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SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present: **ANTONIO I. BRANDVEEN**
J. S. C.

MARK SILVER and ROCHELLE SILVER,

Plaintiffs,

- against -

MITCHELL FROELICH, GABRIEL BOXER and KOTIMSKY & TUCHMAN OF NASSAU, LTD.,

Defendants.

TRIAL / IAS PART 29
NASSAU COUNTY

Index No. 18463/08

Motion Sequence No. 002, 003

The following papers having been read on this motion:

Notice of Motion, Affidavits, & Exhibits 1, 2
Answering Affidavits 3
Replying Affidavits 4
Briefs: Plaintiff's / Petitioner's .....
Defendant's / Respondent's .....

The plaintiffs move for an order striking the answer for the defense failure to address all matters required of the defendants during a deposition, and furnishing documents consistent with Court direction. The plaintiffs also move for summary judgment on the ground no issue of facts exists. The plaintiffs also move for payment of all expenses incidental to the conduct of the December 9, 2009 depositions since the defendants unreasonably failed to appear to address all matters required of the defendants during a deposition, and furnishing documents consistent with Court direction.

The defense attorney for the defendants Mitchell Froelich and Gabriel Boxer cross

moves to relieve Berman, Schulman & Levine as counsel for Froelich and Boxer, and to grant a 30 day stay of the underlying action to permit Froelich and Boxer to obtain new counsel. The defense attorney for Froelich and Boxer states, in a February 24, 2010 affirmation, the defendants retained him on or about December 2, 2008, but Froelich never paid the affirmant nor Berman, Schulman & Levine. The defense attorney for Froelich and Boxer adds he has not spoken with Froelich over six months, although the attorney sent telephone calls and emails to Froelich without any response. The defense attorney for Froelich and Boxer maintains Boxer testified at December 9, 2009 deposition, but both defendants failed to comply or respond with defense counsel's requests for discovery documents requested on January 18, 2010 by the plaintiffs. The defense attorney for Froelich and Boxer avers the defendants' failure to cooperate and communicate with him caused a total breakdown in their attorney-client relationship which counsel states has been an ongoing problem through retention as their attorney. The defense attorney for Froelich and Boxer also moves for denial of the plaintiffs' motion for summary judgment, and to strike the answer.

The plaintiffs oppose the cross motion, and the plaintiffs' attorney points out in a March 9, 2009 affirmation the defendants failed to appear for prior depositions directed by the Court. The plaintiffs' attorney also notes Berman, Schulman & Levine has never been designated as counsel of record because Aron F. Rattner, Esq., Berman, Schulman & Levine, the affirmant requesting to be relieved, represented these defendants from the

inception. The plaintiffs' attorney maintains the plaintiffs are prejudiced by the defendants' conduct because the license agreement no longer exists, and there may not be sufficient assets to execute against once a judgment is rendered in the plaintiffs' favor. The plaintiffs' attorney alleges the opposing side failed to communicate any problem with respect to furnishing information pursuant to the discovery demands of the plaintiffs. The plaintiffs' attorney asserts the defendants' conduct cost the plaintiffs nine hours of legal services for their attorney or $4,050.00.

The defense attorney for Froelich and Boxer states, in a March 17, 2010 reply affirmation, the defense was never served with opposition to the cross motion. The defense attorney for Froelich and Boxer states he allured to a potential problem with his clients during numerous court conferences, but he admits he did not fully elaborate concerning the extent of the issues. The defense attorney for Froelich and Boxer states once both defendants ceased their communication with him, and one of the defendants began disparaging him, it became clear to him as counsel for them he would not be paid, so he saw no alternative but to seek to be relieved as their legal counsel. The defense attorney for Froelich and Boxer also contends there is no statutory mandate nor agreement between the parties for the imposition of attorneys' fees, and if such fees ere warranted it would only be to the prevailing party, and here is none.

This is an action pursuant to the sale by the plaintiffs to the defendants of the capital stock in the corporate entity known as Kotimsky & Tuchman of Nassau Ltd., a

kosher catering business owned by the plaintiffs located at the East Rockaway-Hewlett Jewish Center. This Court carefully reviewed and considered all of the papers submitted by the parties with respect to these motions.

It is well settled that the harsh remedy of striking a pleading should not be employed without a clear showing of deliberate and willful refusal to disclose (see, ***Washington v. Alco Auto Sales***, 199 A.D.2d 1650). The penalty to be imposed for such a refusal or failure is a matter within the sound discretion of the court. The burden of establishing that a failure or refusal to disclose was the result of willful, deliberate, and contumacious conduct rests with the party seeking preclusion (***see, Ahroni v. City of New York***, 175 A.D.2d 789). On October 27, 2009, the Court directed both defendants to appear for examinations before trial on December 9, 2009, and if the defendants failed to appear they would be precluded from offering testimony at trial. Only Boxer appeared, and both defendants continue their failure to fully comply with discovery demands. This Court finds the plaintiffs establish the failure or refusal to disclose by the defendants was the result of willful, deliberate, and contumacious conduct. Therefore, the motion to strike the answer is granted.

22 NYCRR § 130-1.1 (a) provides:

> The court, in its discretion, may award to any party or attorney in any civil action or proceeding before the court, except where prohibited by law, costs in the form of reimbursement for actual expenses reasonably incurred and reasonable attorney's fees, resulting from frivolous conduct as defined in this Part. In addition to or in lieu of awarding costs, the court, in its discretion may impose financial sanctions upon any party or attorney in a

> civil action or proceeding who engages in frivolous conduct as defined in this Part, which shall be payable as provided in section 130-1.3 of this Part. This Part shall not apply to town or village courts, to proceedings in a small claims part of any court, or to proceedings in the Family Court commenced under Article 3, 7 or 8 of the Family Court Act.

22 NYCRR § 130-1.1 © provides:

> For purposes of this Part, conduct is frivolous if: (1) it is completely without merit in law and cannot be supported by a reasonable argument for an extension, modification or reversal of existing law; (2) it is undertaken primarily to delay or prolong the resolution of the litigation, or to harass or maliciously injure another; or (3) it asserts material factual statements that are false. Frivolous conduct shall include the making of a frivolous motion for costs or sanctions under this section. In determining whether the conduct undertaken was frivolous, the court shall consider, among other issues, (1) the circumstances under which the conduct took place, including the time available for investigating the legal or factual basis of the conduct; and (2) whether or not the conduct was continued when its lack of legal or factual basis was apparent, should have been apparent, or was brought to the attention of counsel or the party.

This Court considered the circumstances under which the defendants' conduct took place, including the time available for investigating the legal or factual basis of the conduct with respect to discovery; and the defendants' conduct continued when its lack of legal or factual basis was apparent, should have been apparent, and was brought to the attention of the defense attorney counsel and the defendants. The Court finds the defendants' conduct is frivolous because the plaintiffs have shown it was undertaken by the defendants primarily to delay or prolong the resolution of this litigation, or to harass or maliciously injure the plaintiffs. So, the Court grants plaintiffs' branch of their motion for legal costs attributed to the defendants' conduct with respect to the discovery phase

and incidental to the depositions ordered by the Court, to wit the plaintiffs' cost of nine hours of legal services for their attorney or $4,050.00. is awarded to the plaintiffs.

Summary judgment is a drastic remedy that is awarded only when it is clear that no triable issue of fact exists (***Alvarez v. Prospect Hosp.***, 68 N.Y.2d 320, 325; ***Andre v. Pomeroy***, 35 N.Y.2d 361). Summary judgment is the procedural equivalent of a trial (***Museums at Stony Brook v. Village of Patchogue Fire Dept.***, 146 A.D. 2d 572). Thus the burden falls upon the moving party to demonstrate that, on the facts, it is entitled to judgment as a matter of law (***see, Whelen v. G.T.E. Sylvania Inc.***, 182 A.D. 2d 446). Here, the court finds the plaintiffs have failed to meet their burden to show a *prima facie* entitlement to summary judgment based on these moving papers. However, the defendants have not any raised material issues of fact to warrant a trial in this matter.

CPLR 321 [b] [2] provides:

> An attorney of record may withdraw or be changed by order of the court in which the action is pending, upon motion on such notice to the client of the withdrawing attorney, to the attorneys of all other parties in the action or, if a party appears without an attorney, to the party, and to any other person, as the court may direct.

CPLR 321 [c] provides:

> If an attorney dies, becomes physically or mentally incapacitated, or is removed, suspended or otherwise becomes disabled at any time before judgment, no further proceeding shall be taken in the action against the party for whom he appeared, without leave of the court, until thirty days after notice to appoint another attorney has been served upon that party either personally or in such manner as the court directs.

The Court has carefully reviewed and considered all of the papers submitted with respect to this cross motion by the defense counsel to be relieved. The Court finds the

defense counsel has shown an inability to continue representation after termination of legal services by the client (***see*** New York Rules of Professional Conduct, Rule 1.16 [b] [3]).

Accordingly, the plaintiffs' motion is granted in accord with this decision. The cross motion by the defense counsel is granted only to the extent of granting his application to be relieved, and the underlying action is stayed for 30 days after service of a copy of this order with notice of entry to afford the defendants an opportunity to obtain new counsel.

So ordered.

Dated: **April 15, 2010**

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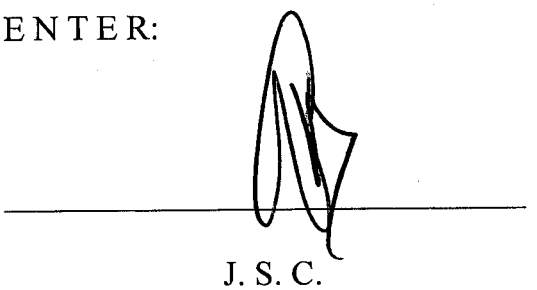

J. S. C.

FINAL DISPOSITION NON FINAL DISPOSITION XXX