

<b>Debono Bros. Bldrs. &amp; Devs., Inc. v Anmuth</b>
2019 NY Slip Op 31023(U)
April 10, 2019
Supreme Court, New York County
Docket Number: 154783/2012
Judge: William Franc Perry
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This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY**

**PRESENT: HON. W. FRANC PERRY PART IAS MOTION 23EFM**

*Justice*

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**INDEX NO. 154783/2012**

DEBONO BROTHERS BUILDERS & DEVELOPERS, INC.

**MOTION DATE 02/19/2019**

Plaintiff,

**MOTION SEQ. NO. 005**

- v -

RUSSELL ANMUTH, ANMUTH FAMILY HOLDINGS LLC

**DECISION AND ORDER**

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 005) 31, 32, 33, 34, 35, 36

were read on this motion to/for STRIKE PLEADINGS

In Motion Sequence Number 005, plaintiff Debono Brothers Builders & Developers, Inc. (“Plaintiff”), moves, pursuant to CPLR 3216, for an order striking the answer of defendant Anmuth Family holdings, LLC (“Defendant”), for its failure to comply with this court’s decision and order on November 20, 2018 (NYSCEF Doc. No. 25), which directed Defendant to produce certain documents on or before January 22, 2019, and to appear for a Status Conference on January 22, 2019. Plaintiff also seeks an order entering judgment on liability in favor of Plaintiff and requests that the court schedule an inquest on damages. Defendant has not opposed Plaintiff’s motion and has not appeared at any of the conferences scheduled by the court in this matter.

In this action, Plaintiff served discovery demands on Defendant on May 29, 2018, and on June 28, 2018 a good faith letter was sent to Defendant requesting responses to the discovery demands previously served. (NYSCEF Doc. Nos. 22 and 23). Thereafter, a motion to compel was served and filed and was scheduled to be heard by the court on November 20, 2019.

Defendant failed to appear on November 20, 2019 and Plaintiff's motion to compel was granted without opposition, directing Defendant to respond to the outstanding discovery on or before January 22, 2019. (NYSCEF Doc. No. 25). Plaintiff now seeks an order pursuant to CPLR 3126 striking Defendant's answer based on Defendant's failure to comply with this court's discovery order.

Pursuant to CPLR 3126, "[i]f any party . . . refuses to obey an order for disclosure or willfully fails to disclose information which the court finds ought to have been disclosed pursuant to this article, the court may make such orders with regard to the failure or refusal as are just." The First Department has long held that "the drastic remedy of striking a party's pleading pursuant to CPLR 3126 for failure to comply with a discovery order . . . is appropriate only where the moving party conclusively demonstrates that the non-disclosure was willful, contumacious or due to bad faith" (*Henderson-Jones v City of New York*, 87 AD3d 498, 504, 928 NYS2d 536 [1st Dept 2011] [internal quotation marks omitted]).

"Willful and contumacious behavior can be inferred by a failure to comply with court orders, in the absence of adequate excuses" (*id.*). While it is preferred that actions be resolved on the merits whenever possible, the efficient disposition of cases "is not promoted by permitting a party . . . to impose an undue burden on judicial resources to the detriment of . . . other litigants. Nor is the efficient disposition of the business before the courts advanced by undermining the authority of the trial court to supervise the parties who appear before it" (*Arts4All, Ltd. v Hancock*, 54 AD3d 286, 287, 863 NYS2d 193 [1st Dept 2008], *affd* 12 NY3d 846, 909 NE2d 83, 881 NYS2d 390 [2009], *cert denied* 559 US 905, 130 S Ct 1301, 175 L Ed 2d 1076 [2010]). "[I]t generally is within the discretion of the motion court to determine the appropriate penalty to be

imposed against an offending party" (*Spira v Antoine*, 191 AD2d 219, 219, 596 NYS2d 1 [1st Dept 1993]).

On November, 20, 2018, this court granted Plaintiff's motion to compel and entered an order compelling Defendant to produce, on or before January 22, 2019, the discovery that was served by Plaintiff. (NYSCEF Doc. No. 25). Defendant has failed to produce any documents responsive to Plaintiff's Notice for Discovery and Inspection, dated May 29, 2018, despite being ordered to do so. Moreover, although Defendant filed an Answer to the Complaint, Defendant has failed to appear at scheduled court conferences in violation of court orders and so-ordered stipulations directing Defendant to appear. On this basis, the court finds striking Defendant's answer to be an appropriate sanction. (see *Watson v City of N.Y.*, 157 AD3d 510, 69 N.Y.S.3d 294 [1st Dept 2018]).

Accordingly, it is hereby

**ORDERED** that Plaintiff's motion to strike Defendant's answer is granted, the answer is stricken and Plaintiff is awarded a default judgment against Defendant on the issue of liability; and it is further

**ORDERED** that an assessment of damages against Defendant Anmuth Family Holdings, LLC is directed, and it is further

**ORDERED** that a copy of this order with notice of entry be served by the movant upon the Clerk of the General Clerk's Office (60 Centre Street, Room 119), who is directed, upon the filing of a note of issue and a certificate of readiness and the payment of proper fees, if any, to place this action on the appropriate trial calendar for the assessment hereinabove directed; and it is further

ORDERED that such service upon the Clerk of the General Clerk's Office shall be made in accordance with the procedures set forth in the *Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases* (accessible at the "E-Filing" page on the court's website at the address [www.nycourts.gov/supctmanh](http://www.nycourts.gov/supctmanh)).

4/10/2019

DATE



W. FRANC PERRY, J.S.C.

CHECK ONE:

CASE DISPOSED

GRANTED

DENIED

NON-FINAL DISPOSITION

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE