

**Solomons v Ahmed**

2011 NY Slip Op 32765(U)

October 20, 2011

Sup Ct, NY County

Docket Number: 110637/10

Judge: Joan M. Kenney

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SCANNED ON 10/25/2011  
SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: JOAN M. KENNEY  
J.S.C. *Justice*

PART 8

Index Number : 110637/2010  
SOLOMONS, PAUL  
vs.  
CHAUDHRY, MUKHTAR AHMED  
SEQUENCE NUMBER : 004  
PUNISH FOR CONTEMPT

INDEX NO. 110637/10  
MOTION DATE 9/23/11  
MOTION SEQ. NO. 004  
MOTION CAL. NO. \_\_\_\_\_

The following papers, numbered 1 to 16 were read on this motion to punish for contempt

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

PAPERS NUMBERED
<u>1-9</u>
<u>10-15</u>
<u>16</u>

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion

**FILED**

OCT 25 2011

NEW YORK  
COUNTY CLERK'S OFFICE

**MOTION IS DECIDED IN ACCORDANCE  
WITH THE ATTACHED MEMORANDUM DECISION**

Dated: 10/20/11

*Joan M. Kenney*  
JOAN M. KENNEY J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST  REFERENCE

SUBMIT ORDER/ JUDG.  SETTLE ORDER/ JUDG.

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

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: IAS Part 8

-----X  
PAUL SOLOMONS,

Plaintiff,

- against -

MUKHTA AHMED CHAUDHRY a/k/a MUKHTAR  
AHMED CHAUNBRHRY, MOHAMAD CHAUDHRY  
a/k/a YASIN CHAUDHRY, and 101A WEST 136TH  
STREET, INC.,

Defendants.

-----X

KENNEY, JOAN M., J.

**Appearances**

Giskan Solotaroff Anderson & Stewart LLP  
*Attorneys for Plaintiff Paul Solomons*  
11 Broadway, Suite 2150  
New York, New York 1004

Claude C. Ramsey III  
*Attorneys for Defendants Mukhtar Ahmed  
Chaudhry a/k/a Mukhtar Ahmed Chaunbrhry*  
3935 White Plains Road  
Bronx, New York 10466

**DECISION AND ORDER**

Index Number: 110637/10

Cal.: 9/23/2011

Motion Seq. No.: 004

**FILED**

**OCT 25 2011**

NEW YORK  
COUNTY CLERK'S OFFICE

Recitation, as required by CPLR 2219(a), of the papers considered in review of this motion to strike, for contempt, and default:

**Papers**

Notice of Motion, Exhibits, & Affidavit  
Affirmation in Opposition & Exhibits  
Reply Affirmation

**Numbered**

1-9  
10-15  
16

In this action seeking damages for alleged discrimination, plaintiff Paul Solomons (Solomons) seeks an Order, pursuant to CPLR 3216, striking defendant Mukhtar Ahmed Chaudhry a/k/a Mukhtar Ahmed Chaunbhry (Mukhtar)'s answer or, in the alternative, compelling Mukhtar to comply with discovery, pursuant to CPLR 3214; an Order finding Mukhta and his attorney, Mr. Claude C. Ramsey III (Ramsey) in contempt, pursuant to Judiciary Law § 753 (A) (3) and 22 NYCRR 130-1.1; and a default judgment, pursuant to CPLR 3215, as against defendants Mohamad Chaudhry a/k/a Yasine Mohammad Chaudhry (Yasine), and 101A West 136th Street, Inc. (101A West) for failing to serve an answer or otherwise appear in the instant action.

**FACTUAL AND PROCEDURAL BACKGROUND**

It is alleged in the complaint that Solomons he was discriminated against by defendants on the basis of sexual orientation and income, in violation of New York City Human Rights Law §§ 8-107 (5) (a) (1), (2), 8-101 *et seq.* and New York City Local Law 10. Solomons served the original complaint on defendants in or around August 2010 and an answer was served on November 16, 2010

(original Answer). Upon request by Solomons, a verified answer was allegedly served on November 23, 2010 (alleged Verified Answer). Both the original Answer and alleged Verified Answer were clearly plead solely on behalf of defendant Mukhtar. It is noted, however, that none of the answers allegedly interposed, including the purported Amended Verified Answer attached to the instant opposition papers, contain a verification page by any of the named defendants.

On February 3, 2011, a compliance conference was held wherein this Court stated that “defendant has not responded to Solomons’ Discovery & Inspection [dated December 2, 2010]” and ordered that “pursuant to the Discovery & Inspection dated December 2, 2010, all documents must be produced by February 28, 2011” (the February 2011 Order) (*see* Ex. “3” attached to notice of motion). The February 2011 Order further states:

All dates are final this Order. The failure to comply with this Order absent a showing of good cause shall result in dismissal of the complaint in the case of the plaintiff; or a striking of the answer, affirmative defenses and counterclaims, or preclusion of evidence at trial in the case of the de of the defendants, upon written notice of motion, of such non-compliance.

Mukhtar failed to comply with the February 2011 Order.

Solomons then interposed a motion to strike and/or compel which this Court granted in part pursuant to a lengthy Decision & Order dated May 31, 2011 (the May 2011 Order) (*see* Ex. “2” attached to notice of motion). Mukhtar was once again ordered to comply with outstanding discovery including *inter alia* that defendant “draft and give plaintiff a current rent roll”, “provide plaintiff with the names of the all the tenants in the building, and the names of all people hired to perform maintenance work”, “produce any insurance documents”, “provide plaintiff with the lease between [Mukhtar and LaFong] and any correspondence between himself and LaFong” (*see* May 2011 Order at 9-11).

In its opposition to the instant application, Ramsey claims that a drafted current rent roll, a list of all the names of tenants in the building, and of the names of all people hired to perform maintenance work, were delivered to Solomons’ counsel in September 2010 (*see* Affirmation of Claude C. Ramsey III annexed to opposition papers, ¶ 2, 12). None of the abovementioned documents or an affidavit of service that Mukhtar allegedly provided to Solomons have been

annexed to the opposition papers. Ramsey further states that, although a lease between LaFong and Mukhtar exists, defendants “have not been able to place his hands on it” (Ramsey Affirm., ¶ 3). As an alleged substitute, Ramsey attaches an affidavit from LaFong, wherein LaFong states that he resides at 101A West 136th Street, New York, New York and further claims that “although I was informed by the Landlord and the lease agreement, that I was responsible for paying for my own utilities, (heat and hot water), and I have a thermostat located in my apartment I disagree with this and believe it to be illegal” (*see* Affidavit of Mr. Carlton Lafong attached to opposition papers). With respect to any correspondence, if any, between LaFong and the Mukhtar and a listing of the names of every person who performed maintenance on the subject building which was ordered to be disclosed in the May 2011 order, Ramsey states this “not a request is [sic] read as [sic] not something defendant can perform” (*see* Ramsey Affirm., ¶ 12).

Solomons served an Amended Complaint on defendants Yasmine and 101A West on June 16, 2011 (Amended Complaint) and in compliance with the Court’s directive to do so by the May 2011 Order (*see* Ex. “7” and “8” attached to notice of motion). Additionally, due to a finding of scandalous, unnecessary, and irrelevant statements in the answer on behalf of Mukhtar, the May 2011 Order also ordered defendant to serve an “amended verified answer which shall not include the scandalous matter set forth in the original verified answer” within 30 days from the service of a copy of this order with notice of entry (*see id.*).

Ramsey asserts that it served a “Verified Amended Answer” onto Solomons’ attorneys on July 26, 2011, which Ramsey claims is the pleading interposed on behalf of Mukhtar, Yasmine, and 101A West (*see* Ex. “C” attached to opposition motion).

It is noted that the only Answer filed with this Court is a “Verified Answer” dated November 22, 2010, solely on behalf of Mukhtar.

### **ARGUMENTS**

Solomons contends that Mukhtar’s answer be stricken because he failed to comply with two court Orders to provide outstanding discovery. Moreover, Solomons argues that Mukhtar and his attorney, Ramsey, should be held in contempt for their repeated disobedience with court orders; and

3) Solomons is entitled to a default judgment as against defendants Yasmine and 101A West for their failing to appear or otherwise answer the complaint.

Mukhtar argues that the instant application must be denied because: 1) all documents have been produced and served, or could not be located; 2) the LaFong affidavit proves the existence of a lease between LaFong and Mukhtar; and 3) defendants Yasmine and 101A West have not defaulted as they have been retained by Ramsey and an Amended Answer was served on Solomons on or around July 26, 2011.

### DISCUSSION

Although actions should be resolved on the merits whenever possible, “a court may strike a pleading as a sanction against a party who refuses to obey an order for disclosure (*see* CPLR 3126[3]). “A 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 AD3d 492, 492 [1st Dept 2010]). The burden then shifts to the nonmoving party to demonstrate a reasonable excuse (*see Reidel v Ryder TRS, Inc.*, 13 AD3d 170, 171 [1st Dept 2004]). A party’s failure to adequately explain what efforts were made to locate documents can support a finding that its failure to comply was willful (*see e.g. Rodriguez*, 70 AD3d at 492-93).

Here, Mukhtar’s failure to comply with Solomons’ discovery demands and two outstanding court orders - one of which included a similar application for the instant relief - was sufficient to demonstrate willful and contumacious behavior. Namely, Mukhtar failed to comply with the February 2011 Order, which unambiguously found that Mukhtar had not responded to Solomons’ Discovery & Inspection dated December 2, 2010 and ordered Mukhtar to respond by a February 28, 2011 deadline. When Mukhtar failed to meet that deadline, Solomons was compelled to engage in motion practice in another attempt to force Mukhtar to produce outstanding discovery. In violation of the clear mandates as set forth in the May 2011 Order, Mukhtar again failed to comply.

Rather than proffer a reasonable excuse for Mukhtar’s failure to comply with February 2011 and May 2011 Order, Ramsey’s self-serving assertions that it has produced *inter alia* the rent roll, list of tenants in the building and names of all people hired to perform maintenance work, are devoid

of factual support as Ramsey fails to annex any of these documents or proof of service thereof. As for the lease between Mukhtar and LaFong, Ramsey's bald statement that he "ha[s] not been able to place his hands on it," is completely insufficient as it is devoid of any detail (*see Rodriguez*, 70 AD3d at 492 ["[d]efendant's failure to adequately explain what efforts were made to locate the documents it failed to disclose . . . also supports a finding that its failure to comply was willful"]). Moreover, the LaFong affidavit, which acknowledges the existence of a lease, appears to have nothing to do with the instant litigation, but seems to be have been drafted in response to another dispute which is not the subject of this litigation. More importantly, LaFong never states in his affidavit that he cannot locate the subject lease.

Furthermore, Ramsey's explanation as to why it could not produce the insurance documents and correspondence between LaFong and defendants, if any, is without merit. Again, Ramsey fails to state in detail what good faith efforts, if any, were made to locate said documents, nor did he provide an affidavit from an individual with personal knowledge to confirm the claim that such documents could not be located. (*see Reidel*, 13 AD3d at 171 [affirming striking of answer for defendant's failure to obey three successive court orders to appear for court-ordered depositions based on a failure to locate said defendants where defense counsel's assertion that good faith efforts had been undertaking, including the hiring an investigator, was devoid of detail and counsel failed to submit an affidavit from the purported investigator]).

This Court declines, however, in its sound discretion to grant that branch of Solomons' motion seeking an order of contempt against Mukhtar or Ramsey (*Troiano v Ilaria*, 205 AD2d 752, 752 [2d Dept 1994] ["[t]o succeed on a motion to punish for civil contempt, the moving party must show that the alleged contemnor has violated a clear and unequivocal court order and that the violation prejudiced a right of a party to the litigation"]).

Finally, that branch of Solomons' motion for a default judgment against defendants Yasine and 101A West, is granted. While Ramsey claims that he personally served a true copy of the amended answer on Solomons and his attorneys, Ramsey fails to attach an affidavit of service of said answer. Moreover, the only pleading recorded with this Court is the original Answer which does not

name Yasine or 101A West. Ramsey's claim of law office failure is unpersuasive since at no point did this Court grant Ramsey leave to file a late answer on behalf of Yasine or 101A West, nor was there an application to file a late answer on their behalf made. If a verified Amended Answer was served upon Solomons, same is stricken as being non-compliant with this Court's directive in the May 2011 Order. Accordingly, it is:

ORDERED that plaintiff Paul Solomons' motion is granted, in part and to the extent that the answer of defendant Mukhta Ahmed Chaudhry a/k/a Mukhta Ahmed Chaunbhry and the purported Verified Amended Answer of defendant Mukhtar Ahmed Chaudhry a/k/a Mukhtar Ahmed Chaunbhry allegedly served on July 26, 2011 is stricken for failure to comply with this Court's directive and failure to seek leave of Court to file/serve a late answer on behalf of defendants Yasine Mohammad Chaudhry and 101A West 136th Street, Inc.; and it is further

ORDERED that the motion for a default judgment is granted as against defendants Yasine Mohammad Chaudhry and 101A West 136th Street, Inc.; and it is further

ORDERED that an assessment of damages against defendants Mukhtar Ahmed Chaudhry a/k/a Mukhtar Ahmed Chaunbhry, Yasine Mohammad Chaudhry and 101A West 136th Street, Inc. is directed; and it is further

ORDERED that a copy of this order with notice of entry to be served by the movant upon the Clerk of the Trial Support Office (Room 158), who is directed, upon the filing of a note of issue and a statement of readiness no later than November 15, 2011 and the payment of proper fees, if any, to place this action on the appropriate trial calendar for the assessment hereinabove directed; and it is further


ORDERED that the remainder of the instant application for contempt, is denied, within the Court's discretion.

Dated: October 20, 2011

**FILED**

ENTER

**OCT 25 2011**

  
 Hon. Joan M. Kenney  
 J.S.C.

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