

Yellowbook Inc. v Heller & Heller

2014 NY Slip Op 31492(U)

June 10, 2014

Sup Ct, New York County

Docket Number: 653498/2011

Judge: Ellen M. Coin

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SUPREME COURT OF THE STATE OF NEW YORK - NEW YORK COUNTY

PRESENT: HON. ELLEN M. COIN

PART 63

YELLOWBOOK INC.,

Plaintiff,

INDEX NO. 653498/2011
MOTION DATE Feb. 19, 2014
MOTION SEQ. NO. 005 and 006
E-FILED

-against-

HELLER & HELLER and MARK HELLER,

Defendants.

The following papers, numbered 1, were read on this motion for a default judgment:

Papers

Papers Numbered

Notice of Motion-Affidavits-Exhibits
Answering Affidavits-Exhibits
Reply Affidavits
Cross-Motion X No

1

Plaintiff Yellowbook Inc. ("Yellowbook") brought this action to recover \$318,937.50 that defendant Mark Heller ("Heller")¹ allegedly failed to pay for his telephone directory advertisements. The complaint alleges that Heller, a practicing attorney, executed six written contracts purchasing advertisements for his law firm in Yellowbook's directories. Yellowbook published Heller's advertisements, and Heller failed to pay.

In motion sequence 005, Yellowbook seeks sanctions and entry

¹ Heller & Heller is not a partnership. Mark Heller practices law under the name of Heller & Heller. Therefore, Mark Heller is the sole defendant.

of a judgment against Heller for failure to appear at a court-ordered deposition. In motion sequence 006, Yellowbook seeks sanctions against defense counsel.

The Court has faced numerous failures by Heller to meet deadlines and comply with his obligations as a litigant. First, Heller defaulted by not filing an answer for five months after Yellowbook served its complaint. By order issued in motion sequence 001, the Court set aside Heller's default and permitted him to interpose a late answer. Next, on November 28, 2012, the Court issued a preliminary conference order requiring that both parties serve all discovery requests and witness lists by January 15, 2013, and all discovery responses by February 8, 2013. Heller failed to timely serve his discovery requests or to provide discovery responses to Yellowbook's timely requests by the deadline of February 8, 2013.

On February 15, 2013, Yellowbook filed a motion to strike Heller's pleadings (motion sequence 003). Heller did not file any opposition. At a compliance conference on March 13, 2013, the parties stipulated to a conditional order striking Heller's pleading in the event Heller failed to produce outstanding discovery in ten days' time (Dkt. #55).

Heller submitted discovery responses on March 23, 2013. Yellowbook then filed another motion to strike Heller's pleading on

April 12, 2013 (motion sequence 004), alleging that Heller's discovery responses were incomplete and insufficient. While the motion was pending, on June 19, 2013, both parties stipulated that Heller would appear for deposition on August 21, 2013.²

At a status conference on August 2, 2013, the parties stipulated that Heller would produce an affidavit shoring up his incomplete interrogatory responses and electronic discovery by August 21, 2013 (Dkt. #73), but Heller failed to comply. As a result, Yellowbook cancelled Heller's deposition scheduled for August 27, 2013.³

At oral argument on October 16, 2013, the Court confronted Heller with his failure to comply with the August 2, 2013 stipulation and sanctioned him by striking his third counterclaim for common law fraud but denied Yellowbook's motion to strike the answer. At the status conference held concurrently with the oral argument, the Court ordered the deposition of Heller to occur on December 3, 2013, and the deposition of Yellowbook to occur on December 4, 2013.

On December 2, 2013, defense counsel notified Yellowbook that

² Apparently, the parties later agreed to move Heller's deposition date to August 27, 2013.

³ Yellowbook had previously cancelled depositions of Heller twice due to his failure to comply with discovery orders; the first was a preliminary conference order issued on November 28, 2012, for the deposition to be held on March 5, 2013 (Dkt. #40), and the second was an order in motion sequence 003 issued on March 13, 2013, for the deposition to be held on May 23, 2013 (Dkt. #55).

Heller would be unavailable for his deposition the following day. Heller had scheduled a last-minute vacation to Miami Beach, and his flight was departing the morning of his deposition. On a conference call with the Chambers on December 2, 2013, the Court denied defense counsel's oral request to amend the October 16, 2013 order to adjourn Heller's deposition and warned of probable default in the event of Heller's failure to appear. On December 3, 2013, Heller did not appear for his deposition. The following day, Heller's counsel did not appear for the deposition of Yellowbook.

Motion for Entry of Default Judgment

When a party refuses to obey an order for disclosure or willfully fails to disclose information, the court may render a judgment by default against the disobedient party (CPLR 3126). Such a harsh sanction is only justifiable when the moving party provides a clear showing that the failure to comply is "willful, contumacious or in bad faith" (*Rodriguez v United Bronx Parents, Inc.*, 70 AD3d 492, 492 [1st Dept 2010]; *Palmenta v Columbia Univ.*, 266 AD2d 90, 91 [1st Dept 1999]). If the moving party clearly shows willfulness or bad faith, the opposing party then assumes the burden of offering a reasonable excuse for its failure to produce the disclosure demanded (*Shapiro v Rose*, 195 AD2d 935, 936 [3rd Dept 1993]).

"Willful and contumacious behavior can be inferred by a failure to comply with court orders, in the absence of adequate excuses." (*Henderson-Jones v City of New York*, 87 AD3d 498, 504 [1st Dept 2011]; see also *Silverio v Arvelo*, 103 AD3d 401, 401 [1st Dept 2013]; *Oasis Sportswear, Inc. v Rego*, 95 AD3d 592, 592 [1st Dept 2012]; *Hutson v Allante Carting Corp.*, 228 AD2d 303, 303 [1st Dept 1996]). When a discovery order is disobeyed, the court may strike relevant pleadings (*Besson v Beirne*, 188 AD2d 330, 331 [1st Dept 1992]; see *Grabow v Blue Eyes, Inc.*, 123 AD2d 155, 158 [1st Dept 1986]).

A single incident of noncompliance with a disclosure order, without a showing of willfulness or bad faith, is not sufficient to justify striking an answer (see *Palmenta v Columbia Univ.*, 266 AD2d 90, 91 [1st Dept 1999]). However, "repeated and persistent" failure to comply with successive disclosure orders without providing adequate explanation establishes willfulness and contumaciousness (see *Rodriguez v United Bronx Parents, Inc.*, 70 AD3d 492, 492 [1st Dept 2010]; *Arts4All, Ltd. v Hancock*, 54 AD3d 286, 286-288 [1st Dept 2008]). For example, disobeying three successive court orders directing defendants to appear for depositions without a reasonable excuse has been held contumacious conduct that warrants striking a pleading (*Reidel v Ryder TRS, Inc.*, 13 AD3d 170, 171 [1st Dept 2004]). Furthermore, in *Asim v City of New York* (2014 NY Slip Op

03939 [1st Dept 2014]), defendant MTA failed to acknowledge ownership of its own vehicle that caused plaintiff's injuries or to disclose the name of the driver until the court ruled that MTA owned the vehicle, and MTA only disclosed an incident report after plaintiff moved for discovery sanctions. MTA's late disclosure of the report and the driver's identity was deemed willful and contumacious behavior that warranted striking its answer. *Id.*

Courts are further justified in striking the pleadings when the nonmoving party is on notice that it risks having its pleadings dismissed for disclosure abuse (see *Oasis Sportswear, Inc. v Rego*, 95 AD3d 592, 592 [1st Dept 2012]; *Arts4All, Ltd.*, 54 AD3d at 289).

Yellowbook has successfully demonstrated that Heller's failure to comply with disclosure orders was willful and contumacious. Given Heller's failure to provide discovery responses by the first court-ordered deadline, failure to produce "full and complete" discovery responses by the second court-ordered deadline, failure to produce an affidavit regarding his electronic discovery, and failure to appear at a deposition despite the Court's express admonition, Heller has exceeded the "repeated and persistent" threshold for willful and contumacious failure to comply with discovery obligations.

Heller has not established a reasonable excuse for his conduct. First, Heller chose not to provide an excuse for his

initial discovery violations. Second, Heller's excuse for not appearing at his deposition is insufficient. Heller could have rescheduled his leisure vacation or at least changed his flight departure to later in the day. Heller notes that he tried to reschedule amicably with opposing counsel; however, opposing counsel was under no obligation to concede to Heller's belated request to reschedule.

Furthermore, the Court warned defense counsel via telephone that Heller's failure to appear at his Court-ordered deposition could result in default. Therefore, Heller was on notice. As he knew the potential consequence of disobeying the Court order but nevertheless disobeyed it, his behavior was willful and contumacious and warrants striking his answer. No lesser sanction is appropriate here, as the Court previously struck part of the answer containing a counterclaim for fraud and this proved to be insufficient deterrence. The only appropriate sanction in the circumstances is to strike the remainder of the answer.

Motion for Sanctions Against Defendants' Counsel

The Court may award to any party costs in the form of reimbursement for actual expenses reasonably incurred and reasonable attorney's fees resulting from frivolous conduct (22 NYCRR 130-1.1). The Court may also impose financial sanctions upon an attorney who engages in frivolous conduct (22 NYCRR 130-1.1).

Conduct is frivolous if it is "undertaken primarily to delay or prolong the resolution of the litigation" (22 NYCRR 130-1.1(c)(2)).

Defendant's unexcused failure to appear for deposition that has been twice ordered by the court may constitute frivolous conduct (*Hughes v Farrey*, 48 AD3d 385, 385 [1st Dept 2008]; see also *Davis v City of New York*, 205 AD2d 442, 442 [1st Dept 1994] (imposing sanction for inexcusable delay in providing discovery and repeated failure to appear for deposition in violation of court orders)). A motion is also frivolous if it is used not as a means of resolving a genuine legal dispute but rather as a mechanism to delay judgment, as it is "undertaken primarily to delay or prolong the resolution of the litigation" (see *Matter of Minister, Elders and Deacons of Refm. Prot. Dutch Church of City of N.Y. v 198 Broadway, Inc.*, 76 NY2d 411, 414 [1990]). "Pressing the same patently meritless claims" is also inherently frivolous conduct (*Yan v Klein*, 35 AD3d 729, 729 [2d Dept 2006]), as is waiting to disclose information dispositive to the case until opposing counsel moves for sanctions (*Asim v City of New York*, 2014 NY Slip Op 03939 [1st Dept 2014]).

Although particular conduct delays or prolongs the resolution of litigation, the delay does not, in and of itself, support an inference that the conduct was "undertaken primarily" for that

purpose (see *Brocklebank v City of Lockport*, 198 AD2d 906, 906 [4th Dept 1993]).

While defense counsel's failure to appear at the Yellowbook deposition may have prolonged the resolution of the litigation, Yellowbook has not offered any evidence that defense counsel's absence was *undertaken primarily* to prolong the resolution of the litigation.

Here, although defense counsel disregarded the court order to conduct the deposition of Yellowbook, he stated that he wanted Heller to be present at the deposition of Yellowbook, which was no longer possible when Heller left suddenly for Miami Beach (Affirmation of Peter Toumbekis, dated January 9, 2013, ¶24). Defense counsel also advised Heller to appear for his deposition, indicating that he was not encouraging Heller to prolong the litigation (Affirmation of Kenneth Chase, dated December 22, 2013, p. 4). While disobeying the Court without good reason is inexcusable, it cannot be automatically inferred that defense counsel's decision not to conduct Yellowbook's deposition was part of an effort to prolong litigation. Imposing a sanction on defense counsel here would not serve the ends of justice as it would not target or address the cause of Heller's intransigence.

In accordance with the foregoing, it is therefore

ORDERED that plaintiff's motion pursuant to CPLR §3126 to

strike the pleading of defendants Heller & Heller and Mark J. Heller, motion sequence 005, is granted and the answer is hereby stricken; and it is further

ORDERED that plaintiff's motion pursuant to CPLR §3126 for sanctions against defense counsel for failure to appear for a Court-ordered deposition, motion sequence 006, is denied; and it is further


ORDERED that the Clerk of Court shall enter judgment in favor of plaintiff Yellowbook, Inc. against defendant Mark J. Heller in the amount of \$318,937.50, together with interest at the rate of 9% per annum from December 16, 2011, as calculated by the Clerk and costs as taxed by the Clerk; and it is further

ORDERED that the Clerk of the Court sever and continue plaintiff's claim for attorney's fees; and it is further

ORDERED that plaintiff shall file a note of issue and certificate of readiness and schedule an inquest on notice to determine the amount of attorney's fees within sixty (60) days from the date of this order.

This constitutes the decision and order of the Court.

Dated: June 10, 2014



Ellen M. Coin, A.J.S.C.

NON-FINAL DISPOSITION