

Arman v Louise Blouin Media Inc.

2013 NY Slip Op 32989(U)

November 21, 2013

Sup Ct, NY County

Docket Number: 1502078/2012

Judge: Cynthia S. Kern

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: CYNTHIA S. KERN J.S.C. Justice

PART

Index Number : 152078/2012
ARMAN, CORICE
vs.
LOUISE BLOUIN MEDIA
SEQUENCE NUMBER : 005
STRIKE ANSWER

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

is decided in accordance with the annexed decision.

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

Dated: 11/21/13

PK, J.S.C.

- 1. CHECK ONE: CASE DISPOSED
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

CYNTHIA S. KERN J.S.C. NON-FINAL DISPOSITION

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: Part 55

-----X
CORICE ARMAN,

Plaintiff,

Index No. 1502078/2012

-against-

DECISION/ORDER

LOUISE BLOUIN MEDIA INC.,

Defendant.

-----X
HON. CYNTHIA KERN, J.S.C.

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motion for : _____

Papers	Numbered
Notice of Motion and Affidavits Annexed.....	<u>1</u>
Answering Affidavits and Cross Motion.....	<u>2</u>
Replying Affidavits.....	<u>3</u>
Exhibits.....	<u>4</u>

Plaintiff commenced the instant action to recover damages stemming from the destruction of a statue during a photo shoot in her apartment. By Decision/Order of this court dated September 6, 2013 (the "September Order"), this court granted plaintiff's motion to compel the disclosure of the reports of Albert Toy and Rena Ohashi (collectively referred to herein as "the reports") and ordered defendant to produce these reports to plaintiff on or before September 20, 2013. Plaintiff now moves for an order pursuant to CPLR § 3126 striking defendant's answer and entering default against defendant on the ground that it has failed to comply with the September Order, or in the alternative a conditional order granting such relief if defendant fails to comply with the September Order within ten days. By separate Notice of Motion, defendant

moves for an order pursuant to CPLR § 3103 to stay compliance with the September Order and pursuant to CPLR § 2221 granting it leave to renew and reargue the September Order and upon renewal and reargument an order denying plaintiff's motion to compel the production of the reports. These motions are consolidated for disposition purposes and for the reasons set forth below, plaintiff's motion is granted in part and defendant's motion is denied.

The relevant facts are as follows. Plaintiff is the widow of the French-American artist, Arman, and her home is filled with valuable artwork and antiquities collected with her husband during their marriage. Defendant is the owner of a media conglomerate, including the online and print magazine Art+Auction, which arranged to publish a feature article on plaintiff and her art collection. For this story, defendant arranged a photography shoot at plaintiff's home. The photo shoot occurred on May 12, 2011, and defendant's art director, Albert Toy, attended and directed the Photo Shoot along with his assistant Rena Ohasi. Also present at the photo shoot was the photographer Eric Guillemain, hired by Art+Auction for the show, and his assistant. During the course of the photo shoot, plaintiff's full-figure seated female terracotta statue from Nigeria, which is referred to in the primitive art work as a "Nok Figure," was destroyed (the "incident"). According to the affidavit of Ms. Ohasi, she was in the kitchen with plaintiff when the Nok Figure was destroyed and she did not see it happen, nor did she assist in moving the figure at any point.

On or about April 24, 2012, plaintiff commenced this action to recover for the damages she sustained as a result of the destruction of the Nok Figure. During discovery, it was revealed that on the day of the incident the individuals present at the photo shoot were requested to write a written statement regarding what had occurred at the photo shoot. Specifically, by email dated

May 13, 2011, one day after the incident, Benjamin Genocchio, editor in chief of Art+Auction and vice president of defendant, wrote to Mrs. Arman's publicist, Robin Davis, stating that "I requested a written report from all my people who were there so I can try to determine what happened." Additionally, during Mr. Genocchio's deposition, he testified that, "the people that were at the photo shoot were asked to provide a written document" and "that material was provided to the [in-house] attorney." During Mr. Toy's deposition he confirmed that immediately after the incident, Ellen Fair, deputy editor of Art+Auction, and Mr. Genocchio instructed him to "write down—what had occurred, and from, throughout the entire day leading to the fall of the statue and send it to Dawn Fasano, [defendant's in-house attorney]." Mr. Toy further testified that he wrote the requested email and sent it to Ms. Fasano as well as Mr. Genocchio and Ms. Fair. Additionally, Mr. Toy testified that he recalled his assistant, Ms. Ohashi, on the computer making a statement of the events as well.

In the September Order, this court granted plaintiff's motion to compel the reports made by Mr. Toy and Ms. Ohashi on the ground that defendant failed to meet its burden of demonstrating that the reports were privileged. Accordingly, defendant was ordered to produce the reports to plaintiff on or before September 20, 2013, which it failed to do.

The court first turns to defendant's motion to renew and reargue. On a motion for leave to reargue, the movant must allege that the court overlooked or misapprehended matters of fact or law. CPLR § 2221(d)(2). Additionally, on a motion for leave to renew, the movant must allege new facts not offered on the prior motion that would change the prior determination or demonstrate that there has been a change in the law that would change the prior determination and a reasonable justification for the failure to present those facts on the prior motion. CPLR §

2221(e)(2) and (3).

In the present case, as an initial matter, defendant's motion for reargument is denied as it has failed to establish that the court misapprehended the law or facts. Indeed, defendant has failed to identify any new law or arguments that were not already considered by the court on the prior motion.

Additionally, defendant's motion for renewal is denied as it has failed to allege new facts not offered on the prior motion that would change the prior determination or a reasonable justification for failure to present those facts on the prior motion. The only new facts presented by defendant is the affidavit of defendant's in-house counsel, Dan Fasano, which defendant contends it did not present on the prior motion as "Ms. Fasano did not know the basis of plaintiff's challenge to the privileged nature of [the reports] until the Court decision." This alleged explanation is simply not a reasonable justification for defendant's failure to present the affidavit in the first instance. Indeed, defendant fails to present one reasonable explanation as to why the affidavit could not have been presented with the prior motion. In any event, Ms. Fasano's affidavit contains nothing more than conclusory statements that would not change this court's prior determination.

Finally, the remaining portion of defendant's motion seeking a protective order pursuant to CPLR § 3103 is denied as improper. A protective order pursuant to CPLR § 3103 is only proper when a party is seeking an order "denying, limiting, conditioning or regulating the use of any disclosure device." In other words, CPLR § 3103 is only a mechanism to suspend disclosure of discovery demanded by an opposing party until such time as the court rules on the litigant's motion. Here, defendant is seeking a stay of this court's September Order, which is not a

disclosure device. Accordingly, defendant's reliance upon CPLR § 3103 for the relief it seeks is misplaced. If defendant seeks a stay of the September Order pending its appeal, it must seek such relief from the First Department.

The court now turns to plaintiff's motion to strike defendant's answer on the ground that it has failed to comply with this court's September Order. Pursuant to CPLR § 3126, "if any party . . . refuses to obey an order for disclosure or willfully 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." It 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 A.D.3d 498, 504 (1st Dept 2011). "Willful and contumacious behavior can be inferred by a failure to comply with court orders, in the absence of adequate excuses." *Id.*

In the present case, plaintiff has demonstrated that defendant's failure to comply with the September Order was willful and contumacious. As an initial matter, it is undisputed that defendant failed to produce to plaintiff the reports by September 20, 2013, as this court explicitly directed it to do in the September Order. Additionally, the only excuse provided by defendant for its non-compliance is that it was appealing the decision and filing a motion to renew and reargue. This excuse is without merit as an appeal or motion for reargument does not automatically stay the prior order and defendant has failed to seek a stay pending its appeal. Accordingly, plaintiff's motion is granted to the extent that defendant's answer is struck unless, within 30 days after service of a copy of this order with notice of entry, defendant produces the accident reports to

