

**Gaulsh v Diefenbach PLLC**

2019 NY Slip Op 33149(U)

October 22, 2019

Supreme Court, New York County

Docket Number: 654346/2015

Judge: Barbara Jaffe

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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. BARBARA JAFFE PART IAS MOTION 12EFM

*Justice*

-----X

Sune Gaulsh,

Plaintiff,

- v -

Diefenbach PLLC,

Defendant.

-----X

INDEX NO. 654346/2015  
MOTION DATE \_\_\_\_\_  
MOTION SEQ. NO. 002, 003

**DECISION + ORDER ON  
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 002) 89-102, 104-116, 119, 121

were read on this order to show cause to judicially estop the assessment of damages.

The following e-filed documents, listed by NYSCEF document number (Motion 003) 63-86, 117-118

were read on this motion to compel.

By order to show cause, defendant moves for an order judicially estopping plaintiff from proceeding on a previously ordered assessment of damages. Plaintiff opposes. (Motion seq. 002).

By notice of motion, plaintiff moves for orders compelling defendant to comply with his discovery demands, and imposing sanctions for its noncompliance. Defendant opposes. (Motion seq. 003).

I. BACKGROUND

On September 8, 2015, plaintiff filed a petition for chapter seven bankruptcy with the United States Bankruptcy Court for the Southern District of New York. (NYSCEF 92).

On December 22, 2015, plaintiff commenced this action against defendant, his former counsel in a prior child custody action, advancing causes of action for breach of contract, fraudulent inducement, duress, and breach of fiduciary duty. (NYSCEF 94). Defendant did not

file an answer, and on January 5, 2017, plaintiff moved for a default judgment. (NYSCEF 5). By decision and order dated March 10, 2017, as pertinent here, plaintiff's motion for a default judgment was denied by another justice of this court, to whom this case was assigned. (NYSCEF 37). On April 3, 2017, defendant filed its answer. (NYSCEF 38).

Thereafter, the parties attended discovery conferences and served discovery demands and deficiency letters. (NYSCEF 65-69, 72-73).

On June 26, 2018, the Appellate Division, First Department, reversed the decision and order denying plaintiff's motion for a default judgment motion and remanded the case for an assessment of damages. (NYSCEF 95).

By stipulation dated September 6, 2018, the parties agreed that an assessment of damages would be held on October 18, 2018. By decision and order dated September 7, 2018, the assigned justice notified the parties that unless plaintiff filed a note of issue, the assessment of damages would not be held, and ordered plaintiff to file the note of issue "right away" so that the assessment of damages could be held on the stipulated date. (NYSCEF 102).

Instead, by email dated September 8, 2018, plaintiff demanded that defendant comply with his outstanding discovery requests (NYSCEF 75), and on September 24, 2018, defendant filed a letter with the court seeking an adjournment of the assessment of damages. (NYSCEF 61). On October 8, 2018, plaintiff sent another email to defendant demanding compliance with his outstanding discovery requests. (NYSCEF 76). By email dated October 11, 2018, defendant asked that plaintiff stipulate to extend the date for the assessment of damages. (NYSCEF 77).

On October 17, 2018, plaintiff filed a letter informing the justice that he would not be filing a note of issue as discovery remained outstanding. (NYSCEF 87). The same day, he moved on notice for an order compelling the outstanding discovery (NYSCEF 63), and defendant filed

its order to show cause (NYSCEF 89).

The case has since been assigned to me. Federal court records reflect that as of the date of this decision, plaintiff's bankruptcy case pends.

II. MOTION FOR ORDER JUDICIALLY ESTOPPING PLAINTIFF FROM PROCEEDING  
WITH THE ASSESSMENT OF DAMAGES (mot. seq. 2)

A. Contentions

1. Defendant (NYSCEF 89-102)

Defendant alleges that it discovered that plaintiff had filed for bankruptcy "within the last week," and that he had failed to disclose this action. It argues, in effect, that having failed to disclose this action as an asset in his bankruptcy petition, plaintiff has no capacity to proceed here, and is thereby judicially estopped from seeking damages.

2. Plaintiff (NYSCEF 106-116)

Plaintiff offers an affidavit filed on January 30, 2017 in this action whereby defendant's owner stated that he was aware of plaintiff's bankruptcy petition. He observes that defendant's owner did not mention therein the failure to disclose this action as an asset (NYSCEF 107), and thus argues that defendant waived the affirmative defense of lack of capacity to sue by failing to raise it in its answer.

Plaintiff also alleges that he sought to reopen his bankruptcy case to amend his asset disclosure statement.

Upon amendment, he argues, the bankruptcy trustee must be allowed to intervene and be substituted in his place, unless the trustee abandons the claim, which would permit him to litigate his claim on his own behalf. Plaintiff maintains that a dismissal of this action will prejudice the bankruptcy estate, trustee, and creditors.

### 3. Oral argument (NYSCEF 123)

On November 13, 2018, the matter was orally argued before the previously assigned justice. Defendant argued that plaintiff will not be prejudiced if the case were dismissed and that plaintiff's motion to reopen the bankruptcy case to amend his petition was denied. Defendant contended that substitution of the trustee is not adequate, and thus, even if the bankruptcy case is reopened, this action should be dismissed.

Plaintiff maintained that defendant waived its defense of lack of capacity to sue and alleged that the bankruptcy court had denied his motion to reopen the proceeding without prejudice, and that he is refiling his motion.

The court adjourned the motion pending the submission of the transcript of the oral argument on plaintiff's motion to reopen the bankruptcy proceeding held on November 8, 2018.

### 4. Defendant's supplemental submission (NYSCEF 119)

On November 30, 2018, defendant filed the transcript of the oral argument on plaintiff's motion to reopen the bankruptcy proceeding, which reflects that the court permitted plaintiff to file a memorandum of law as to why the proceeding should be reopened and ordered plaintiff to file an order denying his motion without prejudice.

### 5. Defendant's supplemental submission (NYSCEF 121)

On December 17, 2018, the bankruptcy court granted plaintiff's motion to reopen the bankruptcy proceeding. His amended bankruptcy petition reflects this action as an asset.

### B. Analysis

When a defendant defaults in answering, "such a default admits all traversable allegations contained in the complaint [...] excluding allegations as to damages." (*Access Capital, Inc. v DeCicco*, 302 AD2d 48, 52 [1st Dept 2002]). As defendant is in default, it is precluded from

challenging plaintiff's legal capacity to bring this action. (*First Franklin Fin. Corp. v Alfau*, 157 AD3d 863, 865 [2d Dept 2018]; *US Bank Nat. Ass'n v Dorestant*, 131 AD3d 467, 470 [2d Dept 2015] ["since the defendants in this action defaulted in appearing or answering the complaint and have failed to demonstrate grounds for vacating their default, they are precluded from asserting the plaintiff's lack of standing as a defense"]).

In any event, pursuant to CPLR 3211(e), a party waives the defense of lack of capacity if it is not raised in a responsive pleading. As defendant did not raise lack of capacity to sue in its answer notwithstanding its awareness of the bankruptcy proceeding, the defense is waived. (*See Guiffrida v Storico Dev., LLC*, 60 AD3d 1286, 1287 [4th Dept 2009] [failure to raise affirmative defense of lack of legal capacity to sue due to pending bankruptcy in answer results in waiver]).

### III. MOTION TO COMPEL (mot. seq. 3)

#### A. Contentions

##### 1. Plaintiff (NYSCEF 63-86)

Plaintiff maintains that the only document defendant produced in discovery is a letter dated October 16, 2017 (NYSCEF 72) containing a list of its improper objections to his discovery demands, and that defendant has not complied with the court's discovery orders. Moreover, by not seeking an order of protection, he asserts, defendant waived its right to object. Plaintiff argues that defendant's conduct warrants the imposition of sanctions under CPLR 3126, and costs for making this motion under 22 NYCRR § 130-1.1.

##### 2. Defendant (NYSCEF 117)

In opposition, defendant argues that "[g]iven that the Court has a motion before it that will effectively dispose of the case if granted, it would be a waste of the Court and the parties' resources to respond to discovery motions," and thus, requests that discovery be stayed.

### 3. Reply (NYSCEF 118)

In reply, plaintiff observes that defendant does not oppose his motion, and contends that a stay on discovery is not warranted. He reiterates his earlier contentions.

#### B. Analysis

A party may seek an order compelling compliance or a response to any request notice, interrogatory, demand, question, or order under CPLR article 31. (CPLR 3124). Plaintiff may not rely on defendant's failure to seek a protective order as proof of his entitlement to discovery. (*Pyron v Banque Francaise Du Commerce Exterieur*, 256 AD2d 204, 204–205 [1st Dept 1998]). Nevertheless, defendant neither disputes that it has not complied with plaintiff's discovery demands nor does it contest the propriety of those demands. Absent a showing that defendant willfully failed to obey an order of disclosure or willfully failed to disclose information, preclusion of evidence or striking of pleadings pursuant to CPLR 3126 is unwarranted. (*See Michaluk v New York City Health and Hosps. Corp.*, 169 AD3d 496 [1st Dept 2019] ["(s)ince defendant never sought to compel disclosure or to have preclusionary language added to any of the parties' compliance orders, its motion to dismiss ... was premature given the lack of evidence that plaintiffs' delay in conducting the deposition was willful, contumacious or due to bad faith"]; *W&W Glass, LLC v 1113 York Ave. Realty Co. LLC*, 83 AD3d 438 [1st Dept 2011] ["there appear to be no prior motions by plaintiff to compel disclosure, rendering any motion to strike the answer pursuant to CPLR 3126 premature in this case."]; *Double Fortune Prop. Investors Corp. v Gordon*, 55 AD3d 406 [1st Dept 2008] [as plaintiff responded to discovery requests, proper course was for defendant to move to compel further discovery rather than moving to strike complaint]; *see also Pehzman v Dept. of Educ. of City of New York*, 95 AD3d

625 [1st Dept 2012] [striking of answer is ultimate penalty that may be imposed only upon extreme conduct]; *Palmenta v Columbia Univ.*, 266 AD2d 90 [1st Dept 1999] [striking answer inappropriate absent clear showing that failure to comply was willful, contumacious, or in bad faith, which moving party must affirmatively establish]; *Commerce & Indus. Co. v Lib-Corn, Ltd.*, 266 AD2d 142 [1st Dept 1999] [striking of pleading “not a sanction to be routinely imposed whenever a party fails to comply with *any* item of discovery”] [emphasis in original]).

However, as the issue of liability was resolved with the granting of plaintiff’s motion for a default judgment, plaintiff’s motion to compel is granted to the sole extent that the parties are to appear for a status conference to resolve outstanding discovery issues pertaining only to damages.

Pursuant to 22 NYCRR § 130-1.1, costs may be awarded to reimburse actual expenses reasonably incurred and reasonable attorney fees. Sanctions may also be imposed against an attorney or party or both, resulting from frivolous conduct, which, as pertinent here, is undertaken: (1) although completely without merit in law; (2) primarily to delay or prolong the resolution of the litigation, or to harass or maliciously injure another; or (3) to assert material factual statements that are false. Absent evidence that defendant was motivated by a desire to prolong or delay the litigation, sanctions are unwarranted.

Defendant offers no authority for its contention that its order to show cause stays discovery, and in any event, as its order to show cause is denied, its request is moot.

#### IV. CONCLUSION

Accordingly, it is hereby

ORDERED, that defendant’s order to show cause is denied in its entirety; it is further

ORDERED, that plaintiff’s motion to compel is granted to the extent that the parties are

directed to appear for a status conference on December 18, 2019 at 2:15 pm at 60 Centre Street, Room 341, New York, New York.

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**BARBARA JAFFE, J.S.C.**

10/22/2019  
**DATE**

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE