

**New Gold Equities Corp. v Valoc Enters., Inc.**

2016 NY Slip Op 31630(U)

August 23, 2016

Supreme Court, New York County

Docket Number: 652528/2013

Judge: Kelly A. O'Neill Levy

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 19

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NEW GOLD EQUITIES CORP.,

Plaintiff,

- against -

VALOC ENTERPRISES, INC., NORMAN R.  
BERKOWITZ, NOT IN HIS INDIVIDUAL  
CAPACITY, BUT SOLELY IN HIS CAPACITY AS  
THE EXECUTOR AND TRUSTEE OF THE ESTATE  
OF RHODA MILLER GOLDMAN A/K/A RHODA  
MILLER and THE ESTATE OF RHODA MILLER  
GOLDMAN A/K/A RHODA MILLER,

Defendants.

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**DECISION/ORDER**

Index No. 652528/2013

Mot. Seq. 002

**KELLY O'NEILL LEVY, J.:**

Plaintiff New Gold Equities Corp. moves, pursuant to CPLR 3126, for an order striking and dismissing the answer of defendants Valoc Enterprises, Inc., Norman R. Berkowitz, not in his individual capacity, but solely in his capacity as the executor and trustee of the estate of Rhoda Miller Goldman a/k/a Rhoda Miller, and the estate of Rhoda Miller Goldman a/k/a Rhoda Miller ("defendants") with prejudice, and holding defendants in civil contempt. Plaintiff moves in the alternative for an order, pursuant to CPLR 3124, directing defendants to propound answers to interrogatories without objection within three days. After considering the papers and after oral argument, the motion is granted in part.

According to the verified amended complaint, for many years, defendant Valoc Enterprises ("Valoc") leased real estate property known as and located at 212-223 East 43<sup>rd</sup> Street and 212-226 East 44<sup>th</sup> Street, New York, NY, from plaintiff New Gold Equities ("New Gold") and its predecessor on a triple-net basis. Valoc sublet the properties to various subtenants and transferred the funds it collected to Rhoda Miller Goldman ("Miller"), the late sole shareholder of Valoc, as well as its Secretary and Treasurer, Norman R. Berkowitz

("Berkowitz"). Berkowitz is also the executor and trustee of the Estate of Miller, which is now the owner of Valoc. New Gold alleges that Berkowitz and Miller sanctioned the transfers, leaving Valoc unable to pay various debts to New Gold as well as several municipal authorities. New Gold also alleges that Berkowitz used a Valoc-issued credit card for personal charges long after Miller died and Valoc ceased doing business in 2012.

On July 18, 2013, New Gold commenced this action against Valoc, Berkowitz acting in his capacity as executor of Miller's estate, and the estate itself. Defendants answered on or about August 22, 2013.<sup>1</sup> On or about July 19, 2013, after serving its initial complaint, New Gold served upon defendants its first discovery request. The request sought all relevant documents regarding Valoc's income and assets, as well as documents concerning any transfer of money between Valoc and Miller and Berkowitz. Defendants failed to respond, and on September 4, 2013, New Gold moved to compel compliance pursuant to CPLR 3124. On December 11, 2013, the court (Singh, J.) entered an order resolving the motion, directing that the defendants produce all documents requested without objection on or before January 11, 2014.

On January 13, 2014, two days after the deadline, defendants made a limited production of documents and failed to submit an affidavit, resulting in the court (Singh, J.) entering a second order on March 12, 2014 directing defendants to serve an affidavit. On March 18, 2014, Berkowitz submitted an affidavit on behalf of the defendants stating that he conducted a search for the documents requested and produced all documents that were found and was compliant with Plaintiff's demand. However, at his deposition on December 10, 2014, Berkowitz retracted that statement, saying that he completed no such search, but that "maybe the bookkeeper" conducted the search. In her examination before trial on August 26,

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<sup>1</sup>New Gold later filed an amended complaint on April 14, 2014, which defendants answered on or about May 15, 2014.

2015, the aforementioned bookkeeper, Sandra Daniel, testified that she never saw the document request and that Berkowitz never asked her to search the records in connection with a lawsuit.

On September 30, 2015, the court issued a third order directing Valoc and Berkowitz to comply with the document demands. Defendants made additional documents available, but Berkowitz did not produce any documents on behalf of the estate. Valoc produced only documents within their immediate possession, and not ones that were within their custody and control, as the court had directed them to in the order. In a court-ordered second deposition in January 2016, Berkowitz admitted that defendants made no effort to produce said documents that were within their custody and control. On February 5, 2016, New Gold wrote to defendants demanding that they produce all responsive documents within their custody and control. The letter went unanswered, which led the court to issue a fourth order on February 17, 2016, directing defendants to produce all documents by April 18, 2016. Defendants produced no documents by the deadline, and emailed New Gold on April 19, 2016 to advise that they would be providing documents in the future. On April 20, 2016, New Gold wrote to defendants demanding that they comply with the February 2016 order within seven days. On April 26, 2016, defendants produced several credit card statements, but none of the other documents requested in the February 2016 order.

Plaintiff subsequently brought the instant motion, seeking an order striking and dismissing defendants' answer with prejudice and holding defendants in contempt. In the alternative, New Gold seeks an order directing defendants to respond to the interrogatories within three days. New Gold has also requested that the Court hold defendants in civil contempt and sanction them in an amount equal to New Gold's attorneys' fees, costs, and expenses incurred as a result of their non-compliance. New Gold alleges that in addition to failing to comply with the four court conference orders, defendants have engaged in other

“contumacious conduct,” including ignoring interrogatories served on March 22, 2016 as well as several requests for the estate’s tax returns.

Defendants argue in opposition that they made a good faith effort to produce all documents within their control. Defendants also claim that the documents that are relevant to this motion are newly-requested ones and are therefore not part of the prior discovery orders. Defendants also argue that plaintiff has failed to make any sort of good faith effort to resolve the issues of the motion. Specifically, defendants claim that plaintiff violated Part 19’s Rule 2(B) by making its motion before first requesting a discovery conference.

To grant the drastic measure of striking an answer, the court must determine that a party’s failure to comply with a past disclosure order was due to “willful, deliberate, and contumacious conduct or its equivalent.” *Martignetti v Ricevuto*, 271 A.D.2d 508, 509 (2d Dep’t 2000). Such conduct can be inferred by the court when a party repeatedly fails to comply with disclosure. *Kingsley v. Kantor*, 265 A.D.2d 529, 530 (2d Dep’t 1999). The court has the discretion to determine whether or not to strike the noncomplying party’s pleading. *Zletz v. Wetanson*, 67 N.Y.2d 711, 713 (1986). To successfully oppose a motion to strike a pleading, the noncomplying party generally must show that it has both a reasonable excuse and a meritorious defense for noncompliance. *Bryant v. New York City Hous. Auth.*, 69 A.D.3d 488, 489 (1st Dep’t 2010).

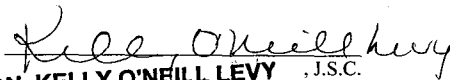
Plaintiff has established that defendants have failed to provide discovery as directed in four previous court orders from December 2013, March 2014, September 2015, and February 2016. The Court finds defendants’ response to the prior discovery orders inadequate and untimely, but is affording defendants a final opportunity. Plaintiff’s motion is therefore granted to the extent that defendants’ answer will be stricken if defendants do not respond to the interrogatories, without objection, within twenty (20) days of service of a copy

of this order with notice of entry. *See Mohel v. Gavriel Plaza*, 123 A.D.3d 464, 465 (1st Dep't 2014) (affirming motion court's conditional order to strike pleading where party had repeatedly failed to properly respond to notice for discovery and inspection).

This matter is adjourned to October 5, 2016 at 9:30 AM in Part 19 (111 Centre Street, Room 1164B) for status conference.

This constitutes the decision and order of the court.

Dated: August 23, 2016

  
HON. KELLY O'NEILL LEVY J.S.C.