

**Jantek, Inc. v Jaymar Mktg., Inc.**

2009 NY Slip Op 30863(U)

April 15, 2009

Supreme Court, Nassau County

Docket Number: 23208/07

Judge: William R. LaMarca

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**SHORT FORM ORDER**

**SUPREME COURT - STATE OF NEW YORK  
COUNTY OF NASSAU - PART 15**

**Present: HON. WILLIAM R. LaMARCA  
Justice**

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**JANTEK, INC., d/b/a JANTEK COMPUTERS,  
Plaintiff,**

**Motion Sequence #3  
Submitted January 27, 2009  
XXX**

**-against-**

**INDEX NO: 23208/07**

**JAYMAR MARKETING, INC. and 333 BAYVILLE  
AVENUE RESTAURANT CORP., d/b/a CRESCENT  
BEACH CLUB, INC.,  
Defendants.**

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**The following papers were read on these motions:**

**JAYMAR and BAYVILLE Notice of Motion.. .....1  
Affirmation in Opposition to Motion.....2  
Reply Affidavit.....3  
JANTEK Memorandum of Law in Opposition to Motion.....4**

Defendants, JAYMAR MARKETING, INC. (hereinafter referred to as "JAYMAR") and 333 BAYVILLE AVENUE RESTAURANT CORP., d/b/a CRESCENT BEACH CLUB, INC. (hereinafter referred to as "CRESCENT"), move for an order, pursuant to CPLR §§ 3103 and 3126, striking the complaint of the plaintiff, JANTEK, INC., d/b/a JANTEK COMPUTERS ("JANTEK") due to plaintiff's willful noncompliance with an Order of this Court dated October 1, 2008 (hereinafter referred to as the "October 1 Order"). Alternatively, defendants, JAYMAR and CRESCENT, seek an Order awarding monetary sanctions against the plaintiff for its refusal to provide discovery and affidavits as ordered

by this Court and for its willful violation of the October 1 Order and to deem, as conclusively established certain factual findings against the plaintiff. Plaintiff, JANTEK, opposes the motion which is determined as follows:

By Short Form Order dated October 1, 2008, this Court: (1) granted plaintiff, JANTEK's motion, for an Order, seeking leave to amend the caption to correctly name CRESCENT as the defendant; and (2) denied defendant, JAYMAR's cross motion for an order dismissing the plaintiff's complaint for willful failure to comply with disclosure; this Court instead directed plaintiff, JANTEK to respond to defendant JAYMAR's Notice for Discovery and Inspection dated February 22, 2008. Specifically, this Court directed the plaintiff:

to fully respond to JAYMAR's Notice for Discovery and Inspection, dated February 22, 2008, within ten (10) days after service of a copy of this order upon its counsel with notice of entry, or provide an explanation why the demanded material or any part thereof is not available in accordance with Wilensky v. JRB Marketing & Opinion Research.

This Court further directed that, in accordance with the dictates of *Wilensky v JRB Marketing & Opinion*, 161 AD2d 761, 556 NYS2d 356 (2<sup>nd</sup> Dept. 1990):

[I]f a particular document or record specified in the . . . notices to produce . . . was never made, is no longer in existence, or is not within [plaintiff's] custody or control, and therefore incapable of being produced . . . then an officer or employee of the [plaintiff] with knowledge of the facts shall so state by detailed affidavit setting forth with respect to each such document or record the reason why it was not made, or if made and then destroyed, the date upon which it was destroyed, by whom, and the reason therefor, and if a particular document is still in existence but not within the [plaintiff's] custody or control, the place where and the person into whose custody or control it was put and when. . .

In its prior Order, this Court also discussed that "the requested disclosure is of critical significance as JAYMAR avers that plaintiff's alleged damages, including the demanded retainer charges for the years 2002-2004, are newly invented to retaliate

against JAYMAR for failing to continue the business relationship, and have never been billed before this lawsuit. JANTEK's failure to bill for the charges at the time they were incurred lends credence to defendant's allegations."

This Court also clearly stated that "failure to respond as directed may result in penalties pursuant to CPLR §3126.

Timely compliance with this Court's October 1 Order was due on November 13, 2008. Based upon the papers submitted for this Court's consideration, as well as the unchallenged arguments of the defendants, however, it is clear that plaintiff has made an incomplete production of documents and has violated the directives of this Court's prior Order.

Plaintiff's submission of a "Response to Notice for Discovery and Inspection" wherein counsel for the plaintiff purports to identify the category or categories responsive to each specification, fails to address the various categories of documents specified in the document request. Furthermore, as directed by this Court in its October 1 Order, plaintiff's response does not contain the affidavit from JANTEK's president setting forth the information required by the *Wilensky* decision with respect to documents which were not produced. While JANTEK purports to offer an "explanation" of its failure to produce certain documents, such explanation is merely perfunctory and does not address all of the missing material. Further, it remains unchallenged that at the Preliminary Conference held on November 25, 2008 (following this Court's Order), and as exhibited by the plain language of the Preliminary Conference Order, plaintiff declined to provide unproduced documents and materials and also refused to comply with the directive that they provide by affidavit

an explanation for the missing material as required by *Wilensky*.

This is a breach of contract action. To establish a cause of action for breach of contract, one must demonstrate: (1) the existence of a contract between the plaintiff and defendant; (2) consideration; (3) performance by the plaintiff; (4) breach by the defendant; and (5) damages resulting from the breach (*Furia v Furia*, 116 AD2d 694, 498 NYS2d 12 [2<sup>nd</sup> Dept. 1986]). Plaintiff cannot avoid the production of, *inter alia*, documentary evidence of such contract and agreements supporting its allegations and claims.

The subject Notice for Discovery and Inspection is dated February 22, 2008, over a year ago. It can no longer be overlooked that plaintiff has, notwithstanding this Court's characterization of this information as "of critical significance" to JAYMAR's defense, yet to provide very basic discovery demands. Specifically, for example, plaintiff has failed to provide documents which refer or relate to, *inter alia*, the business dealings between plaintiff and both defendants including the terms of the contracts it seeks to recover retainer fees under, ledgers, receivable reports, or other documents showing that it had accrued receivables under those contracts, correspondence, documents showing the services provided or materials, documents relating to the work performed such as service notes, payment records and invoices or other documents related to the material provided; the "reasonable value" of the parts and services, and the ostensibly agreed "price to be paid by defendant to plaintiff" (as directly alleged in the complaint) as well as other documents relating to agreements or negotiations, or documents which would enable this Court to see if the claimed "reasonable value" is consistent with pricing to others or within the industry; and identified financial records which would establish whether, prior to the late

rendering of invoices, defendants had a receivable such as ledgers, receipt of payment records, statements of account, trial balances, or reserves for bad debt.

Instead, plaintiff and its counsel assert objections, including (1) the information sought concerns other clients of plaintiffs; (2) that it not germane to the case; (3) that it would constitute an “illegal fishing expedition” which would violate confidential communication rules; and (4) that it would expose plaintiff’s hard drive to the risk of unnecessary damage and possible infection by viruses.” These arguments are entirely frivolous and are nothing more than a willful decision by plaintiff and its counsel to defy the Court’s order regarding production of information central to their defense. For example, it cannot be overlooked in this case that this corporate plaintiff is in the business of selling computers and parts thereto and offering services to maintain and repair computers and computer systems. This Court is not persuaded that JANTEK does not have knowledge of the technology surrounding the duplication of hard drives. Plaintiff’s frivolous objections and its blatant refusal to comply with this Court’s order that it produce documents and records central to the defense, the evasion and incompleteness of production to the other specifications, and its failure to provide the “*Wilensky*” affidavit, compels this Court, to grant defendants’ motion to strike plaintiff’s complaint, pursuant to CPLR 3126.

In opposition to the motion, plaintiff, neither addresses nor contests the showing that it violated the October 1, 2008 Order; counsel for plaintiff, fails to address at all, JANTEK’s failure to provide the *Wilensky* affidavit, its refusal to supplement responses, or its refusal to withdraw the objection providing digital and printed data related to the creation of invoices. Plaintiff’s opposition also fails to explain how, in fact, it complied with each

specification in defendants' Notice for Discovery and Inspection. Thus, the uncontested facts establish a willful violation of the Order entitling defendants to the striking of the Amended Complaint.

The nature and degree of the penalty to be imposed pursuant to CPLR § 3126 are matters of discretion (*Morano v Westchester Paving & Sealing Corp.*, 7 AD3d 495, 776 NYS2d 83 [2<sup>nd</sup> Dept. 2004]). It is well settled that the drastic remedy of striking a pleading is inappropriate absent a clear showing that the failure to comply with discovery demands is willful, contumacious, or in bad faith (CPLR § 3126; *Foncette v LA Express*, 295 AD2d 471, 744 NYS2d 429 [2<sup>nd</sup> Dept. 2002]). After a careful reading of the submissions herein, including defense counsel's affirmation of good faith, and based upon the plaintiff's continued disregard of the compliance orders of the Court which required meaningful responses to the directed discovery (*See, Kihl v Pfeffer*, 94 NY2d 118, 700 NYS2d 87, 722 NE2d 55 [C.A. 1999]), it is hereby

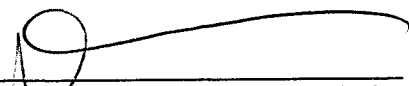
**ORDERED**, that plaintiff's complaint is dismissed pursuant to CPLR §3126; and it is further

**ORDERED**, that defendants' application for an Order awarding monetary sanctions against the plaintiff, and making certain conclusive factual findings against the plaintiff, is denied.

All further requested relief not specifically granted is denied.

This constitutes the decision and order of the Court.

Dated: April 15, 2009

  
WILLIAM R. LaMARCA, J.S.C.  
**ENTERED**  
6 APR 17 2009  
NASSAU COUNTY  
COUNTY CLERK'S OFFICE

TO: Solomon M. Lowenbraun, Esq.  
Attorney for Plaintiff  
99 South Service Road, Suite 414  
New Hyde Park, NY 11040

Forchelli, Curto, C rowe, Deegan, Schwartz, Mineo & Cohn, LLP  
Attorneys for Defendant Jaymar Marketing, Inc.  
330 Old Country Road, Suite 301  
Mineola, NY 11530

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