

**Astoria Fed. Sav. & Loan Assn. v JPMorgan
Chase Bank, N.A.**

2010 NY Slip Op 30589(U)

March 12, 2010

Supreme Court, Nassau County

Docket Number: 006500-06

Judge: Timothy S. Driscoll

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-STATE OF NEW YORK
SHORT FORM ORDER**

Present:

HON. TIMOTHY S. DRISCOLL
Justice Supreme Court

-----X
**ASTORIA FEDERAL SAVINGS AND LOAN
ASSOCIATION, as successor to Greater New
York Savings Bank,**

Plaintiff,

-against-

**J.P. MORGAN CHASE BANK, N.A., B&K REALTY
HOLDING CORP. a/k/a B&K REALTY CORP.,
LOUIS KATZ and LYDIA KATZ,**

Defendants.

TRIAL/IAS PART: 22

NASSAU COUNTY

Index No: 006500-06

Motion Seq. Nos: 1 & 2

Submission Date: 1/14/10

-----X

JPMORGAN CHASE BANK, N.A.,

Defendant and Third-Party Plaintiff,

-against-

**B&K REALTY HOLDING CORP. a/k/a B&K
REALTY CORP., LOUIS KATZ and LYDIA KATZ,**

Third-Party Defendants.

-----X

The following papers have been read on these motions:

- Notice of Motion, Affirmation in Support,
Affirmation of Good Faith and Exhibits.....X**
- Notice of Motion, Affirmation in Support and Exhibits.....X**
- Affidavit of L. Katz in Opposition.....X**
- Affirmation in Opposition and Exhibit.....X**
- Reply Affirmation and Exhibits.....X**
- Reply Affirmation and Exhibit.....X**

This matter is before the Court for decision on 1) the motion filed by Defendant/Third-Party Plaintiff JPMorgan Chase Bank, N.A. (“JPMC”) on September 17, 2009, and 2) the motion filed by Plaintiff Astoria Federal Savings and Loan Association, as successor to Greater New York Savings Bank (“Astoria”) on November 10, 2009, both of which were submitted on January 14, 2010. For the reasons set forth below, the Court grants the motions to the extent that the Court will impose costs on Defendants/Third-Party Defendants B&K Realty Holding Corp. a/k/a B&K Realty Corp. (“B&K”), Louis Katz (“Louis”) and Lydia Katz (“Lydia”) (collectively “B&K Defendants”) that movants incurred as a result of the failure of the B&K Defendants to comply with their discovery obligations in a timely manner. Accordingly, the Court directs Astoria and JPMC to provide the Court, on or before March 24, 2010, with Affirmations outlining the costs they incurred as a result of the delays of B&K Defendants as outlined in this decision. B&K Defendants shall submit any response to these Affirmations on or before March 31, 2010 and shall ensure that Astoria and JPMC receive its response prior to the conference before the Court on April 1, 2010 at 9:30 a.m. The Court declines to impose sanctions pursuant to CPLR § 3126.

A. Relief Sought

JPMC moves for an Order: 1) pursuant to CPLR § 3126(2), prohibiting the B&K Defendants from opposing JPMC’s claims which rely on the information that the B&K Defendants have failed to disclose; 2) pursuant to CPLR § 3126(2), prohibiting the B&K Defendants from producing in evidence things or items of testimony in opposition to JPMC’s claims which rely on the information that the B&K Defendants have failed to disclose; 3) pursuant to CPLR § 3126(3), striking the B&K Defendants’ pleadings or parts thereof; 4) pursuant to CPLR § 3126(3), rendering a judgment on default against the B&K Defendants; or, alternatively; 5) compelling disclosure by the B&K Defendants pursuant to CPLR § 3124; and 6) awarding JPMC attorneys’ fees, costs and disbursements associated with the enforcement of an order made by the Court, compelling disclosure.

Astoria moves for an Order: 1) pursuant to CPLR § 3126(2) precluding the B&K Defendants from opposing Astoria’s claims which rely on the information that the B&K Defendants have failed to disclose; 2) pursuant to CPLR § 3126(2), precluding the B&K Defendants from producing in evidence things or items of testimony in opposition to Astoria’s claims which rely on the information that the B&K Defendants have failed to disclose;

3) pursuant to CPLR § 3126(3), striking the B&K Defendants' answer or parts thereof; 4) pursuant to CPLR § 3126(3), granting Astoria judgment on default against the B&K Defendants; or, alternatively, 5) compelling disclosure by the B&K Defendants pursuant to CPLR § 3124; and 6) awarding Astoria attorney's fees and costs associated with the making of its motion and enforcement of the Court's order compelling disclosure.

The B&K Defendants oppose these motions.

B. The Parties' History

The factual allegations in the Amended Complaint ("Complaint") dated March 13, 2008 reflect that this action involves a dispute regarding 1) a 1988 Master Agreement between Manufacturers Hanover Trust Company ("MHT"), to which JPMC is the successor by merger, and B&K regarding property located in Brooklyn, New York ("Subject Premises"), 2) loans extended by Greater New York Savings Bank, to which Astoria is the successor by merger, to B&K in connection with the Subject Premises, 3) B&K's alleged default on its loan obligations, and 4) Plaintiff's allegation that Louis and Lydia were the alter egos of B&K and, therefore, should be personally responsible for its debts. Plaintiff seeks damages for Defendants' default on their loan obligations.

The Complaint does not allege exactly when B&K allegedly defaulted on its obligations, but does allege that, on or about September 30, 2005, Astoria accelerated the mortgage and demanded all payments due and owing under applicable promissory notes. On or about June 16, 2008, the B&K Defendants interposed an answer to the Amended Complaint ("Answer").

On May 29, 2008, Astoria served the B&K Defendants with Plaintiff's First Notice of Discovery and Inspection to the B&K Defendants ("First Astoria Demand") (Ex. C to Astoria motion) which required the B&K Defendants to respond on or before July 3, 2008. The B&K Defendants provided their Response to Plaintiff's First Notice of Discovery Inspection ("B&K Response to Astoria Demand"), along with a cover letter ("Cover Letter") from counsel for the B&K Defendants ("B&K Counsel"), on or about November 7, 2008. In the Cover Letter (Ex. D to Astoria motion), B&K Counsel advised Astoria's counsel that there were numerous outstanding documents that he intended to submit to Astoria shortly after December 2, 2008.

On December 19, 2008 counsel for Astoria conducted an inspection at the office of B&K Counsel, at which time B&K Counsel produced some, but not all, responsive documents. By

letter dated January 30, 2009 to B&K Counsel, Astoria's counsel demanded production of all outstanding documents, as well as copies of the documents that counsel for Astoria had viewed on December 19, 2008 ("Inspected Documents").

On February 11, 2009, the parties appeared for a Preliminary Conference before the Honorable Leonard B. Austin. Pursuant to the Preliminary Conference Order ("PC Order") dated February 11, 2009 (Ex. F to Astoria motion), the parties were directed to respond to all previously served demands on or before March 11, 2009. Astoria affirms that the B&K Defendants did not respond to Astoria's previously served demands as directed in the PC Order. This case was subsequently reassigned to the Court in May of 2009.

On June 1, 2009, counsel for Astoria and JPMC appeared before the Court for a compliance conference but counsel for B&K Defendants failed to appear at that conference. By letter dated June 9, 2009 to counsel for B&K Defendants (Ex. G to Astoria motion), counsel for Astoria again demanded production of all outstanding documents. On June 12, 2009, B&K Defendants produced the Inspected Documents.

On or about September 18, 2009, Astoria served a Second Notice of Discovery and Inspection ("Second Astoria Demand") on the B&K Defendants (Ex. H to Astoria motion). On September 23, 2009, the parties appeared before the Court for a compliance conference. Astoria affirms that the Court directed the B&K Defendants to comply with all outstanding discovery and, specifically, to respond to the Second Astoria Notice on or before October 30, 2009 and invited Astoria to file a motion if B&K Defendants did not comply. Astoria does not provide a copy of a written Order or transcript regarding this direction, consistent with the Court's records which reflect that this schedule was set at a conference with the Court's Principal Law Clerk.

By letter dated September 23, 2009 (Ex. I to Astoria motion), Astoria outlined B&K's discovery obligations as set forth at the September 23, 2009 conference. With that letter, Astoria also provided B&K with a courtesy copy of the First Astoria Demand and a reminder that B&K had represented that it was in possession of additional responsive documents that it had agreed to produce. Astoria affirms that B&K Defendants have still failed to comply with their discovery obligations by failing to produce documents, or provide any response to, the following requests in the Second Astoria Demand:

Document Demand No. 1 - All financial records of B&K, including but not limited to corporate books and record, corporate tax returns, bank records, and financial statements.

Document Demand No. 2 - All corporate formation documents for B&K including but not limited to the Certificate of Incorporation.

Document Demand No. 3 - All agreements relating to the ownership and/or operation of B&K including but not limited to any shareholders' agreement or operating agreement.

Document Demand No. 4 - All corporate minutes of B&K.

Document Demand No. 5 - All corporate resolutions of B&K.

Document Demand No. 6 - Any and all documents relating to payments made by B&K to Louis Katz, Lydia Katz, and/or any other officers, directors, or shareholders of B&K.

Astoria also affirms that it is "not satisfied" (Astoria Aff. in Support at ¶ 20) that B&K Defendants have produced all documents in response to the First Astoria Demand. Astoria does not, however, provide the specific requests in the First Astoria Demand to which B&K Defendants have allegedly not responded satisfactorily.

JPMC affirms as follows in support of its motion:

By Third-Party Summons and Complaint dated December 18, 2007, JPMC seeks, *inter alia*, indemnification against the B&K Defendants in the amount of any award granted to Astoria against JPMC in the initial action.

By Defendant and Third-Party Plaintiff's First Request for Production of Documents from Third-Party Defendants dated May 29, 2008 ("JPMC Demand") (Ex. C to JPMC motion), JPMC sought production of documents from the B&K Defendants by July 1, 2008. JPMC granted B&K Defendants a courtesy extension to July 30, 2008 to produce the requested documents. B&K Defendants did not respond and, by e-mail dated July 31, 2008, JPMC reminded B&K Defendants of their obligation to respond to the JPMC Demand.

JPMC affirms that, for over a year, B&K Defendants have failed to comply with their disclosure obligations. Specifically, B&K Defendants have failed to produce documents in response to the following requests in the JPMC Demand ("Disputed JPMC Demands"):

Document Demand # 8 - Any and all agreements or contracts between Plaintiff and/or [Greater New York Savings Bank] and [JPMorgan Chase Bank, N.A.] and/or [Manufacturers Hanover Trust Company] concerning the Subject Premises, the Building, the B&K Cash Consideration and/or the Collateral Agreement.

Document Demand # 17 - All financial records of B&K Realty Holding Corp. a/k/a B&K Realty Corp. including but not limited to: corporate books and records; banking records; and financial statements.

Document Demand # 18 - All corporate minutes of B&K Realty Holding Corp. a/k/a B&K Realty Corp.

Document Demand # 19 - All corporate resolutions of B&K Realty Holding Corp. a/k/a B&K Realty Corp.

Document Demand # 20 - Any and all documents relating to payments may be B&K Realty Holding Corp. a/k/a B&K Realty Corp. To Louis Katz and/or Lydia Katz and/or any other officers, directors, or shareholders of B&K Realty Holding Corp. a/k/a B&K Realty Corp.

In the B&K Response to the First Astoria Demand dated November 3, 2008 (Ex. D to Astoria motion) and B&K Response to the JPMC Demand (Ex. D to JPMC motion), B&K Defendants interposed certain objections, *e.g.* that the request was overbroad and unduly burdensome, but stated that “Subject to and without waiving objections, [B&K] Defendants will produce any documents in its possession regarding [these Demands].”

On November 10, 2008, B&K Defendants produced three (3) documents in response to the twenty (20) demands in the JPMC Demand. Despite the assurance of counsel for B&K Defendants that he would produce outstanding responsive documents in due course, and follow-up correspondence between JPMC and B&K Defendants, B&K Defendants failed to comply with the deadlines in the PC Order and failed to produce all documents requested.

On June 5, 2009, counsel for B&K Defendants offered to produce documents at the cost to JPMC of \$100 per hour, which offer JPMC declined in the absence of legal authority or a Court Order directing such payment. On June 12, 2009, B&K Defendants produced documents responsive to a portion of the JPMC Demand, but failed to produce documents in response to Demands 8, 17, 18, 19 and 20, as outlined above. JPMC sent letters to B&K Defendants on June 30 and July 16, 2009 (Ex. K to JPMC motion), which were unsuccessful in resolving this dispute.

B&K Defendants provide an Affidavit of Louis dated January 13, 2010 in opposition to the motions. Louis affirms as follows:

B&K Defendants have intended to produce the demanded documents, as demonstrated by: 1) their production of B&K’s tax returns for 1985-1993 and 1997-2005, as well as most of

the statements and checks from B&K's accounts, 2) their location of the most recent corporate tax returns, which incoming counsel is preparing for production, 3) their diligent but ultimately unsuccessful efforts to locate a) additional tax returns and bank documents, and b) corporate records regarding B&K which was incorporated approximately 25 years ago, and 4) Louis' recent location of lease and other documents, including loan documents for a refinance by Astoria that never closed, which incoming counsel is preparing for production. Louis submits that he and his wife Lydia have made a good faith effort to comply with their discovery obligations.

In his Affirmation in Opposition dated December 9, 2009, counsel for B&K Defendants ("B&K Counsel") affirms as follows:

B&K Defendants intend fully to respond to the Disputed JPMC Demands. B&K Defendants 1) have already produced tax returns for 1985-1993 and 1997-2005); and 2) will send, via overnight courier, the first group of bank statements for years 1998 and 1999 with copies of checks. B&K Counsel is unaware whether documents are missing for the period 1985 through 2005.

With respect to the requests for corporate records, B&K Counsel provides an Affirmation of Paul G. Sessler, Esq., former corporate counsel to B&K ("Prior B&K Counsel"), dated December 8, 2009. Prior B&K Counsel affirms as follows regarding the discovery requests for 1) B&K's corporate minutes, 2) B&K's corporate resolutions, and 3) B&K's corporate books and records (Prior B&K Counsel's Aff. at ¶¶ 3 and 4):

To the best of my knowledge and belief, there were, over the course of my representation of B&K, prepared in the ordinary course all required minutes, resolutions and records to (i) establish and maintain discrete bank accounts, (ii) operate the business of this single asset corporation which effectively constructed a retail banking building, or branch, for Manufacturer's Hanover ("M-H"), (iii) execute the obligations of its sublease from M-H and the sub-sublease of the same premises back to M-H, and to (iv) satisfy its regulatory obligations including payment of taxes (the "Materials").

To the best of my knowledge and belief the Materials were prepared and I did not transfer them to the client. Therefore, I undertook a search through my firm's records for them. However, I have not been able to locate any part of the Materials.

B&K Counsel affirms that the only outstanding discovery item is the remainder of the bank statements and checks, the production of which is being expedited.

Pursuant to a so-ordered stipulation (“Stipulation”) dated November 18, 2009, 1) the B& K Defendants agreed to produce all outstanding documents on or before December 3, 2009; and 2) the depositions of Luis and Lydia were to take place on a mutually agreeable date between January 19, 2010 and January 22, 2010.

At a conference before the Court on December 10, 2009, in consideration of the recent appearance by substitute counsel for the B&K Defendants, the Court directed that B&K respond to any outstanding discovery requests by December 23, 2009. The Court also advised the parties that the depositions of Luis and Lydia should proceed as directed in the Stipulation. In their Reply Affirmations, Astoria and JPMC provide a transcript from this December 10, 2009 conference reflecting the Court’s directions.

C. The Parties’ Positions

JPMC and Astoria submit that the Court should grant relief, pursuant to CPLR § 3126, in light of the failure of B&K Defendants to comply with JPMC and Astoria’s Demands.

B&K Defendants submit that the Court should deny the instant motions in light of the facts that B&K Defendants have substantially complied with their discovery obligations, and agreed to expedite full compliance.

RULING OF THE COURT

A. Penalties for Failure to Comply with Discovery Obligations

CPLR § 3126 provides as follows:

If any party, or a person who at the time a deposition is taken or an examination or inspection is made is an officer, director, member, employee or agent of a party or otherwise under a party’s control, 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, from producing in evidence designated things or items of testimony, or from introducing any evidence of the physical, mental or blood condition sought to be determined, or from using certain witnesses; or
3. an order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or any part thereof, or rendering a judgment by

default against the disobedient party.

The nature and degree of the penalty to be imposed pursuant to CPLR § 3126 lies within the sound discretion of the trial court. *Workman v. Town of Southampton*, 892 N.Y.S.2d 481, 482 (2d Dept. 2010), quoting *McArthur v. New York City Hous. Auth.*, 48 A.D.3d 431 (2d Dept. 2008). The striking of a pleading may be appropriate where there is a clear showing that the failure to comply with discovery demands is wilful or contumacious, or in bad faith. *Workman* at 482 citing, *inter alia*, *Northfield Ins. Co. v. Model Towing & Recovery*, 63 A.D.3d 808 (2d Dept. 2009). The wilful and contumacious conduct can be inferred by a party's repeated failure to respond to demands or to comply with discovery orders, absent a reasonable excuse. *Id.*, citing, *inter alia*, *McArthur* and *Northfield*.

B. Application of these Principles to the Instant Action

It is undisputed that the B&K Defendants did not respond to the Astoria and JPMC Demands in a timely fashion. It appears to the Court that these delays were attributable to both prior counsel for B&K Defendants, and Louis and Lydia's lack of attention to the importance of this case.

First, based on the Court's review of the history of this case while it was pending before Justice Austin, and the Court's experience during conferences with prior counsel, the Court has concerns that prior counsel was not sufficiently conscientious in ensuring that his clients complied with their discovery obligations. It also appears, however, that B&K Defendants, through their current counsel, have now provided Astoria and JPMC with extensive documentation, and explained their inability to provide other documentation.

Second, it appears that Louis and Lydia contributed to the delays by failing to make more prompt and thorough searches for relevant documentation. The Court is concerned that their dilatory conduct reflects their lack of attention to and appreciation of their obligations. By way of example, the Court directed Louis to appear at a conference on February 24, 2010. When Louis did not appear, allegedly for medical reasons, the Court directed current counsel for B&K Defendants to provide medical documentation supporting Louis' claimed infirmity. Louis produced a one page document, which appeared to be a copy of a prescription pad, with notations by Joseph T. Ingrassia, M.D. reflecting simply that Louis was "unable to attend court on 2/24/10." Dr. Ingrassia provided no information regarding his qualifications and no explanation of his basis for concluding that Louis was unable to attend court.

Given that Astoria and JPMC have been provided by current counsel for B&K Defendants with significant documentation as well as explanations for other documents sought, the Court declines to impose the severe sanctions specifically prescribed by CPLR § 3126. The Court concludes, however, that a financial sanction is appropriate because of the significant time and effort that has been required for B&K Defendants to respond appropriately to discovery requests. *See* Patrick M. Connors, Practice Commentaries to CPLR § 3126 at C3126:11 (2005) (“The rule is ensconced in all departments today that costs and attorneys’ fees, as set by the court, are a fair exaction from a party who has generated unnecessary effort by the other side in seeking court assistance with disclosure when it should not have been necessary”). Thus, the Court will impose costs and attorneys’ fees on the B&K Defendants that Astoria and JPMC incurred as a result of the failure of the B&K Defendants to respond promptly and completely to their Demands.

The Court directs Astoria and JPMC to provide the Court, on or before March 22, 2010, with Affirmations outlining the costs they incurred as a result of the delays of B&K Defendants as outlined in this decision. B&K Defendants shall submit any response to these Affirmations on or before March 29, 2010 and shall ensure that Astoria and JPMC receive its response prior to the conference before the Court on April 1, 2010 at 9:30 a.m.

The Court further reminds the B&K Defendants of their obligations to comply with this Court’s Orders and assures them that the Court will consider any such behavior in the future in assessing whether the imposition of further sanctions is appropriate.

All matters not decided herein are hereby denied.

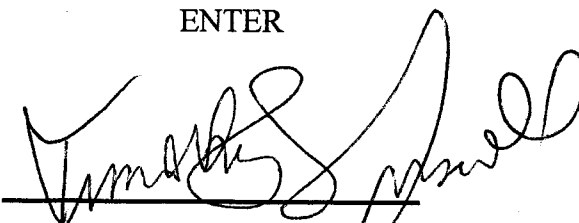
This constitutes the decision and order of the Court.

The Court reminds counsel for all parties of their required appearance before the Court on April 1, 2010 at 9:30 a.m.

DATED: Mineola, NY

March 12, 2010

ENTER



HON. TIMOTHY S. DRISCOLL

J.S.C.

ENTERED

MAR 18 2010

**NASSAU COUNTY
COUNTY CLERK'S OFFICE**