

Mears v Long

2015 NY Slip Op 32704(U)

May 14, 2015

Supreme Court, Suffolk County

Docket Number: 16118/2013

Judge: James Hudson

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Supreme Court of the County of Suffolk State of New York - Part XL

PRESENT:

HON. JAMES HUDSON

Acting Justice of the Supreme Court

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INDEX NO.:16118/2013

ROBERT MEARS and
R M REPAIR SERVICE CORP.,

SEQ. NO.:002-MG

Plaintiffs,

ANTHONY E. CORE, PC
By: Michael E. White, Esq
Attorneys for Plaintiff
173 School Street
Westbury, NY 11590

-against-

CHRISTOPHER LONG a/k/a CHRIS LONG,
STEVEN LONG a/k/a STEVE LONG and
CHRISTOPHER ISAZA a/k/a CHRIS ISAZA and
950 SOUTH 2ND REALTY CORP.,

RABINOWITZ & GALINA, ESQS.
By: Michael M. Rabinowitz, Esq.
Attorney for Defendants
94 Willis Avenue
Mineola, NY 11501

Defendants.

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Upon the following papers numbered 1-19 read on this Motion/Order to Show Cause for Default Judgment; Notice of Motion/ Order to Show Cause and supporting papers 1-9; ~~Notice of Cross Motion and supporting papers 0~~; Answering Affidavits and supporting papers 10-18; Replying Affidavits and supporting papers 19; ~~Other _____~~; (and after hearing counsel in support and opposed to the motion),

ORDERED, that Plaintiffs' motion for an Order Striking Defendants' pleadings, and directing the entry of Judgment in Plaintiffs favor and against the Defendants is granted under the circumstances presented (CPLR § 3126). It is further

ORDERED, that Defendants' answer is hereby stricken and the Clerk directs that judgment be entered in favor of Plaintiffs and against Defendants on the issue of liability. Upon the filing of a Note of Issue and Statement of Readiness, the matter will be referred to the Calendar Control Part for a trial on the issue of damages.

The case at bar is an action for damages, sounding, *inter alia*, in breach of fiduciary duty, conversion and prima facie tort. Defendants were served with a summons and verified

[* 2]

complaint on June 26, 2013. In response, Defendants served their verified answer on August 16, 2013. On December 11, 2013 the Court (Spinner J.)* issued a Preliminary Conference Order directing all disclosure to be completed on or before January 30, 2014. On September 3, 2014, a Compliance Conference was held and the Court learned that Defendants had not provided disclosure as per the prior Order. Thereafter, certain disclosure was provided which plaintiff contends was inadequate. The Court conducted another Compliance Conference on September 24, 2014. At that time, a specific schedule for the depositions was stipulated and So Ordered by the Court. This order provided for depositions to be completed by October 17, 2014, and for the original of a lease agreement to be presented to Plaintiffs no later than October 17, 2014. Defendants did not provide the documentation nor did they appear for their depositions. Another Compliance Conference was held on October 22, 2014. On November 5, 2014, the Court issued another Order directing Defendants to produce the document in question on or before November 12, 2014, and to appear for deposition on specific dates, beginning November 13th and ending November 17th of 2014. The document was not produced and Defendants did not appear. Plaintiffs have moved to strike Defendants answer pursuant to CPLR § 3126.

Defense counsel opposes the motion and submits affirmations from Defendants. Mr. Christopher Long states in relevant part "I fully understand that I did not appear for my Examination Before Trial as set forth in the November 2014, Order. I did not appear at my Examination since I only would appear if my father appeared. For the reasons set forth in his Affidavit appended hereto, since he did not appear I did not appear." The affiant then assures the Court that the requested document was provided. He also uses the affidavit to argue the merits of Plaintiffs' claims.

In Mr. Steven Long's affidavit, he states that 2014 was a difficult year for his business. Consequently, during the months of November and December (2014), he was obliged to travel "...throughout the country purchasing and selling equipment to enable my business to survive." He further indicates that concerning the months of November and December (2014) "I was so busy during that time period that I did not communicate with my attorneys which necessitated them to bring a motion to be relieved as counsel. However, I am now back in New York, ready to appear for my Examination Before Trial..."

Mr. Christopher Isaza's affidavit reads in virtually identical fashion to Mr. Steven Longs. After reiterating that 2014 was difficult year for business, Mr. Isaza states "During November and December, 2014, your Deponent was traveling throughout the country with Mr. Long, purchasing and selling equipment to enable our business to survive....I had no alternative but to travel during November and December...I was so busy during that time period that I did not communicate with my attorneys which necessitated them to bring a motion to be relieved as counsel. However, I am now back in New York, ready to appear for my Examination Before Trial..."

[* 3]

In the recent decision of *Poveromo v. Kelley–Amerit Fleet Services, Inc.*, 127 A.D.3d 1048, 5 N.Y.S.3d 885, [2nd Dept. 2015] the Court reiterates the well settled principle that:

“A court may strike a pleading as a sanction if a party “refuses to obey an order for disclosure or wilfully fails to disclose information which the court finds ought to have been disclosed” (CPLR§ 3126[3]; *see, Wolf v. Flowers*, 122 A.D.3d 728, 996 N.Y.S.2d 169; *Tos v. Jackson Hgts. Care Ctr., LLC*, 91 A.D.3d 943, 943–944, 937 N.Y.S.2d 629; *Moray v. City of Yonkers*, 76 A.D.3d 618, 619, 906 N.Y.S.2d 508). However, the drastic remedy of striking an answer is inappropriate absent a clear showing that the Defendant's failure to comply with discovery demands was willful and contumacious (*see, Bernardis v. Town of Islip*, 95 A.D.3d 1050, 944 N.Y.S.2d 626; *Polsky v. Tuckman*, 85 A.D.3d 750, 924 N.Y.S.2d 830; *Mazza v. Seneca*, 72 A.D.3d 754, 899 N.Y.S.2d 294).”

A fair description of Defendants explanations for their failure to provide disclosure can be summed up in one word-indifference. We do not apply this term lightly. We remind the parties that the final decretal paragraph in the Court's November 5, 2014 Order reads as follows: “...in the event the Defendants impede the discovery in this action by failing to present the original of the referenced lease agreement as directed and/or the Defendants, or any one of them, fails to appear...as directed for the Examination Before Trial, the Defendants Answer, any Counterclaims and Defenses...*shall be struck* by the Court.” (emphasis ours). In describing the necessity of their absences during November and December (2014), Respondents omit to discuss their inactivity in the preceding months. Defendants should have noted that it was their dilatory behavior that prompted the strong language in Judge Spinner's November 5, 2014 Order. To ignore it's clear wording and to avoid even the courtesy of using the telephone to call their attorney (who in turn would have communicated with opposing counsel and the Court) demonstrates an utter disregard for the judicial process. Moreover, based on their prior behavior, the Defendants declaration that they are now willing to proceed appears less than sincere. “The willful and contumacious character of a party's conduct can be inferred from the party's repeated failure to respond to demands and/or to comply with discovery orders”. (*McArthur v. New York City Housing Authority*, 48 A.D.3d 431, 851 N.Y.S.2d 271 [2nd Dept.2008]). In the matter *sub judice*, the Respondents have disobeyed three prior Orders of the Court. In light of the feeble nature of their excuses, their behavior is clearly wilful. In the case of Mr. Christopher Long, it is not necessary to infer the egregiousness of his behavior. He candidly stated that he would not appear without his father. Since there was no such qualification in the Court's clearly worded Order, his disobedience is admitted.

It is always preferable to have actions decided on their merits (*Sieden v. Copen*, 170 AD2d 262, 565 N.Y.S.2d 803 [1st Dept 1991]). However, Defendants dilatory tactics in failing to provide disclosure for several months and their disobedience of prior Court Orders,

[* 4]
causes us to find that their conduct constitutes continuous willful failures to comply with discovery (see, *Gonzalez v. Paniccioli*, 174 AD2d 709, 571 N.Y.S.2d 558 [2d Dept 1991]).

Accordingly, the promised sanction in the November 5, 2014 Order shall be imposed.

Therefore, plaintiff's motion to strike is granted. Under the circumstances, the plaintiffs will be also be awarded costs to be determined by the Court after the jury has rendered it's verdict on the issue of damages (CPLR § 8101, 8106).

The foregoing constitutes the order of the Court.

DATED: MAY 14, 2015
RIVERHEAD, NY



HON. JAMES HUDSON, A.J.S.C.

*This case was reassigned from the Hon. Jeffery Arlen Spinner in January of 2015