

<b>AMERIMAX Capital, LLC v Estate of Ender</b>
2019 NY Slip Op 32051(U)
July 15, 2019
Supreme Court, New York County
Docket Number: 153817/2018
Judge: Alexander M. Tisch
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At an I.A.S. Part 18 of the Supreme Court of the State of New York, held in and for the County of New York, at the Courthouse, located at 111 Centre Street, Borough of New York, City and State of New York, on the 15<sup>th</sup> day of July 2019

**PRESENT:**

**HON. ALEXANDER M. TISCH, J.S.C.**

**DECISION & ORDER**

AMERIMAX CAPITAL, LLC,

MOTION SEQ. NO. 002

Plaintiff(s),

-against-

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THE ESTATE OF PAUL A. ENDER a/k/a PAUL ANTHONY ENDER, Deceased, and SIMONE ENDER, as Executrix of the Estate of Paul A. Ender a/k/a Paul Anthony Ender,

Defendant(s).

The following e-filed papers, NYSCEF Doc. Nos. 33-45, 51-58, were read on this motion to strike pleadings.

**ALEXANDER M. TISCH, J.:**

Upon the foregoing papers, plaintiff moves this Court for an order striking defendants' verified answer and granting plaintiff default judgment pursuant to CPLR 3126 and the Preliminary Conference Order dated August 1, 2018, due to deficiencies in defendants' responses to discovery demands and preliminary conference order. Alternatively, plaintiff moves this Court for an order conditioning the striking of defendants' answer and entering a default judgment against defendants upon defendants' failure to sufficiently comply with the Preliminary Conference Order and the outstanding demands. For the reasons set forth below, the motion is denied.

The plaintiff, AMERIMAX Capital, LLC, contends that defendants' answer should be stricken pursuant to CPLR 3126 because defendants' responses to its discovery demands were "so woefully insufficient and/or improper that it has essentially served no responses at all" (NYSCEF Doc. No. 35).

In opposition, the defendants, the Estate of Paul A. Ender A/K/A Paul Anthony Ender, deceased, and Simone Ender, as Executrix of the Estate of Paul A. Ender a/k/a Paul Anthony Ender, argue against striking their answer pursuant to CPLR 3126 because the Estate has properly responded to plaintiff's

discovery demands. Specifically, defendants agreed to provide the plaintiff with a copy of the records that it receives from a third party, Columbia Capital, and do not possess other documents the plaintiff demanded, including “any alleged agreement between AMERIMAX and the decedent.” Further, the Estate has responded properly to plaintiff’s interrogatories and “has not spoken with anyone other than people protected by the attorney client privilege” (NYSCEF Doc. No. 42). The Estate has also objected to certain discovery demands for being “overbroad and not calculated to lead to relevant discovery” or calling for a “legal assertion.”

“If 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 . . . an order striking out pleadings or parts thereof . . . or rendering a judgment by default against the disobedient party” (CPLR 3126). However, the striking of a party’s pleading “is not [a] sanction to be routinely imposed whenever party fails to comply with any item of discovery, without regard for that party’s substantial compliance efforts or its legitimate objections to scope of opponent’s demands” (Commerce & Indus. Ins. Co. v Lib-Com, Ltd., 266 AD2d 142, 145 [1st Dept 1999]). It is not proper to strike a party’s pleading without showing that the party’s noncompliance with respect to discovery demands was “willful, contumacious, or in bad faith” (see Mangual v New York City Tr. Auth., 48 AD3d 212, 212 [1st Dept 2008]; see also Hall v Hall, 238 AD2d 257, 257 [1st Dept 1997]; Remuneration Planning & Serv. Corp. v Berg & Brown, Inc., 151 AD2d 268, 269 [1st Dept 1989]). Further, “a party’s dissatisfaction with its opponent’s document production is an insufficient basis for a finding that the opponent was willful and contumacious” (Commerce & Indus., 266 AD2d at 146).

“[A] meaningful analysis of a party’s compliance must consider not just whether the produced items are responsive to the demands, but also whether the demands themselves were proper” (id. at 145). In Commerce & Industry (266 AD2d 145–46), the First Department decided that a party is not entitled to have the opposition’s pleading stricken for failure to comply with certain discovery demands where: (a) any deficiencies in compliance for discovery demand were not “so egregious as to outweigh policy that actions should be resolved on their merits”; (b) “although apparently believing that certain

requested files were unavailable, [the opposition] continued to look for them to [the] best of its ability”; (c) there was no evidence that the opposition’s “confidentiality and relevance objections were made in bad faith”; and (d) the opposition “fully responded to all other interrogatories.”

Here, defendant has properly responded to plaintiff’s discovery demands. Although the Estate did not attach any document to its Responses, it provided plausible explanation that this was because the file it obtained from the prior case “contained no responsive documents” (NYSCEF Doc. No. 41). Further, defendants’ counsel requested responsive documents from a third party, Columbia Capital, caused its client to “do a search of all old files of Mr. Ender” and agreed to “turn all responsive documents over” and “produce anything remotely relevant” (NYSCEF Doc. No. 41). Therefore, defendants are continuing to look for responsive documents relevant to plaintiff’s discovery demands to the best of their ability and there is no evidence that its current noncompliance with respect to discovery demands is “willful, contumacious, or in bad faith” (Mangual, 48 AD3d 212).

Additionally, the Estate has also properly responded to all of plaintiff’s interrogatories. Defendant has served a response to AMERIMAX’s each and every interrogatory. Of the thirty-eight responses made by the Estate, plaintiff was unsatisfied with all of them and deemed these responses “so woefully insufficient and/or improper that [defendant] has essentially served no responses at all” (NYSCEF Doc. No. 35). However, plaintiff’s dissatisfaction with its opponent’s responses is “an insufficient basis for a finding that the opponent was willful and contumacious” (Commerce & Indus., 266 AD2d at 146). Of the responses deemed unsatisfactory by plaintiff, defendant either was “unable to provide information responsive to this demand,” answered directly that it “has not discussed the action other than with people who are protected by the attorney client privilege,” or objected to the interrogatory “as overbroad and not calculated to lead to relevant discovery” or because it calls for “legal assertion” or “legal strategy” (see NYSCEF Doc. No. 41). Since the Estate responded fully to all interrogatories and there was no evidence that its objections based on privilege or relevance were not legitimate or “made in bad faith,” plaintiff is not entitled to have the defendant’s answer stricken for failure to comply with discovery demands.

In conclusion, there is no evidence of willful or contumacious noncompliance of discovery demands on the part of defendant. Any deficiencies in defendant's compliance for discovery demand were not "so egregious as to outweigh policy that actions should be resolved on their merits" (Commerce & Indus., 266 AD2d at 145). Hence, it is not proper to strike defendant's answer. Additionally, plaintiff's alternative request for relief is denied, as the Court finds no need to compel defendant to provide a further response (aside from defendant's continuing obligations to amend and supplement their discovery responses as information becomes available to them — which need not be ordered).

Accordingly, it is hereby ORDERED that the motion is denied in its entirety. This shall constitute the decision and order of the Court.

Dated: July 15, 2019



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ALEXANDER M. TISCH, J.S.C.