

Arellius Enters., Inc. v City of White Plains
2019 NY Slip Op 34176(U)
July 9, 2019
Supreme Court, Westchester County
Docket Number: 59839/2018
Judge: Joan B. Lefkowitz
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (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 period 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 WESTCHESTER-COMPLIANCE PART

-----X
ARELLIUS ENTERPRISES, INC. d/b/a BATTLEGROUND
ZERO,

Plaintiff,

-against-

CITY OF WHITE PLAINS,

Defendant.
-----X

LEFKOWITZ, J.

DECISION and ORDER

Index No. 59839/2018

Motion Date: July 1, 2019

Seq. No. 4

The following papers were read on defendant’s motion for an order pursuant to CPLR 3126 precluding plaintiff from introducing any evidence in support of its claim for lost income damages, directing plaintiff to reimburse defendant for reasonable attorney’s fees incurred in appearing at compliance conferences, directing plaintiff to reimburse defendant for costs associated with the filing of the present motion, extending the time for defendant to conduct the completion of plaintiff’s deposition and the deposition of a witness from the White Plains City Building Department, and the issuance of a conditional order dismissing plaintiff’s complaint should plaintiff fail to oppose this motion and/or appear for its deposition:

- Order to Show Cause; Affirmation in Support; Exhibits A-L;
- Affirmation in Opposition; Exhibits 1-10
- NYSCEF File

Upon the foregoing papers and the proceedings held on July 1, 2019, this motion is determined as follows:

Plaintiff commenced this action by the filing of a summons and verified complaint on June 25, 2018. Plaintiff alleges that defendant issued a building permit in connection with a retail video-game store and video-gaming center that plaintiff intended to open at the Galleria Mall in White Plains, New York. Plaintiff claims that it suffered monetary damages when defendant allegedly negligently suspended the permit. Defendant filed a verified answer on August 28, 2018. On November 19, 2018, the parties appeared for a preliminary conference and entered into a preliminary conference stipulation which was so-ordered on November 27, 2018. Pursuant to the Preliminary Conference Order, plaintiff was required to serve its verified bill of particulars by January 21, 2019, demands for discovery and inspection and interrogatories were to be served on

or before January 31, 2019, with responses thereto to be served within 30 days thereafter. Defendant served a demand for a verified bill of particulars on December 21, 2018 and a first set of interrogatories and combined demands on January 31, 2019.

The parties appeared on March 7, 2019 for a compliance conference. The March 8, 2019 Compliance Conference Order directed plaintiff to serve a verified bill of particulars, verified responses to interrogatories, a response to the Preliminary Conference Order, and responses to the combined demands on or before March 29, 2019. The March 8, 2019 Compliance Conference Order warns that the “failure to comply strictly with the terms hereof shall be grounds for the striking of pleadings or other relief pursuant to CPLR 3126.”

The parties appeared for a compliance conference on April 11, 2019. The Compliance Conference Order from that conference directed, inter alia, plaintiff to serve a verified bill of particulars, verified responses to interrogatories, responses to the Preliminary Conference Order, and responses to the combined demands on or before April 26, 2019. The Order warned plaintiff “that compliance with Court orders is mandatory . . . late service of discovery responses does not constitute compliance. Noncompliance with this order shall result in the issuance of a briefing schedule and shall be grounds for the striking of pleadings, dismissal, preclusion, imposition of costs and/or sanctions and any other relief the Court deems warranted.”

The parties appeared for a compliance conference on April 30, 2019. As of the April 30, 2019 conference, plaintiff had produced a bill of particulars, interrogatory responses, and a response to the combined demands, however certain attachments to the combined demands had not been produced. During the April 30, 2019 conference, plaintiff’s counsel represented that those attachments had been recently mailed to defense counsel and would be received within several days. The Compliance Conference Order from that conference directed the completion of plaintiff’s deposition on May 17, 2019 and the completion of defendant’s deposition on or before May 31, 2019. When defense counsel did not receive the promised attachments, the parties were directed to appear at a compliance conference on May 15, 2019 at which time the court issued a briefing schedule for the present application.

Defendant brings this motion seeking CPLR 3126 relief on the grounds that plaintiff failed to respond to defendant’s discovery demands in violation of the Preliminary Conference Order and two compliance conference orders, that plaintiff misrepresented to the court that the attachments were mailed to defendant prior to the April 30, 2019 conference when they were not actually mailed out until May 16, 2019, and that plaintiff’s responses are incomplete.

Plaintiff responds that it neither refused to obey an order nor willfully failed to disclose information. Plaintiff argues, inter alia, that it disclosed information in response to the demands and has acted in good faith. Plaintiff further argues it has a reasonable excuse for any delay in responding to the demands on the grounds that plaintiff has suffered substantial financial losses as a result of defendant’s actions which it contends has hindered plaintiff’s ability to gather the information necessary to respond to the demands. Plaintiff further contends that the negative publicity allegedly suffered by plaintiff as a result of defendant’s action resulted in plaintiff’s inability to develop alternative locations for its business to recoup its losses. Plaintiff further argues

that there were additional delays due to a substitution of counsel in January 2019.

At oral argument plaintiff's counsel represented that all outstanding discovery had been provided and defendant's counsel confirmed it had received all outstanding discovery that day.

Pursuant to CPLR 3101(a), a party is entitled to "full disclosure of all matter material and necessary in the prosecution or defense of an action." The phrase "material and necessary" is "to be interpreted liberally to require disclosure, upon request, of any facts bearing on the controversy which will assist preparation for trial by sharpening the issues and reducing delay and prolixity. The test is one of usefulness and reason" (*Allen v Crowell-Collier Publ. Co.*, 21 NY2d 403, 406 [1968] [internal quotation marks omitted]; see *Matter of Kapon v Koch*, 23 NY NY3d 32 [2014]). The party seeking disclosure has the burden 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 (*Foster*, 74 AD3d at 1140). The court has broad discretion to supervise discovery and to determine whether information sought is material and necessary in light of the issues in the matter (*Mironer v City of New York*, 79 AD3d 1106, 1108 [2d Dept 2010]; *Auerbach v Klein*, 30 AD3d 451, 452 [2d Dept 2006]).

CPLR 3126 provides that if any party "wilfully fails to disclose information which the court finds ought to have been disclosed," the court may, inter alia, issue an order of preclusion or an order striking the pleadings, dismissing the action, or rendering judgment by default against the disobedient party. "The nature and degree of the penalty to be imposed on a motion pursuant to CPLR 3126 is a matter generally left to the discretion of the Supreme Court" (*Carbajal v Bobo Robo*, 38 AD3d 820 [2d Dept 2007]). To invoke the drastic remedy of striking a pleading a court must determine that the party's failure to disclose is wilful and contumacious (*Greene v Mullen*, 70 AD3d 996 [2d Dept 2010]; *Maiorino v City of New York*, 39 AD3d 601 [2d Dept 2007]). "Wilful and contumacious conduct can be inferred from repeated noncompliance with court orders ... coupled with no excuses or inadequate excuses" (*Russo v Tolchin*, 35 AD3d 431, 434 [2d Dept 2006]; see also *Prappas v Papadatos*, 38 AD3d 871, 872 [2d Dept 2007]).

In the present case, plaintiff failed to timely respond to discovery demands in violation of four court orders which has necessitated otherwise unnecessary court appearances and motion practice. Plaintiff's conduct has wasted the resources of defendant's counsel and of the Court. However, insofar as plaintiff has, albeit belatedly, complied with its discovery obligations the Court finds that an order of preclusion is unwarranted at this time. However, defendant is entitled to a monetary award of costs associated with bringing the present motion.

All other arguments raised on this motion and evidence submitted by the parties in connection thereto have been considered by this court, notwithstanding the specific absence of reference thereto.

Accordingly, it is:

ORDERED that defendant's motion is granted to the extent that on or before July 22, 2019, plaintiff's counsel shall remit to defense counsel the sum of \$250.00 for costs associated with the making of this motion. Plaintiff shall upload proof of the foregoing to the NYSCEF website on or before July 22, 2019; and it is further

ORDERED that all parties shall appear at a conference in the Compliance Part, Courtroom 800, on July 25, 2019 at 9:30 a.m.; and it is further;

ORDERED that defendant shall serve a copy of this Decision & Order, with notice of entry, upon plaintiff within five days of entry.

The foregoing constitutes the Decision & Order of this court.

Dated: White Plains, New York
July 9, 2019



HON. JOAN B. LEEKOWITZ, J.S.C.

To:
Service Upon All Counsel Via NYSCEF

cc: Compliance Part Clerk