

**Griffin v Jericho Terrace**

2008 NY Slip Op 30740(U)

March 6, 2008

Supreme Court, Nassau County

Docket Number: 1659-07/

Judge: William R. LaMarca

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**SHORT FORM ORDER**

**SUPREME COURT - STATE OF NEW YORK  
COUNTY OF NASSAU - PART 17**

**Present: HON. WILLIAM R. LaMARCA  
Justice**

**GINA GRIFFIN and KNOT TO BE FORGOTTEN,  
Plaintiffs,**

**Motion Sequence #1  
Submitted December 20, 2007**

**-against-**

**INDEX NO: 1659/07**

**JERICO TERRACE, ROBERT STEVENSON and  
CHRISTOPHER LEONE,**

**Defendants.**

**The following papers were read on this motion:**

<b>Notice of Motion.....</b>	<b>1</b>
<b>STEVENSON Affidavit.....</b>	<b>2</b>
<b>Reply Affidavit.....</b>	<b>3</b>

**Requested Relief**

Counsel for the plaintiffs, GINA GRIFFIN and KNOT TO BE FORGOTTEN, moves for an order, pursuant to CPLR §§3124 and 3126, directing the defendants, JERICO TERRACE, ROBERT STEVENSON and CHRISTOPHER LEONE, to respond to the plaintiffs' First Notice for Production of Documents, dated March 28, 2007, or, in the alternative, for an order precluding the defendants from offering any evidence or testimony at trial, or, in the alternative, dismissing the defendants' answer pursuant to CPLR §3126 and awarding counsel fees in the amount of \$3,910.00. An Affidavit of Service reflects that

counsel for all defendants was duly served with the instant motion, by Federal Express on November 19, 2007, but only an Affidavit in opposition is submitted by defendant, STEVENSON. The motion is determined as follows:

### Background

This is an action sounding in disability discrimination, unpaid wages and commissions, breach of contract, tortious interference with contracts and defamation. In the complaint, plaintiff alleges, *inter alia*, that, in about April 2002, she was hired by JERICHO TERRACE as an event coordinator and to run the Vendor Program, where she worked with brides who had booked the facility for their event and acted as a liaison to house recommended vendors throughout the planning stage of the clients' affair. Plaintiff states that, at the same time that she was employed by JERICHO TERRACE, she also conducted a business known as "NOT TO BE FORGOTTEN", where she sold invitations, favors and accessories for special events. She claims that she was to receive a salary, and commissions of 5% for the Vendor Program from JERICHO TERRACE, and that she agreed to sell invitations to the clients and pay JERICHO TERRACE 10% of the net income. Plaintiff claims that she was required to work out of the JERICHO TERRACE facility, to use their equipment and to follow their rules and procedures. She alleges that, despite being an employee of JERICHO TERRACE, the facility and its owner, LEONE, failed and refused to make the appropriate payments for FICA as required by law.

Plaintiff alleges that, in January 2003, the terms of plaintiff's agreement with JERICHO TERRACE changed because they claimed she was making too much money. Plaintiff states that she agreed to change her salary structure and that she changed the

Vendor Program and Bridal Showcases in order to increase the revenue for JERICO TERRACE, and that their bookings increased 300%. Plaintiff claims that she brought in many new vendors and conducted the most successful Bridal Showcase to date, which led to a dramatic increase in the hours that she worked. It appears that, in early 2004, JERICO TERRACE hired ROBERT STEVENSON as Director of Sales. Plaintiff claims that she made many suggestions to assist STEVENSON in his position and that he adopted many of her suggestions but took credit for the ideas.

Plaintiff alleges that, in Spring 2004, LEONE requested that she set up a Vendor Program for another facility in Plainview, New York. Plaintiff states that, although LEONE promised to pay for her time, she was never paid for performing said services. Additionally, plaintiff claims that, after successful January and March 2005 Bridal Showcases, STEVENSON reminded plaintiff that she was an employee, not an independent contractor, and thus was under his supervision as he was the General Manager. She alleges that STEVENSON wanted to change plaintiff's commission structure and indicated that she could no longer sell invitations to JERICO TERRACE clients unless she paid the facility \$300.00 per month like other vendors. It appears that plaintiff acquiesced.

The complaint sets forth a series of events that occurred from April 2005 forward, wherein plaintiff alleges that she was not paid commissions for January and February 2005, that STEVENSON pressured her to work increased hours without an increase in pay, that STEVENSON held meetings with vendors and excluded plaintiff from the meetings, that renovations to JERICO TERRACE left plaintiff without an office during the busiest time of the year which resulted in diminished vendor income and decreased commissions.

Simultaneously, plaintiff states that she began to experience panic attacks which culminated in January 2006, when plaintiff experienced a severe panic attack and did not return to JERICO TERRACE until April 28, 2006.

Upon her return, plaintiff alleges that STEVESON blocked plaintiff's arrangements with vendors, docked her pay for sick days and, on or about August 4, 2006, fired plaintiff and advised her that she would no longer be recommended as a vendor and would not be paid any commissions due her. She alleges that, thereafter, various vendors advised her that, rather than losing favored status with various catering facilities including JERICO TERRACE, they could no longer do business with plaintiff. It is plaintiff's position that STEVENSON solicited her clients and told her she was "done in the business and that she was banned from JERICO TERRACE". She alleges that she was caused to suffer emotional and economic damages, that she was discriminated against and wrongfully discharged from her employment, that salary and benefits due to her were not paid, that JERICO TERRACE breached the agreement to pay plaintiff commissions and that JERICO TERRACE deliberately damaged plaintiff's reputation and standing in the community and interfered with existing business relationships. Plaintiff seeks \$5 million in compensatory and punitive damages.

On the instant motion, plaintiffs request an order of preclusion for failure of defendants to provide necessary discovery. Counsel for plaintiffs states that, on October 19, 2007, some seven (7) months after plaintiff served the Notice for Document Production, the defendants responded to plaintiffs' discovery demand by serving a "Response to Document Production" and producing seventy-nine (79) pages, the last page of which was blank. Counsel claims that, with the exception of responses to six (6) of plaintiffs'

demands, the defendants responded by using the word “none.” The attorney for the plaintiffs contends that “none” is an inadequate response, arguing it is not clear what was meant by the word. Counsel also suggests that many of the requested documents that were not furnished actually do exist. Counsel for plaintiffs states that, prior to bringing the within motion, he sent four (4) letters to defendants’ attorney requesting a response to the initial discovery demand and to amplify the responses already provided, without success.

In opposition to the motion, STEVENSON states that he reviewed plaintiffs’ document production request, defendants’ response, and plaintiff’s affidavit submitted in support of this application, specifically the schedules annexed to pages 4, 5 and 6 of that affidavit, as well as the available records of JERICHO TERRACE, and has been unable to locate any additional documents in response to the requests made. His affidavit specifically responds to the outline of demands set forth in plaintiffs’ counsel’s affidavit and reiterates his response that defendants have none of the requested documents. He further states that, “I understand my obligation and I continue to search for relevant documents. I have also asked my accountant to provide pay records for Gina Griffin. He was not able to locate any separate records for her.” ( ¶ 4).

In reply, plaintiff asserts that some of the documents requested do exist. For example, plaintiffs state that STEVENSON’s claim in ¶19 that “I can not located [sic] any ‘Brides Seen’ documents for any files in which the plaintiff was involved” is entirely false because, when she was terminated from her employment, STEVENSON took those documents from her and told her he had to hold on to them. With reference to ¶24 wherein STEVENSON states, “We do not have any documents referencing gratuities”, plaintiffs claim to have personal knowledge that, once a year, during the holiday season,

STEVENSON would send a letter to each vendor specifying how gratuities were to be paid and that said letter is maintained on the computer in the main office. Plaintiff urges that an order of preclusion be granted.

### The Law

CPLR §3101(a) requires the “full disclosure of all information that is material and necessary to the defense or prosecution of an action”. The “material and necessary” requirement directed in CPLR §3101(a) is to be liberally construed to require disclosure where the matter sought will assist in trial preparation by sharpening the issues and reducing delay. *Andon v 302-304 Mott Street Associates*, 94 NY2d 746, 709 NYS2d 873, 731 NE2d 589 (C.A. 2000), citing *Allen v Crowell-Collier Publishing Co.*, 21 NY2d 403.

Where a claim is made that requested documents do not exist, the requesting party “is entitled to a detailed statement, made under oath, by an employee or officer with direct knowledge of the facts concerning the past and present status of the disputed documents”. *Wilensky v JRB Marketing & Opinion Research, Inc.*, 161 AD2d 761, 556 NYS2d 356 (2<sup>nd</sup> Dept. 1990); *see also, Mercado v St. Andrews Housing Development Fund Company, Inc.*, 289 AD2d 148, 734 NYS2d 436 (1<sup>st</sup> Dept. 2001); *Longo v Armor Elevator Co., Inc.*, 278 AD2d 127, 720 NYS2d 443 (1<sup>st</sup> Dept. 2000). The affidavit which is submitted must show that the production of documents is impossible. *Abbadessa v Sprint*, 291 AD2d 363, 735 NYS2d 880 (2<sup>nd</sup> Dept. 2000); *Wilensky v JRB Marketing & Opinion Research, Inc., supra*. Where a party claims that documents are unavailable, a detailed affidavit to that effect may be required and the resisting party can also “be precluded from using these records at trial if they are found prior to trial, except at plaintiff’s option”. *Orner v Mount Sinai Hosp.*, 305

AD2d 307, 761 NYS2d 603 (1<sup>st</sup> Dept. 2003). A party may not be compelled to produce information which he or she does not possess. *Barber v BPS Venture, Inc.*, 31 AD3d 897, 819 NYS2d 329 (3<sup>rd</sup> Dept. 2006); *Euro-Central Corp. v Dalismer, Inc.*, 22 AD3d 793, 803 NYS2d 171 (2<sup>nd</sup> Dept. 2005); *Gatz v Layburn*, 9 AD3d 348, 790 NYS2d 157 (2<sup>nd</sup> Dept. 2006). However, the failure to provide the information in his possession will preclude a party from later offering proof regarding that information at trial, except at plaintiffs' option. See, *Bivona v Trump Mar. Casino Hotel Resort*, 11 AD3d 574, 782 NYS2d 667 (2<sup>nd</sup> Dept. 2004); *Kontos v Koakos Sylogos "Ippocrates", Inc.*, 11 AD3d 661, 783 NYS2d 653 (2<sup>nd</sup> Dept. 2004); *Corriel v Volkswagen of Am., supra*; see also, *Orner v Mount Sinai Hosp., supra*.

The nature and degree of the penalty to be imposed for failure to comply with a disclosure order is a matter generally left to the discretion of the Court. *Kingsley v Kantor*, 265 AD2d 529, 697 NYS2d (2<sup>nd</sup> Dept. 1999). To invoke the drastic remedy of preclusion, the Court must determine that the party's failure to comply with a disclosure order was the result of willful, deliberate and contumacious conduct or its equivalent. *Patterson v New York City Health & Hospitals Corp.*, 284 AD2d 516, 726 NYS2d 715 (2<sup>nd</sup> Dept. 2001); see also, CPLR § 3126; *Foncette v LA Express*, 295 AD2d 471, 744 NYS2d 429 (2<sup>nd</sup> Dept. 2002). Where plaintiffs have failed to timely respond to court orders or provide any excuse for the delay, and then failed to supply adequate responses to discovery demands, such conduct may be considered willful and contumacious, warranting dismissal of the pleadings. (*Hanlon v Rosenthal*, 7 AD3d 758, 776 NYS2d 906 [2<sup>nd</sup> Dept. 2004]), or an order of preclusion. *Precise Court Reporting, Inc. v Karten*, 6 AD3d 412, 775 NYS2d 339 [2<sup>nd</sup>

Dept. 2004]).

The attorneys for the plaintiffs may be laying the groundwork for a "Failure to Produce Documents" charge. (PJI 1:77) at the time of trial. Where a notice to produce documents has been served, an inference may arise if it can be shown at trial that the missing or destroyed documents are relevant to the issue.

While the deliberate destruction of written evidence gives rise to the inference that the matter destroyed or mutilated is unfavorable to the spoliator, this unfavorable presumption does not arise from the mere destruction of documents, but it must appear that the documents were written evidence relevant to the issues, or at least the documents should be required to be produced upon the trial.

*In re Eno's Will*, 196 AD 131, 187 NYS 756 (1<sup>st</sup> Dept. 1921).

After a careful reading of the submissions herein, it is the judgment of the Court that plaintiffs are not entitled to dismissal of defendants answer. The Court finds that defendants have provided the requested information to the extent possible and defendant STEVENSON, has provided a detailed affidavit specifically responding to the document requests which the Court finds is adequate. It is well settled that the drastic remedy of striking an answer is inappropriate absent a clear showing that the failure to comply with discovery demands is willful, contumacious, or in bad faith. CPLR § 3126; *Foncette v LA Express, supra*. No such showing has been made herein. Defendants represent that they have provided requested information to the extent possible. However, the defendants are precluded from using the requested records at trial, if they are found prior to trial, except at plaintiff's option. *Orner v Mount Sinai Hosp., supra*. Based on the foregoing, it is therefore


**ORDERED**, that plaintiffs' motion to compel document production or for an order of preclusion is granted to the extent that defendants are precluded from using the requested records at trial, if they are found prior to trial, except at plaintiffs' option; and it is further

**ORDERED**, that counsel for the parties shall appear for a previously scheduled Certification Conference on March 13, 2008, at 9:30 A.M.

All further requested relief not specifically granted is denied.

This constitutes the decision and order of the Court.

Dated: March 6, 2008

  
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WILLIAM R. LaMARCA, J.S.C.

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**ENTERED**

MAR 10 2008

**NASSAU COUNTY**  
COUNTY CLERK'S OFFICE