

Northern Leasing Sys., Inc. v Estate of Turner

2010 NY Slip Op 30906(U)

April 14, 2010

Supreme Court, New York County

Docket Number: 602006/04

Judge: Jane S. Solomon

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

JANE S. SOLOMON

PRESENT: _____
Justice

PART 55

Northern Leasing Systems

INDEX NO. 602006/04

MOTION DATE 11/23/09

- v -

MOTION SEQ. NO. 09

Turner, Edward

MOTION CAL. NO. _____

The following papers, numbered 1 to 15 were read on this motion to/for preclude

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

Answering Affidavits -- Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

1-3

4-P

11-15

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

is decided in accordance with the annexed memorandum decision and order.

NB Not due 5/30/10

FILED

APR 15 2010

NEW YORK
COUNTY CLERK'S OFFICE

Dated: 4/14/10



JANE S. SOLOMON

J.S.C.

Check one: FINAL DISPOSITION

NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE CITY OF NEW YORK
COUNTY OF NEW YORK: PART 55

-----x
NORTHERN LEASING SYSTEMS, INC.,

Plaintiff,

Index No.: 602006/04

DECISION and ORDER

-against-

THE ESTATE OF EDWARD M. TURNER and
SB RESTAURANTS, INC.,

Defendants.
-----x

FILED

APR 15 2010

JANE S. SOLOMON, J.:

NEW YORK
COUNTY CLERK'S OFFICE

Plaintiff Northern Leasing Systems, Inc. (NLS) sued to recover under three equipment leases between it and defendant SB Restaurants, Inc. (SB Restaurants). SB Restaurants owns and operates restaurants in Arizona. In July 2003, it acquired credit card verification equipment from non-party Cardpayment Solutions, Inc. (CSI), a California-based vendor of merchant point of sale equipment. To finance the transaction, title to the equipment was transferred to NLS, and NLS leased the equipment to SB Restaurants. The principal of SB Restaurants, the now-deceased Edward M. Turner (Turner), whose estate has been substituted for him as a defendant, executed the leases and personally guaranteed payment. SB Restaurants made payments on the leases through April 2004, and then defaulted. This lawsuit was commenced on June 28, 2004.

Defendants answered and asserted counterclaims for fraudulent inducement and negligent misrepresentation. In part, defendants allege that CSI and one of its employees, Chet Green

[* 3]

(Green), fraudulently induced SB Restaurants to procure equipment that was incompatible and unworkable. Green is said to have promised that the equipment could be returned if unsatisfactory, with no further obligation on SB Restaurants, but that NLS refused to honor this promise despite "repeated reminders" that the equipment needed to be removed (Amended Answer, paragraph 41). Also, it is alleged that Green took advantage of Turner, who was an invalid under heavy medication at the time he signed the equipment leases, and therefore lacked capacity to make a contract. Defendants allege that, because of the medication, Turner did not understand what he signed. For its part, NLS claims that CSI was an independent contractor, and not its sales agent.

In an October 15, 2008 decision and order, which decided motion sequence 005, the court addressed discovery issues and granted defendants' motion to amend their answer and counterclaims. Defendants' request to have Turner's deposition taken in Arizona, and to take the deposition of his doctor there, also was granted. It was noted that discovery was outstanding and the parties were directed to supplement their discovery responses in light of the determinations in the decision, and to attend a compliance conference on December 15, 2008 to verify compliance.

On December 30, 2008, defendants moved to preclude NLS

[* 4]

from presenting evidence at trial, and sought a commission to take evidence of CSI in the State of California. NLS cross-moved to strike the answer and counterclaims. Defendants' motion was denied by an earlier interim order, leaving only the cross-motion for consideration here. In the cross-motion, NLS states that defendants failed to provide fundamental disclosure in numerous aspects regarding both their defenses to the complaint and their counterclaims. There was oral argument on February 23, 2009, where it was learned that although commissions to take depositions in Arizona were issued, Turner still had not been deposed, and that, nearly five years into this lawsuit, defendants' counsel had never even met Turner, his client, and had not ascertained where SB Restaurant's corporate documents were located. Apart from Turner's voluminous medical records, defendants had produced virtually no relevant material. The motion was adjourned to give defendants further opportunity to ascertain the location of documents and the availability of the witnesses whose testimony they sought, including that of Turner.

On March 2, 2009, counsel returned to court.

Defendants still had not produced meaningful disclosure, and were given a further opportunity to comply. An interim order issued, with a detailed list of specific items of disclosure defendants must provide. The March 2, 2009 interim order directed them to appear again in Part 55 on April 6, 2009, "at which time x-motion

* 5]

striking answer & counterclaims will be granted absent compliance by Ds". The interim order also stated that "[defendants] are precluded from relying on any material not produced by [April 2, 2009]".

On April 6, oral argument again was held on the record, and it was learned that defendants' counsel traveled to Arizona and was able to locate SB Restaurants' documents, some of which were located at its store, and that SB Restaurants has employees other than Turner, including Turner's brother Steven Turner, who is vice-president of SB Restaurants and has submitted affidavits to court on behalf of the company.

Defendants made a further document production on or about April 2. The further production revealed no documented problems or complaints by SB Restaurants regarding the credit card verification equipment at issue. Also absent was any documentation to support the claim that CSI was an agent of NLS, rather than an independent contractor. The documents show that in late July 2003, when the leases and guarantees were executed, Turner signed checks and apparently operated the business as usual, albeit from a hospital bed.

After hearing from counsel, the court invited further submissions from counsel, in part to permit defendants to provide clean explanations for why material was not produced.

On April 20, 2009, both attorneys made further

submissions. Defendants' counsel made a passing reference in his affirmation to the fact that Turner had died. The matter was stayed by the court pursuant to CPLR 1015 to permit the substitution of Turner's estate, and this motion was marked off the calendar until the substitution was made. Substitution was granted (motion 008), and this motion was restored.


"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" (*Kihl v Pfeffer*, 94 NY2d 118, 123 [1999]). Courts are authorized to address failures to comply with orders to provide disclosure by such orders as are just, including dismissing an action or striking out a pleading (*id.*, and see CPLR 3126[3]).

This lawsuit began in 2004. NLS's claim stands or falls on the terms of the leases and guarantees, and records of payment. The discovery failures that have knotted this litigation for nearly six years involve defendants' answer and counterclaims. Defendants were given several opportunities to comply both with NLS's discovery demands and this court's orders, and their compliance has been minimal. In light of defendants' partial compliance with the interim order of March 2, 2009, striking the answer and counterclaims is too harsh a remedy. The appropriate sanction is to preclude defendants from introducing into evidence any material not produced by April 2, 2009. This

preclusion bars defendants from introducing testimony of defendants or any non-party witness, including that of Turner's doctor, because defendants failed to make even minimal efforts to procure such testimony in a timely fashion, and instead engaged in dilatory tactics to hinder discovery. Moreover, although it appears that Turner was physically disabled at all times relevant to this lawsuit, his disability is not an excuse for SB Restaurants' failure because at all times it had other employees and officers capable of taking the action necessary to provide disclosure.

It would appear that there can be no evidentiary basis for defendants' defenses and counterclaims, but that determination is beyond the scope of this motion. Accordingly, it hereby is

ORDERED that plaintiff's cross-motion is granted to the extent that defendants are precluded from introducing evidence that was not produced by April 2, 2009; and it further is

 ORDERED that plaintiff shall file and serve a note of issue by ~~April~~ ^{May} 30, 2010.

Dated: April 14, 2010

ENTER

FILED

J.S.C.

APR 15 2010

JANE S. SOLOMON

NEW YORK
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