

Dutchess Truck Repair Inc. v Boyce
2011 NY Slip Op 34161(U)
December 14, 2011
Supreme Court, Dutchess County
Docket Number: 9406/08
Judge: James D. Pagones
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF DUTCHESS

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DUTCHESS TRUCK REPAIR INC., RALPH PAGANO
and JOSEPH MORI

Plaintiffs,

DECISION AND
ORDER

-against-

Index No. 9406/08

JOE BOYCE and SALLY BOYCE, Individually and
Doing Business As TRANS STAR ENTERPRISES,
TRANS STAR ENTERPRISES, INC. and LEE NIZNIK
d/b/a LEES AUTO BODY

Defendants.

----- X

PAGONES, J.D., A.J.S.C.

Plaintiffs move for an order (1) pursuant to CPLR §3126 striking the defendant Joe Boyce's answer for failing and refusing to appear for a deposition and (2) vacating the plaintiffs' default in serving a reply to the defendant Joe Boyce's counterclaims and compelling the defendant Joe Boyce to accept the reply dated and served July 8, 2009. The defendant opposes the plaintiffs' application and cross-moves for an order (1) precluding the plaintiffs from offering any evidence at trial with respect to information demanded by the defendant in his notices to produce or, alternatively (2) compelling the plaintiffs to respond to the outstanding notices to produce. For the reasons set forth more fully herein, it is ordered that the plaintiffs' motion is denied in its entirety. It is further ordered that defendant Joe Boyce's cross-motion is granted to the

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extent that the plaintiffs are hereby ordered to respond to the outstanding notices to produce, without objection, within ten (10) days of the date of this decision and order.

PLAINTIFFS' MOTION

It has been held that in order to invoke the drastic remedy of striking a pleading for failure to disclose pursuant to CPLR §3126, the court "must determine that the party's failure to comply was the result of willful, deliberate and contemptuous conduct or its equivalent." (Beard v. Peconic Foam Insulation Corp., 149 AD2d 555, 556 [2nd Dept. 1989].) On this motion, the plaintiffs have entirely failed to establish that defendant Boyce acted in a willful or deliberate manner in refusing to appear for deposition. To the contrary, plaintiffs' counsel's good faith affirmation indicates that the plaintiffs have not availed themselves of any legitimate attempt to secure defendant Boyce's appearance for a deposition since serving the notice for deposition in July 2009, which itself did not contain a date for the deposition to occur. The only attempts the plaintiffs can arguably point to are (1) executing a preliminary conference stipulation and order which provided each party with the opportunity to demand the other's deposition and (2) discussing with my principal court attorney during a June 22, 2011 conference the plaintiffs' continued desire, notwithstanding the plaintiffs' filing of a note of issue which was subsequent struck

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because of outstanding discovery due to defendant Boyce, to depose defendant Boyce. The court finds that the plaintiffs failed to make sufficient good faith efforts to secure the outstanding discovery prior to filing this motion to strike defendant Boyce's answer. Therefore, it is ordered that the plaintiffs' motion to strike the defendant's answer is denied. It is further ordered that the defendant's motion to dismiss the plaintiffs' complaint is denied.

The plaintiffs' request for an order vacating their default on defendant Boyce's counterclaim is also denied. Pursuant to CPLR R5015(a), a court may vacate a default where the moving party demonstrates both reasonable excuse for its default and the existence of a meritorious defense. (Rockland Tr. Mix Inc. v. Rockland Enters., Inc., 28 AD3d 630 [2nd Dept. 2006].) By decision and order dated September 25, 2009, this court found that the plaintiffs failed to serve an answer to defendant Boyce's counterclaim and that their time to do so was expired. The court specifically noted that "plaintiffs' counsel has not moved for an order directing the defendants to accept service of their late answer to the counterclaim which has been rejected by the defendants' counsel. Under the circumstances, the court cannot direct the defendants' counsel to accept the proffered answer to the counterclaim." The plaintiffs have offered no reasonable excuse for their nearly 30 month default, aside from

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attributing such default to "law office failure". The court is unpersuaded that such failure constitutes reasonable excuse, particularly in light of the fact that the plaintiffs' default and their means of remedying the same were pointed out to the plaintiffs by this court's decision and order over two years ago. Moreover, the plaintiffs have failed to set forth any meritorious defense in their moving papers to the alleged counterclaim and the proposed answer is nothing more than a general denial. The court rejects the plaintiffs' affidavit of merit as improperly presented for the first time in reply papers. (Constantine v. Premier Cab Corp., 295 AD2d 303 [2nd Dept. 2002].) Therefore, it is ordered that the plaintiffs' motion to vacate their default in serving a reply to the counterclaim of defendant Boyce and compelling them to accept the reply is denied.

DEFENDANT BOYCE'S MOTION

On July 6, 2011, defendant Boyce served on the plaintiffs two separate notices to produce. Both notices to produce related to documents demanded at the plaintiffs' prior depositions. Although defendant Boyce's counsel has failed to set forth a good faith affirmation as required in 22 NYCRR §202.7, counsel's affirmation sufficiently sets forth the good faith effort made to obtain compliance with the outstanding discovery. Therefore, it is ordered that defendant Boyce's motion is granted to the extent that the plaintiffs are hereby directed to comply with the

outstanding notices to produce, without objection, within ten (10) days of the date of this decision and order.

It is further ordered that the plaintiffs are directed to file their note of issue within thirty (30) days of the date of this decision and order. Adjournments are only granted with leave of the court.

The Court read and considered the following documents upon these applications:

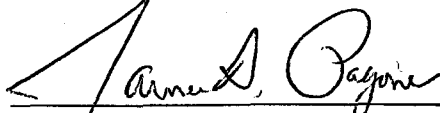
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The foregoing constitutes the decision and order of the Court.

Dated: Poughkeepsie, New York
 December 14, 2011

ENTER


 HON. JAMES D. PAGONES, A.J.S.C.