

**Dino's Props. Mgt., Inc. v Greenberg**

2019 NY Slip Op 32909(U)

October 2, 2019

Supreme Court, Suffolk County

Docket Number: 40901/2010

Judge: William G. Ford

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SHORT FORM ORDER

INDEX NO.: 40901/2010

**SUPREME COURT - STATE OF NEW YORK  
I.A.S. PART 38 - SUFFOLK COUNTY**

PRESENT:

**HON. WILLIAM G. FORD  
JUSTICE OF THE SUPREME COURT**

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**DINO'S PROPERTIES MANAGEMENT,  
INC.,**

**Plaintiff,**

**-against-**

**SETH GREENBERG,**

**Defendant.**

\_\_\_\_\_  
**SETH GREENBERG,**

**Third-Party Plaintiff,**

**-against-**

**DIEGO TRUILLO (TRUJILLO),**

**Third-Party Defendant.**

\_\_\_\_\_  
x

Motion Submit Date: 03/07/19  
Mot Conf Held: 01/09/17  
Mot Seq 001 MG; CASE DISP

**PLAINTIFF'S COUNSEL:**

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East Hampton, New York 11968

**DEFENDANT & THIRD-PARTY**

**PLAINTIFF'S COUNSEL:**

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Read on defendant's unopposed motion to strike plaintiff's complaint for failure to provide discovery, the Court considered the following:

1. Notice of Motion, Affirmation in Support & supporting papers; and upon due deliberation and full consideration of the same; it is

**ORDERED** that defendant's motion seeking an order striking plaintiff's complaint as discovery sanction for a willful and contumacious failure to provide court-ordered discovery pursuant to CPLR 3126 is **granted** in the following manner; and it is further

**ORDERED** that defendant's counsel is hereby directed to serve a copy of this decision and order with notice of entry via electronic filing and electronic mail upon plaintiff's counsel forthwith; and it is further

**ORDERED** that, if applicable, within 30 days of the entry of this decision and order, that defendant's counsel is also hereby directed to give notice to the Suffolk County Clerk as required by CPLR 8019(c) with a copy of this decision and order and pay any fees should any be required.

This breach of contract action commenced on plaintiff's filing of a summons and complaint on November 5, 2010, arising out of an arrangement entered into between the parties sometime in 2008 whereby defendant and third-party defendant would install trees, plants and/or shrubs at plaintiff's premises in Southampton, Suffolk County, New York. Plaintiff contends that shortly after the work was performed the plants died, something he attributes to a lack of adequate care or maintenance on the defendant's part. Plaintiff further asserts despite requests for replacement made to defendant, no corrective action occurred.

Despite this, plaintiff apparently had also contacted with defendant to erect a pool and spa in his yard, as well as construct a deck and retaining wall per agreed upon plans. Premised on plaintiff's understanding that defendant had the requisite knowledge, skill, training and experience, he agreed to pay defendant \$ 19,000.00. In reliance on their agreement, defendant then acquired stone, gravel and sand which was delivered to plaintiff's property. Ultimately however, plaintiff contends that the pool and spa and related deck was improperly installed by defendant.

Plaintiff amended the complaint on February 22, 2011. Defendant then joined issue on plaintiff's complaint serving an answer on May 27, 2011. They also initiated third-party practice serving a third-party complaint. Having joined issue, defendant then served its first discovery requests seeking production of documents and serving a notice for an examination before trial. Issue joined on the third-party complaint by third-party defendant on June 30, 2011.

Now pending before the Court is defendant and third-party plaintiff's motion to strike plaintiff's complaint for neglect to prosecute and willful and contumacious refusal to provide court-ordered discovery, this matter having laid dormant since the parties' request for preliminary conference on July 8, 2016. A preliminary conference order issued as a result on July 25, 2016 calling for plaintiff's production of paper discovery on or before August 11, 2016. Since the entry of the Preliminary Conference Order commencing discovery and serving as the initial discovery scheduling order governing the conduct of pretrial disclosure in this matter, this matter has appeared before this Court on the discovery compliance conference calendar over 20 times, the first such appearance on January 19, 2017. Appearing before this Court, counsel for the parties then entered into a discovery stipulation "so-ordered" by this Court on January 19, 2017 again calling for plaintiff's document production responsive to defendant's discovery demands. Despite providing defendant with part compliance on or about February 10, 2017, defendant maintains certain demanded documents were missing and remain outstanding with no explanation from the plaintiff. Thus, the parties entered into an additional "so-ordered" discovery stipulation dated January 3, 2018 to provide plaintiff additional time to render compliance, otherwise defendant would have leave to move for the appropriate discovery sanction. Given the history of this case and the prior orders, this Court will not excuse plaintiff's unexplained and refusals to abide his discovery obligations in this litigation.

It is well settled that a trial court is vested with broad discretion to supervise the discovery process, and its determinations in that respect will not be disturbed in the absence of demonstrated abuse (*see United Airlines v. Ogden New York Servs.*, 305 AD2d 239, 240, 761 NYS2d 16; *Cho v. 401–403 57th St. Realty Corp.*, 300 AD2d 174, 176, 752 NYS2d 55); *Ulico Cas. Co. v. Wilson, Elser, Moskowitz, Edelman & Dicker*, 1 AD3d 223, 224, 767 NYS2d 228 [1st Dept. 2003]). However, the courts on the other hand recognized that “parties to a civil dispute are free to chart their own litigation course and, in so doing, they may stipulate away statutory, and even constitutional rights’ ” (*Astudillo v MV Transp., Inc.*, 136 AD3d 721, 721, 25 NYS3d 289, 290 [2d Dept 2016]). Thus, it has often been said that for “the credibility of court orders and the integrity of our judicial system are to be maintained, a litigant cannot ignore court orders with impunity” (*Jones v LeFrance Leasing Ltd. Partnership*, 110 AD3d 1032, 1033, 973 NYS2d 798, 800 [2d Dept 2013]).

The test to be employed by the Supreme Court when determining discovery issues is one based on usefulness and reason (*see Andon v. 302–304 Mott St. Assoc.*, 94 NY2d 740, 746, 709 NYS2d 873). However, discovery demands which are unduly burdensome, lack specificity, or seek privileged and/or irrelevant information are improper and will be vacated (*see Board of Mgrs. of the Park Regent Condominium v. Park Regent Assoc.*, 78 AD3d 752, 753, 910 NYS2d 654; *Bell v. Cobble Hill Health Ctr., Inc.*, 22 AD3d 620, 621, 804 NYS2d 362; *Lopez v. Huntington Autohaus*, 150 AD2d 351, 352, 540 NYS2d 874; *H.R. Prince, Inc. v Elite Env'tl. Sys., Inc.*, 107 AD3d 850, 850, 968 NYS2d 122, 123–24 [2d Dept 2013])

It is incumbent on the party seeking disclosure to demonstrate that the method of discovery sought will result in the disclosure of relevant evidence or is reasonably calculated to lead to the discovery of information bearing on the claims” (*Crazytown Furniture v. Brooklyn Union Gas Co.*, 150 AD2d 420, 421, 541 NYS2d 30; *see* Seigel, N.Y. Prac. § 345; CPLR 3101[a]; *Herbst v. Bruhn*, 106 AD2d 546, 483 NYS2d 363; *Andon v. 302–304 Mott St. Assocs.*, 94 NY2d 740, 746, 709 NYS2d 873; *Palermo Mason Constr. v. AARK Holding Corp.*, 300 AD2d 460, 751 NYS2d 599; *Vyas v Campbell*, 4 AD3d 417, 418, 771 NYS2d 375, 376 [2d Dept 2004]).

Generally, “public policy strongly favors the resolution of actions on the merits whenever possible, the striking of a party's pleading is a drastic remedy which is warranted only where there has been a clear showing that the failure to comply with discovery is willful and contumacious” (*Desiderio v Geico Gen. Ins. Co.*, 153 AD3d 1322, 1322, 61 NYS3d 309, 311 [2d Dept 2017]). On an application seeking striking of a party’s pleading for refusal to comply with a court’s discovery order, movant bears the burden of making a “clear showing” that the failure to comply was willful and contumacious (*Singer v Riskin*, 137 AD3d 999, 1001, 27 NYS3d 209, 211–12 [2d Dept 2016][internal citations omitted]).

A party’s refusal “to obey an order for disclosure or willfully fail[ure] to disclose information which the court finds ought to have been disclosed ... the court may ... strik[e] out pleadings ... or dismiss[ ] the action ... or render[ ] a judgment by default against the disobedient party” (CPLR 3126[3] ). “While actions should be resolved on the merits when possible, a court may strike [a pleading] upon a clear showing that [a party's] failure to comply with a disclosure order was the result of willful and contumacious conduct.” “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 (*Honghui Kuang v MetLife*, 159 AD3d 878, 881, 74 NYS3d 88, 92 [2d Dept 2018]).

Public policy strongly favors the resolution of actions on the merits whenever possible' ” and “ ‘[t]he striking of a party's pleading is a drastic remedy only warranted where there has been a clear showing that the failure to comply with discovery demands was willful and contumacious.’ ” On an application seeking striking of a party's pleading for refusal to comply with a court's discovery order, movant bears the burden of making a “clear showing” that the failure to comply was willful and contumacious (*Singer v Riskin*, 137 AD3d 999, 1001, 27 NYS3d 209, 211–12 [2d Dept 2016])[internal citations omitted]).

The failure to comply with deadlines and provide good-faith responses to discovery demands “impairs the efficient functioning of the courts and the adjudication of claims.” The Court of Appeals has also pointed out that “[c]hronic noncompliance with deadlines breeds disrespect for the dictates of the Civil Practice Law and Rules” and has also remarked that “[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 (*Arpino v F.J.F. & Sons Elec. Co., Inc.*, 102 AD3d 201, 207, 959 NYS2d 74, 79 [2d Dept 2012]).

The nature and degree of the penalty to be imposed pursuant to CPLR 3126 is a matter within the discretion of the trial court (*Estaba v Quow*, 101 AD3d 940, 940-41, 956 NYS2d 143, 144 [2d Dept 2012]). The drastic remedy of striking an answer is not appropriate absent a clear showing that the failure to comply with discovery demands was willful or contumacious (*JPMorgan Chase Bank, N.A. v New York State Dept. of Motor Vehicles*, 119 AD3d 903, 903, 990 NYS2d 577, 578-79 [2d Dept 2014]).

The striking of a pleading may be appropriate where there is a clear showing that the failure to comply with discovery demands or court-ordered discovery is willful and contumacious. 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 (*Mears v Long*, 149 AD3d 823, 823-24, 52 NYS3d 124, 125 [2d Dept 2017]).

It is clear that the willful and contumacious nature of a party's conduct may properly be inferred from repeated delays in complying with the plaintiff's discovery demands and the Supreme Court's discovery schedule, the failure to provide an adequate excuse for such delays, and the proffer of inadequate discovery responses, which otherwise evince a lack of a good-faith effort to address the requests meaningfully (*Studer v Newpointe Estates Condominium*, 152 AD3d 555, 557, 58 NYS3d 509, 512 [2d Dept 2017]; *Schiller v Sunharbor Acquisition I, LLC*, 152 AD3d 812, 813, 60 NYS3d 79, 81 [2d Dept 2017]; *Henry v Datson*, 140 AD3d 1120, 1122, 35 NYS3d 383, 385 [2d Dept 2016]; *Stone v Zinoukhova*, 119 AD3d 928, 929, 990 NYS2d 567, 568 [2d Dept 2014]; *H.R. Prince, Inc. v Elite Env'tl. Sys., Inc.*, 107 AD3d 850, 851, 968 NYS2d 122, 124 [2d Dept 2013]; *Silberstein v Maimonides Med. Ctr.*, 109 AD3d 812, 814, 971 NYS2d 167, 169 [2d Dept 2013]).

Here, defendant has adequately demonstrated that plaintiff is in derogation of his responsibility to produce demanded discovery, both failing to abide the preliminary conference order and defendant's discovery demands. Given this history recited above, this Court finds

ample evidence adduced by movant that plaintiff's refusal to provide demanded discovery, combined with his refusal to proffer a reasonable excuse for the same, or even to oppose the pending application, constitutes willful and contumacious conduct sufficient to warrant imposition of a discovery sanction. Therefore, defendant's unopposed motion is **granted**.

Further, considering the age of this case and defendant's contention that its ability to both defend the matter and prosecute its third-party claims has been prejudiced or hampered by plaintiff's obstinance, this Court determines that the appropriate sanction or remedy is that plaintiff's complaint is hereby **stricken**.

Therefore, it is accordingly

**ORDERED** that defendants motion pursuant to CPLR 3126 seeking an order dismissing the complaint for willful and contumacious refusal to comply with orders to provide discovery is **granted**; and it is further

**ORDERED** that plaintiff's complaint is hereby dismissed; and it is further

The foregoing constitutes the decision and order of this Court.

Dated: October 2, 2019  
Riverhead, New York



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**WILLIAM G. FORD, J.S.C.**

  X   FINAL DISPOSITION

\_\_\_\_\_ NON-FINAL DISPOSITION