

**Koch v Smith**

2017 NY Slip Op 33327(U)

January 13, 2017

Supreme Court, Queens County

Docket Number: 701170/15

Judge: Howard G. Lane

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This opinion is uncorrected and not selected for official publication.

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: **HONORABLE HOWARD G. LANE** IAS Part 6  
**Justice**

MICHAEL KOCH,  
Plaintiff,

Index  
Number 701170/15

-against-

Motion  
Date September 14, 2016

MARK SMITH and JACOBSON GOLDBERG &  
KULB LLP,

Motion Cal. No. 71

Defendants.

Motion Seq. No. 5

The following papers read on this motion by plaintiff to, among other things, compel discovery, pursuant to CPLR 3124, and cross motion by defendant, Jacobson, Goldberg & Kulb, LLP (JG&K), to impose sanctions against plaintiff for frivolous conduct, pursuant to 22 NYCRR.130.1-1.

	<u>Papers Numbered</u>
Notice of Motion - Affirmation - Exhibits .....	EF 72-74
Notice of Cross Motion - Affirmation - Exhibits .....	EF 75-82
Answering Affirmations - Exhibits .....	EF 84

Upon the foregoing papers, it is ordered that plaintiff's motion, and JG&K's cross motion, are determined as follows:

Initially, this court rendered a decision and order dated December 23, 2015 and entered on January 4, 2016, which granted to plaintiff the same relief as requested by plaintiff herein. That decision was rendered null and void by the fact, unknown to this court at the time of its decision, that plaintiff had agreed to withdraw said motion by notice, served on defendant and filed with the County Clerk, on November 2, 2015. As

such, said decision and order dated December 23, 2015, is hereby rescinded.

This action, sounding in breach of contract, unjust enrichment, and an account stated, arises from an agreement between the parties, dated April 25, 2014, whereby plaintiff promised to perform certain services for defendants, in accordance with fees stated in said agreement. Plaintiff alleges that defendants breached said agreement. Plaintiff moves for an order, pursuant to CPLR 3124, compelling defendants to respond to discovery demands; for an order, pursuant to CPLR 3126 (1), deeming the allegations of the complaint resolved in plaintiff's favor; for an order, pursuant to CPLR 3126 (2), prohibiting defendants from giving testimony supporting their allegations and opposing plaintiff's allegations; and for an order, pursuant to CPLR 3126 (3), striking defendants' answers and granting an inquest on defendants' defaults. Defendant, JG&K, cross-moves for the imposition of "sanctions, costs and reasonable attorney fees" against plaintiff for engaging in frivolous conduct, pursuant to 22 NYCRR 130.1-1.

Striking a pleading or prohibiting the introduction of evidence, pursuant to CPLR 3126, for failure to comply with disclosure is a drastic remedy, and is only appropriate where there is a clear showing that the failure to comply was willful, contumacious or in bad faith (*see Teitelbaum v Maimonides Medical Center*, – NYS3d –, 2016 NY Slip Op. 07944 [2016]; *Cioffi v S.M. Foods Inc.*, 142 AD3d 520 [2016]; *Arpino v F.J.F. & Sons Elec. Co., Inc.*, 102 AD3d 2091 [2012]). It may be inferred that a party's conduct is willful and contumacious when said party repeatedly fails to comply with court orders compelling disclosure without providing a reasonable excuse for said party's noncompliance (*see Pesce v Ferenandez*, 144 AD3d 653 [2016]; *Gutman v Gabrera*, 121 AD3d 1042 [2014]; *Mei Yan Zhang v Santana*, 52 AD3d 484 [2008]).

Plaintiff's submissions, lacking the existence of multiple court orders, are unpersuasive in demonstrating defendants' bad faith or willfulness in failing to comply with the discovery demands and court orders for discovery (*see Jones v LeFrance Leasing Ltd. Partnership*, 110 AD3d 1032 [2013]; *Northfield Inc. Co. v. Model Towing and Recovery*, 63 AD3d 808 [2009]). Hence, defendants' alleged failures to fully comply do not yet support an inference that such failures were willful, contumacious or in bad faith (*see Teitelbaum v Maimonides Medical Center*, – NYS3d –, 2016 NY Slip Op. 07944; *Cioffi v S.M. Foods Inc.*, 142 AD3d 520; *Arpino v F.J.F. & Sons Elec. Co., Inc.*, 102 AD3d 201), and do not warrant the extreme sanction of striking defendants' answer or preclusion. As such, the branches of plaintiff's motion seeking preclusion and/or striking the answer are denied.

However, "[i]f the credibility of court orders and the integrity of our judicial system are to be maintained, a litigant cannot ignore court orders with impunity" (*Kihl v*

*Pfeffer*, 94 NY2d 118, 123 [1999]). When a party fails to comply with multiple court orders and stipulations, for an extended period of time, without a reasonable excuse, thereby frustrating the disclosure scheme set forth in the CPLR, it is well within the broad discretion of the trial court to strike a pleading (*see Zletz v Wetanson*, 67 NY2d 711 [1986]; *Ozeri v Ozeri*, 135 AD3d 838 [2016]; *Lazar, Sanders, Thaler & Associates, LLP*, 131 AD3d 1133 [2015]).

In the case at bar, defendants' responses to plaintiff's demands for discovery and inspection are late, vague, unresponsive and incomplete. Plaintiff's responses to defendants' demands are similarly lacking in substance, unresponsive and incomplete. The court will not condone any further attempts by either party to hinder or circumvent discovery herein. As such, the branch of plaintiff's motion seeking discovery, pursuant to CPLR 3124, is granted solely to the extent that defendants shall comply with all of the discovery demands requested in Exhibit "D" of plaintiff's motion herein, whether previously exchanged or not, providing copies of any and all required documents, within twenty (20) days of serving, or being served with, a copy of this decision with notice of entry. If any such documents are not possessed by defendants, defendants are to supply an affidavit to that effect. Should defendants fail to comply with this order, defendants shall be precluded from offering any evidence at trial that would have been contained in the responses to such discovery demands.

Defendant, JG&K's cross motion, seeking sanctions pursuant to 22 NYCRR 130-1.1(c) (1), is denied. While plaintiff's action may ultimately be dismissed, his claim is not devoid of legal and factual merit, and, therefore, is not deemed to amount to frivolous conduct (*see Stone Mountain Holdings, LLC v Spitzer*, 119 AD3d 548 [2014]). Further, defendants responses to plaintiff's demands, having been determined herein to have been inadequate, cannot form the basis for a frivolous conduct claim against plaintiff due to his refusal to withdraw the subject motion. Under the facts of this case, plaintiff's motion was not "undertaken primarily to delay or prolong the resolution of the litigation, or to harass or maliciously injure another; or it asserts material factual statements that are false" (*Mascia v Maresco*, 39 AD3d 504, 505 [2007]; *see Perna v Reality Roofing, Inc.*, 122 AD3d 821 [2014]; *KeySpan Generation, LLC v Nassau County*, 118 AD3d 949 [2014]).

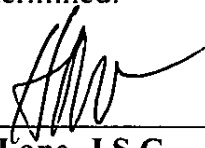
Additionally, based on plaintiff's inadequate responses to defendants' demands for discovery, the court, on its own motion, further orders that plaintiff shall comply with all of the discovery demands requested by defendants of plaintiff in the August 6, 2016 Request for Discovery and Production of Documents (Exhibit "3" in defendant, Smith's opposition to plaintiff's motion), with the lone exception of demand #7 thereof, which is an improper demand, whether previously exchanged or not, providing copies of any and

all required documents, within twenty (20) days of serving, or being served with, a copy of this decision with notice of entry. If any such documents are not possessed by plaintiff, plaintiff is to supply an affidavit to that effect. Should plaintiff fail to comply with this order, plaintiff shall be precluded from offering any evidence at trial that would have been contained in the responses to such discovery demands.

The parties' remaining contentions either are without merit, or need not be addressed in light of the foregoing determination.

Accordingly, plaintiff's motion seeking, among other things, to strike defendants' pleadings and preclude defendants' introduction of evidence, is granted only to the extent of ordering discovery responses from all parties, as above-determined.

Dated: January 13, 2017

  
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Howard G. Lane, J.S.C.

**FILED**  
**JAN 23 2017**  
**COUNTY CLERK**  
**QUEENS COUNTY**