OFFICE