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| Safir v Charm City Hous., LLC |
| 2020 NY Slip Op 31619(U) |
| April 22, 2020 |
| Supreme Court, Kings County |
| Docket Number: 501085/17 |
| Judge: Lawrence S. Knipel |
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At an IAS Term, Commercial Part 4 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 22nd day of April, 2020.

P R E S E N T:

HON. LAWRENCE KNIPEL,

Justice.

-----X
DAVID SAFIR,

Plaintiff,

- against -

CHARM CITY HOUSING, LLC and AMOS WEINBERG,

Defendants.
-----X

DECISION AND ORDER

Index No. 501085/17

Mot. Seq. Nos. 4-5

The following e-filed papers read herein:

NYSCEF#:

Notice of Motion/Cross Motion, Affirmation (Affidavit),
and Exhibits Annexed _____

64-73: 75-90

Reply Affirmations and Exhibits Annexed _____

92-96: 98-100

In this action to recover damages for breach of contract and for other relief, plaintiff David Safir (plaintiff) moves in Seq. No. 4 for leave, pursuant to CPLR 2221 (e), to renew (1) his prior motion for an order restoring this action to the active status and scheduling a Final Disposition Pre-Note Conference, and (2) the prior cross motion of defendants Charm City Housing, LLC and Amos Weinberg (collectively, defendants) for an order, pursuant to 22 NYCRR § 202.27 (b), dismissing the complaint for plaintiff counsel's failure to appear at such conference, or, in the alternative, for an order, pursuant to CPLR 3126 (3), striking the complaint for failure to comply with court-ordered discovery; and, upon renewal, vacating the order, dated June 7, 2019 (NYSCEF #60) (the prior order), which denied his prior motion and granted defendants' prior cross motion. Defendants cross-move in Seq. No. 5 "in the event plaintiff's motion to renew . . . is granted and the action is restored," for an order striking plaintiff's complaint with prejudice, pursuant to CPLR 3126 (3), for failure to comply with court-ordered discovery.

Disposition of Plaintiff's Motion

A motion for leave to renew “shall be based upon new facts not offered on the prior motion that would change the prior determination” and “shall contain reasonable justification for the failure to present such facts on the prior motion” (CPLR 2221 [e] [2] - [3]). “The requirement that a motion for leave to renew must be based on new facts is a *flexible* one” (*Rakha v Pinnacle Bus Servs.*, 98 AD3d 657, 658 [2d Dept 2012] [emphasis added]).

In a case squarely on all fours with the facts here, the Second Judicial Department in *Rakha* granted the plaintiff therein leave to renew. There, as here, “the action was never formally dismissed, as the calendar procedures of CPLR 3404 do not apply to pre-note of issue actions, no 90-day notice was ever issued pursuant to CPLR 3216, and no order was issued dismissing the action under 22 NYCRR 202.27” (*Rakha*, 98 AD3d at 658 [internal citations omitted]). Under the circumstances of this case, the Court, upon renewal, vacates the prior order, grants plaintiff’s prior motion to restore the case to the active status, and denies defendants’ prior cross motion for dismissal of the complaint (*see Rakha*, 98 AD3d at 658; *see also Deutsche Bank Natl. Trust Co. v Gambino*, 181 AD3d 558 [2d Dept 2020]; *Bank of Am., N.A. v Shami*, 173 AD3d 954, 955 [2d Dept 2019]; *Wells Fargo Bank, N.A. v Drago*, 170 AD3d 1083, 1084 [2d Dept 2019], *lv denied* 33 NY3d 911 [2019]).

Disposition of Defendants' Cross Motion

“The Supreme Court has broad discretion in supervising disclosure and in resolving discovery disputes” (*Clarke v Clarke*, 113 AD3d 646, 646 [2d Dept 2014]). “A court may strike a party’s pleading or impose some other sanction if the party ‘refuses to obey an order for disclosure or wilfully fails to disclose information which the court finds ought to have been disclosed’” (*Household Fin. Realty Corp. of NY v Della Cioppa*, 153 AD3d 908, 910 [2d Dept 2017], quoting CPLR 3126). “However, before a court invokes the drastic remedy of striking a pleading, or even of deeming certain issues resolved in accordance with the

movant's claims, there must be a clear showing that the failure to comply with discovery was willful and contumacious" (*Immaculada Lopez v Bell Sports, Inc.*, 175 AD3d 1524, 1525 [2d Dept 2019]).

Here, defendant has submitted insufficient evidence to demonstrate that plaintiff's failure to comply with prior discovery orders was willful and contumacious. Contrary to defendants' contention, they are not entitled to discovery of plaintiff's tax returns and the W-9 forms (Request for Taxpayer Identification Number and Certification). It is well established that "tax returns are generally not discoverable in the absence of a strong showing that the information is indispensable to the [defense]. . ." (*Latture v Smith*, 304 AD2d 534, 536 [2d Dept 2003]). Defendants have failed to demonstrate the existence of special circumstances warranting disclosure of plaintiff's tax returns and the W-9 forms (*see Altidor v State-Wide Ins. Co.*, 22 AD3d 435, 435-436 [2d Dept 2005]). More fundamentally, under the circumstances of this case where *defendants* allegedly owe *plaintiff* money which he invested with defendants from time to time, the initial source(s) of plaintiff's funds and how he subsequently accounted to the taxing authorities regarding those funds, including the monthly income therefrom, are not material and necessary to the defense of this action. Any impeachment value of any false statements that plaintiff may have made to the taxing authorities is far removed from the narrow issue in the case – namely, whether defendants owe plaintiff money – and is outweighed by the strong policy disfavoring disclosure of tax returns and related information, such as the W-9 forms (*see Lichtman v Gibbons*, 30 AD3d 319 [1st Dept 2006]). In that regard, the Court notes that both the pending criminal case against plaintiff (*see* defendants' cross motion, Exs. L-M [NYSCEF #88-89]) and the defendant, Amos Weinberg's, prior one-year suspension of his law license regarding matters

not involving plaintiff (see *Matter of Weinberg*, 25 AD3d 157 [2d Dept 2005]),¹ are unrelated to the substantive issue of this case.

Conclusion

Based on the foregoing and after oral argument, it is hereby

ORDERED that in Seq. No. 4 leave to renew plaintiff's prior motion and defendants' prior cross motion is *granted* and, upon renewal: (1) the order, dated June 7, 2019 (NYSCEF #60), is *vacated*; (2) plaintiff's prior motion is *granted*; (3) defendants' prior cross motion is *denied*; and (4) the prior administrative dismissal of the action on Mar. 8, 2019 is *vacated* and the action is restored to the active status nunc pro tunc to Mar. 8, 2019; and it is further

ORDERED that defendants' cross motion in Seq. No. 5 is *denied*; and it is further

ORDERED that the parties are directed to appear for a Final Disposition Pre-Note Conference in Commercial Part Trial Part 4 on August 13, 2020 at 9:30 a.m.; and it is further

ORDERED that plaintiff's counsel is directed to electronically serve a copy of this decision and order with notice of entry on defendants' counsel and to electronically file an affidavit of service thereof with the Kings County Clerk.

This constitutes the decision and order of the Court.

ENTER FORTHWITH,


K.S.C.
Hon. Lawrence Knipfel

¹ See Plaintiff's Affidavit in Support of Motion, dated Sept. 11, 2019, ¶ 3 ("In 2013, I was approached by defendant Amos Weinberg, *who was my attorney at the time*, with a proposition to invest a substantial sum of money into Mr. Weinberg's company, defendant Charm City Housing, LLC, which is in the business of turning vacant Maryland properties into rental housing.") (emphasis added; capitalization omitted) (NYSCEF #66).