

Lowden v Maken Land Dev.-Two LLC
2018 NY Slip Op 33905(U)
October 15, 2018
Supreme Court, Westchester County
Docket Number: 67459/2016
Judge: Joan B. Lefkowitz
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To commence the statutory time period for appeals as of right [CPLR 5513(a)], you are advised to serve a copy of this order, with notice of entry upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER - COMPLIANCE PART

-----X
STEPHEN G. LOWDEN and ANNA G. LOWDEN,

Plaintiffs,

-against-

MAKAN LAND DEVELOPMENT-TWO LLC
THE DM EQUITIES OF NEW YORK, LLC, and
DAVINDER SINGH MAKAN A/K/A DAVID MAKAN,

Defendants.
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LEFKOWITZ, J.

DECISION & ORDER

Index No. 67459/2016

Motion Date: Sept. 26, 2018

Seq. No. 2

The following papers were read on this motion by plaintiffs for an order: deeming the issues relating to the information sought by plaintiffs resolved in accordance with their claims; prohibiting defendants Davinder Singh Makan a/k/a David Makan (“Makan”), Makan Land Development-Two LLC (“MLD”), and The DM Equities of New York, LLC (“DM Equities”) (collectively “defendants”) from supporting defendants’ claims and defenses; prohibiting defendants from opposing plaintiffs’ claims; precluding defendants from introducing at trial any evidence referred to in plaintiffs’ discovery demands; and striking defendants’ answer and granting a judgment by default against defendants for failure to comply with the disclosure demanded by plaintiffs in this action.

Order to Show Cause - Affirmation in Support - Exhibits A-L
Affirmation in Opposition - Exhibits A-H¹
NYSCEF File

Upon the foregoing papers and the proceedings held on September 26, 2018, this motion is determined as follows:

¹ The Order to Show Cause directed defendants to file their opposition papers to the NYSCEF website on or before September 10, 2018. Defendants filed their opposition on September 17, 2018. Although defendants’ opposition was not timely filed, the court in its discretion has considered defendants’ opposition in the determination of this motion.

Plaintiffs commenced this action on or about November 22, 2016 by the filing of a summons and complaint seeking damages for the alleged breach of a construction contract involving plaintiffs' residence. Plaintiffs further allege that defendants wrongfully diverted certain trust funds advanced by plaintiffs with respect to that contract. Issue was joined by the service of defendants' answer dated January 31, 2017. On or about March 8, 2017, plaintiffs served a notice to produce and interrogatories (collectively the "discovery demands"). Defendants did not respond or object to those discovery demands, nor did defendants seek additional time to respond thereto.

Pursuant to the so-ordered (Lefkowitz, J.) Preliminary Conference Stipulation entered on November 17, 2017, defendants were directed to respond to plaintiffs' discovery demands by December 20, 2017. By letter dated December 21, 2017 plaintiffs sought responses to their discovery demands ("first good faith letter"). On or about January 30, 2018 defendants served responses to plaintiffs' interrogatories. By letter dated February 26, 2018 plaintiffs objected to defendants' interrogatory responses on the grounds that, inter alia, the responses were nonresponsive and referred to documents which had not been produced. By separate letter dated February 26, 2018 plaintiffs sought responses to their notice to produce.

The parties appeared for a compliance conference on March 21, 2018. The Compliance Conference Referee Report & Order (Lefkowitz, J.) entered on March 22, 2018 directed, inter alia, that plaintiffs serve a deficiency letter no later than March 26, 2018 and that defendants serve responses thereto no later than April 2, 2018. That Order warned that "[c]ompliance with Court orders is mandatory. Noncompliance can result in waiver, preclusion, or dismissal/striking of defendants' answer."

The parties appeared for a compliance conference on April 13, 2018. The Compliance Conference Referee Report & Order (Lefkowitz, J.) from that conference, directed defendants to serve responses to plaintiffs' deficiency letter no later than April 13, 2018. This Order warned that failure to comply with its directives would constitute grounds to strike pleadings pursuant to CPLR 3126 or grant other relief pursuant to CPLR 3124. By Compliance Conference Referee Report & Order (Lefkowitz, J.) entered on June 28, 2018 defendants were directed to serve, no later than July 6, 2018, an affidavit of a person with knowledge attesting that following a thorough search for both papers and electronic documents all documents responsive to plaintiffs' discovery demands had been produced (the "disclosure affidavit"). This Order reminded the parties that compliance with court orders is mandatory and that failure to comply with the directives of the Order would constitute grounds to strike pleadings pursuant to CPLR 3126 or grant other relief pursuant to CPLR 3124. The Compliance Conference Referee Report & Order (Lefkowitz, J.) entered on July 23, 2018 noted that defendants had failed to comply with the court's June 28, 2018 Order and had not served the disclosure affidavit as directed.

On this motion plaintiffs state that although the depositions have been completed defendants have not yet furnished the demanded discovery and have not furnished the disclosure affidavit. Plaintiffs argue that the foregoing conduct constitutes willful and contumacious

behavior that was deliberately undertaken to frustrate the current litigation and which entitles plaintiffs to a default judgment or the striking of defendants' answer.

In opposition defendants contend that they have provided plaintiffs with all of the documents in defendants' possession related to this litigation. Defendants contend that they did not deliberately disregard their discovery obligations. Defendants aver that it took them a period of time and several attempts to assemble their discovery responses and to assure that the materials provided were responsive to plaintiffs' requests. Defendants state that after defendants' deposition, defendants provided plaintiffs with additional discovery on August 2, 2018 and August 13, 2018. Defendants further aver that on September 5, 2018 they provided the disclosure affidavit to plaintiffs. Defendants argue that insofar as they have provided responses to plaintiffs' discovery demands the court should not strike defendants' answer nor grant plaintiffs a default judgment.

At oral argument plaintiffs stated that they still have not received all of the discovery that they seek.

"The nature and degree of the penalty to be imposed on a motion pursuant to CPLR 3126 is a matter generally left to the discretion of the Supreme Court" (*Carbajal v Bobo Robo*, 38 AD3d 820 [2d Dept 2007]). To invoke the drastic remedy of striking a pleading, or preclusion, a court must determine that the party's failure to disclose is willful and contumacious (*Greene v Mullen*, 70 AD3d 996 [2d Dept 2010]; *Maiorino v City of New York*, 39 AD3d 601 [2d Dept 2007]; *Kingsley v Kantor*, 265 AD2d 529 [2d Dept 1999]). Willful and contumacious conduct can be inferred from repeated noncompliance with court orders or a failure to comply with court-ordered discovery over an extended period of time, coupled with the lack of an adequate excuse for the failure (*Mei Yan Zhang v Santana*, 52 AD3d 484 [2d Dept 2008]; *Carbajal v Bobo Robo, Inc.*, 38 AD3d 820 [2d Dept 2007]; *Prappas v Papadatos*, 38 AD3d 871 [2d Dept 2007]). In light of defendants' partial compliance with the notice to produce (*see* Exhibit L), defendants' conduct is not sufficient to establish a finding of willful and contumacious behavior to warrant the striking of defendants' answer or the award of a default judgment against them. However, under the circumstances of this case, an order precluding defendants from introducing into evidence any discovery demanded by plaintiffs but not produced by defendants and the imposition of motion costs pursuant to CPLR 8202 in the amount of \$100.00, in favor of plaintiffs, is proper.

In view of the foregoing, it is

ORDERED that the motion by plaintiffs is granted to the extent that plaintiffs shall upload to the NYSCEF website, on or before October 22, 2018, a detailed affidavit/affirmation outlining what discovery is still outstanding and a Proposed Order precluding defendants from offering evidence or testimony pertaining to the claims to which the discovery relates, on a subsequent motion or at trial, upon notice to all parties; and it is further

ORDERED that defendants shall pay CPLR 8202 motion costs in the amount of \$100.00

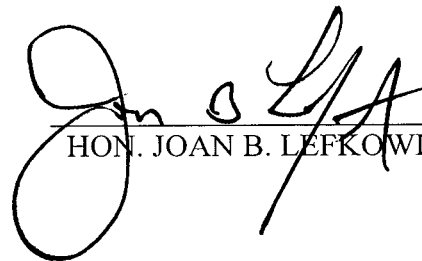
to plaintiffs on or before October 22, 2018, and upload to NYSCEF an affirmation of such payment; and it is further

ORDERED that all parties are directed to appear for a conference in the Compliance Part, Courtroom 800, on October 26, 2018, at 9:30 a.m. at which time a Trial Readiness Order will be issued; and it is further

ORDERED that plaintiffs shall serve a copy of this order with notice of entry upon defendants within ten days of entry.

The foregoing constitutes the decision and order of this court.

Dated: White Plains, New York
October 15 2018



HON. JOAN B. LEFKOWITZ, J.S.C.

To all counsel via NYSCEF

cc: Compliance Part Clerk