

**Foremost Glatt Kosher Caterers v Yummy
Sandwich, LLC**

2013 NY Slip Op 33411(U)

November 8, 2013

Supreme Court, New York County

Docket Number: 601258/2010

Judge: Lucy Billings

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

LUCY BILLINGS
J.S.C.

PRESENT: _____
Justice

PART 46

Index Number : 601258/2010
FOREMOST GLATT KOSHER CATERERS
vs.
YUMMY SANDWICH, LLC
SEQUENCE NUMBER : 003
SUMMARY JUDGMENT

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

The following papers, numbered 1 to 2, were read on this motion for summary judgment
Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). 1
Answering Affidavits — Exhibits _____ | No(s). 2
Replying Affidavits _____ | No(s). _____

Upon the foregoing papers, it is ordered ~~that this motion is~~ and adjudged that:

The court grants plaintiff's motion for summary judgment to the limited extent set forth and otherwise denies its motion, pursuant to the accompanying decision. C.P.L.R. § 3126 (3).

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

FILED

DEC 09 2013

COUNTY CLERK'S OFFICE
NEW YORK

Dated: 11/4/13

Lucy Billings
_____, J.S.C.
LUCY BILLINGS
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: PART 46

-----x

FOREMOST GLATT KOSHER CATERERS,

Index No. 601258/2010

Plaintiff

- against -

DECISION and ORDER

YUMMY SANDWICH, LLC, ERIK GROSS, and
AVI MOCHE,

FILED

Defendants

DEC 09 2013

-----x

LUCY BILLINGS, J.:

COUNTY CLERK'S OFFICE
NEW YORK

The history of disputes over disclosure in this action was reduced to an order dated September 26, 2012, to which the parties stipulated in all respects that plaintiff now seeks to enforce. That order requires that, if defendant has failed to produce the documents specified within the time specified, plaintiff is entitled to a judgment in plaintiff's favor. As of defendant Moche's deposition February 7, 2013, defendants produced all documents that were required by November 2012, with the exception of one category delineated below.

I. DEFENDANTS' NONCOMPLIANCE WITH THE ORDER DATED SEPTEMBER 26, 2012

The documents defendant produced at the beginning of Moche's deposition February 7, 2013, over two months late, were additional certificates showing that plaintiff's products sold by defendants were resold by defendants' buyers, so that defendants' sales were wholesale, not retail, and thus did not obligate defendants to collect a retail sales tax. The production of

these documents, critical to plaintiff's claim for and defendants' defense to the uncollected taxes, at Moche's deposition, disabled plaintiff's attorney from fully examining Moche concerning the resale certificates after adequate time to prepare for that examination. Defendants attribute this belated production to a breakdown between their transmittal of these certificates to their attorney and the inadvertent omission of the certificates from the documents the attorney forwarded on to plaintiff.

The category of documents defendants admittedly have not produced in full or even in large part are all invoices defendants issued for plaintiff's products that defendants sold during the period audited by the New York State Department of Taxation and Finance, which formed the basis for the uncollected taxes assessed. These invoices identify defendants' buyers, enabling plaintiff to ascertain whether the purchases were wholesale or retail. Defendants claim, and plaintiff does not dispute, that they did not maintain paper copies of all these invoices, but stored many of them only electronically in an email account that was deactivated before the September 2012 order. Defendants further admit, however, that they never deleted information from the account and never attempted to retrieve the invoices from the account despite its deactivation. Defendants thus fail to demonstrate that the invoices are beyond defendants' control and irretrievable, even if the account is not functional. These electronically stored invoices are also critical since

defendants have produced only a few hundred paper copies of invoices for thousands of sales during the period audited.

II. REMEDIES FOR DEFENDANTS' NONCOMPLIANCE

Based on defendants' noncompliance with the order dated September 26, 2012, plaintiff moves for summary judgment on plaintiff's claims against all defendants. C.P.L.R. § 3126(3). Because defendants now have produced all required documents that were in defendants' possession, but have not demonstrated their best efforts to produce all required electronic information that was and still may be within their control, nor demonstrated that the information is beyond their control, the court orders the following relief. Defendants shall make their best efforts immediately to access the email account in which defendants stored invoices defendants issued for plaintiff's products that defendants sold during the period audited by the State Department of Taxation and Finance and retrieve those invoices. Within 45 days after service of this order with notice of entry, defendants shall provide all those invoices retrieved, in electronic or paper form, to plaintiff with an affidavit or affidavits on personal knowledge detailing the steps taken to retrieve the invoices and identifying the persons who undertook those efforts. Plaintiff may depose any such affiant or person identified regarding those efforts and re-depose defendant Moche regarding the resale certificates produced February 7, 2013. C.P.L.R. § 3124.

The court also awards \$7,500.00 in costs and penalties in

favor of plaintiff and against defendants, jointly and individually, for defendants' delays in producing the required documents and for plaintiffs' expenses in securing whatever further information is accessible. C.P.L.R. §§ 3126, 8101, 8301(a). This amount also approximates defendants' liability for a small percentage, albeit less than 10%, but including interest and costs, of their sales of plaintiff's products that defendants now admit were retail sales. C.P.L.R. §§ 3126(3), 5001(a) and (b), 8101, 8301(a); Wilson v. Galicia Contr. & Restoration Corp., 10 N.Y.3d 827, 830 (2008); Ramos v. Stern, 100 A.D.3d 409 (1st Dep't 2012); AWL Indus., Inc. v. OBE Ins. Corp., 65 A.D.3d 904, 905-906 (1st Dep't 2009). If defendants fail to pay plaintiff \$7,500.00 by delivery of that amount to plaintiffs within 45 days after service of this order with notice of entry, plaintiff may enter a judgment for that amount against defendants, jointly and individually.

The court grants plaintiff's motion for summary judgment to the limited extent set forth above and otherwise denies its motion. C.P.L.R. § 3126(3). This decision constitutes the court's order.

DATED: November 8, 2013

FILED

DEC 09 2013

COUNTY CLERK'S OFFICE
NEW YORK

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Lucy Billings

LUCY BILLINGS, J.S.C.

**LUCY BILLINGS
J.S.C.**