

**Eden Ventures, Inc. v Srour**

2014 NY Slip Op 31201(U)

May 5, 2014

Sup Ct, NY County

Docket Number: 156517/12

Judge: Cynthia S. Kern

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

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EDEN VENTURES, INC.,

**CYNTHIA S. KERN**  
J.S.C.

Plaintiff,

Index No. 156517/12

-against-

**DECISION/ORDER**

RAYMOND SROUR, Individually and doing business under the names of the following nominally separate entities sued herein individually and as instrumentalities and alter egos of the aforementioned defendant:

- AMERICAN HOME CTR., MACDONALD AVENUE APPAREL INC., 86<sup>th</sup> STREET APPAREL CORP., WASHINGTON HTS. DISCOUNTERS INC., HAMILTON HTS. DISCOUNTERS INC., 3300 WASHINGTON HTS DEPARTMENT STORE, 2510 VALENTINE AVE VARIETY STORE, INC., WILLIS AVENUE OUTLET, INC., MUNDITA OF WILLIS AVENUE, INC., MUNDITA OF FIVE STAR DEPARTMENT STORE, INC., BROADWAY APPAREL, FIVE STAR DEPARTMENT STORE CO, INC., FRANKLIN DEPARTMENT STORE CO, INC., VALENTINE AVENUE DISCOUNT STORE CO, INC., VINOCURS DEPARTMENT STORE, INC., F.R.A. WILLIS REALTY CO, INC., F.R.S. REALTY CO, INC., DOMINICANO DEPT STORE, INC., HAMILTON VARIETY CO, INC., KINGSTONE DISTRIBUTOR'S CO, INC., AMERICAN PLACE AT NOSTRAND INC., AMERICAN PLACE AT 86<sup>th</sup> STREET INC., EL MUNDO DEPARTMENT STORE INC., EL MUNDO OF 133<sup>rd</sup> STREET, INC., EL MUNDO OF JAMAICA INC., EL MUNDO OF KNICKERBOCKER, INC., GLOBAL RETAIL CONCEPTS, INC., GRAND CONCOURSE DISCOUNT, INC., 146 ST DISCOUNT CENTER CO, INC., 158 ST DISCOUNT CENTER CO, INC., AMERICAN DEPARTMENT STORE INC., AMERICAN PLACE AT FOURTH AVENUE INC., BERGAMENT OUTLET CENTER, INC., EL MUNDO DEPARTMENT STORE INC., EL MUNDO HOLDING CO, INC., WILLIS AVENUE DISCOUNT CENTER CO, INC., EL MUNDO 133 DISCOUNT, HAMILTON HEIGHTS DISCOUNT

and JOHN DOES 1-31,

Defendants.

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**HON. CYNTHIA S. 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>
Affirmations in Opposition to the Motion .....	<u>2</u>
Reply Affidavits.....	<u>3</u>
Exhibits.....	<u>4</u>

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Plaintiff Eden Ventures, Inc. (“Eden Ventures”) commenced the instant action to recover \$28,589.00 arising from twenty-three dishonored checks for merchandise purchased by defendants, including, *inter alia*, Raymond Srour (“Mr. Srour”), Bergament Outlet Center, Inc. (“Bergament”), McDonald Avenue Apparel, Inc. (“McDonald”), 86<sup>th</sup> Street Apparel Corp. (“86<sup>th</sup> Street”), 2510 Valentine Ave Variety Store, Inc. (“Valentine”), Washington Hts. Discounters Inc. (“Washington Hts.”), Hamilton Hts. Discounters Inc. (“Hamilton Hts.”) and 3300 Washington Heights Department Store (“3300 Washington Heights”)(collectively referred to herein as the “corporate defendants”). Plaintiff then moved for summary judgment against seven of the corporate defendants and in a decision dated April 5, 2013, this court granted certain portions of that motion. Plaintiff now moves for an Order pursuant to CPLR §3126 striking the remaining corporate defendants’ answer for their repeated failure to provide discovery and granting plaintiff a default judgment against them. For the reasons set forth below, plaintiff’s motion is granted.

The relevant facts are as follows. Eden Ventures is a New York corporation engaged in business as a factor and asset-based lender. Eden Ventures acted as the sole factor and assignee

of the accounts receivable of Fine Fashion LLC (“Fine Fashion”), an importer, manufacturer and wholesaler of textile products. Fine Fashion’s sales, accounts receivable, the goods represented thereby and all rights, interests, claims and causes of action arising therefrom were assigned, transferred and set over by Fine Fashion to plaintiff pursuant to the Assignment of Accounts Receivable agreement (the “Agreement”) between them. Mr. Srour is engaged in the business of owning, controlling and operating a network of corporate entities engaged in the retail discount priced merchandise trade, which are co-defendants in this action.

In or about February 2012, Mr. Srour purchased certain merchandise from Fine Fashion in the names of several of these entities. Plaintiff alleges that Mr. Srour did this by representing and promising to Fine Fashion that he intended to and would pay for the merchandise in a series of post-dated checks which he would personally sign and deliver upon receipt of the goods he wanted to purchase. Between February 2012 and April 2012, Mr. Srour purchased from Fine Fashion, in the names of the co-defendants, the apparel merchandise itemized and set forth in Fine Fashion’s Invoices Nos. 12080, 12081, 12082, 12083, 12084, 12085, 12086 and 12087 which are attached to the moving papers. Fine Fashion sold and delivered said merchandise having a total agreed-upon price of \$38,448.00. Fine Fashion sent the above Invoices to each of the entities at the separate addresses set forth thereon. Additionally, at Mr. Srour’s request, plaintiff sent copies of the Invoices to him at his address at 1726 McDonald Avenue, Brooklyn, New York.

Following defendants’ receipt of the goods, between July 15, 2012 and July 25, 2012, Mr. Srour signed and delivered to Fine Fashion eight checks as partial payments on account thereof, totaling \$9,859.00. These eight checks were part of a larger batch of checks that Mr. Srour

signed and delivered to Fine Fashion, totaling thirty one checks, amounting to a total of \$38,448.00. The first eight checks totaling \$9,859 cleared. However, on or about August 10, 2012, Mr. Srour instructed his bank to stop payment of the remaining twenty three checks allegedly totaling \$28,589.00. Thus, plaintiff alleges that as a result of Mr. Srour's conduct, a balance of \$28,589.00 remains past due and owing to plaintiff for the goods which Mr. Srour obtained from Fine Fashion and for which he has not paid. Plaintiff then commenced the instant action against defendants to recover the \$28,589.00 allegedly due and owing. In or around December 2012, plaintiff moved for summary judgment against seven of the corporate defendants for the full amount of \$28,589.00. However, this court only granted plaintiff judgment in the amount of \$19,737.00 based on the fact that the checks attached to plaintiff's affidavit, on which plaintiff's motion was based, totaled only \$19,737.00 and not the full amount allegedly due and owing. Additionally, this court *sua sponte* granted judgment in favor of Mr. Srour.

Following the issuance of that decision, discovery continued as to the remaining corporate defendants. Specifically, plaintiff served the remaining corporate defendants with a Notice of Discovery and Inspection dated May 23, 2013 in which it requested certain financial documents in order to prove plaintiff's alter ego allegations. However, the remaining corporate defendants failed to respond or provide the requested discovery. The parties appeared in court at least three times after the service of plaintiff's discovery requests to set out a discovery exchange schedule. Specifically, the parties appeared in court on August 20, 2013 and entered into an Order which specified that "Defendants [are] to respond to Plaintiff's second Notice for discovery and inspection by September 20, 2013." As the remaining corporate defendants failed

to respond, the parties returned to court on November 12, 2013 and entered into another order specifying that “[defendant] [is] to produce outstanding financial documents to [plaintiff] w/in 60 days.” Finally, the parties appeared in court yet again on January 28, 2014 and the court was informed that defendants had not yet provided the outstanding discovery. Thus, on that date, the parties entered into an order stating that “[defendant] [is] to produce outstanding financial documents within 14 days.” However, defendants failed to produce the outstanding discovery. Thus, plaintiff now moves for an Order pursuant to CPLR § 3126 striking the remaining corporate defendants’ answer and granting plaintiff a default judgment against them.

Pursuant to CPLR § 3126, “[i]f any party...refuses to obey an order for disclosure or wilfully 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, among them:...3. an order striking out pleadings or parts thereof...or rendering a judgment by default against the disobedient party.” “[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.” *McGilvery v. New York City Tr. Auth.*, 213 A.D.2d 322, 324 (1<sup>st</sup> Dept 1995). A defendant that allows discovery to “trickl[e] in [with a] cavalier attitude should not escape adverse consequence.” *Figdor v. City of New York*, 33 A.D.3d 560, 561 (1<sup>st</sup> Dept 2006). While the penalty of striking a defendant’s answer is severe, “it serves the important function of deterring obstreporous litigation behavior.” *Henderson-Jones v. City of New York*, 2011 WL 3715415 (1st Dept 2011). In determining what amounts to willful and contumacious behavior, the First Department has stated that such behavior can be inferred by a

failure to comply with court orders, in the absence of adequate excuses. *See Henderson-Jones*, 2011 WL 3715415 (1<sup>st</sup> Dept 2011); *see also Johnson v. City of New York*, 188 A.D.2d 302 (1<sup>st</sup> Dept 1992). In *Henderson-Jones*, the First Department specified that when a defendant is ordered by the court, “on no fewer than three occasions, to produce documents” relevant to the case, and that defendant still does not produce said documents, the striking of its answer is the appropriate remedy.

In the instant action, plaintiff’s motion for an order striking the remaining corporate defendants’ answer is granted as plaintiff has demonstrated that their repeated failure to comply with outstanding discovery demands was willful and contumacious. The remaining corporate defendants have failed to sufficiently respond to plaintiff’s outstanding discovery demands and have repeatedly disregarded no fewer than three court orders requiring them to do so. Plaintiff’s Notice for Discovery and Inspection requests certain financial documents to tie the remaining corporate defendants to Mr. Srour in order to collect the remaining \$8,852.00 that plaintiff claims is due and owing. The remaining corporate defendants’ assertion, in opposition to plaintiff’s motion, that plaintiff’s requests are burdensome as it takes “a long time to gather the information and documents” is without merit. The remaining corporate defendants have had ample time, specifically, nearly eleven months, to locate and provide the requested documents. Moreover, counsel for the remaining corporate defendants represented to this court at oral argument on the instant motion and at the prior court conferences that the remaining corporate defendants have no intention of providing plaintiff with the outstanding discovery.

Accordingly, plaintiff’s motion for an Order pursuant to CPLR § 3612 striking the remaining corporate defendants’ answer and granting plaintiff a default judgment against the

remaining corporate defendants is granted. The remaining corporate defendants' answer is hereby stricken. An inquest is hereby directed on the issue of damages on a date to be set by the calendar clerk upon entry and service of a copy of this order together with payment of the appropriate fee. Judgment shall thereafter be entered in favor of the plaintiff and against the remaining corporate defendants for the amount found upon the inquest. Plaintiff's request for attorney's fees is denied as it has not provided a basis for such relief. This constitutes the decision and order of this court.

Dated: 5/5/14

Enter: CK  
J.S.C.

**CYNTHIA S. KERN**  
J.S.C.