

Musso v OTR Media Group, Inc.
2020 NY Slip Op 30528(U)
February 6, 2020
Supreme Court, Kings County
Docket Number: 523025/18
Judge: Leon Ruchelsman
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS : CIVIL TERM: COMMERCIAL 8

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ROBERT J. MUSSO, Chapter 7 Trustee of the
Estate of Ladder 3 Corp.

Plaintiff, Decision and order

- against -

Index No. 523025/18

OTR MEDIA GROUP, INC., AHARON NOE
a/k/a ARI NOE, SARAH NOE, ZYSHE NOE,
MOSHE MINZ, C & M CAPITAL GROUP, LLC.,
GUARDIAN LIFE INSURANCE COMPANY OF
AMERICA, UNITED STATES LIFE INSURANCE
COMPANY, INC., THE CITY OF NEW YORK,
GREENFIELD CUSTOM BUILDERS, INC.,
PARK NATIONAL CAPITAL FUNDING, LLC.,
WHOOPI U.S.A., INC., STERLING CATERERS, INC.,
DEAL BUSTER, INC., BLIZZARD COOLING, INC.,
AND OTR330 BRUCKNER, LLC.,

ms # 1 & 2

Defendants, February 6, 2020

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PRESENT: HON. LEON RUCHELSMAN

The plaintiff has moved pursuant to CPLR §3126 seeking to strike the defendants answer for the failure to comply with discovery. The plaintiff has also moved seeking to strike the discovery and inspection served upon the plaintiff pursuant to CPLR §3101. The defendants oppose the motions. Papers were submitted by the parties and arguments held. After reviewing all the parties this court now makes the following determination.

In 2017 the plaintiff obtained a judgement against defendant OTR Media Group Inc., in the amount of \$287,500 in a Chapter & proceeding in the United States Bankruptcy Court. That judgement was based upon OTR's breach of a stipulation of settlement

executed in 2011 regarding breach of contract claims that took place in 2010. This current lawsuit alleges violations of the debtor creditor law asserting that fraudulent conveyances were made by the individual defendants leaving OTR insolvent.

The plaintiff served discovery demands on the defendants which the defendants did not comply with on the grounds personal issues have prevented them from complying. In addition, the plaintiff has moved seeking the items sought need not be provided.

Conclusions of Law

It is well settled that the trial court maintains broad discretion concerning the appropriate sanction for a discovery violation (Espinal v. City of New York, 264 AD2d 806, 695 NYS2d 610 [2d Dept., 1999]). The severe sanction of striking a pleading is appropriate where it can be demonstrated that the failure to comply with discovery was the result of wilful and contumacious conduct (Harris v. City of New York, 211 AD2d 663, 622 NYS2d 289 [2d Dept., 1995]). Such conduct may be inferred from a party's actions, specifically a long period of time passing without complying with the discovery coupled with the absence of any reasonable excuse to explain such failure to comply (Birch Hill Farm Inc., v. Reed, 272 AD2d 282, 707 NYS2d 188 [2d Dept., 2000]). Generally, the failure of either party to

provide sought after discovery and to follow the express order of the court demonstrates a "pattern of wilful default and neglect" concerning the outstanding discovery (Clarke v. United Parcel Service Inc., 300 AD2d 614, 752 NYS2d 395 [2d Dept., 2002]). Thus, each party is required to introduce a reasonable excuse why such discovery has yet been complied with (Birch Hill Farm Inc., supra).

The court is mindful of the events which have taken place in the defendant's lives which has prevented them from complying with discovery and is satisfied that such non-compliance was not wilful and does not demonstrate a pattern of non compliant behavior. However, the discovery is necessary for the continuation of the lawsuit therefore the defendants must comply with all discovery within 45 days of this order.

Concerning the discovery served upon the plaintiff, the defendant asserts the discovery is relevant because it will "demonstrate Plaintiff's unclean hands and possible fraud-which will establish another affirmative defense to these claims" (see, Affirmation of Aharon Noe, ¶ 4). However, the claims that are being asserted in this lawsuit have nothing whatsoever to do with the discovery sought by the defendants. The claims in this action only deal with fraudulent transfers and violations of the debtor creditor law. The information sought by the defendants

concerns the past conduct which led to a judgement, however, the merits of the judgement are not being litigated in this action, now could the judgement be litigated at this juncture.

Therefore, the discovery sought is not relevant to any of defendants defenses regarding fraudulent transfers and consequently the motion seeking to strike the discovery served by the defendant is granted.

So ordered.

ENTER:

DATED: February 6, 2020
Brooklyn N.Y.



Hon. Leon Ruchelsman
JSC

KINGS COUNTY CLERK
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