

Gal-Ed v 153rd St. Assoc., LLC

2008 NY Slip Op 31404(U)

May 16, 2008

Supreme Court, New York County

Docket Number: 0106882/2006

Judge: Barbara Kapnick

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

PRESENT: **HON. BARBARA R. KAPNICK**

PART 12

Justice

Gal-Ed

INDEX NO.

106882/06

MOTION DATE

- v -

153rd STREET ASSOC

MOTION SEQ. NO.

007

MOTION CAL. NO.

The following papers, numbered 1 to _____ were read on this motion to/for _____

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

and cross motion
are decided in accordance
with the accompanying memorandum
decision.

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

FILED

MAY 20 2008

COUNTY CLERK'S OFFICE
NEW YORK

Dated: 5/16/08

BARBARA R. KAPNICK

Check one: FINAL DISPOSITION

NON-FINAL DISPOSITION

Check if appropriate:

DO NOT POST

REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 12

-----X
MATTY GAL-ED and ARCADI YAGOUDUIEF,

Plaintiffs,

-against-

DECISION/ORDER
Index No. 106882/06
Motion Seq. No. 007

153RD STREET ASSOCIATES, LLC., H. THOMAS
O'HARA ARCHITECT, PLLC, THE DERMOT
COMPANY, INC., KAJIMA CONSTRUCTION
SERVICES, INC., VJB CONSTRUCTION CORP.,
DESIMONE CONSULTING ENGINEERS, PLLC.,
MARINO GERAZOUNIS & JAFFE ASSOCIATES, INC.,
and JAM CONSULTANTS, INC.,

Defendants.

-----X
BARBARA R. KAPNICK, J.:

FILED
MAY 20 2008
COUNTY CLERK'S OFFICE
NEW YORK

Defendant H. Thomas O'Hara Architect, PLLC moves by Order to Show Cause for an order pursuant to CPLR §§ 3042, 3124 or 3126: (i) striking plaintiffs' pleadings in the event this Court finds that plaintiffs have willfully failed to provide a response to its discovery demands dated June 14, 2007 and July 31, 2007, and to provide a response to the Preliminary Conference Order of this Court dated July 11, 2007 and the directives of this Court's Law Secretary in a conference call held with counsel on October 15, 2007;¹ or (ii) compelling plaintiffs to provide a response to defendant's outstanding discovery demands; and/or (iii) precluding plaintiffs from offering evidence at trial with respect to the discovery items which have not been provided.

¹ A detailed account of the procedural history of this case is set forth in the moving papers.

Defendant JAM Consultants, Inc. cross-moves for an order: (i) pursuant to CPLR § 3126 dismissing plaintiffs' Complaint due to their failure and refusal to serve responsive answers to its interrogatories; or, in the alternative, (ii) pursuant to CPLR §§ 3124 and 3126 compelling plaintiffs to serve responsive answers to its interrogatories and submit to depositions by dates certain, and if they fail to comply, dismissing the Complaint.²

Defendant DeSimone Consulting Engineers, PLLC cross-moves for an order: (i) pursuant to CPLR § 3126 dismissing plaintiffs' Verified Complaint for their 'willful and contumacious failure to respond' to its March 2, 2007 discovery demands and for their violation of two court orders; or, in the alternative, (ii) pursuant to CPLR § 3124 compelling plaintiffs to provide responses to its discovery demands immediately, or otherwise precluding plaintiffs from introducing into evidence at the trial of this action any documents or information contained within its project file that was not produced prior to the date of this motion.

Plaintiffs' counsel submitted a separate affirmation in opposition to the motion and each cross-motion, arguing that his delay in responding to the discovery demands was not willful,

² This cross-motion was withdrawn by Stipulation on February 13, 2008.

deliberate or contumacious, but was caused due to: (a) his extended absence from his office as a result of a death in his family, his daughter's wedding and his observance of the Jewish holidays; (b) a death in the plaintiffs' family; (c) the sudden departure of an associate who was assigned the matter during his absence; and (d) the emergency trip to England by another associate for personal reasons.

On November 27, 2007, the initial return date of the motion and cross-motions, the parties entered into a Stipulation outlining the outstanding discovery and adjourning the motion and cross-motions to February 20, 2008 to ensure plaintiffs' compliance with their discovery obligations.

The return date was moved up as a result of a flurry of letters and phone calls from counsel, and further oral argument was held on the record on February 13, 2008. Plaintiffs' counsel did not dispute that he had failed to comply with the terms of the Stipulation, but represented that the delay was caused, at least in part, by his departure from the firm where he had been an associate, which required a subsequent substitution of counsel and transfer of the file. Plaintiffs were provided with a final opportunity to comply with the November 27, 2007 Stipulation and this Court adjourned the matter, including the motion and the one

remaining cross-motion, to March 19, 2008 for a further conference with a caveat from this Court that the date was not to be adjourned.

On the morning of March 19, 2008, this Court received by hand delivery from plaintiffs' counsel's office (i) a letter dated March 18, 2008 from Hillel Isseroff, M.D., a copy of which was sent to defendants' counsel, representing that plaintiffs' counsel - Levi Huebner - was under his "care for an acute medical illness since Friday March 14, 2008 and will continue to be until its resolution", and (ii) another letter dated March 18, 2008, on the same letterhead, this time from Eli Rosen, M.D., a copy of which was apparently not forwarded to defendants' counsel, representing that Mr. Huebner is on medication for urticaria, that "the medication is a sedative and impairs his function" and "[a]s such he needs to be cautious and not make court appearances whilst on same."³

Neither plaintiffs' attorney of record nor any other attorney on behalf of plaintiffs appeared in Court on March 19, 2008. Defendants' counsel, who were all present, and quite angry in Court

³ Plaintiffs' counsel did not attempt to schedule a conference call with this Court to request an adjournment of the March 19, 2008 conference.

on that date, represented on the record that plaintiffs have still failed to produce responses to the outstanding discovery.

Plaintiffs' failure to comply with their obligations under the July 11, 2007 Preliminary Conference Order, the November 27, 2007 Stipulation, and the directives of this Court on February 13, 2008 cannot be excused by the fact that plaintiffs' counsel sought treatment for a skin condition on March 14, 2008.

It is well settled that in order to impose the drastic remedy of preclusion and/or dismissal,

the court must determine that the offending party's failure to comply with discovery demands was willful, deliberate and contumacious (citations omitted). Generally, willfulness can be inferred when a party repeatedly fails to respond to discovery demands and/or to comply with discovery orders, coupled with inadequate excuses for those defaults (citations omitted).

Siegman v Rosen, 270 AD2d 14, 15 (1st Dep't 2000). See also *Brewster v FTM Servo, Corp.*, 44 AD3d 351 (1st Dep't 2007); *Manrique v New York-Presbyterian Hospital*, 40 AD3d 270 (1st Dep't 2007); *Zapco 1500 Investment L.P. v Wiener*, 299 AD2d 206 (1st Dep't 2002).

Given the entire history of this case, including the numerous motions by plaintiffs for default judgments against the defendants on technical grounds, this Court finds that plaintiffs' repeated

failure to respond to defendants' discovery demands and/or to comply with this Court's discovery demands, coupled with inadequate excuses for those defaults, gives rise to an inference that said failure was "willful, deliberate and contumacious."

Accordingly, the motion and cross-motion are granted, and the Clerk may enter judgment dismissing plaintiffs' Complaint as to all the defendants with prejudice, together with \$250.00 costs payable by plaintiffs' counsel to defendant H. Thomas O'Hara Architect, PLLC, and \$250.00 costs payable by plaintiffs' counsel to defendant DeSimone Consulting Engineers, PLLC.

This constitutes the decision and order of this Court.

Date: May 16, 2008


Barbara R. Kapnick
J.S.C.

**BARBARA R. KAPNICK
J.S.C.**

FILED
MAY 20 2008
COUNTY CLERK'S OFFICE
NEW YORK