

Shchukin House OU v Iseev
2019 NY Slip Op 33192(U)
October 28, 2019
Supreme Court, New York County
Docket Number: 155936/2016
Judge: Paul A. Goetz
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTYPRESENT: HON. PAUL A. GOETZ

PART

IAS MOTION 47EFM

Justice

SHCHUKIN HOUSE OU,

Plaintiff,

- v -

RUSTAM ISEEV,

Defendant.

INDEX NO.

155936/2016

MOTION DATE

N/A

MOTION SEQ. NO.

008DECISION + ORDER ON
MOTION

RUSTAM ISEEV

Plaintiff,

-against-

NIKOLAY SHCHUKIN, PAVEL ABRAMOV

Defendant.

Third-Party

Index No. 595166/2017

The following e-filed documents, listed by NYSCEF document number (Motion 008) 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271

were read on this motion to/for

SANCTIONS

Plaintiff Shchukin House OU, an art gallery located in Estonia which deals primarily in Russian fine art, commenced this action against defendant/third-party plaintiff Rustam Iseev, to recover five pieces of artwork that defendant Iseev allegedly stole from plaintiff. In his answer and third-party complaint, defendant Iseev asserts that plaintiff Shchukin House, its principal Nikolay Shchukin, and his associate, Pavel Abramov, pledged these five pieces of artwork to him in exchange for a \$2,000,000 loan. Defendant/third-party plaintiff Iseev now moves pursuant to CPLR 3126 for sanctions, including striking the complaint and third-party answer, based on the failure of plaintiff Shchukin House and third-party defendant Shchukin to comply with their discovery obligations, and to strike the note of issue. Defendant/third-party plaintiff

Iseev's motion is based on plaintiff and third-party defendant's failure to produce documents responsive to their demands which were served on April 20, 2017, and on the failure of Nikolay Shchukin to appear for a deposition on behalf of plaintiff and as a third-party defendant. Plaintiff Shchukin House and third-party defendant Shchukin cross-move for sanctions.

With respect to the documents, defendant/third-party plaintiff served document demands on plaintiff Shchukin House and its principal, third-party defendant Shchukin, on April 20, 2017, seeking, *inter alia*, all documents relating to plaintiff and third-party defendant's alleged ownership of the five paintings in dispute, the authenticity and value of the paintings, the sale or transfer of the paintings, and all documents concerning the ownership and management of Shchukin House. Affirmation of Irina Frolova dated September 4, 2019, Exh. I. On September 6, 2017, plaintiff and third-party defendant belatedly responded to Iseev's document requests. Although they did not object to any of Iseev's demands, they produced only a handful of documents. Frolova Aff., Exh. J. Notably absent from this production was a single document reflecting the plaintiff's ownership of three of the paintings at issue. Also, the two documents produced allegedly showing ownership of the other two paintings were produced in redacted form. Plaintiff and third-party defendant also failed to produce any documents reflecting the authenticity of the paintings, such as a chain of title report, or any reports or appraisals showing the value of the paintings, which they claim are worth \$60 million. After attempting to negotiate a resolution with plaintiff and third-party defendant's counsel, defendant/third-party plaintiff Iseev filed a motion to compel the production of all documents responsive to his requests (motion seq. #005). In its decision dated September 4, 2018, which dismissed several of plaintiff's causes of action, this court stated that the motion was denied without prejudice in order to address these issues at the next compliance conference.

At the next compliance conference which was held on November 8, 2018, plaintiff and third-party defendant's counsel objected to producing any information regarding the purchase price for the paintings unless the parties entered into a confidentiality stipulation. Although plaintiff and third-party defendant had failed to object on the basis of confidentiality before, including in their responses to the demands, the court accommodated plaintiff and third-party defendant's request and directed that they produce the records within 30 days of executing a confidentiality stipulation. At the next conference, on January 17, 2019, plaintiff and third-party defendant once again failed to produce responsive documents, including the two unredacted purchase agreements, and the court gave plaintiff and third-party defendant another opportunity to do so. On March 7, 2019, another status conference was held. Plaintiff had once again failed to comply with the prior court orders by producing documents in response to Iseev's demand and producing unredacted purchase agreements. Although it was not raised previously, plaintiff's counsel now states that they do not possess any additional responsive documents. Additionally, although the parties had entered into a confidentiality stipulation, plaintiff and third-party defendant refused to provide unredacted purchase agreements, claiming that because the stipulation was signed by counsel and not by the parties, it was insufficient.

In an effort to accommodate plaintiff and third-party defendant's newly raised objections, the court ordered them to produce any additional responsive documents or submit a "Jackson affidavit" describing, in detail, the search that was conducted. With respect to the unredacted purchase agreement, the court ordered plaintiff and third-party defendant to produce these documents or move for a protective order by March 28, 2019.

Once again, plaintiff and third-party defendant failed to submit a proper Jackson affidavit and instead filed an affidavit from Marina Preobrazhenskaya, the co-owner of Shchukin House,

which stated, in the most general terms possible, that she had conducted a search for documents and there were no additional responsive documents. The court addressed this deficiency at the next conference on April 4, 2019 and directed plaintiff and third-party defendant to submit a proper, duly notarized Jackson affidavit which detailed the search that was conducted. Although plaintiff filed another affidavit on April 13, 2019, it was once again, deficient. Accordingly, at the June 13, 2019 conference, the court once again directed plaintiff to submit a detailed Jackson affidavit specifying the search conducted. Again, plaintiff failed to comply and failed to submit any additional affidavit in accordance with the order.

It is evident, based on the conduct above, that plaintiff and third-party defendant have no intention of complying with the court's orders or providing defendant/third-party plaintiff with any meaningful document discovery in this matter. Despite being given multiple opportunities to comply, plaintiff and third-party defendant have failed to do so and instead, have obstructed and delayed the production of documents in this matter by raising belated and frivolous objections to discovery.

What's more, plaintiff and third-party defendant's obstructionist tactics have also prevented defendant/third-party plaintiff from taking the deposition of Nikolay Shchukin, one of the principals of plaintiff Shchukin House and a third-party defendant in this matter. By order dated April 4, 2019, Nikolay Shchukin was directed to appear for a deposition in New York on June 4, 2019, or if undue hardship was shown, by video conference in Estonia before a diplomatic representative. A few days prior to scheduled deposition, defendant/third-party plaintiff Iseev's counsel emailed plaintiff and third-party defendant's counsel to confirm the deposition. Frolova Aff., Exh. Y. In response, plaintiff and third-party defendant's counsel responded, without providing any explanation, that his client was unavailable to appear for a

deposition in New York. Although he stated that the client would be available to take the deposition remotely in a private house in Russia, he failed to explain or provide any evidence of undue hardship for Shchukin's inability to appear in New York for his deposition or to provide a means to conduct the deposition before a diplomatic representative, as required by the order.

When the parties appeared for the next scheduled conference on June 13, 2019, the court gave Shchukin another opportunity to appear for a deposition, in either New York, Estonia or Russia, by July 30, 2019. Although initially plaintiff's counsel stated that his client could appear in New York for the deposition, he later represented that he could only appear in Russia due to Visa issues. Frolova Aff., Exh. Z. Further, he could not arrange for the deposition to be held before a diplomatic representative, as required by the order. Thus, plaintiff and third-party defendant have violated at least two court orders by failing to proceed with the deposition in New York, or, by showing undue hardship and arranging for a remote deposition before a diplomatic representative, as required by the orders and CPLR 3113.

In sum, plaintiff and third-party have thwarted defendant Iseev's ability to obtain any meaningful discovery in this matter and to pursue his claims and defenses. Under these circumstances, defendant Iseev is entitled to the most severe sanction in the form of striking the plaintiff and third-party defendant's pleadings. *See Loeb v. Assara New York I LP*, 118 A.D.3d 457 (1st Dep't 2014); *Oasis Sportswear v. Rego*, 95 A.D.3d 592 (1st Dep't 2012).

In addition to opposing the motion, plaintiff and third-party defendant filed a cross-motion pursuant to CPLR 3126 seeking sanctions against defendant/third-party plaintiff Iseev and his counsel. The cross-motion is primarily based on what occurred at the scheduled conference held on August 15, 2019. Plaintiff and third-party defendant argue that the conference should never have been held because they recently filed the note of issue. Thus, their

counsel failed to appear for the scheduled conference, claiming that the conference should have been “aborted” due to the filing of the note of issue. However, plaintiff’s improper filing of the note of issue four days before the scheduled conference does not mean that he was no longer obligated to appear for the scheduled conference. At no time did the court cancel the conference. Nor did plaintiff and third-party defendant’s counsel ever inquire as to whether he was still required to appear for the conference. Plaintiff and third-party defendant’s alleged presumption that he was not required to appear for the conference because he filed the note of issue was incorrect and he may not complain that his client is now being penalized for his own mistake.

Moreover, the alleged misrepresentations by defendant/third-party plaintiff counsel’s to the court were not misrepresentations at all but were accurate and truthful statements concerning the status of discovery in this matter. Although Shchukin purported to appear for a remote deposition in Moscow on July 29, 2019, this deposition did not comply with the requirements of CPLR 3113, which requires that the deposition be held before a diplomatic and consular agent. Likewise, plaintiff and third-party defendant had failed to file a revised Jackson affidavit, as required by the court’s prior order dated June 13, 2019, which detailed the search conducted. Thus, both of the alleged misrepresentations were in fact accurate statements and plaintiff and third-party defendant’s cross-motion must be denied. Accordingly, it is

ORDERED that the motion for sanctions is granted and the complaint of plaintiff Shchukin House and the answer of third-party defendant Shchukin are stricken; and it is further

ORDERED that the cross-motion for sanctions is denied; and it is further

ORDERED that the note of issue filed by plaintiff is stricken; and it is further

ORDERED that, on or before November 15, 2019, defendant/third-party plaintiff shall serve a copy of this order with notice of entry upon, and file a note of issue and statement of readiness with, the Clerk of the General Clerk's Office (60 Centre Street, Room 119), and pay the fee therefor; 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); and it is further

ORDERED that, upon said filing and the payment of the appropriate fee, the Clerk shall place this matter upon the trial calendar for an inquest as to damages on the counterclaims and third-party complaint.

10/28/19
DATE


PAUL A. GOETZ, J.S.C.

CHECK ONE:

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CASE DISPOSED

☒

GRANTED

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DENIED

☒

NON-FINAL DISPOSITION

☐

GRANTED IN PART

☐

OTHER

APPLICATION:

☐

SETTLE ORDER

☐

SUBMIT ORDER

CHECK IF APPROPRIATE:

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INCLUDES TRANSFER/REASSIGN

☐

FIDUCIARY APPOINTMENT

☐

REFERENCE