

El Barrio Holdings, LLC v 333-339 East 109 LLC

2008 NY Slip Op 32297(U)

August 13, 2008

Supreme Court, New York County

Docket Number: 0602758/2006

Judge: Martin Shulman

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

MARTIN SHULMAN

PRESENT: _____ J.S.C. _____
Justice

PART 1

Index Number : 602758/2006
EL BARRIO HOLDINGS
VS.
333-339 EAST 109
SEQUENCE NUMBER : 002
STRIKE

INDEX NO. 602758/070
MOTION DATE _____
MOTION SEQ. NO. 002
MOTION CAL. NO. _____

n this motion to/for _____

Notice of Motion/ ~~Order to Show Cause~~ — Affidavits — Exhibits A-F

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED	
1	_____
2	_____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the attached decision and order.

FILED
AUG 18 2008
COUNTY CLERK'S OFFICE
NEW YORK

Dated: August 13, 2008

[Signature]
MARTIN SHULMAN 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: IAS PART 1

-----X
EL BARRIO HOLDINGS, LLC,

Plaintiff,

Index No.: 602758/06

-against-

DECISION/ORDER

333-339 EAST 109 LLC, et al,

Defendants.
-----X

FILED
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NEW YORK

Defendants move for an order striking plaintiff's complaint pursuant to CPLR §3126 and vacating the note of issue pursuant to Uniform Rule 202.24(e). Plaintiff opposes the motion.

Defendants base this motion upon plaintiff's failure to comply with this court's compliance conference order dated December 18, 2007 (Exh. A to motion), which provides in relevant part:

Both sides to respond to outstanding document demands . . . by January 15, 2008. Depositions of both parties to be conducted in Defendants' counsel's office on January 23, 2008. This is a firm, final deadline. Note of issue to be filed by January 31, 2008.

It is undisputed that plaintiff's counsel failed to appear for the scheduled depositions or to contact defense counsel in advance thereof and failed to respond to defendants' document request contained in an August 2007 deposition notice (Exh. D to motion). Defendants' counsel duly noted the foregoing defaults on the record (Exh. B to motion).¹

¹ The motion also alleges that, by letter dated August 29, 2007 (Exh. C to motion), plaintiff's counsel advised that his client was unavailable to be deposed the next day.

In opposition to defendants' motion, plaintiff's counsel claims law office failure. Specifically, the associate handling the case, who "was at the time unwell", failed to enter the discovery deadlines contained in the December 18, 2007 order in the firm's calendar, then left the firm "abruptly in the first week of January 2008 . . ." without apprising other members of the firm of the upcoming deadlines. Plaintiff also notes defendants' own failures to adhere to court imposed deadlines throughout this litigation, and specifically notes that defendants' document production due January 15, 2008 was unresponsive.

Section 3126 of the CPLR provides in pertinent part as follows with respect to penalties for failure to comply with orders to disclose:

If any party . . . refuses to obey an order for disclosure or wilfully fails to disclose information which the court finds ought to have been disclosed pursuant to this article, the court may make such orders with regard to the failure or refusal as are just, among them:

1. an order that the issues to which the information is relevant shall be deemed resolved for purposes of the action in accordance with the claims of the party obtaining the order; or
2. an order prohibiting the disobedient party from supporting or opposing designated claims or defenses . . . ; or
3. an order striking out pleadings or parts thereof, . . . or dismissing the action or any part thereof, or rendering a judgment by default against the disobedient party.

Where a party disobeys a court order and by his conduct frustrates the disclosure scheme provided by the CPLR, dismissal of the party's pleadings is within the broad discretion of the trial court. *Zletz v. Wetanson*, 67 N.Y.2d 711, 499 N.Y.S.2d 933 (1986); *Berman v. Szpilzinger*, 180 A.D.2d 612, 580 N.Y.S.2d 324 (1st Dept., 1992). In *Stanfill Plumbing & Heating Corp. v. Dravo Constructors, Inc.*, 216 A.D.2d 101, 627

N.Y.S.2d 689 (1st Dept., 1995), the First Department held that the lower court "did not improvidently exercise its discretion in dismissing the underlying action for the failure of plaintiff to comply with prior court-ordered discovery." The court specifically found that it was proper to dismiss the plaintiff's complaint since the record revealed that the lower court had given the plaintiff ample opportunity to comply with discovery and the plaintiff repeatedly failed to comply. *Id.*

While the penalty of striking a pleading for failure to comply with disclosure is extreme, the courts nonetheless have held that dismissing the pleading is the appropriate remedy where the failure to comply has been "clearly deliberate or contumacious." *Henry Rosenfeld, Inc. v. Bower & Gardner*, 161 A.D.2d 374, 555 N.Y.S.2d 320 (1st Dept., 1990); *Kutner v. Feiden, Dweck & Sladkus*, 223 A.D.2d 488, 489, 637 N.Y.S.2d 15 (1st Dept., 1996), *lv. to app. den.*, 88 N.Y.2d 802, 644 N.Y.S.2d 689 (1996)(disobedience of a series of court orders directing discovery warranted striking of pleading); *Berman v. Szpilzinger, supra*.

Here, the court must balance two competing interests, *viz*, the interest in having the case decided on the merits and the interest of enforcing court orders. This court does not disregard "firm, final deadline[s]" lightly. On these facts, the court cannot conclude that plaintiff's conduct warrants the harsh penalty of striking the complaint. Nonetheless, it is within the court's discretion to make such orders as may be just in the event of a party's failure to comply with court ordered discovery. CPLR §3126; *Riley v. Iss Int'l Serv. Sys. Inc.*, 304 A.D.2d 637, 757 N.Y.S.2d 593 (2nd Dept. 2003)("It is within

the Supreme Court's broad discretion to determine whether- and to what degree -to impose sanctions against a party for discovery violations [citations omitted].").


To this end, plaintiff's counsel states that he offered defendants' counsel a "bust fee" in connection with the canceled deposition and suggested the parties reschedule the depositions forthwith. Landy Aff. in Opp. at ¶14. The court attempted to resolve the issues raised in this motion via several telephone conferences with the parties' counsel, during which a monetary penalty was discussed to compensate defendants for their inconvenience. The parties were unable to agree as to an amount. The court finds that the appropriate amount to be paid to defendants is \$350.00. *Gradaille v. City of New York*, 52 A.D.3d 279, _____ N.Y.S.2d _____ (1st Dept. 2008)(motion court providently exercised its discretion in vacating an order striking defendant's answer on condition defendant pay plaintiff \$2,500 as a monetary sanction); *Riley v. Iss Int'l Serv. Sys. Inc.*, *supra*.

Finally, plaintiff filed the note of issue as the December 18, 2007 order directed, despite the fact that discovery was not complete. Accordingly, the note of issue must be stricken. For the reasons set forth above, it is hereby

ORDERED that defendants' motion is granted to the extent that the note of issue is vacated and the complaint shall be stricken unless plaintiff: 1) pays to defendant \$350.00 within 30 days of service of a copy of this decision and order with notice of entry; 2) provides outstanding written discovery within 30 days of service of a copy of this decision and order with notice of entry; and 3) submits to a deposition within 45 days of service of a copy of this decision and order with notice of entry.

The foregoing constitutes the Decision and Order of this Court. Copies of this Decision and Order have been sent to counsel for the parties.

Dated: New York, New York
August 13, 2008



Hon. Martin Shulman, J.S.C.

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NEW YORK