

Fish & Richardson, P.C. v Schindler

2009 NY Slip Op 30629(U)

March 20, 2009

Supreme Court, New York County

Docket Number: 601327/07

Judge: Shirley Werner Kornreich

Republished from New York State Unified Court
System's E-Courts Service.

Search E-Courts (<http://www.nycourts.gov/ecourts>) for
any additional information on this case.

This opinion is uncorrected and not selected for official
publication.

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

JUSTICE SHIRLEY WERNER KORNREICH

PRESENT: _____

PART 54

Justice

Index Number : 601327/2007
FISH & RICHARDSON, P.C.
 vs.
SCHINDLER, RANDY
 SEQUENCE NUMBER : 002
 DEFAULT JUDGMENT

INDEX NO. _____
 MOTION DATE 12/4/08
 MOTION SEQ. NO. _____
 MOTION CAL. NO. _____

this motion to/for _____

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

PAPERS NUMBERED
1-6
7-8

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

MOTION IS DECIDED IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION AND ORDER.

FILED
 MAR 24 2009
 COUNTY CLERK'S OFFICE
 NEW YORK

Dated: 3/20/09

JUSTICE SHIRLEY WERNER KORNREICH
[Signature]
 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: PART 54

-----X
FISH & RICHARDSON, P.C.,

Plaintiff,

-against-

RANDY SCHINDLER,

Defendant

KORNREICH, SHIRLEY WERNER, et al.

Index No.: 601327/07

DECISION
and ORDER

FILED
MAR 24 2009
COUNTY CLERK'S OFFICE
NEW YORK

This action arises out of plaintiff Fish & Richardson's (Fish & Richardson) representation of defendant Randy Schindler in a prior 2003 lawsuit Mr. Schindler brought against his former employer. Fish & Richardson now seeks to recover \$214,370.58 in legal fees, plus costs and interest, arising from its representation in the prior matter. Here, Fish & Richardson seeks an order: (i) pursuant to CPLR § 3215 and 22 N.Y.C.R.R. § 202.27 entering a default judgment against Mr. Schindler for his failure to appear for a Status Conference as scheduled on September 4, 2008; or (ii) striking Mr. Schindler's answer, pursuant to CPLR § 3126, for his failure to comply with multiple court orders and discovery deadlines; (iii) fees and costs; and (iv) such other relief as the court deems just and proper. Defendant opposes.

I. Background

Fish & Richardson commenced this action sounding in breach of contract, quantum meruit and an account stated by filing its summons and complaint on or around April 23, 2007. Mr. Schindler was personally served with a copy of the summons and complaint on May 18, 2007. In a stipulation dated June 26, 2007, Mr. Schindler, through his then counsel Lester Schwab Katz

and Dwyer, LLP (LSKD) agreed to waive all affirmative defenses based upon lack of proper service of process. On June 6, 2007, issue was joined via Mr. Schindler's interposition of an answer and assertion of four affirmative defenses.

On December 20, 2007, a Preliminary Conference (PC) was held before the court. The PC called for Mr. Schindler to provide insurance information to the plaintiff on or before January 16, 2008. The PC also provided, *inter alia*, that the parties were to: serve interrogatories by January 30, 2008; serve responses to interrogatories by February 29, 2008. Plaintiff was to receive defendant's response to plaintiff's first request for the production of documents dated August 1, 2007, on or before January 16, 2008. Depositions were scheduled on or before April 30, 2008. A Compliance Conference was set down for March 6, 2008.

At the March 6 conference, the court discovered that Mr. Schindler was in violation of the PC by failing to provide responses to either plaintiff's first set of interrogatories or its second request for production of documents. Therefore, the court ordered "[plaintiff and defendant] to respond to interrogatories by 3/28/08. [Plaintiff] to respond to [defendant's] d/I and [defendant] to respond to [plaintiff's supplemental] d/I no later than 4/11/08...All other exchanges done by 4/11/08." Depositions were moved to May 23, 2008.

On or about June 30, 2008, LSKD moved, by Order to Show Cause, to withdraw as Mr. Schindler's counsel. In support of the motion to withdraw, Jonathan Murphy Esq., of LSKD, cited Mr. Schindler's failure to cooperate in discovery and failure to pay legal fees as reasons necessitating LSKD's withdrawal.

With regards to discovery Mr. Murphy noted:

6. This case remains in the discovery phase. Currently, the defendant Schindler owes

responses to Interrogatories served by the plaintiff. Despite efforts to obtain the cooperation of Mr. Schindler to assist us in responding to those Interrogatories, after repeated requests he has failed to assist us in responding to those Interrogatories...

15. Despite seeking explicit direction and instructions from Mr. Schindler on how he wishes to proceed, in light of the issues that were raised in the litigation and the current outstanding Interrogatories owed, Mr. Schindler has failed to respond with any substantive input in this litigation. In addition, despite seeking his cooperation in order to respond to outstanding Interrogatories and other discovery, Mr. Schindler has failed to so participate and cooperate in providing said response despite our repeated attempts that he do the same.

Plaintiff's Exhibit H. Mr. Murphy also asked permission to serve Mr. Schindler via Federal Express at his P.O. Box in Southampton, New York as that was the only address LSKD had on file. On June 30, 2008, Hon. Sherry Klein Heitler signed the order and provided a return date before this court of July 31, 2008. Justice Heitler's order also permitted LSKD to serve Mr. Schindler at his P.O. Box by July 7, 2008.

On July 31, 2008, this court granted LSKD's motion to withdraw (July 31 Order) upon satisfaction of the following conditions: (1) LSKD was directed to serve a copy of this order with notice of entry upon both Mr. Schindler and the plaintiff; and (2) LSKD was to forward a notice directing Mr. Schindler to appoint substitute counsel within 20 days after service of such notice and to serve a notice of appearance on the plaintiff within 5 days of such retainer. The order provided that should Mr. Schindler not retain new counsel within 20 days, he would be deemed as proceeding *pro se* and would be required to provide plaintiff with his residential address where service could be effected. In addition, a 20 day stay of the proceedings was granted from service upon Mr. Schindler of the order. LSKD was given a retaining lien on Mr. Schindler's file, and the court also scheduled a Status Conference for September 4, 2008.

Mr. Schindler failed to appear at the September 4 Status Conference. Nonetheless, the

court issued a Compliance Conference Order noting his non-appearance and failure to comply with the July 31 Order to provide his residential address. The court also directed Mr. Schindler "to either appoint new counsel [within] 20 days or he shall be deemed as proceeding *pro se* in this matter." A further conference was scheduled for October 2, 2008. Plaintiff served a copy of the order, with notice of entry, upon Mr. Schindler via first class mail that same day. Mr. Schindler retained new counsel on the morning of October 2, 2008.

On or about October 20, 2008, Fish & Richardson moved by Order to Show Cause, for a motion to, *inter alia*, grant plaintiff leave to serve a Subpoena Duces Tecum upon LSKD in order to obtain more detailed information as to its representation of Mr. Schindler. On November 6, 2008, the court granted this motion "only to the extent of permitting plaintiff-movant to serve and obtain an affidavit from someone with knowledge from defendant's prior firm, [LSKD] Jonathan Murphy, as to whether a copy of [the court's] decision relieving them as counsel was served upon defendant and when."

On or about November 24, 2008, Mr. Murphy submitted an affidavit stating that he emailed Mr. Schindler at 4:38p.m. on August 6, 2008, to advise him of the July 31 Order. Mr. Murphy also averred that on August 20, 2008, he had a copy of the order with notice of entry served on Mr. Schindler, by certified mail, return receipt requested, tracking number 70053110000243100230, at P.O. Box 1480, Southampton, New York 11969. In addition, a review of the County Clerk file reveals an affidavit of service from Jasmattie Rupnarain. This affidavit states that on August 6, 2008, Ms. Rupnarain served a copy of the July 31 Order with notice of entry, via regular mail, upon both the plaintiff and Mr. Schindler.

As of December 3, 2008, in violation of four separate court orders, Mr. Schindler still

* 6]

failed to provide Fish & Richardson the following discovery: (1) a list of insurance information pursuant to the December 20, 2007 PC Order; (2) a response to Plaintiff's First Set of Interrogatories, originally due on March 28, 2008; (3) a list of potential witnesses, which was to be provided by April 11, 2008; and (5) his residential address.

II. *Conclusions of Law*

Where a party "wilfully fails to disclose information which the court finds ought to have been disclosed[,] the court may strike pleadings or parts thereof, dismiss the action or any part thereof or enter a default judgment against the insubordinate party. CPLR § 3126(3). Although actions should be disposed on the merits, the court may strike a pleading against a party who does not comply with court ordered disclosure. *Reidel v. Ryder TRS, Inc.*, 13 A.D.3d 170, 171 (1st Dept 2004). The court may strike an answer only when the movant establishes "a clear showing that the failure to comply is willful, contumacious or in bad faith." *Id.* quoting *Palmenta v. Columbia Univ.*, 266 A.D.2d 90, 91 (1st Dept 1999). Willful and contumacious conduct can be inferred from a party's repeated failure to comply with court ordered disclosure coupled with the party's inadequate excuses offered to justify the default. *Maiorino v. City of New York*, 2007 NY Slip Op 3104; 39 A.D.3d 601 (2d Dept 2007); *Baralan Int'l v. Avant Indus., Ltd.*, 242 A.D.2d 226 (1st Dept 1997); *Johnson v. City of New York*, 188 A.D.2d 302 (1st Dept 1992). Once this showing is made, the burden shifts to the nonmovant to proffer a reasonable excuse. *Reidel*, 13 A.D.3d at 171.

The Appellate Division gives IAS courts substantial deference to compel compliance with discovery orders and, absent a clear abuse of discretion, any penalty imposed pursuant to CPLR § 3126 will not be disturbed. *Arts4All, Ltd. v. Hancock*, 54 A.D.3d 286 (1st Dept 2008). Public

policy favoring the disposition of actions on the merits does not permit litigants to impose an undue burden on the discovery process. *Id.* at 286-87. The efficacious disposition of matters is frustrated by litigants who undermine the authority of the court to supervise discovery. *See Id.* at 287. In fact, IAS courts are now encouraged “to employ a more proactive approach” in situations where a party has repeatedly failed to comply with court ordered discovery. *Figdor v. City of New York*, 2006 NY Slip Op 7809; 33 A.D.3d 560 (1st Dept 2006). As the Court of Appeals stated in *Kihl v. Pfeffer*, 94 N.Y.2d 118, 123 (1999): “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.”

Applying these principles to the case at bar, Mr. Schindler’s continued violation of four separate court orders (The PC order dated 12/20/07, Compliance Conference Order of March 6, 2008, July 31 Order and September 4, 2008 Compliance Conference Order) over a period of approximately 10 months clearly constitutes wilful and contumacious conduct. *Maiorino*, 39 A.D.3d at 601.

Mr. Schindler offers three excuses for his failure to provide discovery in this action. Regarding his non-appearance at the September 4, 2008, Status Conference, Mr. Schindler claims he does not recall being served with the July 31 Order. This excuse does not suffice. Ms. Rupnarain’s affidavit of service demonstrates service of the order via regular mail on August 6, 2008 at his only known address. Moreover, Mr. Murphy, his lawyer, again served the order on August 20 by certified mail, and earlier emailed him. Mr. Schindler’s mere denial of receipt does not on its own rebut the presumption created by Ms. Rupnarain’s affidavit that proper service was effectuated. *Kihl*, 94 N.Y.2d at 122 (properly executed affidavit of service raises

presumption that proper mailing occurred and mere denial of receipt is not enough to rebut this presumption); *Northern v. Hernandez*, 17 A.D.3d 285 (1st Dept 2005).

Mr. Schindler's second proffered excuse is that at the time of the September 4 conference he was suffering from severe liver disease and rheumatoid arthritis. Mr. Schindler averred that he was taking several medications associated with these conditions which caused him to be in constant pain, discomfort and resulted in a severe impairment of his cognitive abilities. Mr. Schindler offers no documentary evidence to support these assertions. A mere assertion of illness not buttressed with medical documentation, does not constitute a reasonable excuse. *See Guerre v. Trs. of Columbia Univ.*, 300 A.D.2d 29 (1st Dept 2002); *Matter of Male J.*, 214 A.D.2d 417 (1st Dept 1995).

Finally, Mr. Schindler cites the law office failure of his former counsel LSKD. However, the documentary evidence repudiates this allegation. Mr. Schindler's assertion that he was not on notice regarding his failure to provide discovery in this matter is utterly contradicted by the record. In his affidavit in support of his motion to withdraw, Mr. Murphy cited Mr. Schindler's failure to actively engage in discovery. As noted above, Mr. Murphy specifically cited to his repeated attempts to obtain information from Mr. Schindler in order to respond to plaintiff's first set of interrogatories. Mr. Murphy also averred that despite his repeated attempts, defendant failed to cooperate or provide any meaningful input in the discovery phase of this case. This affidavit, along with Mr. Murphy's Order to Show Cause, were duly served on Mr. Schindler on or about July 7, 2008. Mr. Schindler did not file any papers in opposition to LSKD's motion. Nor did he appear before the court on July 31, 2007 to contest the motion. The record also shows Mr. Schindler was served with copies of the July 31 Order and September 4, 2008 Compliance

Conference Order. These orders and affidavits detailed the discovery problems associated with his conduct.

Mr. Schindler also claims that discovery has been delayed due to LSKD's failure to turn over his file. The July 31 Order clearly delineates that LSKD "is to have a retaining lien on the file." In sum, defendant's bold conclusory allegation of law office failure does not constitute a reasonable excuse for default. *Perez v. New York City Hous. Auth.*, 47 A.D.3d 505 (1st Dept 2008); *Achampong v. Weigelt*, 240 A.D.2d 247 (1st Dept 1997); *Van Kleeck v. Morton Memorial Hosp.*, 251 A.D.2d 494 (2d Dept 1998).

Moreover, Mr. Schindler retained new counsel on October 2, 2008. He filed an affidavit in opposition to this motion on or about October 14, 2008. His counsel appeared for oral argument on or about December 4, 2008. Nonetheless, the discovery outlined herein remains due and outstanding. Despite four court orders and plaintiff's filing of the instant motion, Mr. Schindler continues to frustrate the discovery process.

Consequently, Fish & Richardson has met its burden to strike defendant's answer. *Yoon v. Costello*, 2006 NY Slip Op 3976; 29 A.D.3d 407 (1st Dept 2006) (sanction of striking answer warranted in light of defendant's repeated and persistent failure to comply with several disclosure orders); *Langer v. Miller*, 281 A.D.2d 338 (1st Dept 2001) (defendant willfully and contumaciously failed to comply with preliminary conference order and two compliance conference orders such that extreme sanction of striking answer was warranted); *Helms v. Gangemi*, 265 A.D.2d 203 (1st Dept 1999) ("Defendants pleadings were properly struck because of his repeated failure to comply with plaintiff's disclosure demands, as directed by the IAS Court...Defendant's persistent failure to produce documents demanded by plaintiff and directed

by court was dilatory conduct that warranted extreme sanction of striking his pleadings”); *Ortiz v. Weaver*, 188 A.D.2d 290 (1st Dept 1992) (defendant’s successive failures to respond to plaintiff’s discovery demands as well as court orders seeking same constituted type of dilatory and obstructive conduct warranting striking of answer). Indeed, were the court to reach the second prong of Fish & Richardson’s motion, its request for a default judgment, the court would grant it for failure to put forth any reasonable, valid excuse for his failure to appear.

Accordingly, it is

ORDERED that plaintiff’s motion pursuant to CPLR 3126 is granted and defendant Richard Schindler’s answer is hereby stricken, his affirmative defenses are dismissed and plaintiff is granted a judgment as to liability only on its first, second and third causes of action; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly; and it is further

ORDERED that the issues of damages and attorneys’ fees is referred to a Special Referee to hear and determine; and it is further

ORDERED that a copy of this order with notice of entry shall be served on the Clerk of the Reference Part (Room 119) to arrange a date for the reference to a Special Referee; and it is further

ORDERED that the Clerk shall notify all parties of the date of the hearing on the issue of damages with costs and disbursements to plaintiff as taxed by the Clerk of the Court upon submission of an appropriate bill of costs.

FILED
 ENTER
 MAR 24 2009
 COUNTY CLERK'S OFFICE
 NEW YORK

[Handwritten Signature]

 J.S.C.

DATE: March 20, 2009
 New York, NY