

**BMM Four, LLC v BMM Two, LLC**

2013 NY Slip Op 34003(U)

February 4, 2013

Supreme Court, Westchester County

Docket Number: 60249/2011

Judge: Joan B. Lefkowitz

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This opinion is uncorrected and not selected for official publication.

To commence the statutory time period for appeals as of right [CPLR 5513(a)], you are advised to serve a copy of this order, with notice of entry upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF WESTCHESTER – COMPLIANCE PART

-----X  
BMM FOUR, LLC,

Plaintiff,

-against-

BMM TWO, LLC and BMM THREE, LLC, JP MORGAN CHASE BANK, N.A., as successor in interest to WASHINGTON MUTUAL BANK, F.A. and WORKERS' COMPENSATION BOARD OF THE STATE OF NEW YORK,

Defendants.  
-----X

LEFKOWITZ, J.

**DECISION & ORDER**

Index No. 60249/2011  
Return Date: Feb. 4, 2013  
Motion Seq.: 2

The following papers were read on this motion by plaintiff for an order pursuant to CPLR 3126 striking defendants' answer, and further precluding any evidence with respect to any future accounting proceeding held herein:

- Order to Show Cause, Affirmation, Exhibits
- Memorandum in Opposition, Affirmations, Exhibits

Upon the foregoing papers and oral argument on February 4, 2013, the motion is decided as follows:

In this action to partition real property located at 204 Union Avenue, Mount Vernon, New York and allegedly held as tenants-in-common by plaintiff BMM Four LLC and co-defendants BMM Two LLC and BMM Three LLC (hereinafter "BMM defendants"), plaintiff moves for an order pursuant to CPLR 3126 striking the BMM defendants' answer on grounds of their alleged failure to comply with Court-ordered discovery obligations herein.

The gravamen of plaintiff's action, commenced in December 2011 against the BMM defendants and various non-appearing lienors and successor lienors on the subject property, is that the BMM defendants have been in possession of the subject premises since 2004, collecting rents from residential and commercial tenants but not properly distributing such rental proceeds to plaintiff. After joinder of issue, this Court held numerous discovery conferences and issued discovery Orders on July 12, October 3, October 22 and November 19, 2012, respectively. These discovery Orders, in substance, directed the BMM defendants' principals to submit to examinations before trial. The October 22 order specifically fixed deposition dates in November 2012 and mandated that the parties may not adjourn such depositions without prior court order.

Despite this admonition, however, the papers indicate that the parties adjourned such depositions without prior approval – plaintiff asserts that there were “mutual” scheduling conflicts, while the BMM defendants assert that plaintiff had the conflict – and a further conference was held on November 19 fixing dates certain for depositions in December. Electronic mails submitted by plaintiff in support of this motion demonstrate that counsel for the BMM defendants also adjourned the December depositions and requested new dates in January 2013. At the December 19 conference, plaintiff received a briefing schedule for Order to Show Cause bringing on the instant motion to strike the BMM defendants’ answer.

In support hereof, plaintiff pleads and proves the foregoing procedural history, attaching relevant court orders, discovery demands and electronic correspondence seeking to procure defendants’ compliance. Plaintiff further avers that the BMM defendants failed to provide bank statements relevant to the subject property, except for the period between June 2010 and February 2012, which post-2004 statements the July 12 discovery Order required the BMM defendants produce. Plaintiff also asserts that, in response to this Court’s discovery Orders, the BMM defendants disclosed only “minimal” expenditure statements relating to the subject property. Plaintiff exhorts this Court to conclude that the foregoing noncompliance or inadequate compliance, over multiple months, evinces a pattern of defendant conduct that is willful and contumacious, specifically calculated to continue the BMM defendants’ control of the subject premises and continued wrongful retention of rental proceeds undistributed to plaintiff. Plaintiff concludes that the proper remedy for this course of conduct is to strike the BMM defendants’ answer and preclude their submission of evidence in an accounting subsequent to partition of the subject property.

The BMM defendants submit three affirmations in opposition, from Robert Forte as member of BMM Three LLC, William Forte as member of BMM Two LLC, and Mark Forte as member of BMM Two LLC. These three affirmations, many of whose key provisions read identically, assert that all defendants always have been willing to be deposed and, in essence, blame the parties’ failure to complete depositions on plaintiff’s scheduling intransigence. Robert Forte blames plaintiff’s counsel for being unavailable on dates that Robert Forte proposed. William Forte concedes that he requested several adjournments due to “business and personal commitments, and a health issue,” and insists that plaintiff bears the blame for “refus[ing] to reschedule.” Mark Forte likewise concedes his request for several adjournments and stated that his duty to “family has to take precedents [*sic*]” over business. The affirmation of the BMM defendants’ counsel concedes that there have been multiple Court Orders, “the seriousness of which [counsel] fully understands and has explained repeatedly to these Defendants. But the principals of these Defendants are business and family men, [who are] entrepreneurs and investors with interests in many real estate holdings and investments. They are extremely busy.” This affirmation further asserts that the BMM defendants have produced all paper discovery physically in their possession.

To invoke the drastic CPLR 3126 remedy of striking a party’s pleadings for failure to comply with discovery demands, a court first must determine that the party’s failure to disclose is willful and contumacious (*see Greene v Mullen*, 70 AD3d 996, 997 [2d Dept 2010]; *Maiorino*

*v City of New York*, 39 AD3d 601 [2d Dept 2007]). “Willful and contumacious conduct can be inferred from repeated noncompliance with court orders, *inter alia*, directing depositions, coupled with no excuses or inadequate excuses” (*Russo v Tolchin*, 35 AD3d 431, 434 [2d Dept 2006]; see *Prappas v Papadatos*, 38 AD3d 871, 872 [2d Dept 2007]). In any event, “[t]he nature and degree of the penalty to be imposed on a motion pursuant to CPLR 3126 is a matter generally left to the [trial court’s] discretion” (*Patterson v New York City Health & Hosps. Corp. [Queens Hosp. Ctr.]*, 284 AD2d 516 [2d Dept 2001]; *Greene*, 70 AD2d at 997; see *Carbajal v Bobo Robo, Inc.*, 38 AD3d 820, 821 [2d Dept 2007]).

The BMM defendants offered no cognizable excuse for failing to comply with discovery schedules in this action, and thus a remedy for their violation is warranted. While this Court is sympathetic to the legitimate interests of any litigant’s “business,” “family” and “health” needs, the BMM defendants offer this Court only cursory, unspecified and unproved assertions about their scheduling conflicts. They do not show, and this Court perceives no basis to conclude, why plaintiff and this Court should continue to bear the burden of the BMM defendants’ business or personal interests. Many litigants are busy – as is this Court – and, in any event, it is this Court’s duty to enforce all litigants’ discovery obligations, including those that the BMM defendants owe to plaintiff in the instant action.

Recognizing that plaintiff stipulates to a “mutual” scheduling conflict for the November depositions, and inasmuch as the BMM defendants assert that they are willing to be deposed, this Court declines to conclude, at this time, that the drastic remedy of striking the BMM defendants’ pleadings is warranted. In this connection, the Court observes the BMM defendants’ assertion – and plaintiffs’ papers do not provide sufficient cause to dispute – that the BMM defendants have cooperated with paper discovery and supplied such documents responsive to plaintiff’s demands as are in these defendants’ possession. If there is reasonable basis to believe, however, that the BMM defendants are evading documentary discovery, however, plaintiff may seek proper relief in accordance with this Decision and Order.

As to the depositions, this Court will give the BMM defendants one final opportunity to be deposed in this action, at a date to be set in accordance with this Decision and Order, all excuses laid aside. If the BMM defendants do not fully and expeditiously comply herewith, then their answer will be stricken in accordance herewith. Accordingly, it is hereby

ORDERED that so much of plaintiff’s motion pursuant to CPLR 3126 to strike the BMM defendants’ pleadings as is predicated on such defendants’ alleged failure to supply documentary discovery, is denied without prejudice to a further motion upon a briefing schedule granted in accordance with the Rules of this Court; and it is further

ORDERED that so much of plaintiff’s motion pursuant to CPLR 3126 to strike the BMM defendants’ pleadings as is predicated on such defendants’ failure to submit to examinations before trial is granted to the extent that, not later than seven days after the date of entry of this Order, plaintiff shall serve on such defendants notice of the time and place of examinations before trial to be held within this county, on a date not sooner than 15 days and not later than 30

days after such notice; provided that if any of the BMM defendants shall fail to appear and be examined in accordance herewith, then plaintiff, not later than seven days after such failure, may serve on this Court and such defendants by NYSCEF an affidavit of such non-compliance along with a proposed order striking such non-complying defendant's pleadings and precluding such defendant from introducing evidence in a subsequent accounting of the proceeds of the real property that is the subject of the instant action; and it is further

ORDERED that, no later than 14 days after entry of this Decision and Order, each of the BMM defendants shall make to plaintiff a monetary payment in the amount of \$500.00 to cover plaintiff's expenses associated with the bringing of this motion, and file with the Court an affidavit certifying such payment; and it is further

ORDERED that the counsel are directed to appear in the Compliance Part, Room 800 of this Courthouse, at 9:30am on March 29, 2013, for further proceedings in this matter.

The foregoing constitutes the decision and order of this Court.

Dated: White Plains, New York  
February 4, 2013



HON. JOAN LEFKOWITZ, J.S.C.

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