

**Hong v Polverari**

2013 NY Slip Op 34076(U)

April 8, 2013

Supreme Court, Westchester County

Docket Number: 59183/2011

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  
DANIEL HONG,

Plaintiff,

**DECISION & ORDER**

-against-

Index No. 59183/2011  
Motion Date: April 8, 2013

DANIEL POLVERARI,

Seq. No. 2

Defendant.

-----X  
LEFKOWITZ, J.

The following papers were read on this motion by plaintiff for an order, pursuant to CPLR 3124 and CPLR 3126, striking defendant's answer, setting the matter down for an inquest on damages, and awarding plaintiff costs and attorney's fees for the present motion.

- Order to Show Cause - Affirmation in Support - Exhibits A-I
- Good Faith Affirmation - Exhibits A-B
- Affirmation in Opposition - Exhibits A-I

Upon the foregoing papers and the proceedings held on April 8, 2013, the motion is decided as follows:

In this breach of contract action, plaintiff now seeks the foregoing relief based upon defendant's failure to provide a response to plaintiff's discovery demands. Plaintiff served combined discovery demands dated November 28, 2012 upon defendant, including a Demand for Witnesses, Demand for Statements, and Request for Production of Documents. Plaintiff also served a First Set of Interrogatories dated November 28, 2012.

A Preliminary Conference Stipulation was so ordered by this court on November 29, 2012, wherein the parties agreed that defendant would respond to the discovery demands and interrogatories within 45 days. The Preliminary Conference Order, however, was not entered and uploaded to NYSCEF until January 8, 2013.

Thereafter, since defendant had not provided response to the discovery demands, plaintiff sought an immediate conference and a briefing schedule for the present motion. A compliance conference was held on February 20, 2013, and the court issued a briefing schedule for the present motion. In the briefing schedule, the court further directed that the motion be

withdrawn, if defendant provided the demanded discovery by March 4, 2013. Plaintiff did not receive a response to the discovery demands by March 4, 2013, and filed a proposed Order to Show Cause on that same date. This court issued the Order to Show Cause on March 5, 2013.

On March 6, 2013, defendant served plaintiff with a Response to Discovery Demands and a response to the interrogatories. In response to plaintiff's demand for the production of documents, which included 20 demands, defendant only produced the parties' written agreement. Defendant also responded to the remaining combined discovery demands, including the Demand for Statements and Demand for Witnesses. Defendant's response to plaintiff's First Set of Interrogatories consisted of handwritten responses next to each interrogatory. The response was sworn to by defendant and properly notarized.

By letter dated March 6, 2013, plaintiff's counsel rejected the service of the discovery responses as untimely and in violation of the court's order. Plaintiff's counsel asserted that the court's briefing schedule required service of the responses before 12:00 P.M. on March 4, 2013. Plaintiff's counsel also objected to the responses as wholly inadequate since defendant provided only one document in response to plaintiff's 20 document demands. Plaintiff's counsel objected to the response to the interrogatories on the grounds that it was not submitted in separate form and did not include a verification.

Defendant opposes the motion. Defense counsel contends that the initial failure to provide the discovery responses was due to the fact that the Preliminary Conference Order was not uploaded to NYSCEF until after the time provided in the order to respond had expired. Defense counsel asserts that he is local counsel for defendant and was not aware of the discovery deadlines in the Preliminary Conference order. He further asserts that he was advised by lead counsel that the parties had agreed to certain discovery dates and that he, therefore, did not appear at the preliminary conference or receive the discovery dates. Defense counsel further contends that after the compliance conference held on February 20, 2013, he did his best to comply in good faith to provide the discovery responses, but was unable to reach defendant and there was a delay in obtaining defendant's notarized signature on the interrogatory response. Defense counsel contends that the two day delay in providing plaintiff with the discovery responses and response to the interrogatories did not prejudice plaintiff and plaintiff should be compelled to accept defendant's discovery production. Finally, defense counsel contends that defendant did not willfully fail to provide the discovery responses, but rather it was the confusion between lead counsel and local counsel, as well as the late entry of the Preliminary Conference Order, which caused the delay.

CPLR 3126 provides that if any party "wilfully fails to disclose information which the court finds ought to have been disclosed," the court may, inter alia, issue an order striking the pleadings, dismissing the action, or rendering judgment by default against the disobedient party. "The nature and degree of the penalty to be imposed on a motion pursuant to CPLR 3126 is a matter generally left to the discretion of the Supreme Court" (*Carbajal v Bobo Robo*, 38 AD3d 820 [2d Dept 2007]). To invoke the drastic remedy of striking a pleading a court must determine

that the party's failure to disclose is willful and contumacious (*Greene v Mullen*, 70 AD3d 996 [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 ... coupled with no excuses or inadequate excuses" (*Russo v Tolchin*, 35 AD3d 431, 434 [2d Dept 2006]; see also *Prappas v Papadatos*, 38 AD3d 871, 872 [2d Dept 2007]).

Although defendant has now belatedly provided responses to plaintiff's discovery demands, defendants' discovery responses are incomplete. In response to plaintiff's demand for documents, defendant provided only one document and failed to respond to the majority of the document demands. Notably, defendant failed to indicate whether the demanded documents were in his possession or were once in defendant's possession, are in the possession of a third party, or indicate whether a search was taken to locate the documents and the details of any such search. Additionally, plaintiff correctly contends that the response to the interrogatories was not in the proper form insofar as the handwritten responses in the margin of the interrogatories is difficult to read. Nonetheless, under the circumstances of this case, the drastic remedy of striking the answer is not warranted.

Plaintiff, however, is entitled to a further response to the document demands. Defendant shall provide a supplemental response to the document demands. If the documents are not in defendant's possession, defendant shall respond to each demand that the demanded documents are not in his possession and shall indicate whether the documents were once in his possession or are in the possession of a third party, and provide the details of the search taken to find the demanded documents. Moreover, plaintiff is entitled to a response to the interrogatories in proper form as required by CPLR 3133. Defendant's handwritten responses in the margins of the interrogatories served by plaintiff is difficult to read and defendant should provide plaintiff with typewritten responses after each interrogatory.

Moreover, insofar as the present motion was necessitated by defendant's failure to timely serve discovery responses, plaintiff is entitled to costs and attorney's fees for the present motion in the sum of \$250.

In view of the foregoing, it is

ORDERED that the branches of the motion seeking an order striking the answer of defendant and for an immediate inquest on damages are denied; and it is further

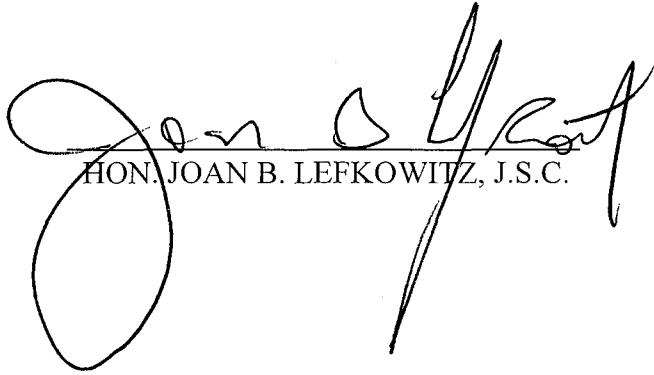
ORDERED that the motion is granted to the extent that, on or before April 22, 2013, defendant shall serve plaintiff with (1) a supplemental response to plaintiff's document demands, which shall include a response to each document demand and, if the demanded documents are not in defendant's possession, defendant shall indicate that the documents are not in his possession, whether the documents were once in his possession or are in the possession of a third party, and the details of the search taken to locate the demanded documents; and (2) a typewritten response to plaintiff's First Set of Interrogatories in the form mandated by CPLR 3133; and it is further

ORDERED that defendant shall pay plaintiff motion costs and attorney's fees in the amount of \$250 on or before April 22 , 2013; and it is further

ORDERED that counsel shall appear for a conference in the Compliance Part, Courtroom 800, on April 24, 2013 at 9:30 A.M.

The foregoing constitutes the decision and order of this court.

Dated: White Plains, New York  
April 8, 2013



HON. JOAN B. LEFKOWITZ, J.S.C.

TO:

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cc: Compliance Part Clerk