

<b>Pourquoi M.P.S. Inc. v Worldstar Intl., L.T.D.</b>
2009 NY Slip Op 32645(U)
October 16, 2009
Supreme Court, Queens County
Docket Number: 4883/05
Judge: Orin R. Kitzes
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**Short Form Order**

**NEW YORK SUPREME COURT - QUEENS COUNTY**

**Present: HONORABLE ORIN R. KITZES  
Justice**

**IA Part 17**

-----X  
**POURQUOI M.P.S. INC., (D/B/A L.I.F.E.  
INTERNATIONAL),**

**Plaintiff,  
-against-**

**Index No.: 4883/05  
Motion Date: 10/14/09  
Motion Cal. No.: 44**

**WORLDSTAR INTERNATIONAL, L.T.D.  
AND SONYA CHANG,**

-----X

The following papers numbered 1 to 12 read on this motion by plaintiff for an order pursuant to CPLR 3126 precluding defendants from producing certain discovery pursuant to a Court Order and sanctioning defendants for spoliation of evidence.

	<u>PAPERS NUMBERED</u>
Notice of Motion-Affirmation-Exhibits.....	1-4
Memorandum of Law.....	5
Affirmation in Opposition-Exhibits.....	6-8
Reply Affidavit.....	9-11
Reply Memorandum of Law.....	12

Upon the foregoing papers it is ordered that this motion by plaintiff for an order pursuant to CPLR 3126 specifying that defendants shall be precluded from producing evidence and testimony at trial on the topics covered in Document Request Nos. 1-6, 8-9, 11-29 and 31-33 in Plaintiff’s Fifth Request For Production Of Documents To Defendants (hereinafter, “Pltf’s Fifth Doc. Req.”), as provided by the So-ordered Stipulation dated July 17, 2009 (hereinafter, the “July 2009 So-Ordered Stipulation”) and sanctioning defendants for the spoliation of key evidence relating to, among other things, the defendants’ affirmative defenses and Counterclaim in this case, in the form of an Order striking defendants’ pleadings, is decided as follows:

As set forth in this Court’s May 24, 2007 Memorandum Decision, this action stems from sales of garlic from December 2003 to February 2004, when the plaintiff, a California corporation, sold to the defendant garlic at a price of \$161,004.00. The defendant did not pay for the garlic, and the plaintiff began this action on March 3, 2005, asserting causes of action for breach of contract, unjust enrichment, and an account stated. Ana Chan, the plaintiff’s President, swears that the garlic was "of conforming quality and condition" and that the defendants did not complain about or reject the garlic. On the other hand, the defendants allege that the garlic shipped by the plaintiff had already begun to deteriorate. Sonya Chiang, the defendant’s

President, swears that the garlic "was completely unusable by us. We practically gave it away. We had to dump a good deal of it." She also alleges that she "consistently complained about the condition of the garlic and other matters to my shipper in China who had engaged the corporate plaintiff as its importer ." Defendant Worldstar's thirty-third affirmative defense raised in its verified answer also alleges that the plaintiff continued to ship the garlic after notice from the defendant that the goods were unmarketable. Mary Chien, the Vice-President of Double Green Produce, Inc., one of the defendant's customers, alleges that her company refused "to honor our prior agreement with Worldstar to purchase the garlic" because "the garlic simply was not marketable."

There have been many discovery conferences in this matter, and at the July 17, 2009 conference, the parties stipulated to a final discovery schedule that this Court so-ordered. This Order stated that:

Defendants shall produce responses to Plaintiff's Fifth Notice of Inspection by July 24, 2009. The responses shall be produced so as to be received by 5:00p.m on July 24, 2009. If no responses are produced for a particular request, defendants shall produce an affidavit from Sonya Chian, which shall state: 1. What actions were taken to locate the documents; 2. That a search was performed of the computer referenced by Sonya Chiang, its hard drive and any other storage devices on the computer; and 3. no documents responsive to the request were located. Defendants shall produce an affidavit by Sonya Chiang by July 24, 2009 certifying that all emails responsive to plaintiff's document request, has been produced fro Worldstar's computer and that no other emails exist on the computer, which computer was used by the defendants at the pertinent time in question. More specifically, the affidavit shall allege that S. Chiang inspected the computer identified at her deposition, that she inspected all storage devices/drives on the computer, including all email addresses (as identified in Plaintiff's sixth document request), and no additional documents responsive to Plaintiff's document demands were found. Defendants shall produce a witness list and expert witness list by July 4, 2009. Defendants shall respond to the items that were left outstanding at the deposition of Sonya Chiang, as identified in Plaintiff's June 4, 2009 letter, by July 24, 2009. The deadline for filing a note of Issue shall be extended to 8/14/09. Dispositive motions shall be filed October 21, 2009. Trial scheduled for 3/15/10. Thirty days before trial, counsel for the responsive parties shall certify that all documents that the party intends to use at trial on its prima facie case/affirmative defense(s) have been produced. To the extent that no documents or an explanatory Affidavit is produced in connection with a particular document request, Defendants shall be precluded from entering into evidence testimony /or documents on the particular topic. Except for the discovery noted above, there

shall be no additional discovery in this case.

Plaintiff now moves for an order specifying defendants are precluded from offering evidence or testimony regarding certain specified topics due to defendants failure to adhere to the July 17, 2009 So-Ordered Stipulation. In particular, plaintiff claims that defendants responses to the Order were received late and they failed to produce documents responsive to the vast majority of the Document Requests in Plaintiff's Fifth Doc. Req., and the Defendants did not submit an Affidavit by Defendant Chiang specifically alleging what efforts were taken to search the Defendants' computer. According to plaintiff, the Affidavit by Defendant Chiang stated, in essence that "...for the reasons stated in my affidavit made on August 4, 2008, which I expressly incorporate by reference, I have been unable to locate any additional documents that are responsive to plaintiff's Fifth and Sixth Notices of Discovery and Inspection to the extent not previously produced or presently being produced. Plaintiff's point out that the August 4, 2008 Affidavit of Defendant Chiang failed to include any allegations concerning a search of Defendants' computer. Plaintiff claims that this Affidavit is insufficient to meet the directives of the Court's Order and pursuant to the July 17, 2009 So-ordered Stipulation, this Court should enter an Order precluding the Defendants from entering evidence or testimony concerning the topics covered in Document Request Nos. 1-6, 8-9, 11-29 and 31-33 in Pltf's Fifth Doc. Req.

Defendants oppose this motion and claim that they have satisfied their obligations pursuant to the July 17, 2009 So-ordered Stipulation. Initially, they claim they attempted to deliver the responses on July 24 at 4:55 p.m. however the messenger was unable to complete the delivery due to a failure on plaintiff's part. They also claim that, to the extent defendants did not, and were unable to, produce any additional responsive documents, defendants produced an affidavit of Sonya Chiang dated July 24, 2009 which states, in pertinent part, as follows:

I thoroughly searched for additional documents responsive to plaintiff's document notices in or about August, 2008 and have searched again recently for further additional documents responsive to plaintiff's Fifth and Sixth Notices of Discovery and Inspection. For the reasons stated in my affidavit made on August 4, 2008, which I expressly incorporate herein by reference, I have been unable to locate any additional documents that are responsive to plaintiff's Fifth and Sixth Notices of Discovery and Inspection to the extent not previously produced or presently being produced.

According to defendants, this affidavit sufficiently satisfied the July 17 Order.

The Court finds that defendants have not adhered to the July 17, 2009. That Order concerned information that was highly material to this action, in fact, this information formed the basis of this Court denying plaintiff's summary judgment motion. It had also been the subject of other Court Orders that required plaintiff to provide this information, however due to insufficient responses by defendants, the July Order was necessarily specific regarding the contents of any

affidavit from Sonya Chiang explaining the efforts she made to find the information. These previous insufficient responses regarding the emails and other discovery also led this Court to include in the July Order the self-executing preclusion language. It is clear that Sonya Chiang's affidavit of July 24, 2009 fails to state she searched the pertinent computer, its hard drive or any other storage device. Significantly, she had previously stated that a particular computer contained this information. Accordingly, this Court finds defendants' have failed to adhere to the July 17, 2009 Order and the several prior Orders to be wilful and contumacious acts designed to thwart defendant's ability to defend this action and has been designed to frustrate the disclosure scheme provided by the New York Civil Practice Law and Rule. CPLR 3126. Castrignano v Flynn, 255 AD2d 352 (2d Dept 1998.) *Compare*, 14 AD3d 546 (2d Dept 2005.) Accordingly, the branch of the motion seeking an Order specifying preclusion is granted and the appropriate sanction is defendants' preclusion from producing evidence and testimony at trial on the topics covered in Document Request Nos. 1-6, 8-9, 11-29 and 31-33 in Plaintiff's Fifth Request For Production Of Documents To Defendants. Trataros Construction v New York City School Construction Authority, 46 Ad3d 872 (2d Dept 2007.)

The branch of the motion seeking to have defendants Pleadings struck for the spoliation of key evidence is denied. Plaintiff claims that defendants have failed to provide any legitimate reasons why defendants have no additional documents responsive to Plaintiff's demands. Plaintiff also claims it has learned through its independent investigations that the allegations in the Aug. 2008 Chiang Aff. are, at best, false. In that affidavit, defendant Chiang represents that "Defendants had documents responsive [to Plaintiff's demands for documents concerning defects in the garlic] but those documents "were sent to Watermelon & Produce, Inc. [Worldstar's purported customer of the garlic]." Defendant Chiang further alleges that when she attempted to retrieve the documents from Watermelon & Produce, she was advised by its principal "that his warehouse was already sealed by the U.S. Marshals and [he] could not get in." On July 17, 2009, however, the Plaintiff received a letter from the Office of General Counsel for the United States Marshals Service specifically advising that it has no records "relating to an alleged 'seizure' or 'sealing' by the U.S. Marshals Service concerning a New York corporation named, 'Watermelon & Produce, Inc.,' or its principal, 'Kwang Mi Jung.'" Accordingly, Defendants' allegations that its documents cannot be produced because of an alleged "sealing" or "seizure" at the warehouse where Defendants' documents were stored is, at best, false. Plaintiff claims that defendants have intentionally disposed of any emails concerning their transactions with the Plaintiff. Plaintiff also asserts that defendants' allegation that the emails were deleted to "save limited free storage quota," is disingenuous and defendants have spoliated key evidence relating to the allegations in this action. Finally, plaintiff claims that defendant Chiang was clearly on notice of the possibility of litigation between Worldstar and LIFE at the time that Defendant Chiang allegedly deleted the subject information from Defendants' computer..

Defendants claim that defendants' deletion of the emails in question occurred long time

prior to plaintiff's filing of the instant action. Specifically they claim that the emails in question were dated between 9/15/03, 9/11/03, 9/12/03, 9/18/03, 9/23/03, 1/24/04, and 1/26/04 whereas plaintiff commenced this action in May 2004). Secondly, the deletion of the emails in question was necessitated by the limited free email space quota so that the free email account would have space to receive new incoming emails. Thirdly, the deletion of these emails does not fatally compromise plaintiff's ability to defend defendants' defenses and counterclaims or leave plaintiff without a means to defend defendants' defenses and counterclaims. Fourthly, defendants themselves are also prejudiced with the loss of the emails and other documents in support of their defenses and counterclaim.

“Because striking a pleading is a drastic sanction to impose in the absence of willful or contumacious conduct, the prejudice that results from the spoliation must be considered in order to determine whether such drastic relief is necessary as a matter of fundamental fairness. Thus, where a party destroys key evidence such that its opponents are deprived of appropriate means to confront a claim with incisive evidence, the spoliator may be punished by the striking of its pleading . A less severe sanction is appropriate, however, where the missing evidence does not deprive the moving party of the ability to establish his or her case or defense. Furthermore, where the plaintiffs and defendants are equally affected by the loss of the items in their investigation of the accident and neither have reaped an unfair advantage in the litigation, it is improper to dismiss a pleading on the basis of spoliation of evidence” De Los Santos v. Polanco, 21 A.D.3d 397 (2d Dep't 2005) (citations omitted. )

In the instant case, the Court finds that a sanction for the destruction of the subject information is not appropriate. Based on the above granting of plaintiff's motion to specify preclusion, defendants are not able to present evidence or testimony regarding their defenses or counterclaims that relate to topics covered by the destroyed emails, which severely limits defendants ability to present key defenses and counterclaims. As such, this evidence is no longer material. Moreover, the fact that this information would have been needed by defendants to prove their defenses and counterclaims also suggests a sanction is not necessary.

**Dated: October 16, 2009**

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**ORIN R. KITZES, J.S.C.**

