

Bueller v 1625-1631 Fulton Ave. Owner LLC
2020 NY Slip Op 32829(U)
August 27, 2020
Supreme Court, New York County
Docket Number: 650660/2017
Judge: Robert R. Reed
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. ROBERT R. REED PART 43

Justice

-----X

RENEE BUELLER,

Plaintiff,

- v -

1625-1631 FULTON AVE OWNER LLC, GEORGE
BARANOWSKY, LES REAL ESTATE GROUP LLC

Defendant.

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INDEX NO. 650660/2017

MOTION DATE N/A

MOTION SEQ. NO. 004

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 004) 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75

were read on this motion for SANCTIONS

Upon the foregoing documents, it is ordered that this motion is granted in part and denied in part.

In this breach of contract action, plaintiff Renee Bueller (Bueller) alleges that individual defendant George Baranowsky (Baranowsky) and she were the sole members of corporate defendant LES Real Estate Group (LES). Bueller alleges that Baranowsky and she each owned 50% of LES. Bueller further alleges the existence of a consultant fee agreement between LES and co-defendant 1625-1631 Fulton Ave Owner LLC (Fulton LLC). Bueller, as the thrust of her complaint, asserts that Baranowsky liquidated the fee agreement for a lump sum, when Baranowsky neither had apparent or direct authority to do so. As a result, Bueller complains, she has been damaged.

In the instant motion, defendants allege that Bueller has failed to respond to their second discovery demand, dated February 13, 2019. Defendants assert that Bueller's failure to respond is in utter disregard of three previous status conference orders, dated May 16, 2019, July 11,

2019, and October 3, 2019, respectively. The previous orders expressly directed Bueller to provide responses to defendants' second discovery demand. In that second discovery demand, defendants seek documents that purport to show Bueller's membership in LES and her entitlement to a portion of the LES consultancy fee. Defendants assert that, as of the date the instant motion, Bueller has failed to produce any evidence of her alleged membership in LES and her entitlement to a portion of the consultancy fee.

Defendants now move, pursuant to CPLR 3126, for an order (1) declaring that plaintiff was not a member of LES Real Estate Group, and (2) to preclude plaintiff from offering evidence of the same at trial. Defendants argue that plaintiff's blatant disregard for three previous court orders is indicative of plaintiff's willful and contumacious conduct in her failure to respond to their demands. In opposition, Bueller argues that she has been hospitalized a number of times since September 2019, that she has provided responses to previous interrogatories indicating that she is a member of LES, and that defendants' second discovery demand seeks information that was already produced or of which she is not in possession.

CPLR 3101 requires 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 Publishing Co.*, 21 NY2d 403).

CPLR 3126 authorizes the court to sanction a party who "refuses to obey an order for disclosure or willfully fails to disclose information which the court finds ought to have been disclosed." In addition, a failure to comply with discovery, particularly after a court order has been issued, may constitute the "dilatory and obstructive, and thus contumacious, conduct

warranting the striking of [a party's pleading]" (*Kutner v Feiden, Dweck & Sladkus*, 223 AD2d 488, 489 [1st Dept 1998]).

Defendants assert that the documents they seek are central to plaintiff's claims that she is a member of LES and therefore entitled to a portion of the consultancy fee. Plaintiff has conceded in her opposition that she failed to respond to the aforementioned court orders. In plaintiff's sworn affidavit accompanying her opposition, plaintiff explains that her failure to comply with court orders dated May 16, 2019, July 11, 2019, and October 3, 2019 was due to her numerous hospitalizations. However, plaintiff has failed to submit any hospital records or even a doctor's note to support this excuse. Likewise, plaintiff's counsel never claimed at previous status conferences that plaintiff was hospitalized or that counsel had been unable to communicate with plaintiff. The record is devoid of any attempt by plaintiff's counsel, before this motion, to advise defense counsel that plaintiff had been hospitalized and was therefore unable to respond to defendants' second discovery demand. Moreover, the court cannot simply overlook plaintiff's failure to comply with previous status conference orders of May 16, 2019 and July 11, 2019 -- before plaintiff's alleged hospitalizations beginning September 2019.

Nevertheless, the remedy defendants seek is drastic. "To invoke the drastic remedy of preclusion of evidence of evidence for discovery violations, the court must determine that the offending party's lack of cooperation with disclosure was willful, deliberate and contumacious" (*see Assael v. Metropolitan Tr., Auth.*, 4 AD3d 443; *see also Pryzant v. City of New York*, 300 AD2d 383). The court is not prepared to excuse plaintiff's conduct to the point as reasonable. Still, it is not prepared to conclude at this time that such conduct warrants preclusion. The court notes, indeed, that there are other discovery methods yet available to defendants to procure the information they seek or to establish an evidentiary concession by plaintiff.

Accordingly, it is

ORDERED that defendants' motion is granted to the limited extent that, within 21 days of the entry of this order, plaintiff is directed to respond to defendants' second discovery demand, dated February 13, 2019, and, if plaintiff contends that she is not in possession or control of any of the requested documents, plaintiff is directed to provide a Jackson affidavit by someone with knowledge detailing where the search for such documents took place, the methods used, and the efforts is any, used to preserve such documents; and it is further

ORDERED that defendants' motion is in all other ways denied, without prejudice.

This constitutes the Decision and Order of the court.

8/27/2020

DATE

ROBERT R. REED, J.S.C.

CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input type="checkbox"/>	DENIED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	<input type="checkbox"/>	OTHER
APPLICATION:	<input type="checkbox"/>	GRANTED	<input type="checkbox"/>		<input checked="" type="checkbox"/>	GRANTED IN PART	<input type="checkbox"/>	
CHECK IF APPROPRIATE:	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>		<input type="checkbox"/>	SUBMIT ORDER	<input type="checkbox"/>	REFERENCE
	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>		<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/>	