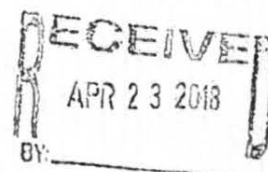


Bellerose Dental, P.C. v Liberty Universal Corp.
2018 NY Slip Op 33626(U)
April 18, 2018
Supreme Court, Queens County
Docket Number: 15248/14
Judge: Allan B. Weiss
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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: Honorable, ALLAN B. WEISS IAS PART 2
Justice

BELLEROSE DENTAL, P.C.,

Plaintiff,

-against-

LIBERTY UNIVERSAL CORP., a/k/a LIBERTY
UNIVERSAL INC., ROMAN MATATOV, ATLANTIS
DENTISTRY, P.C. and JULIA ABEND,

Defendants.

Index No.: 15248/14

Motion Date: 4/13/18

Motion Seq. No.: 5

The following papers numbered 1 to 9 read on this motion by plaintiff for an Order restoring the action to the trial calendar pursuant to CPLR 3404, compelling the defendants Liberty Universal Corp., a/k/a Liberty Universal Inc. and Roman Matatov (the defendants) to provide copies of the tax returns set forth in the So Ordered stipulation dated November 15, 2016, to produce copies of the transcript of the plaintiff's deposition conducted by the defendants and directing that defendants to appear for a deposition and for a conditional order striking the defendants' answer or precluding them from submitting evidence at trial.

PAPERS
NUMBERED

Notice of Motion-Affidavits-Exhibits	1 - 4
Answering Affidavits-Exhibits.....	5 - 7
Replying Affidavits.....	8 - 9

Upon the foregoing papers it is ordered that this motion is determined as follows.

The Note of Issue in this action was vacated on May 9, 2017 to allow the parties to complete discovery. Thus, the action is not subject to restoration pursuant to CPLR 3404 inasmuch as the action was not "marked off" the trial calendar, but rather, the Note of Issue was vacated (see Lopez v. Imperial Delivery Service, Inc., 282 AD2d 190 [2001]lv to appeal dismissed 96 NY2d 937 [2001]). Vacature of the Note of Issue results in returning the action to pre-note of issue status (see Bilkho v Roosevelt Square, LLC, 157 AD3d 849 [2018]).

Thus, the branch of the motion which is, in effect, a motion to restore the action to active status and to vacate the "disposed" marking is granted (see Bilkho v Roosevelt Square, LLC, supra). The clerk is directed to restore the action to active status.

The remainder of the motion is determined as follows.

When a party fails to comply with a court order and frustrates the disclosure scheme set forth in the CPLR, it is within the court's discretion to strike the "pleadings or parts thereof" (CPLR 3126 [3]) as a sanction against such party (see Kihl v Pfeffer, 94 NY2d 118, 122 [1999]; Smith v County of Nassau, 138 AD3d 726, 728 [2016]; Stone v Zinoukhova, 119 AD3d 928, 929, [2014]; Edwards v Prescott Cab Corp., 110 AD3d 671 [2013]). However, the drastic remedy of preclusion or striking of a pleading should not be imposed unless there is a clear showing that the failure to comply with discovery demands or court-ordered discovery is willful and contumacious (see Hasan v 18-24 Luquer St. Realty, LLC, 144 AD3d 631, 632 [2016]; Harris v City of New York, 117 AD3d 790, 790 [2014]; Brandenburg v County of Rockland Sewer Dist. #1, 127 AD3d 680, 681 [2015]; Arpino v F.J.F. & Sons Elec. Co., Inc., 102 AD3d 201, 210 [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 (see Montemurro v Memorial Sloan-Kettering Cancer Ctr., 94 AD3d at 1066; Commisso v Orshan, 85 AD3d at 845). "Willful and contumacious conduct may be inferred from a party's repeated failure to comply with court-ordered discovery, coupled with inadequate explanations for the failures to comply or a failure to comply with court-ordered discovery over an extended period of time" (Gutman v Cabrera, 121 AD3d 1042, 1043 [2014] quoting Orgel v Stewart Tit. Ins. Co., 91 AD3d 922, 923 [2012], quoting Rock City Sound, Inc. v Bashian & Farber, LLP, 83 AD3d 685, 686-687 [2011] [internal quotation marks omitted]; see Arpino v F.J.F. & Sons Elec. Co., Inc., supra at 210).

This action was commenced on October 17, 2014. A preliminary conference was held on June 15, 2015 and a compliance conference on September 4, 2015. The resulting orders from the conferences directed the parties to appear for depositions. On May 9, 2017, the Note of Issue was vacated to allow the parties to complete discovery. On November 15, 2016 a lengthy conference was held to resolve the discovery issues raised in plaintiff's and defendants', Atlantis Dentistry and Abend's motions. Attorneys for all parties appeared at the conference. The stipulation

provided that, inter alia, Liberty Universal defendants would produce tax returns and appear for a deposition. The stipulation was So Ordered by the court.

The Liberty Universal defendants have failed to produce tax returns as provided in the November 15, 2016 So Ordered Stipulation nor have they appeared for a deposition.

In opposition to the motion the defendants assert that the tax returns are not relevant to the action and that they should not be compelled to appear for a deposition because of the extensive amount of time that has passed since the discovery time line set for this action.

The defendants' arguments are without merit. The extensive delay in this action is in no small part the result of defendants' refusal to provide discovery, to timely conduct the deposition of the plaintiff and refusal to appear for a deposition. The defendants' willful non-compliance is amply demonstrated by their failure to comply with prior court Orders and in particular Zara Javakov affirmation and e-mail on March 6, 2018 to the defendants' attorney, in which she absolutely refused to produce her clients for a deposition on the grounds that "...the matter is stricken and we are years outside of the discovery deadline."

Contrary to counsel's claim, only the Note of Issue not the "matter" was stricken. Counsel's undisputed disregard of the court's order of November 15, 2016 demonstrates the defendants' willful and contumacious conduct warranting striking of their answer.

However, in view of the strong public policy of resolving disputes on the merits the defendants, Liberty Universal Corp., a/k/a Liberty Universal Inc. and Roman Matatov shall appear for a deposition on June 4, 2018 at 10:00 a.m. at Diamond Court Reporting, 89-00 Sutphin Boulevard, Jamaica, New York. There shall be no adjournment of the deposition and it shall continue day to day until completed.

In addition, defendants shall produce copies of the corporate defendant's corporate tax returns for the period set forth in the November 15, 2016 So Ordered Stipulation within 10 days of the date of this Order or provide an affidavit by a person with personal knowledge as to the reason for the non-production. The affidavit should include details such as the basis for the affiant's knowledge, their familiarity with the defendants' record keeping practices and locations, the nature of

the search conducted, whether a search was conducted in every location where the records were likely to be found and if no such documents or records were made, why it was not made (see Henderson-Jones v City of New York, 87 AD3d 498, 505 [2011]; Rivera-Irby v City of New York, 71 AD3d 482, 483 [2010]).

If the defendants fail to appear for a deposition as provided herein their answer is stricken without the need for a further Order.

The defendants shall serve the plaintiff with a copy of the plaintiff's deposition testimony within 10 days of the date of entry of this Order.

The action may be restored to the trial calendar and a new note of issue filed in accordance with the Order of Judge Schulman dated May 9, 2017.

A copy of this Order is being mailed to the attorneys for the parties.

Dated: April 18, 2018
D# 58

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J.S.C.