

<b>Jian-Guo Yu v Greenway Mews Realty LLC</b>
2012 NY Slip Op 30139(U)
January 18, 2012
Supreme Court, New York County
Docket Number: 116885/05
Judge: Martin Shulman
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SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY

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

PART 1

Index Number : 116885/2005  
YU, JIAN-GUO  
vs.  
GREENWAY MEWS REALTY  
SEQUENCE NUMBER : 012  
STRIKE

INDEX NO. 116885/05  
MOTION DATE 1/18/12  
MOTION SEQ. NO. 012

The following papers, numbered 1 to \_\_\_\_\_, were read on this motion to strike/judge

Notice of Motion/Order to Show Cause -- Affidavits -- Exhibits : A-E [No(s)] 1, 2

Answering Affidavits -- Exhibits A-C [No(s)] 3, 4

Replying Affidavits + Suc-Reply Affirmation [No(s)] 5, 6

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

**FILED**

JAN 19 2012

NEW YORK  
COUNTY CLERK'S OFFICE

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

Dated: Jan. 18, 2012

**MARTIN SHULMAN**

- 1. CHECK ONE: .....  CASE DISPOSED  NON-FINAL DISPOSITION
- 2. CHECK AS APPROPRIATE: ..... MOTION IS:  GRANTED  DENIED  GRANTED IN PART  OTHER
- 3. CHECK IF APPROPRIATE: .....  SETTLE ORDER  SUBMIT ORDER
- DO NOT POST  FIDUCIARY APPOINTMENT  REFERENCE

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

-----X

JIAN-GUO YU, et al,

Plaintiffs,

Index No.: 116885/05

-against-

DECISION/ORDER

GREENWAY MEWS REALTY LLC, et al,

**FILED**

Defendants.

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JAN 19 2012

Third-party defendant UAD Group ("UAD") moves pursuant to CPLR §3126(b) to strike defendant/third-party plaintiff Little Rest Twelve, Inc.'s ("LRT") third-party complaint or alternatively to preclude LRT and plaintiffs from producing evidence at trial. LRT opposes the motion.<sup>1</sup>

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By prior decision and order dated September 16, 2011 and entered on September 19, 2011, this court *inter alia* denied UAD's motion to dismiss the third-party complaint or alternatively to sever the third-party action and granted UAD 60 days from entry thereof to conduct discovery (the "60 day deadline"). Substantial discovery had already been completed in the main action, which had been pending for approximately five (5) years before the third-party action was commenced against UAD. As LRT provided UAD with copies of all pleadings and discovery in the main action, this court

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<sup>1</sup> Although the motion file contains an affirmation in opposition from plaintiffs, UAD advised the court by letter dated November 29, 2011 that it had not been served with such opposition until after the motion's submission date. Plaintiffs do not deny this contention and this court declines to consider this untimely submission.

anticipated that UAD would not require extensive discovery and that this case would expeditiously proceed to trial.<sup>2</sup>

In opposition to UAD's motion, LRT states that it has complied or substantially complied with all of UAD's demands as follows: 1) LRT served its bill of particulars on October 26, 2011; 2) LRT previously produced documents on May 25, 2011; 3) LRT produced an additional 192 pages of documents on November 3, 2011; and 4) formal responses will be served prior to the court-imposed 60 day deadline (November 18, 2011).<sup>3</sup> In reply, UAD argues that providing documents in lieu of a formal response is insufficient. LRT responded via a sur-reply affirmation<sup>4</sup> advising the court that it served its formal responses to the combined demands on November 15, 2011. As a result, LRT argues that this motion is now moot.

#### Discussion

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

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<sup>2</sup> This action was referred to the Administrative Coordinating Part (Part 40) for trial assignment but was adjourned without date pending determination of UAD's motion to dismiss or sever.

<sup>3</sup> This court rejects LRT's conclusion that it had until November 18, 2011 (the 60 day deadline) to respond to UAD's demands. As UAD notes in reply, LRT's last minute service of its discovery responses impaired UAD's ability to conduct depositions within the court-ordered time limit. Further, as UAD served its demands on all parties on May 13, 2011, LRT was already in default in serving its discovery responses when this court issued its September 16, 2011 decision and order imposing the 60 day deadline.

<sup>4</sup> By letter dated November 28, 2011, UAD objected to LRT submitting a sur-reply. However, in the event this court accepts the sur-reply, UAD asked the court to consider its letter as a response thereto. This court has considered both submissions.

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

In *Stanfill Plumbing & Heating Corp. v Dravo Constructors, Inc.*, 216 AD2d 101 (1<sup>st</sup> 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 (1<sup>st</sup> Dept 1990); *Kutner v Feiden, Dweck & Sladkus*, 223 AD2d 488, 489 (1<sup>st</sup> 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, despite LRT's misguided assumption that it had until November 18, 2011 to respond to UAD's demands, this court cannot conclude that LRT's delay in responding to UAD's demands was deliberate or contumacious. Accordingly, the court declines to strike the third-party complaint or enter an order of preclusion. However, as UAD was unable to meet the court-ordered discovery deadline through no fault of its own, this court grants UAD an extension of time through March 2, 2012 to depose LRT and co-defendant Greenway Mews Realty, LLC.<sup>5</sup>

As to plaintiffs, although this court is not considering plaintiffs' counsel's affirmation in opposition, the court declines to impose discovery sanctions against plaintiffs at this time.<sup>6</sup> However, plaintiffs are directed to respond to UAD's DBP and its combined demands (Exh. C to Motion) on or before February 17, 2012. To the extent

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<sup>5</sup> From the exhibits attached to UAD's motion, it appears that UAD only served deposition notices for these two defendants/third-party plaintiffs. LRT indicates in its opposition that it is willing to produce a second witness for depositions.

<sup>6</sup> It is not readily apparent that UAD directed a demand for a verified bill of particulars ("DBP") to plaintiffs. UAD served two (2) separate DBP's (Exh. C to Motion) simultaneously, both of which state in their preamble paragraphs that particulars are being sought from the third-party plaintiffs. However, further review of the demands reveals that one directs its inquiries to plaintiffs while the other directs its inquiries to the third-party plaintiffs. In light of this confusion, the court cannot conclude that plaintiffs willfully failed to respond.

\* 6]  
that plaintiffs may have previously responded to similar demands, their response shall direct UAD to the document containing such response.

Accordingly, it is hereby

ORDERED that third-party defendant UAD's motion is denied and, in the court's discretion, UAD is permitted additional time to depose defendants/third-party plaintiffs, and plaintiffs are permitted additional time to respond to UAD's demand for a verified bill of particulars and combined demands, as directed herein above. **All dates for the completion of discovery are final.**

The parties are directed to appear for a status conference on February 7, 2012 at 9:30 a.m. at Part 1, 60 Centre Street, Room 325, New York, New York.

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

Dated: New York, New York  
January 18, 2012

  
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Hon. Martin Shulman, J.S.C.

**FILED**

JAN 19 2012

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