

**Druek v Alvarez**

2015 NY Slip Op 31282(U)

July 21, 2015

Supreme Court, New York County

Docket Number: 653327/2013

Judge: Eileen Bransten

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

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JEFFREY DRUEK and OUTER REEF YACHTS, INC.,

Plaintiffs,

-against-

Index No. 653327/2013  
Motion Date: 7/14/2015  
Motion Seq. No. 002

FERNANDO ALVAREZ, RANDY BIRR and BIRR  
A/C & HEATING CORP.,

Defendants.

-----X  
BRANSTEN, J.

In this action, Plaintiffs Jeffrey Druke and Outer Reef Yachts, Inc. (“ORY”) request relief due to Defendants Fernando Alvarez, Randy Birr, and Birr A/C & Heating Corp.’s failure to comply with discovery demands. Plaintiffs request an order pursuant to CPLR § 3126, striking Defendants’ Answers, or alternatively, an Order pursuant to Sections 3101 and 3124 compelling the Defendants to comply with outstanding discovery demands. For the reasons that follow, Plaintiff’s motion under CPLR § 3126 is conditionally granted and Defendants’ Answers will be stricken unless Defendants comply with Plaintiffs’ outstanding discovery demands by September 1, 2015.

**I. Background**

In 2010, Defendant Birr, acting on behalf of Defendant Alvarez, contacted Plaintiff Druke regarding potential business ventures. *See* Compl. ¶ 10. Alvarez informed Druke that he was involved the process of developing an internal combustion

engine that would run on ammonia, as well as a process for producing ammonia at a fraction of the normal cost. *See* Compl. ¶ 11. Plaintiffs allege that Alvarez represented that he would repay any money loaned to him in furtherance of these ventures. *See* Compl. ¶ 12. Based on this representation, Plaintiff Druek, both individually and through ORY, agreed to invest money in the Defendants' venture. *See* Compl. ¶ 15. Alvarez then instructed Druek to transfer the funds directly to Birr and Defendant Birr A/C & Heating Corp. ("Birr A/C"). *See* Compl. ¶ 13, 14. While Druek transferred the monies to Defendants, to date, no loans have been repaid. (Compl. ¶ 45.)

Plaintiffs filed this breach of contract and fraud action on September 25, 2013. Defendant Alvarez interposed an Answer and counterclaims on December 6, 2013. Defendant Birr filed an Answer on January 18, 2014, as well as a cross-claim against Defendant Alvarez.

*A. Initial Discovery Demands and Change of Counsel*

Plaintiff's first set of interrogatories and demand for production of documents were served on the Defendants on March 4, 2014, both of which went unanswered. On October 28, 2014, the Court granted the motion brought by Defendant Alvarez's original attorney to be relieved as counsel.<sup>1</sup> *See* Amended Affirmation of Janet Walsh ("Walsh Affirm.") ¶ 7.

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<sup>1</sup> Counsel for Defendant Birr & Birr A/C now also represents both Defendants.

B. *Preliminary Conference*

On November 11, 2014, a Preliminary Conference was held. In its Preliminary Conference Order, the Court ordered that the initial demand for discovery and inspection “shall be served by all parties on or before November 25, 2014,” and that “responses to demands shall be served by all parties on or before December 23, 2014.” *See* Walsh Affirm. Ex. F (Preliminary Conference Order). Additionally, the Court stated that Interrogatories “shall be served by all parties on or before November 25, 2014,” and “answers to interrogatories shall be served on or before December 23, 2014.” *See* Walsh Affirm. Ex. F.

Following the Preliminary Conference, Plaintiffs sent a letter to Defendants on January 8, 2015, stating that to date, no responses had been received to the March 4, 2014 Interrogatories or Demand for Production of Documents on all Defendants. *See* Walsh Affirm. Ex. F. Plaintiff then sent an email to Defendants on February 13, 2015 – well after the Preliminary Conference Order deadline passed – again requesting compliance with discovery and notifying the Defendants that Plaintiffs would raise the issue to the Court. *See* Walsh Affirm. Ex. H.

C. *Compliance Conference*

A Compliance Conference was held on February 17, 2015. At that conference, Plaintiffs informed the Court that Defendants did not comply with the deadlines set forth in the Preliminary Conference Order. As the Compliance Conference Order states,

Defendants attributed their failure to comply to Defendant Alvarez's failure to provide responsive documents to counsel. *See* Walsh Affirm. Ex. I. The Compliance Conference Order also noted that the parties met about the needed production and set March 10, 2015 as the new deadline to complete the interrogatories, document production, and response to demand for bill of particulars.

On February 26, 2015, Plaintiffs received a box with what appeared to be bank statements relating to an account held by Defendant Birr. *See* Walsh Affirm. ¶ 13. Plaintiff sent an email acknowledging receipt, and asking for confirmation of the contents, but received no response. *See* Walsh Affirm. Ex. J; *see also* Walsh Affirm. ¶ 13.

#### D. *The Instant Motion*

In the instant motion, Plaintiffs seek an order pursuant to CPLR § 3126, striking Defendants' Answer for failure to comply with discovery demands. Alternatively, Plaintiffs request an order to compel Defendants' compliance pursuant to CPLR § 3124.

Defendants counter that they submitted responses to the interrogatories and document demands. However, these responses are dated May 29, 2015 – well after the deadline set in the Compliance Conference Order and only after Plaintiffs had to file the instant motion. Additionally, Defendants state that they produced 544 pages of documents (191 from Defendant Alvarez and 353 from Defendant Birr), again on May 29, 2015. *See* Affirmation of Robert Del Grosso (“Del Grosso Affirm.”) ¶¶ 4, 5.

Defendants attribute the delay to their October 28, 2014 change in counsel and to their

current counsel's substantial workload as a solo practitioner. *See* Del Grosso Affirm. ¶¶ 6, 8. Additionally, Defendants assert that Plaintiffs have suffered no prejudice as a result of the delay. *See* Del Grosso Affirm. ¶ 9.

On July 13, 2015, Plaintiffs filed a Reply Affirmation in Further Support of Plaintiffs' Order to Show Cause. Plaintiffs assert that they sent a letter to Defendants on July 9, 2015, identifying deficiencies in Defendants' responses. *See* Walsh Reply Affirm. ¶ 4; *see also* Walsh Reply Affirm. Ex. D. Plaintiff alleges that Defendant has objected to many demands, stating that the information can be addressed in depositions as opposed to interrogatories. *See* Walsh Reply Affirm. ¶ 7. Additionally, Plaintiffs claim that there are still several outstanding document demands – particularly the demands numbered 34, 35, 36, 48, and 49 – and that the continued failure to produce such documents has interfered with the parties' ability to move forward with depositions. *See* Walsh Reply Affirm. ¶ 8.

## II. Discussion

When a party ignores a request for disclosure during discovery, there are two remedies that a party can seek: (1) an order to compel under CPRL § 3124, or (2) sanctions under § 3126, including an order to strike a party's answer. *Coffey v. Orbachs, Inc.* 22 A.D.2d 317, 318 (1st Dep't 1964).

A. *Plaintiff's Motion to Strike Pursuant to CPLR § 3126*

Under CPLR § 3126, if a party refuses to obey an order to disclose, or willfully fails to disclose information, that party may face various penalties, including an order striking its pleadings or parts thereof, staying further proceedings until the order is obeyed, dismissing the action or any part thereof, or rendering a judgment by default against the disobedient party. *See* CPLR § 3126. As the Court of Appeals has explained, the Court's integrity and credibility only can be maintained so long as its orders are acknowledged and followed. *See Kihl v. Pfeffer*, 94 N.Y.2d 118, 123 (1999).

Nevertheless, striking an answer is an extreme remedy and should be applied with restraint and discretion. *See CDR Creances S.A.S. v. Cohen*, 23 N.Y.3d 307, 321 (2014).

Defendants in this case failed to produce documents or answers to interrogatories for over a year and missed two Court-ordered deadlines in the Preliminary Conference Order and Compliance Conference Order. Documents and interrogatory responses were only produced on the eve of this Court's original hearing date on the motion,<sup>2</sup> and even then, the answers provided were lacking.

1. Alvarez's Interrogatory Responses

For example, Defendant Alvarez objects to Plaintiffs' Interrogatory No. 17, which inquires into prior claims and legal proceedings brought against Alvarez involving

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<sup>2</sup> The Court originally scheduled oral argument on this motion for Monday, June 1, 2015 but adjourned the hearing to July 14, 2015.

allegations of fraud. Alvarez's objection is plainly improper, asserting that the request is a "fishing expedition" and lacks foundation. These are not proper grounds to object to the interrogatory<sup>3</sup> and are egregiously improper given the tardiness of the response. For other interrogatories, Alvarez objects that they "call[] for evidence in the nature of testimony to be given at depositions." Again, this is not a proper objection.

Alvarez also objects to Interrogatory No. 12 on attorney-client privilege grounds, yet asserts in his response to the following interrogatory, No. 13, that he has not created a privilege log. To the extent that the response to Interrogatory No. 12 should contain reference to documents withheld as privileged, Alvarez is required to produce a privilege log and cite to it in his response.

Further, certain of Alvarez's responses are incomplete. When asked in Interrogatory No. 29 to provide information regarding an individual named "Sebastian" who is referenced in the Complaint, Alvarez provides the non-responsive answer that "[t]here is no Alvarez family member in Spain named Sebastian." See Walsh Reply Affirm. Ex. A (Alvarez Response to Interrogatories). The Complaint does not state that "Sebastian" lives in Spain, it merely alleges that Alvarez represented to Druek that he needed \$10,000 from Druek to fly to Spain to meet with "Sebastian." (Compl. ¶ 40.)

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<sup>3</sup> For a non-exhaustive list of proper interrogatory responses, the Court directs counsel to Section 26:14 of *Commercial Litigation in New York State Courts* (Robert L. Haig ed., 3rd ed. 2010).

## 2. Birr's Interrogatory Responses

Just as Alvarez objected to Interrogatory No. 12 on attorney-client privilege grounds, so too do Birr and Birr A/C, and just like Alvarez, they contradictorily note in their next response that they have not maintained a privilege log. Likewise, Birr and Birr A/C object to an interrogatory regarding prior claims and legal proceedings on the grounds that this inquiry is a “fishing expedition.” These objections are improper, and indeed, all of the improper objections noted above with regard to Alvarez’s interrogatory responses are repeated in Birr and Birr A/C’s responses. Thus, the Court’s ruling above applies with equal force to Defendants Birr and Birr A/C, and they are directed to provide responses that comply with the CPLR and the Commercial Division Rules.

## 3. Defendants' Responses to Document Demands

Finally, Defendants Alvarez, Birr, and Birr A/C have failed to provide documents in response to Demands No. 8 and 9 on the grounds that these document demands seek documents protected by the attorney-client privilege. Again, Defendants have failed to provide a privilege log in this matter. To the extent that Defendants seek to withhold documents as privileged, they must submit a privilege log in accordance with the Commercial Division Rules. Moreover, it seems extremely unlikely that every document responsive to Demand No. 8 and 9 is, in fact, privileged. Demand No. 8 seeks “[t]he entire contents of all of your files relating to this matter...” while Demand No. 9 requests “[a]ll writings reflecting facts in issue in this case...” Further, Defendants must produce

all documents in their possession, custody, or control that are not covered by the privilege.

#### 4. Conditional Order

The lateness and inadequacy of Defendants' document production and interrogatory responses compel this Court to grant Plaintiffs' motion. However, the Court is mindful that the severity of the sanction should be proportional to the violation. *See Young v. City of New York*, 104 A.D.3d 452, 454 (1st Dep't 2013) ("In monitoring discovery, any sanction levied by a court must be proportionate to the conduct at issue"). Thus, "CPLR 3126 . . . broadly empowers a trial court to craft a conditional order—an order "that grants the motion and imposes the sanction 'unless' within a specified time the resisting party submits to the disclosure." *Gibbs v. St. Barnabas Hosp.*, 16 N.Y.3d 74, 79 (2010). Therefore, the Court elects to grant a conditional order. Defendants are ordered to provide full and complete responses to all of Plaintiffs' interrogatories, particularly Interrogatories No. 12, 13, 17, and 29, as well as produce all documents responsive to Plaintiffs' document demands, particularly No. 8 and 9 (and a privilege log, if required), by September 1, 2015. Failure to comply with this Order will result in the striking of Defendants' Answers.

**III. Conclusion**

For the foregoing reasons, it is

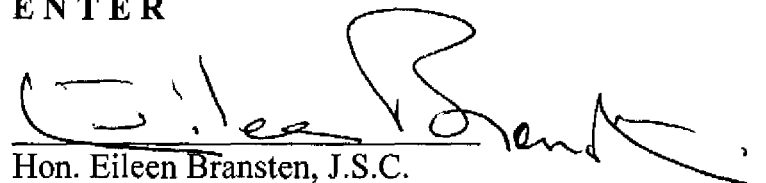
ORDERED that Plaintiffs' motion for sanctions is granted and the Answers of Defendant Alvarez, Birr, and Birr A/C are stricken unless, by September 1, 2015, Defendants Alvarez, Birr, and Birr A/C shall: (i) produce all documents responsive to Plaintiffs' document demands that are in their custody or control (and provide a privilege log, if necessary) and (ii) provide full and complete answers to all of Plaintiffs' interrogatories; and it is further

ORDERED that, counsel shall appear for a status conference in Room 442, 60 Centre Street, on September 8, 2015 at 10 AM.

Dated: New York, New York  
July ~~12~~, 2015

(21)

ENTER

  
Hon. Eileen Bransten, J.S.C.