

<b>Malewich v Battagliola</b>
2010 NY Slip Op 31084(U)
May 3, 2010
Supreme Court, New York County
Docket Number: 109371/08
Judge: Saliann Scarpulla
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5/5/10

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

PRESENT: SALIANN SCARPULLA  
*Justice*

PART 19

Index Number : 109371/2008  
**MALEWICH, JOSEPH**  
VS.  
**BATTAGLIOLA, HENRY J.**  
SEQUENCE NUMBER : 003  
STRIKE ANSWER

INDEX NO. \_\_\_\_\_  
MOTION DATE 2/24/10  
MOTION SEQ. NO. \_\_\_\_\_  
MOTION CAL. NO. \_\_\_\_\_

this motion to/for \_\_\_\_\_

PAPERS NUMBERED  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...  
Answering Affidavits — Exhibits \_\_\_\_\_  
Replying Affidavits \_\_\_\_\_

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion *and cross-motion* are decided in accordance with the accompanying memorandum decision.

**FILED**  
MAY 05 2010  
NEW YORK  
COUNTY CLERK'S OFFICE

Dated: 5/3/10

Saliann Scarpulla  
**SALIANN SCARPULLA** J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION  
Check if appropriate:  DO NOT POST  REFERENCE

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

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: CIVIL TERM: PART 52

-----X  
JOSEPH MALEWICH and PATRICIA MALEWICH,

Plaintiffs,

Index Number 109371/08  
Submission Date 2/24/2010  
Mot. Seq. No. 003

-against-

**DECISION & ORDER**

HENRY J. BATTAGLIOLA,

Defendant.

-----X

**Appearances: For Plaintiff :**  
Dean T. Cho, Esq.  
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Forest Hills, New York 11375  
718-344-8188

**For Defendant:**  
Richard Bruce Rosenthal & Associates, P.C.  
By Richard Rosenthal, Esq.  
120-82 Queens Boulevard  
Kew Gardens, New York 11415  
718-261-0200

Papers considered in review of this motion:

<b>Papers</b>	<b>Numbered</b>
Notice of Mot. and Affirm. in Supp.....	<u>1</u>
Notice of Cross-Mot and Affirm in Oppos.....	<u>2</u>
Reply in Supp. of Mot.....	<u>4</u>

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**HON SALIANN SCARPULLA, J.:**

In this action to recover \$ 69,500.00 as a deposit on a failed real estate transaction, plaintiffs Joseph Malewich and Patricia Malewich (collectively “ the Malewiches” or “plaintiffs”) move, pursuant to CPLR 3126, to strike the answer and counterclaim of defendant Henry J. Battagliola (“Battagliola”) for his repeated, willful and continuing non-compliance with his discovery obligations. The Malewiches also request the release of their down payment, with accrued interest, and an award of reasonable attorneys’ fees

and costs. Battagliola cross-moves for identical relief, arguing in return that it is the Malewiches who failed to meet their discovery obligations.

This is the second discovery motion the Malewiches' have made to compel Battagliola to comply with their discovery demands. Their first motion resulted in a stipulation, dated August 4, 2009, in which the parties agreed that:

Defendant [Battagliola] shall serve responses to Plaintiffs' [the Malewiches] document requests and interrogatories without any objection and produce all responsive documents to the extent same in defendant's possession by August 17<sup>th</sup>, 2009. Defendant consents to conditional order striking his answer and counterclaim and agrees to pay Plaintiff's reasonable attorneys' fees and costs of motion if full compliance with above discovery by August 17<sup>th</sup> is not complied with [sic]. Time is of the essence to foregoing.

Defendants [sic] shall serve all of his discovery requests by August 17, 2009, with no further extensions permitted. (Malewich, Ex. M).

On August 17, 2009, the last day to comply with the above stipulation, Battagliola served his discovery responses. (Malewich, Ex. N). The Malewiches argue that the answers Battagliola provided to the interrogatory requests ostensibly relied on lack of memory and hence offered no substantive information. Devoid of substance, such response could not be viewed as a good faith compliance with the August 4, 2009 stipulation.

In opposition, Battagliola accuses the Malewiches of similarly failing to meet their discovery obligations due to lack of any response to Battagliola's discovery demands, dated March 31, 2009, four months prior to the August 4, 2009 stipulation. Battagliola attaches the alleged affidavit of service of these discovery demands by Suhail Roman,

dated and notarized March 31, 2010. There is, however, an alternative affidavit of service of Battagliola's discovery demands, bearing the date of September 25, 2009, which would make the service of the discovery demands untimely under the parties' stipulation.

Battagliola's counsel attributes the discrepancy to a typographical error made by his staff, and maintains that he had actually made his discovery requests on March 31, not September 25, 2009.<sup>1</sup> The Malewiches' counsel affirms, however, that prior to the service of this cross-motion, he had never received Battagliola's demand for the production of documents and first set of interrogatories.

### **Discussion**

The First Department "encourage[s] the IAS courts to employ a more proactive approach" and to take necessary steps to ensure an orderly discovery process when faced with repeated failure to comply with discovery orders. *See Figdor v City of New York*, 33 A.D.3d 560, 560 (1<sup>st</sup> Dep't 2006). The degree and the scope of the penalty to be imposed on a non-complying party pursuant to CPLR 3126 rests with the sound discretion of the court. *See Pascarelli v City of New York*, 16 A.D.3d 472, 472 (1<sup>st</sup> Dep't 2005).

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<sup>1</sup> An affidavit of Suhail Roman explains that the discrepancy occurred because he used a previous affidavit of service of Battagliola's discovery requests as a template for an affidavit of service of the cross-motion. This explanation, however, does not account for another affidavit of service of Battagliola's cross-motion, dated October 6, 2009, which is consistent with the Court's record as to the timing of the filing of the cross-motion (although the cross-motion bears the designation "amended cross-motion," the Court records contain only one cross-motion filing by Battagliola).

“Although actions should be resolved on the merits whenever possible, a court may strike a pleading as a sanction against a party who refuses an order for disclosure.” *Reidel v Ryder TRS, Inc.*, 13 A.D.3d 170, 171 (1<sup>st</sup> Dep’t 2004) (citations omitted). The court may “strike an answer only when the moving party establishes a clear showing that the failure to comply is willful, contumacious or in bad faith. See *Rodriguez v United Bronx Parents, Inc.*, 70 A.D.3d 492 (1<sup>st</sup> Dep’t 2010).

After review of Battagliola’s responses to the Malewiches’ discovery demands, the Court finds that Battagliola has failed sufficiently to comply with the August 4, 2009 stipulation. Battagliola’s response to demands for production of documents -- that the documents must be in the Malewiches’ possession -- is insufficient.<sup>2</sup> Similarly, Battagliola’s response to interrogatories - that he can’t remember all of the documents which are responsive – then placing the onus on the Malewiches’ to “provide a listing and or copies of such communications along with the dates, times and places thereof, and the sum and substance thereof,” to which Battagliola will then “examine same and attempt to identify those that I can recall” is not in compliance with his discovery obligations.

The August 4, 2009 stipulation obligated Battagliola to “respond,” to the interrogatories and document demands, and his waiver of any and all objections required him to provide a full and complete answer, without evasion or a sudden lack of memory.

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<sup>2</sup> The Malewiches do not specifically address the adequacy of Battagliola’s response to their request for the production of documents. The Court has, however, reviewed the response and finds it inadequate.

Further, this is the second motion that the Malewiches have made in an attempt to have Battagliola comply with his discovery obligations.

However, because Battagliola did make an attempt to respond to the Malewiches' discovery demands, albeit in a less than satisfactory way, the Court will not impose the ultimate sanction of striking Battagliola's answer and counterclaim. Instead, the Court will permit Battagliola one last opportunity to fully and appropriately answer the Malewiches' request for the production of documents and interrogatories. The Court also imposes the costs of this motion and the previous discovery motion on Battagliola.

In answering the Malewiches' discovery requests, Battagliola must adhere to the following guidelines:

1. Interrogatories shall be answered in writing under oath;
2. Each interrogatory question shall be answered separately, taking full account of the definition section of the interrogatory requests;
3. Each answer to a discovery request (both interrogatory responses and responses to the demand for production of documents) shall be preceded by the question to which it responds;
4. Battagliola may not object, either in form or substance, to any discovery request;
5. Document requests shall be fully complied with, and documents fully identified and produced, regardless of Battagliola's personal belief that certain documents may already be in the Malewiches' possession; and
6. Battagliola may withhold any document protected by a privilege, but must concurrently submit a privilege log identifying each document withheld, the date of the document, and the basis for asserting the privilege.

Battagliola shall effect service of the amended/supplemental answers to the Malewiches' discovery requests no later than May 30, 2010 (in hand). Further, Battagliola shall pay the Malewiches \$1,000 in costs for the two motions to compel

Battagliola's compliance with his discovery obligations, also no later than May 30, 2010. In the event that Battagliola once again fails satisfactorily to respond to the Malewiches' discovery demands, or fails to pay the costs, the Malewiches are granted leave to file another motion and the Court will strike Battagliola's answer and counterclaim.

Finally, rather than attempting to determine whether Battagliola served his discovery demands in accordance with the time limits set forth in the parties' August 4, 2009 stipulation, and in light of this Court's commitment to the full exchange of all information between parties to a litigation, the Court simply directs the Malewiches to respond to Battagliola's discovery demands on or before May 30, 2010 (in hand).

In accordance with the foregoing, it is

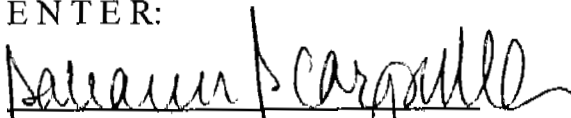
ORDERED that the motion by plaintiffs Joseph and Patricia Malewich to strike the responsive pleading of defendant Henry J. Battagliola pursuant to CPLR 3126 is granted to the extent that defendant Henry J. Battagliola shall fully comply with the Court's directives set forth above and shall pay plaintiffs \$ 1,000.00, the costs of the two discovery motions, by May 30, 2010, and the motion is otherwise denied, with leave to renew on grounds of defendant's non-compliance; and it is further

ORDERED that the motion by defendant Henry J. Battagliola to strike plaintiffs' complaint pursuant to CPLR 3126 is granted only to the extent that the Malewiches are directed to respond to defendant's discovery demands by May 30, 2010.

This constitutes the Decision and Order of the Court.

Dated: May 3, 2010  
New York, New York

ENTER:

  
Hon. Saliann Scarpulla, J.S.C.

**FILED**  
MAY 05 2010  
NEW YORK  
COUNTY CLERK'S OFFICE