

Kelley v Doaman

2008 NY Slip Op 31356(U)

April 30, 2008

Supreme Court, Nassau County

Docket Number: 2104-07/

Judge: Roy S. Mahon

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SCA

SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. ROY S. MAHON

Justice

TRIAL/IAS PART 9

**EDWARD KELLEY a/k/a ADARSI DAS, THE
INTERNATIONAL SOCIETY FOR KRISHNA
CONSCIOUSNESS, INC. and THE GOVERNING
BODY COMMISSION OF THE INTERNATIONAL SOCIETY
FOR KRISHNA CONSCIOUSNESS,**

Plaintiff(s),

- against -

**IAN DOAMAN and JOSEPH BONOMO a/k/a
KRISHNA BALARAMA SWAMI**

Defendant(s).

INDEX NO. 002104/07

**MOTION SEQUENCE
NO. 6**

**MOTION SUBMISSION
DATE: April 16, 2008**

The following papers read on this motion:

**Order to Show Cause
Affirmation
Memorandum of Law**

**X
X
X**

Upon the foregoing papers, the motion by the Defendants-counterclaim Plaintiffs brought by Order to Show Cause for an Order granting leave to reargue and/or to renew the Order to Show Cause dated February 29, 2008, and upon such reargument, withdrawing and/or vacating the order thereon dated March 26, 2008, and substituting it with an order granting the said Order to Show Cause and striking Plaintiffs-counterclaim Defendants' pleading herein (ie., Verified Complaint dated January 31, 2007, and Verified Reply to Counterclaims dated June 5, 2007), or alternatively, precluding Plaintiffs-counterclaim Defendants from presenting any evidence at trial, for failure to comply with this Court's Order of December 4, 2007, and/or produce all documents requested in and/or failure to comply fully with, Defendants-counterclaim Plaintiffs' discovery requests dated April 13, 2007; and ordering Plaintiffs-counterclaim Defendants to pay to Defendants-counterclaim Plaintiffs all reasonable costs and expenses, including attorneys' fees, in the amount of \$10,000 or such other sum as may be appropriate, incurred in connection with that Order to Show Cause of February 29, 2008, on grounds of Plaintiffs-counterclaim Defendants' wilful, contumacious, and sustained failure/refusal to comply with their discovery obligations despite repeated requests and court orders, is determined as hereinafter provided:

In its entirety, the Court in its prior Order dated March 26, 2008 stated:

“Upon the foregoing papers, the motion by the defendants brought by Order to Show Cause for an Order pursuant to CPLR 3124, 3126 and the inherent power of the Court striking plaintiffs’ pleadings herein, i.e., Verified Complaint dated January 31, 2007, and Verified Reply to Counterclaims dated June 5, 2007, or alternatively, precluding plaintiffs from presenting any evidence at trial, for failure to comply with this Court’s Order of December 4, 2007, and/or produce all documents requested in, and/or failure to comply fully with, defendants’ discovery requests dated April 13, 2007; and Ordering plaintiffs to pay to defendants all reasonable costs and expenses, including attorneys’ fees, in the amount of \$10,000 or such other sum as may be appropriate, incurred in connection with this motion on grounds of plaintiffs;’ wilful, contumacious, and sustained failure/refusal to comply with their discovery obligations despite repeated requests and court orders, is determined as hereinafter provided:

In support of the instant application, the defendants have not submitted an affidavit of service attesting to service of the Order to Show Cause as directed in the Order to Show Cause. As such, the defendants’ application for an Order pursuant to CPLR 3124, 3126 and the inherent power of the Court striking plaintiffs’ pleadings herein, i.e., Verified Complaint dated January 31, 2007, and Verified Reply to Counterclaims dated June 5, 2007, or alternatively, precluding plaintiffs from presenting any evidence at trial, for failure to comply with this Court’s Order of December 4, 2007, and/or produce all documents requested in, and/or failure to comply fully with, defendants’ discovery requests dated April 13, 2007; and Ordering plaintiffs to pay to defendants all reasonable costs and expenses, including attorneys’ fees, in the amount of \$10,000 or such other sum as may be appropriate, incurred in connection with this motion on grounds of plaintiffs;’ wilful, contumacious, and sustained failure/refusal to comply with their discovery obligations despite repeated requests and court orders, is **dismissed.**”

In support of the instant application, the Defendants-counterclaim Plaintiffs have submitted an affidavit of service attesting to service of the Defendants-counterclaim Plaintiffs’ prior application as directed in the Order to Show Cause. As such, to the extent that the Defendants-counterclaim Plaintiffs seek reargument of their prior application, said application is **granted.**

In pertinent part, the Court in its prior Order dated December 4, 2007 stated:

“The motion by the defendants brought by Order to Show Cause for an Order pursuant to CPLR 3124, and 3126 precluding plaintiffs from presenting any evidence at trial for failure to produce all documents requested and/or failure to comply fully with defendants’

discovery requests dated April 13, 2007, despite repeated requests and the motion by the plaintiffs brought by Order to Show Cause for an order granting plaintiffs a three-month stay of all proceedings in this action, to permit plaintiffs' incoming counsel—which will replace the undersigned as counsel for plaintiffs in the International Society for Krishna Consciousness Inc. and the Governing Body Commission of the International Society for Krishna Consciousness—to familiarize themselves with the procedural history and complex factual background of this action and a related action captioned **Kelley, et al. v Garuda, et al.**, Index 007016/14 (Sup. Ct. Nassau) are both determined as hereinafter provided.

The defendants in their instant application have established that the defendants' respective discovery requests in the defendants' April 13, 2007 Demand seeks discovery that is material and necessary to the facts in litigation (see **Allen v Crowell-Collier Publishing Company**, 21 NY2d 403, 288 NYS2d 449, 235 NE2d 430). The plaintiffs International Society for Krishna Consciousness, Inc. and The Governing Body Commission of the International Society for Krishna Consciousness (hereinafter ISKCON and GBC) outgoing counsel opposes the requested relief on the grounds that the new counsel for ISKCON and GBC needs time to familiarize themselves with the issues in litigation. The Court notes that ISKCON and GBC's former counsel have not offered a plausible explanation of said entities' delay in responding to the defendants' demands between April 13, 2007 and the plaintiffs' instant cross motion dated September 24, 2007 other than the records are "decades old and kept in India or other disparate locations world wide." Given the plaintiffs' six month delay in responding from date of the defendants' Demand to the plaintiffs' instant application and the fact that the plaintiffs ISKCON and GBC have offered no submission from either entity as to the requested discovery and the search for same, the plaintiffs' outgoing counsel's contentions related to the future to provide the requested discovery are conclusory at best. Although ISKCON and GBC's former counsel seeks a stay as to discovery related to said plaintiffs' retaining new counsel, the Court further observes that there is no submission from the new counsel related to the issues of discovery in this action.

Accordingly the plaintiffs shall respond to the defendants' April 13, 2007 Discovery Demands on or before December 31, 2007 and the defendants' application for an Order precluding plaintiffs from presenting any evidence at trial for failure to produce all documents requested and/or failure to comply fully with defendants' discovery requests dated April 13, 2007, despite repeated requests is **denied** without prejudice to renew if the plaintiffs do not provide the discovery as directed herein."

In examining the issue of non-compliance with a Court order as to discovery, the Court in **Kihi v Pfeffer, 94 NY2d 118, 700 NYS2d 87** stated in clear and unequivocal language:

"... when a party fails to comply with a court order and frustrates the disclosure scheme set forth in the CPLR, it is well within the Trial Judge's discretion to dismiss the complaint (*Zeitz v Wetanson*, 67 NY2d 711, 713, 499 NYS2d 933, 490 NE2d 852).

Regrettably, it is not only the law but also the scenario that is all too familiar (*seem e.g., Tewari v Tsoutsourasi*, 75 NY2d 1, 10-11, 550 NYS2d 572, 549 NE2d 1143; *Reynolds Sec. V Underwriters Bank & Trust Co.*, 44 NY2d 568, 571-572, 406 NYS2d 743, 378 NE2d 106; *Laverne v Incorporated Bil. Of Laurel Hollow*, 18 NY2d 635, 637, 272 NYS2d 780, 219 NE2d 294, appeal dismissed 386 U.S. 682, 87 S.Ct. 1324, 18 L.Ed2d 403). 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. Indeed, the Legislature, recognizing the need for courts to be able to command compliance with their disclosure directives, has specifically provided that a 'court may make such orders as are just,' including dismissal of an action (CPLR 3126). Finally, we underscore that compliance with a disclosure order requires both a timely response and one that evinces a good-faith effort to address the requests meaningfully."

Kihi v Pfeffer, supra at 90

A review of the respective submissions herein establish an issue of fact as to whether the Court Ordered discovery as contained in the Court's December 4, 2007 Order has been complied. Based upon the divergent contentions of the respective parties, the matter is referred to **Court Attorney/Referee Frank Schellace, Esq.** to hear and report as to compliance pursuant to CPLR §3104 and CPLR §4201. **Counsel for the respective parties shall appear before Court Attorney/Referee Frank Schellace, Esq. on May 13, 2008 at 9:30 a.m. in Room 060, Nassau County Supreme Court.**

The Defendants-counterclaim Plaintiffs' application for an Order precluding Plaintiffs-counterclaim Defendants from presenting any evidence at trial, for failure to comply with this Court's Order of December 4, 2007, and/or produce all documents requested in and/or failure to comply fully with, Defendants-counterclaim Plaintiffs' discovery requests dated April 13, 2007; and ordering Plaintiffs-counterclaim Defendants to pay to Defendants-counterclaim Plaintiffs all reasonable costs and expenses, including attorneys' fees, in the amount of \$10,000 or such other sum as may be appropriate, incurred in connection with that Order to Show Cause of February 29, 2008, on grounds of Plaintiffs-counterclaim Defendants' wilful, contumacious, and sustained failure/refusal to comply with their discovery obligations despite repeated requests and court orders, is **denied** without prejudice to renew after the Court Attorney/Referee renders the report.

SO ORDERED.

DATED: 4/30/2008

ENTERED

Roy S. Mahon

J.S.C.

MAY 05 2008

NASSAU COUNTY
COUNTY CLERK'S OFFICE