

**B.E.N. Trading Corp. v Shirley Import, Inc.**

2008 NY Slip Op 32006(U)

July 2, 2008

Supreme Court, New York County

Docket Number: 0602707/2005

Judge: Richard B. Lowe

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

PRESENT: HON. RICHARD B. LOWE, III  
Richard B. Lowe, III  
Justice

PART 56M

B.E.N. Trading Corp.

INDEX NO. 602707/05

MOTION DATE 6/26/08

MOTION SEQ. NO. 003

MOTION CAL. NO. \_\_\_\_\_

- v -

Shirley Import, Inc., et. al.

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

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

Answering Affidavits — Exhibits \_\_\_\_\_

Replying Affidavits \_\_\_\_\_

PAPERS NUMBERED

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion

MOTION IS DECIDED IN ACCORDANCE  
WITH ACCOMPANYING MEMORANDUM DECISION.

**FILED**

JUL 17 2008

COUNTY CLERK'S OFFICE  
NEW YORK

HON. RICHARD B. LOWE, III

Dated: 7/2/08

J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST  REFERENCE

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

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

-----X  
B.E.N. TRADING CORP.,

Plaintiff,

Index No. 602707/05

-against-

SHIRLEY IMPORT, INC. And AVRAHM MAHMIAS  
a/k/a AVRAM NAHAMIYAS,

Defendants.  
-----X

SHIRLEY IMPORT, INC., K and AVRAHM MAHMIAS  
a/k/a AVRAM NAHAMIYAS,

Third-Party Plaintiffs,

Third Party Index No.  
590872/05

-against-

BINYAMIN ABADI, EZRA ABADI, OZOGUL ILKAY  
and B.E.N. TRADING CORP.,

Third-Party Defendants.  
-----X

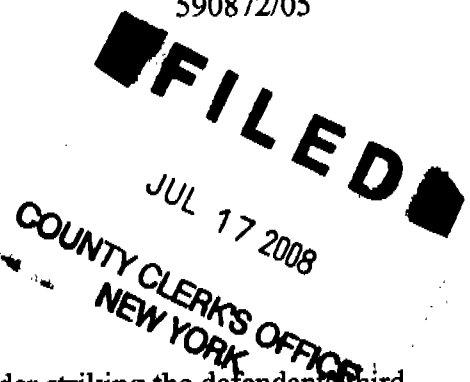
Hon. Richard B. Lowe, III:

Plaintiff moves pursuant to CPLR 3126 seeking an order striking the defendants' third-party plaintiffs' (the "defendants") answer and the third-party complaint. For reasons stated on the record of June 26, 2008 and for those stated herein, the motion is granted.

**Background**

As discussed on the June 26, 2008 record, this matter has suffered a tortured history of delays and failures to comply with court directives, mostly at the hands of the defendants.

On June 14, 2006, this court heard a motion to strike the answer of defendants because of



numerous failures to produce discovery pursuant to the orders of this court.<sup>1</sup> At the hearing, it was noted that many of the directives of the court's special master had not been followed by the defendants. (Tr. 6/26/08 6:17-22). The court also noted that the motion was filed after the special master recommended that leave be given to hear the motion because defendants would not adhere to discovery orders. (Tr. 6/26/08 10:20-23). On the return date, defendants were forewarned that any further violations of directives of the court would result in a striking of the pleadings (Tr. 6/26/08 11: 11-14).

Thereafter, delays continued throughout the discovery process due to the defendants' failure to provide discovery. However, with the assistance of the special master, the discovery process was concluded and a note of issue was filed.

Thereafter, this case was originally set down for the trial to begin on March 29, 2007. The trial did not go forward due to the purported ill health of defendants' counsel of record, Morton Buckvar. The case was adjourned to May 7, 2007. Mr. Buckvar was not well enough to go forward on that date and asked for an additional adjournment. The case was then adjourned again to June 11, 2007.

On June 11, 2007, counsel for the defendants was again not available to go forward. This time, the case had to be adjourned because the counsel chosen to replace Mr Buckvar, his cousin, inexplicably pulled out at the eleventh hour. Therefore, defendants needed to find replacement counsel.

The next date for trial was August 7, 2007. Again, the trial could not go forward because substitute counsel asked this court for additional time to prepare for the trial as he had

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<sup>1</sup>This was the second of two motions to strike the answer brought by the plaintiffs.

purportedly only recently been retained. Another trial date was again scheduled on November 26, 2007, however on November 20, 2007, plaintiffs advised this court that a consent to change attorneys indicating Mr. Buckvar's replacement by new counsel, Samuel Karliner, had not been filed. Again, the case was adjourned due to the failure to make the appropriate filing. Thereafter the case was adjourned to February 4, 2008, but due to the death of plaintiffs' counsel's stepfather, it could not go forward.

Thereafter, Mr. Karliner needed two additional adjournments, the latest being May 12, 2008. Each adjournment was due to his being retained and scheduled to appear on two separate criminal trials.

When the parties appeared before this court on May 12, 2008 to discuss Mr. Karliner's unavailability to go forward, Mr. Karliner was expressly warned that any additional prejudice to the plaintiff due to the delays caused by the defendants would not be tolerated. This court was specifically concerned because of the approximate 18 month of delay of this matter going to trial, almost entirely caused by the defendants' counsel inability to proceed.

Furthermore, at this point there was unavoidable prejudice to the plaintiffs who were not provided with a pre-trial memorandum by the defendants, despite the fact that they had timely provided their memorandum to the defendants. The briefs are intended to be exchanged simultaneously.<sup>2</sup> Defendants were now in the advantageous position of being privy to their adversaries' memorandum prior to the preparation of their own, which provided an unfair advantage. It was also evident at the May 12, 2008 appearance that the plaintiffs still did not

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<sup>2</sup> This court's rules for trial provide that pre-trial memorandum are to simultaneously be exchanged five business days prior to the scheduled trial date.

know whether defendants intended to pursue their counterclaims as Mr. Karliner expressed his uncertainty whether he had sufficient proof to go forward. It is for these reasons that defense counsel was admonished that absolutely no further delays or actions which would prejudice the plaintiffs would be tolerated. The next trial date was set for June 30, 2008.

On June 25, 2008, plaintiffs presented the instant order to show cause seeking to strike the defendants answer and the third party complaint. The plaintiffs seek such relief because as of yet, three business days before trial, they had not received the defendants pre trial memorandum. Furthermore, defendants had not yet responded to outstanding expert disclosure which therefore prevented him from establishing his counterclaims, despite warnings at the May 12, 2008 hearing.

After being served with the order to show cause on June 25, 2008, this court was contacted by someone referring to himself as "Mr. Silver" who indicated that he would be trying the case beginning on Monday. This was unbeknownst to the court as there had been no substitution of counsel filed in the county clerk's office and there had been no other communication with the court. "Mr. Silver" was advised that whomever was counsel of record must appear on the return date of the order to show cause.

#### **Discussion**

In recent cases, the Court of Appeals has issued a series of decisions which seek to protect the credibility of the court system. Specifically, the court has said, "if the credibility of court orders and the integrity of our judicial system are to be maintained, a litigant cannot ignore court orders without impunity." (*Kihl v Pfeffer* 94 NY2d 118, 123 [1999]). The court, in so holding, seeks to ameliorate "sloppy practice threatening the integrity of our judicial system."

(*Brill v City of New York* 2 NY3d 648 [2004]). “[S]tatutory time frames –like court ordered time frames are not options, they are requirements, to be taken seriously by the parties. (*Miceli v State Farm Mutual Automobile Insurance Co*, 3 NY3d 725 [2004]).

“It is appropriate to strike a defendant’s answer where its failure to comply with discovery demands is wilful, contumacious, or in bad faith.” (*DiDomenico v C&S Aeromatik Supplies, Inc.*, 252 AD2d 41, 52 [2nd Dept 1998]). Wilfulness is found where a party repeatedly fails to respond to demands or to comply with court orders without an adequate excuse (*Id.*).

This court has attempted to be mindful of the “strong public policy of our courts to permit an action to proceed to disposition on its merits” (*Andino v DeJesus* 790 NYS2d 20 [1st Dept 2005]). Indeed, it has denied two prior motions brought by the plaintiffs to strike the defendants answer for failures to comply with discovery orders. It did so despite the recommendation of the special master that the defendants be penalized for failures to comply with the directives of this court. In order to see that the matter was indeed decided on its merits, through continued utilization of the court’s special master, a note of issue was eventually filed and discovery completed despite repeated delays and violations of court orders by the defendants.

It has now been eighteen months since this matter was first placed on the trial calendar. There have been approximately seven adjournments of this matter almost entirely because of the inability of defendants to retain counsel who is prepared and ready to proceed. This court has granted numerous adjournments due to among other things: the purported illness of defense counsel, the sudden withdrawal of the replacement counsel, the need for preparation by yet another replacement counsel, and then the simultaneous engagement of counsel in pending criminal matters. Despite its frustration with the inability to proceed with the trial, expressed on

the record throughout, this court granted the adjournments, again, mindful that every attempt must be made to dispose of a matter on its merits.

Now, most recently, two business days before the most recent scheduled trial date, while the defendant purports to be ready to proceed to trial, it is again in violation of this court's orders. Despite its acknowledgment that it *knew* this court expected and had a rule requiring a pre-trial memorandum to be submitted five business days prior to the trial date, and despite the fact that plaintiff provided defendant with said memorandum, defense counsel represents that he decided it was not necessary for him to prepare it (Tr. 6/25/08 4:10-19).<sup>3</sup> Furthermore, it is not even clear to this court or opposing counsel who will serve as counsel during the trial. An individual known as "Mr. Silver" who has never appeared before this court either in person or through the filing of a consent to change attorney, contacted the court to advise that he will be trying the matter. However, Mr. Karliner, who claims he is no longer counsel of record, had his partner Mr. Adler<sup>4</sup> appear to argue this motion, presumably because it has come to his attention that the proper filing has not been made which would have removed him from the case. Lastly, this court notes that despite an admonition by this court on May 12, 2008, defendants have failed to respond to outstanding expert disclosure in order to proceed with its counterclaims.

There can be no doubt that the defendants were on notice that they have exhausted the patience of the court. More importantly, the prejudice to the plaintiff at this point cannot be

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<sup>3</sup>The court notes that plaintiff's counsel spoke to Mr. Silver who indicated he was unaware of the court's rules (Tr 6/25/08 5:12-16)

<sup>4</sup>The court notes that on the record Mr. Adler purported to be there to fill in for Mr. Karliner although he did not have knowledge of the "facts" for purposes of responding to specific inquiries of the court (Tr 6/25/08 17: 6-9; 18: 1-4). This is in violation of Rule 1 of the Rules of the Commercial Division (Uniform Rules of NYS Trial Courts § 202.70(g)(1).

ignored and relief must be given. Lastly, the defendants conduct is a clear example of the type of sloppy litigation and affront to the integrity of the judicial system which the Court of Appeals has expressly stated is intolerable.

Therefore, for all of these reasons, the motion to strike the answer of the defendants and the third party complaint is granted.

**Conclusion**

ORDERED that the motion is granted and the Clerk of the Court is directed to enter judgment on the complaint in favor of plaintiff and against defendants/third party plaintiffs in the amount of \$250,000, together with interest as prayed for allowable by law [at the rate of \_\_\_9% per annum from the date of \_\_\_\_\_], until the date of entry of judgment, as calculated by the Clerk and thereafter at the statutory rate, together with costs and disbursements as be taxed by the Clerk upon submission of an appropriate bill of costs and it is further


ORDERED that the third party complaint is dismissed and the Clerk is directed to enter judgment in favor of the third party defendants.

This shall constitute the Order and Decision of the Court.

Dated: July 2, 2008

**FILED**  
JUL 17 2008  
COUNTY CLERK'S OFFICE  
NEW YORK

ENTER:

  
HON. RICHARD B. LOWE, III