

Estrategia Corp. v Lafayette Commercial Condo

2011 NY Slip Op 33404(U)

December 20, 2011

Supreme Court, New York County

Docket Number: 100147/08

Judge: Martin J. Schulman

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 OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: **MARTIN SHULMAN**
J.S.C.

PART 1

Index Number : 100147/2008
ESTRATEGIA CORP.
vs
LAFAYETTE COMMERCIAL CONDO
Sequence Number : 006
STRIKE ANSWER

INDEX NO.

100147/08

MOTION DATE

MOTION SEQ. NO.

006

MOTION CAL. NO.

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

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits A-E
~~Notice of Cross-Motion~~
Answering Affidavits — Exhibits 1

PAGES NUMBERED

1, 2

Replying Affidavits Exhibit 1

3

4

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion is decided in
accordance with the attached decision and
order.

FILED

DEC 22 2011

NEW YORK
COUNTY CLERK'S OFFICE

Dated: Dec. 20, 2011

MARTIN SHULMAN J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

SUBMIT ORDER/ JUDGE SETTLE ORDER/ JUDGE

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 1

-----X
ESTRATEGIA CORP. and ALLEN HIRSCH,

Plaintiffs,

Index No.: 100147/08

-against-

DECISION/ORDER

LAFAYETTE COMMERCIAL CONDO,

FILED

Defendant.
-----X

DEC 22 2011

Defendant Lafayette Commercial Condo ("LCC") moves pursuant to CPLR
NEW YORK COUNTY CLERK'S OFFICE
§3126(3) to strike third-party defendant Obivia, LLC's ("Obivia") answer or alternatively
to compel a representative of Obivia to appear for depositions.¹ Obivia opposes the
motion and cross-moves pursuant to CPLR §3126(3) to dismiss the third-party action as
against it, or alternatively for a preclusion order.

This court's October 5, 2010 compliance conference order directed all third-party
discovery to be completed on or before December 3, 2010. LCC's counsel alleges that
he and/or his office staff called Obivia's counsel on November 19, 2010 and December
2, 2010 and left messages regarding scheduling Obivia's deposition. None of these
calls was returned and LCC maintains that Obivia's conduct is wilful and contumacious.

In opposition to LCC's motion, Obivia's counsel contends LCC first contacted his
office to schedule depositions on December 2, 2010, the day before the court imposed

¹ Determination of the within motion was held in abeyance at the parties' request pending this court's determination of plaintiffs' motion for partial summary judgment and LCC's cross-motion for summary judgment dismissing the complaint (collectively the "summary judgment motions"). By stipulation dated June 2, 2011, LCC withdrew the instant motion as to third-party defendants Cholo Dinero LLC and 114 Kenmare Associates, LLC d/b/a La Esquina. These third-party defendants agreed that they would appear for depositions after the summary judgment motions were determined, unless this court granted LCC's cross-motion and dismissed the complaint.

deadline, and as such waived its entitlement to depositions. Obivia's counsel admits receiving LCC's counsel's November 19, 2010 message but claims it referred only to scheduling depositions generally, without specifically indicating that LCC was attempting to schedule Obivia's deposition.

In support of its cross-motion, Obivia claims it served a notice of discovery and inspection on LCC on April 12, 2010 but never received a response thereto. In response, LCC alleges it served responses to all third-party demands on July 8, 2010 yet Obivia never voiced any objection until it brought the within cross-motion.² Obivia does not dispute or even respond to this statement.

Section 3126 of the CPLR provides in pertinent part as follows with respect to penalties for refusal to comply with orders to disclose:

If any party . . . 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 . . . ; or
3. an order striking out pleadings or parts thereof, . . . or dismissing the action or any part thereof, or rendering a judgment by default against the disobedient party.

Where a party disobeys a court order and by his conduct frustrates the disclosure scheme provided by the CPLR, dismissal of the party's pleadings is within the broad

² The court notes that Obivia's cross-motion lacks an affirmation of good faith as mandated by 22 NYCRR §202.7(a).

* 4]
discretion of the trial court. *Zletz v Wetanson*, 67 NY2d 711 933 (1986); *Berman v Szpilzinger*, 180 AD2d 612 (1st Dept 1992).

In *Stanfill Plumbing & Heating Corp. v Dravo Constructors, Inc.*, 216 AD2d 101 (1st Dept 1995), the First Department held that the lower court "did not improvidently exercise its discretion in dismissing the underlying action for the failure of plaintiff to comply with prior court-ordered discovery." The court specifically found that it was proper to dismiss the plaintiff's complaint since the record revealed that the lower court had given the plaintiff ample opportunity to comply with discovery and the plaintiff repeatedly failed to comply. *Id.*

While the penalty of striking a pleading for failure to comply with disclosure is extreme, the courts nonetheless have held that dismissing the pleading is the appropriate remedy where the failure to comply has been "clearly deliberate or contumacious." *Henry Rosenfeld, Inc. v Bower & Gardner*, 161 AD2d 374 (1st Dept 1990); *Kutner v Feiden, Dweck & Sladkus*, 223 AD2d 488, 489 (1st Dept 1996), *lv. to app. den.*, 88 NY2d 802 (1996)(disobedience of a series of court orders directing discovery warranted striking of pleading); *Berman v Szpilzinger, supra*.

Here, the better practice would have been for LCC to notice the depositions of each third party in writing. Notwithstanding the foregoing, the court cannot conclude that LCC made no good faith effort to schedule depositions within the court-ordered time frame. As such, LCC is granted a final opportunity to complete third-party depositions, provided same are completed on or before January 27, 2012, that date

being prior to the previously scheduled January 30, 2012 mediation date in this action so as to avoid any further delay of this action.

As to the cross-motion, Obivia does not dispute that LCC has responded to its demands and as such, the court can only presume that the responses LCC served were adequate. Obivia's cross-motion is therefore denied. Accordingly, it is hereby

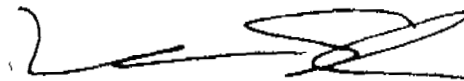
ORDERED that defendant third-party plaintiff LLC's motion is granted solely to the extent that third-party defendant Obivia is directed to appear for a deposition on or before January 27, 2012, and the motion is otherwise denied; and it is further

ORDERED that third-party defendant Obivia's cross-motion is denied in its entirety; and it is further

ORDERED that all third-party depositions be noticed forthwith and completed on or before January 27, 2012. **This date is final.**

The foregoing constitutes the Decision and Order of this Court. Copies of this Decision and Order have been sent to counsel for LCC and Obivia.

Dated: New York, New York
December 20, 2011



Hon. Martin Shulman, J.S.C.

FILED

DEC 22 2011

NEW YORK
COUNTY CLERK'S OFFICE