

Boyce v Willner

2012 NY Slip Op 33630(U)

January 6, 2012

Sup Ct, New York County

Docket Number: 650210/2009

Judge: Charles E. Ramos

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

PRESENT: CE Ramos
Justice

PART 53

Index Number : 650210/2009
BOYCE, CHARLES
vs.
WILLNER, EDWARD J.
SEQUENCE NUMBER : 025
STRIKE A PLEADINGS

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____

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

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). _____

Answering Affidavits — Exhibits _____ | No(s). _____

Replying Affidavits _____ | No(s). _____

Upon the foregoing papers, it is ordered that this motion is

Motion is decided in accordance with
accompanying Memorandum Decision.

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

Dated: 1/10/12

CE Ramos
CHARLES E. RAMOS J.S.C.

- 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: IAS PART 53

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CHARLES BOYCE,

Plaintiff,

Index No. 650210/09

-against-

EDWARD J. WILLNER and
E.A. TECHNOLOGIES, INC.,

Defendants.

-----x

Charles Edward Ramos, J.S.C.:

This is an action for breach of contract by plaintiff Charles Boyce (Boyce) against his former partner, defendant Edward J. Willner (Willner), and defendant E.A. Technologies, Inc. (E.A. Technologies). Boyce moves, pursuant to CPLR 3126, for an order striking defendants' Second Amended Answer, for failure to provide discovery. For the reasons stated below, the motion is denied.

The facts of this action are set forth fully in this Court's decision dated February 8, 2011. Briefly, E.A. Technologies is an electronics and communications infrastructure contractor which designs and develops both hardware and software. Boyce is a former owner and chief operating officer of E.A. Technologies, and Willner is the company's sole shareholder, president and chief executive officer.

This action arises from Boyce and Willner's attempt to sever

the partnership. In furtherance of that goal, they executed three agreements: 1) a Share Repurchase Agreement; 2) an Employment Agreement; and 3) a Sale-Dissolution Agreement. They also executed amendments to the Share Repurchase Agreement and the Employment Agreement.

Boyce commenced this action on May 20, 2009, asserting, among other things, a claim for breach of the Share Repurchase amendments, and seeking a declaration that he is entitled to terminate the Employment Agreement for cause.

On December 21, 2010, plaintiff served an Amended First Request for the Production of Documents. In a compliance conference order dated June 6, 2011, this court directed defendants to produce such documents by July 7, 2011. On July 18th, at oral argument on an earlier motion, the court noted that defendants had waived any objections to producing certain documents, and ordered defendants to produce any remaining documents within two weeks.

On August 12th, plaintiff moved for an order striking defendants' answer, for failure to produce documents. In a compliance conference order dated August 25, 2011, the court directed defendants to produce any outstanding documents by September 12th. The court also directed the parties to submit supplemental affirmations in connection with the motion to strike.

Plaintiff now contends that the motion should be granted

because defendants have not produced all documents responsive to his demands. Defendants argue that the motion should be denied for two reasons. First, they assert that plaintiff failed to submit an affirmation of good faith as required by Uniform Rule 202.7 (a) (2). Second, they contend that they have, in fact, provided a substantial portion of the required discovery.

Uniform Rule 202.7 (a) (2) provides, in relevant part, that with respect to disclosure motions, the moving party must submit an "affirmation that counsel has conferred with counsel for the opposing party in a good faith effort to resolve the issues raised by the motion" (22 NYCRR 202.7 [a] [2]). In *Molyneaux v City of New York*, (64 AD3d 406, 407 [1st Dept 2009]), the Appellate Division, First Department, held that the trial court "improperly granted plaintiffs' CPLR 3126 motion in the absence of the required affirmation by their attorney that the latter had conferred with defendants' attorney in a good faith effort to resolve the issues raised by the motion" (see *148 Magnolia, LLC v Merrimack Mut. Fire Ins. Co.*, 62 AD3d 486 [1st Dept 2009]; *Cerreta v New Jersey Tr. Corp.*, 251 AD2d 190 [1st Dept 1998]).

Here, it is undisputed that plaintiff's motion does not contain an affirmation stating that plaintiff's counsel conferred with defendant's counsel in a good faith effort to resolve the issues raised by the motion. Therefore, on this basis alone, the

motion must be denied.

In any event, plaintiff has not demonstrated that defendant's answer should be stricken. "[I]t is well settled that the drastic remedy of striking a party's pleading pursuant to CPLR 3126 for failure to comply with a discovery order is appropriate only where the moving party conclusively demonstrates that the non-disclosure was willful, contumacious or due to bad faith" (*Henderson-Jones v City of New York*, 87 AD3d 498, 504 [1st Dept 2011], quoting *McGilvery v New York City Tr. Auth.*, 213 AD2d 322, 324 [1st Dept 1995]). "Willful and contumacious behavior can be inferred by a failure to comply with court orders, in the absence of adequate excuses" (*Id.* [citations omitted]). Whether to strike a party's pleading is a matter within the discretion of the trial court (*Commisso v Orshan*, 85 AD3d 845 [2d Dept 2011]).

Here, document production has clearly been slow, involving several court orders, as described above. Moreover, defendants concede that they mistakenly failed to provide the company's 2006 tax returns and certain credit card statements and they state that such documents will be provided, if they have not already been provided as of the date of this decision.

However, defendants have also demonstrated that they have provided a large number of documents responsive to plaintiff's demand, including tax returns, financial statements and e-mail

correspondence, for numerous years. In light of that production, the court finds, in its discretion, that plaintiffs have not demonstrated that the drastic remedy of striking defendants' answer is appropriate here.

Accordingly, it is

ORDERED that plaintiff Charles Boyce's motion to strike the answer of defendants Edward Willner and E.A. Technologies, Inc. is denied.

DATED: January 6, 2012

ENTER:



JEScc
CHARLES E. RAMOS