

**Witkin v Quality Custom Brokers, Inc.**

2008 NY Slip Op 30549(U)

February 21, 2008

Supreme Court, New York County

Docket Number: 0874-05/

Judge: Stephen A. Bucaria

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SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

**HON. STEPHEN A. BUCARIA**

Justice

TRIAL/IAS, PART 4  
NASSAU COUNTY

\_\_\_\_\_

GLENN WITKIN,

Plaintiff,

INDEX No. 020874/05

MOTION DATE: Dec. 7, 2007  
Motion Sequence # 001, 002

-against-

QUALITY CUSTOM BROKERS, INC. and  
GENE MOLZON,

Defendants.

\_\_\_\_\_

The following papers read on this motion:

- Notice of Motion..... X
- Cross-Motion..... X
- Affirmation in Further Support &Opposition..... X

This motion, by defendants, for an order: (a) pursuant to CPLR 3126 striking plaintiff's Complaint or, alternatively, precluding plaintiff from offering any documentary or testimonial evidence in support of his claims or in opposition to defendants' counterclaim and defenses due to plaintiff's deliberate and willful failure to comply with (i) defendants' Notice for Discovery and Inspection dated June 28, 2006 (the "Document Demands"), (ii) defendants' Notice To Take Deposition Upon Oral Examination dated June 28, 2006 (the "Deposition Notice") and (iii) this Court's Preliminary Conference Stipulation and Order dated April 13, 2007 (the "Order"); (b) awarding defendants their reasonable attorneys' fees and costs associated with this motion; and (c) granting such other, further and different relief as to this Court may seem just and proper; and a cross-motion, by plaintiff, for an order:

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(a) pursuant to CPLR 3126 striking defendants answer or, alternatively, precluding plaintiff from offering any documentary or testimonial evidence in support of his claims or in opposition to defendants counterclaim and defenses due to plaintiff's deliberate and willful failure to comply (b) pursuant to CPLR 3124 compelling defendants to disclose the documentation required by the sales agreement attached hereto as Exhibit A; his (c) pursuant to CPLR 3103 granting to plaintiff a protective order (d) awarding plaintiff's their reasonable attorneys' fees and costs associated with this motion; and (e) granting such other, further and different relief as to this Court may seem just and proper, are **both** determined as hereinafter set forth.

**FACTS**

The plaintiff, Glenn Witkin, entered into a Share Purchase Agreement (herein "Agreement") with the defendant, Quality Custom Brokers, Inc., on May 28, 2004 whereas plaintiff agreed to redeem and sell all of his shares in the corporation for \$25,000. Additionally, the Agreement calls for an equal distribution of accounts receivable to be made between plaintiff and defendant, less applicable expenses. The Agreement sets forth provision 5(L) which calls for forfeiture of future disbursements if either party unilaterally retains payment rightfully due to the corporation. Plaintiff has commenced this action averring that the defendant purportedly committed breach by not making accounts receivable payments in accord with the Agreement. Defendant avers that plaintiff wrongfully withheld a payment that was meant for the corporation, thereby forfeiting his right to further account receivable payments as per the Agreement.

**DEFENDANTS' CONTENTIONS**

Defendants' counsel avers that the plaintiff demonstrates a lack of good faith and a willful failure to comply with discovery efforts. On June 28, 2006, a Document Demand and a Deposition Notice was served. Plaintiff thereafter failed to respond to either request, but himself filed a Request for Preliminary Conference with the Court, which was scheduled for March 28, 2007. Plaintiff's attorney failed to make an appearance and the defendant asserts that he could not be reached. The conference was thereafter rescheduled for April 13, 2007. At the conference, both parties stipulated to a discovery schedule ordered by the Court. Counsel maintains that plaintiff's response and document demands were due May 13, 2007, and plaintiff, without excuse, failed to respond to the deadline, and was thereafter unreachable for communication.

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Counsel contends that pursuant to the order, depositions were scheduled for June 26, 2007, and sent a letter reminding plaintiff of the meeting and informing him that the defendants had not yet received any document demands. (exhibit J). Counsel suggested that depositions could be rescheduled by stipulation and to adjourn the Status Conference scheduled for July 10, 2007. The Conference was adjourned to August 14, 2007 and the Court requested the counsel to inform plaintiff's attorney of the date. (exhibit K).

Defendants' attorney again attempted to contact counsel by letter reminding him of the date of the Conference. (exhibit L). The plaintiff's attorney appeared at the Conference without having responded to defendant's document demands, without explanation other than he was not sure if his client possessed any of the responsive documents. The conference was adjourned to September 14, 2007.

Defendants' attorney maintains that plaintiff's counsel was contacted on August 24, 2007 to request responsive documents and reschedule depositions (exhibit M); on September 5, 2007, contact was attempted to no avail. At the September 14, 2007 conference, plaintiff's counsel did not appear and efforts to contact him were unsuccessful; the Conference was adjourned to September 20, 2007.

On September 20, 2007, defendants' attorney contends that counsel for plaintiff appeared one and one half hours late without a file and without excuse for non-response to the document demands or for the non compliance with the deposition schedule. Plaintiff's attorney informed the Court that his wife suddenly took ill. Defendant contends plaintiff's attorney has willfully disregarded and hampered efforts of discovery.

**PLAINTIFF'S CONTENTIONS**

Plaintiff avers that the documents that the defendants seek are already in their possession. He additionally avers that the defendants are seeking documents that are irrelevant to the lawsuit, including the plaintiff's personal banking records, and seeks a protective order from the Court against this request. Plaintiff contends, that the defendant is in possession of documents essential to the lawsuit such as books and records that the plaintiff was entitled to view as per the Agreement, but has yet to be provided. Plaintiff cites sections of the Agreement where the parties agreed to cooperate in information regarding the books and records of the corporation, and other provisions regarding forfeiture. Counsel argues that the defendants failed to comply with the terms of the agreement and the litigation cannot move forward until this issue is resolved. Plaintiff further argues that repeated efforts to reschedule settlement conference with the defendant have been to no avail.

**DEFENDANTS' AFFIDAVIT IN SUPPORT OF ITS MOTION AND  
OPPOSITION TO THE PLAINTIFF'S CROSS MOTION**

Defendants' counsel argues that the plaintiff's cross motion is frivolous and untimely; that plaintiff cannot, and has not, claimed the defendant violated any order or directive of the Court. Defendants' attorney asserts plaintiff is asking the Court to compel them to produce documents notwithstanding the fact that plaintiff has not served any notice for discovery and inspection and the documents desired are unspecified. Defendants' attorney argues that the protective order sought by the plaintiff is vague and is being used in order to avoid production of properly requested documents; plaintiff has willfully and consistently failed to comply with the Court's order of June 2006 notwithstanding numerous opportunities to comply. Defendants' counsel contends the request for plaintiff's bank records is narrowly read by opposing counsel to solely include personal bank records but the request stated "records of the individual and any corporation that he might have owned or operated."

**DECISION**

It is well settled New York law that remedies for obstructing the discovery process, including dismissal of the complaint or answer, are within the discretion of the court. (**Mills v Ducille**, 170 A.D.2d 657, 2<sup>nd</sup> Dept., 1991; **Zletz v Wetanson**, 67 N.Y.2d 711, 1986). However, striking of the pleading is considered a drastic measure, and it is inappropriate absent a consistent failure to comply, which can be inferred as willful and contumacious. (**Barth v City of New York**, 294 A.D.2d 386, 2<sup>nd</sup> Dept., 2002). Inadequate excuses for failure to comply, compounded with continued non compliance and repeated adjournments further leads to the inference of bad faith and willful obstruction of the discovery process. (**Kryzhanovskaya v City of New York**, 31 A.D.3d 717, 2<sup>nd</sup> Dept., 2006). Some courts require an order compelling disclosure disobeyed before it is applicable to resort to CPLR 3126 for remedies. (**Zletz v Wetanson**, 67 N.Y.2d 711, Cir. App., 1986). The remedy of sanctions are available, conditioned upon further non compliance, because general policy favors resolution of disputes on the merits. (**Barth v City of New York**, 294 A.D.2d 386, 2<sup>nd</sup> Dept., 2002; **Kryzhanovskaya v City of New York**, 31 A.D.3d 717, 2<sup>nd</sup> Dept., 2006; **Robinson v Pediatric Assoc. of Irwin Ave.**, 307 A.D.2d 1029, 2<sup>nd</sup> Dept., 2003).

In the case at bar, defendants' counsel submits as evidence multiple facsimile transmissions of correspondence sent to plaintiff's attorney on several different occasions thereby demonstrating a good faith effort in communications. Plaintiff's inadequate excuses and consistent non compliance can be inferred as willful interference with discovery.

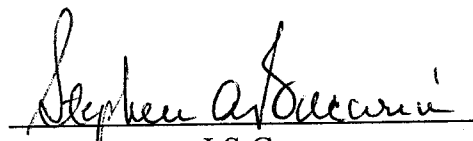
Accordingly, plaintiff shall produce all of the material demanded within 30 days of this order and submit to an oral deposition on April 9, 2008 at 9:30 a.m. in the Supreme Courthouse, 100 Supreme Court Drive, Mineola, New York 11501. Failure to comply with these deadlines shall result in the preclusion of the plaintiff.

**PLAINTIFF'S CROSS MOTION AND PROTECTIVE ORDER**

The plaintiff's cross motion and protective order is **denied**. The plaintiff has not adequately demonstrated the defendants' non compliance, and plaintiff's assertions that the discovery process is proceeding are unsupported and in conflict with his absence from conferences. Moreover, the protective order that plaintiff seeks is not appropriate as plaintiff does not adequately demonstrate the need for privacy within the factual context. These records are not confidential as they are shared with a third party, and policy states that the purpose of discovery is to obtain information that is likely to be pertinent at trial.

A Certification conference is scheduled for May 6, 2008 at 9:30 a.m. in Chambers of the undersigned. The status conference scheduled for March 7, 2008 is hereby cancelled.

Dated FEB 21 2008

  
J.S.C.

**ENTERED**

FEB 20 2008

**NASSAU COUNTY  
COUNTY CLERK'S OFFICE**