

Grinshpun v Borokhovich

2014 NY Slip Op 31260(U)

May 13, 2014

Supreme Court, New York County

Docket Number: 115376/2010

Judge: Jeffrey K. Oing

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.

This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 48

-----x

ARON GRINSHPUN, SAM ZELTSER, ZELIG
ZELTSER, and THREE STAR CAPITAL, LLC,

Plaintiffs,

-against-

GENNADY (a/k/a Eugene) BOROKHOVICH and
VITALY ZARETSKY,

Defendants.

Index No.: 115376/2010

Mtn Seq. No. 004

DECISION AND ORDER

-----x

JEFFREY K. OING, J.:

Plaintiffs move, pursuant to CPLR 3126, for an order striking defendant Vitaly Zaretsky's answer for his purported failure to comply with discovery obligations.

After this motion was initially filed, but before it was fully briefed and submitted to this Court, the parties appeared for a number of court conferences at which time defendant Zaretsky was given several opportunities to provide plaintiffs with outstanding discovery demands. At the December 13, 2013 court conference, defendant finally provided plaintiffs with some 458 pages of purportedly responsive documents, along with a two-page response identifying these documents. The parties then entered into a stipulation dated December 13, 2013, So-Ordered by this Court, that would allow plaintiffs an opportunity to review the documents and advise defendant Zaretsky of any deficiencies (Konopka Reply Affirm., Ex. F).

Plaintiffs' counsel, Michael Konopka, Esq., affirms that when he reviewed the documents he "found them to be essentially a group of documents that had no bearing on plaintiffs' demands" (Konopka Affirm., ¶ 5). At the January 30, 2014 court conference, this Court set forth a briefing schedule for the instant motion (1/30/2014 Order).

In opposition, defendant Zaretsky states in his affidavit that he has "made a thorough search of all [his] papers and documents and ha[s] provided all documents in [his] possession that are relevant to [plaintiffs'] demands" (Zaretsky Aff., ¶ 3). Zaretsky attests that he did not supply the requested copies of his personal tax returns for the years 2004 through 2012 because they are "personal documents and have no bearing on this litigation," and further states that, "[n]o other requested documents are in [his] possession" (Id., ¶¶ 20, 21). In addition, Zaretsky's counsel states in an affirmation that plaintiffs' demands are "extremely broad and lacking specificity," and that, if plaintiffs "can narrow the focus and identify the exact documents they claim exist," he will personally "make a concerted effort to reach out to any third parties who maybe in possession of these documents and supply them" to plaintiffs (Bacher Affirm., ¶ 5).

Pursuant to CPLR 3126, if a party refuses to obey a disclosure order, the Court may order that party's pleading to be

stricken. Striking an answer, however, is "an extreme and drastic penalty, and should not be invoked where the moving affidavit fails to show conclusively that the default was clearly deliberate or contumacious" (Cantos v Castle Abatement Corp., 251 AD2d 40, 41 [1st Dept 1998] [quotation and citation omitted]).

The record before me does not rise to such a degree as to warrant such a drastic remedy. Defendant Zaretsky's affidavit, however, fails to provide any detail as to why he no longer has the relevant documents in his possession. As such, Zaretsky must appear at an examination before trial ("EBT") to respond to this and other issues. Failure to appear at the EBT shall result in Zaretsky's answer being stricken given that he has already failed to appear for a previously ordered EBT twice (Konopka Affirm., Exs. A-B).

Additionally, Zaretsky shall provide plaintiffs' counsel with copies of his tax returns for the years 2004-2012. He may redact said tax returns to the extent that they are joint returns; however, only as to any information concerning his spouse, if any. Although disclosure of tax returns is generally disfavored due to their confidential and private nature, such disclosure may be compelled when there is a showing of overriding necessity (Matthews Indus. Piping Co. v Mobil Oil Corp., (114 AD2d 772 [1st Dept 1985])). Here, in light of the extensive claims of fraud and deceit at issue, and the fact that Zaretsky is unable

to produce corporate documents or account for their absence, the tax returns appear to be indispensable to the instant litigation. Zaretsky makes no claim that the information contained therein is available from any other sources (cf. Briton v Knott Hotels Corp., 111 AD2d 62 [1st Dept 1985]). Without deciding if the returns will ultimately be admissible at trial, Zaretsky's own failure to maintain responsive corporate documents renders production of the income tax returns sought by plaintiffs material and necessary to the prosecution of this action.

Accordingly, it is

ORDERED that branch of the motion to strike defendant Vitaly Zaretsky's answer is denied without prejudice; and it is further

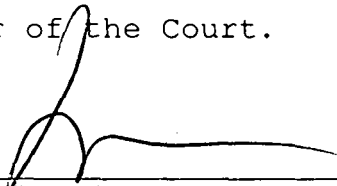
ORDERED that branch of the motion for costs is denied; and it further

ORDERED that defendant Vitaly Zaretsky appear for an EBT on or before June 20, 2014; and it is further

ORDERED that defendant Vitaly Zaretsky provide to plaintiffs' counsel copies of his tax returns for the years 2004 through 2012, in accordance with the above directive, on or before June 13, 2014.

This constitutes the decision and order of the Court.

Dated: 5/13/14



HON. JEFFREY K. OING, J.S.C.