

J.P.'s Catering, Inc. v MIPR Hudson Val. Corp.

2019 NY Slip Op 34064(U)

April 2, 2019

Supreme Court, Orange County

Docket Number: EF009182-2017

Judge: Sandra B. Sciortino

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.

This opinion is uncorrected and not selected for official publication.

To commence the statutory time for appeals as of right (CPLR 5513 [a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ORANGE

-----X
J.P.'s CATERING, INC., doing business as Made in Puerto Rico Latin Cuisine & Sports Bar, JOSE MANUEL POLLOCK, and KELLY POLLOCK,
Plaintiffs,

-against-

DECISION AND ORDER
INDEX NO.: EF009182-2017
Motion Date: 02/21/2019
Sequence No. 3

MIPR HUDSON VALLEY CORP. And JOSE MANUEL TORRES,
Defendants.

-----X
SCIORTINO, J.

The following papers numbered 1 to 8 were considered in connection with the unopposed application of defendants for an Order dismissing the Complaint and granting an inquest on the Counterclaims:

PAPERS

NUMBERED

Amended Notice of Motion/Affirmation (Rubin-Gaines)/
Exhibits A-F

1 - 8

Background and Procedural History

This action arises out of a dispute concerning the ownership and rights to run a restaurant located in the Town of Wallkill, New York. Plaintiffs opened a restaurant in 2015. In 2017, plaintiffs began to negotiate with defendant Torres to sell an ownership interest in exchange for monetary contributions he would make to improve and reopen the restaurant. The parties began to have disagreements about management, and plaintiffs were eventually locked out of the premises.

On November 9, 2017, plaintiffs electronically filed a Summons and Complaint. The Complaint asserted several causes of action, including injunctive relief, declaratory judgment, breach of fiduciary duty, tortious interference with business, trespass and wrongful ejection. The following day, November 10, 2017, plaintiffs filed an Order to Show Cause to enjoin defendants from entering or possessing the restaurant property. A temporary restraining order was granted on November 15, 2017. Thereafter, plaintiffs operated the restaurant for some time, but the restaurant was closed again. By Order dated April 24, 2018, the temporary restraining order was vacated.

In the interim, defendants filed a Verified Answer and Counterclaims (Exhibit F) on January 17, 2018. Defendants sought, *inter alia*, damages for moneys invested in the amount of \$350,000; a declaration of constructive trust on the leased premises; specific performance of the parties' agreement, and an accounting.

Shortly thereafter, on July 6, 2018, plaintiffs' counsel moved to be relieved. That application was adjourned to August 17, 2018, at which time plaintiffs failed to appear; however, in a telephone call to the Court on August 16, 2018, they indicated their consent to the relief. The attorney's application was granted by Decision and Order dated August 17, 2018. The matter was adjourned to October 1, 2018, whereupon plaintiffs were reminded that the corporation must be represented by counsel. (Exhibit A)

On October 1, 2018, plaintiffs once again failed to appear. The conference was adjourned to October 19, 2018. The individual plaintiffs appeared on that date, but no attorney appeared on behalf of the plaintiff corporation. A discovery schedule was set, and the matter adjourned to December 10, 2018. Defendants served and re-served discovery demands, including Interrogatories and Combined Demands. (Exhibits C and D) Plaintiffs did not serve demands or respond to

defendants' demands.

On December 10, 2018, plaintiffs once again failed to appear.

Motion to Dismiss

By Notice of Motion electronically filed on January 23, 2019, defendants seek an order dismissing the Complaint and granting an inquest on defendants' counterclaims. Reciting the history as outlined herein, defendants assert that the extensive delay caused by plaintiffs' failure to appear and their continued failure to retain counsel to represent the corporate plaintiff permits an inference of willful failure to disclose. Moreover, Civil Practice Law & Rules §321(a) requires a corporation to appear by counsel; and failure to retain counsel is grounds for an entry of default judgment. The individual plaintiffs' failure to have appeared at conferences scheduled on August 17, 2018, October 1, 2018 and December 10, 2018 further warrants dismissal of their individual claims.

Plaintiffs have not filed any papers in response to the motion.

Plaintiff has not opposed the motion.

DISCUSSION

On the basis of the foregoing, defendants' application to dismiss the Complaint with prejudice is granted. Section §202.27 of the Uniform Rules for trial courts provides, in relevant part, that:

At any scheduled call of a calendar or at any conference, if all parties do not appear and proceed or announce their readiness to proceed immediately...., the judge may note the default on the record and enter an order as follows:

- (a)
- (b) If the defendant appears but the plaintiff does not, the judge may dismiss the action and may order a severance of counterclaims or cross-claims.

Plaintiffs brought this action in November 2017, and have yet to appear with counsel,

cooperate with discovery or advance the matter in any meaningful way. They have failed to appear at numerous conferences and have continued to refuse to secure counsel for the corporate entity. Plaintiffs have not offered any excuse or responded to the motion for default. Further, Civil Practice Law and Rules §3124 requires full, complete and compulsory disclosure. The failure to provide disclosure is sanctionable pursuant to section §3126. Where there has been a repeated failure to deliver the requisite discovery, and repeated failure to adequately respond to court directives, without explanation, willful and contumacious failure can be inferred. (*Devito v. J & J Towing, Inc.*, 17 AD3d 624 [2d Dept 2005]) In such a circumstance, the striking of a pleading is appropriate. (*Smookler v Dicerbo*, 166 AD3d 838 [2d Dept 2018])

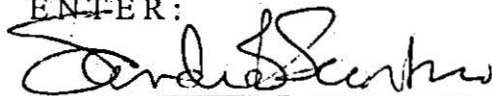
On the basis of the foregoing, the Complaint is dismissed, and the counterclaims are hereby severed. This matter shall be set down for inquest on May 13, 2019 at 10:00 a.m.

All matters not decided herein are denied.

The foregoing constitutes the decision and order of the court.

Dated: April 2, 2019
Goshen, New York

ENTER:



HON. SANDRA B. SCIORTINO, J.S.C.

TO: *Counsel of Record via NYSCEF*

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