Shoe Taxi Corp. v Woodside Mgt. Inc.
2016 NY Slip Op 30488(U)
February 24, 2016
Supreme Court, Kings County
Docket Number: 502218/2013
Judge: Lawrence S. Knipel
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.

At an IAS Term, Part Comm-4 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 24th day of February, 2016

PRESENT:

HON. LAWRENCE KNIPEL,
Justice.

----------X

SHOE TAXI CORP.,

Plaintiff,

- against -

Index No. 502218/13

WOODSIDE MANAGEMENT INC.,

Defendant.

----------X

The following papers numbered 1 to 3 read herein:

	Papers Numbered
Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed	1 - 2
Opposing Affidavits (Affirmations)	
Reply Affidavits (Affirmations)	3
Affidavit (Affirmation)	
Other Papers	

Upon the foregoing papers, plaintiff Shoe Taxi Corp. (Shoe) moves for an order 1) striking the answer, defenses and counterclaim of defendant Woodside Management Inc. (Woodside), 2) compelling Woodside to respond to the Judicial Subpoena Duces Tecum served upon it and to Shoe's notice for discovery and inspection and set of interrogatories and 3) awarding costs and attorney's fees to Shoe.

Shoe commenced this action to recover damages for breach of contract, unjust enrichment, breach of covenant of good faith and fair dealing, breach of fiduciary duty, conversion and unlawful business conduct by Woodside in its management of two New York City taxi medallions owned by Shoe. According to the complaint, on or about February 1, 2012, Shoe entered into two identical agreements with Woodside whereby Woodside agreed to provide management services for the medallions, agreeing, inter alia, to make certain payments, including, but not limited to monthly payments to Shoe, payment of New York City taxicab and hail vehicle trip taxes and commercial motor vehicle taxes, payment of insurance premiums, payment of summonses for violations and payment of medallion renewal fees. Shoe alleges that Woodside failed to perform all obligations under the management agreement, including, but not limited to, failing to timely make certain third-party payments and meet its reporting requirements.

In the course of discovery, Shoe served upon Woodside a notice for discovery and inspection (D&I), a set of interrogatories and Judicial Subpoena Duces Tecum. By order dated November 13, 2014, following a compliance conference, the court (Hon. David I. Schmidt, J.) directed that Woodside respond to the D&I and interrogatory requests by December 31, 2014. The order noted that Shoe reserved the right to compel Woodside's compliance with the Judicial Subpoena Duces Tecum.

On December 19, 2014, Shoe moved for an order granting summary judgment on its breach of contract and breach of fiduciary duty causes of action, directing an inquest on

damages, compelling Woodside to respond to Shoe's Judicial Subpoena Duces Tecum and entering a conditional order and dismissing Woodside's counterclaim. By order dated May 15, 2015, this court granted Shoe summary judgment on the issue of unpaid trip taxes in the amount of $17,632.44. This court denied Shoe summary judgment on the issue of punitive damages and disgorgement of profits on the ground that there were issues of fact as to Shoe's entitlement to punitive damages and disgorgement of profits and the amount thereof. The court further granted that part of Shoe's motion with respect to the subpoena and directed that Woodside provide all responsive documents to Shoe's counsel by June 30,2015. A judgment in the amount of $17,632.44 was entered on June 17, 2015.

In the instant motion to strike pleadings and other relief, Shoe maintains that Woodside has failed to comply with any discovery demands. On September 11, 2015, Shoe and Woodside entered into a stipulation adjourning the motion to October 23, 2015 and Woodside agreed to waive opposition to Shoe's motion to strike if not received by October 9, 2015. When the parties appeared before this court on October 23, 2015, Woodside raised the issue of the potential impact of providing the requested discovery in light of a criminal investigation pending against Woodside's principal for failure to pay trip taxes. This court issued an order directing that Woodside provide a letter advising the court of any such impact by November 6, 2015.

By letter dated November 6, 2015, Woodside's counsel asserted that the provision of discovery in this case "without some type of non-disclosure agreement and an agreement that

the discovery provided in [this case] will not be used in any criminal proceedings could have an adverse effect on the criminal investigation and any potential criminal liabilities that may arise from that investigation." Defendant's counsel argues that defendant has a right under the Fifth Amendment to the United States Constitution to refrain from providing evidence against itself that could result in criminal prosecution. Shoe responded by letter dated November 19, 2015, arguing that the trip tax issue which is the subject of the criminal investigation is resolved in this matter, that the discovery sought herein does not relate to the trip tax issue but rather to disgorgement of profits and the enforcement of the judgment entered in this matter and that defendant, a corporation, cannot avail itself of the Fifth Amendment privilege. Shoe acknowledged that it is willing to enter into a non-disclosure agreement regarding the documents and information that are the subject of its motion.

"The nature and degree of the penalty to be imposed pursuant to CPLR 3126 lies within the sound discretion of the Supreme Court" (*Lazar, Sanders, Thaler & Assoc., LLP v Lazar*, 131 AD3d 1133, 1133 [2d Dept 2015]; *see Crystal Clear Dev., LLC v Devon Architects of N.Y., P.C.*, 127 AD3d 911, 913 [2d Dept 2015]; *McArthur v New York City Hous. Auth.*, 48 AD3d 431, 431 [2d Dept 2008]). While actions should be resolved on the merits when possible, a court may strike an answer upon a clear showing that the defendant's failure to comply with discovery demands or court-ordered discovery was the result of willful and contumacious conduct (*see Brandenburg v County of Rockland Sewer Dist. # 1, State of N.Y.*, 127 AD3d 680, 681 [2d Dept 2015]; *Almonte v Pichardo*, 105 AD3d 687, 688 [2d Dept

2013]; *Arpino v F.J.F. & Sons Elec. Co., Inc.*, 102 AD3d 201, 210 [2d Dept 2012]). "The willful and contumacious character of a party's conduct can be inferred from the party's repeated failure to comply with discovery demands or orders without a reasonable excuse" (*Commisso v Orshan*, 85 AD3d 845, 845 [2d Dept 2011]; *see Espinal v New York City Health & Hosps. Corp.*, 115 AD3d 641, 641 [2d Dept 2014]). Here, Woodside's willful and contumacious conduct can be inferred from its undisputed repeated failure to provide responses to Shoe's discovery demands despite two court orders so directing.

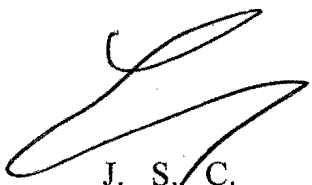
The court finds the arguments set forth in Woodside's November 6, 2015 letter unavailing. "It is basic that the privilege against self incrimination is a personal right which cannot be invoked by, or on behalf of, a corporation. Similarly, an agent or officer of the corporation cannot invoke the privilege and decline to produce records and documents of the corporation over which he has custody in a representative capacity, even if the contents of the documents would personally incriminate him" (*State of New York v Carey Resources*, 97 AD2d 508, 508-509 [2d Dept 1983] [citations omitted]; *see Matter of Grand Jury Subpoena Duces Tecum Dated Dec. 14, 1984*, 69 NY2d 232, 242 [1987]). Woodside thus cannot claim that its corporate records are protected by the Fifth Amendment. Shoe's action is against Woodside only and Shoe is seeking discovery related to profits realized by Woodside, which Shoe seeks under its breach of fiduciary duty and unjust enrichment claims, as well as information relevant to the enforcement of Shoe's judgment. Woodside has offered no other opposition to Shoe's motion.

In light of the foregoing and taking into consideration the absence of formal opposition from Woodside, Shoe's motion to strike Woodside's answer, defenses and counterclaim is granted. Woodside is to respond to Shoe's demand for D&I, interrogatories and Judicial Subpoena Duces Tecum within 45 days of the service of this order with notice of entry. Plaintiff's time to file a note of issue is extended to July 15, 2016 as per the attached Stipulation dated February 23, 2016.

The branch of Shoe's motion for costs and attorneys fees is denied.

The foregoing constitutes the decision and order of the court.

E N T E R,



J. S. C.

HON. LAWRENCE KNIPEL
SUPREME COURT JUSTICE