

**Alison's Bright Ideas, Inc. v Urbandaddy, Inc.**

2020 NY Slip Op 32946(U)

September 4, 2020

Supreme Court, New York County

Docket Number: 650532/2019

Judge: Nancy M. Bannon

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. NANCY M. BANNON PART IAS MOTION 42EFM

Justice

-----X

ALISON'S BRIGHT IDEAS, INC.
Plaintiff,

- v -

URBANDADDY, INC.
Defendant.

-----X

INDEX NO. 650532/2019
MOTION DATE 08/17/2020
MOTION SEQ. NO. 003

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 003) 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62 were read on this motion to/for STRIKE PLEADINGS.

In this breach of contract action, the plaintiff, a provider of recruitment and placement services, seeks to recover unpaid fees from the defendant, a media company that used its services. By an order dated May 6, 2019, the court granted the plaintiff's motion to strike the defendant's counterclaims pursuant to CPLR 3211(a)(7). By an order dated January 22, 2020, the court granted the plaintiff's motion pursuant to CPLR 3126 to strike the defendant's answer or compel discovery to the extent of directing the defendant to provide all outstanding discovery in response to the demand dated October 31, 2019, on or before January 27, 2020, or it would be precluded from offering evidence at trial.

A status conference order dated January 30, 2020, states that the defendant did not respond in full to all outstanding discovery demands by January 27, 2020. The order precluded the defendant from offering certain evidence at trial in support of its defenses and directed the defendant to provide other discovery on or before March 25, 2020, with the admonition that the defendant's failure to comply with that directive would result in the striking of the answer. The order listed, in paragraphs 1 through 10, the precise items of discovery that the defendant was to provide, and includes the parties' contract, documents relating to any candidates referred by the plaintiff and hired by the defendant, documents concerning compensation paid by the defendant to certain candidates, emails between certain candidates and the defendant, and the

names of the individuals who furnished information upon which the defendant responded to the plaintiffs; interrogatories. A status conference was scheduled for March 25, 2020, and the Note of Issue deadline was set at March 31, 2020.

The March 25, 2020, status conference was not held due to the COVID-19 health crisis and temporary courthouse closure. This motion ensued.

By the instant motion, filed June 29, 2020, the plaintiff seeks to strike the defendant's answer pursuant to CPLR 3126 for failure to comply with the court's orders, and entry of a money judgment and attorney's fees and for sanctions pursuant to 22 NYCRR 130.1.1 payable to the Client's Security Fund. The plaintiff claims that the defendant failed to produce the subject discovery or a Jackson affidavit by March 25, 2020, as required by the order, requiring the striking of the answer.

The defendant failed to timely oppose the motion. The plaintiff agreed to extend its time to oppose until August 7, 2020. The stipulation was incorporated into an order dated July 22, 2020. The defendant did not file its opposition papers until early on August 8, 2020.

In its opposition, the defendant does not dispute that it delayed in providing discovery and in violation of court orders. However, the defendant maintains that it made good faith efforts to comply, responded in full prior to the January 30, 2020, conference and that the plaintiff only objected to the defendant's disclosure one hour prior to the status conference. The defendant does not, however, state that it has since complied with the January 30, 2020 order and provided all discovery listed therein. Indeed, the plaintiff represents that the discovery was never provided. Nor does the defendant argue that the plaintiff's discovery demands were overbroad, not "material and necessary" to the litigation or otherwise improper. The court acknowledges that counsel for the defendant relates that, due to the COVID-19 health crisis, beginning in March 2020 he experienced ongoing serious family health issues that took him out of town. However, no excuse or explanation is provided for the lapse of time between January 30, 2020, and March 2020, and counsel does not explain why another attorney could not assist him.

CPLR 3126 authorizes the court to sanction a party who "refuses to obey an order for disclosure or wilfully fails to disclose information which the court finds ought to have been disclosed" and that "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 the [pleading].” Kutner v Feiden, Dweck & Sladkus, 223 AD2d 488, 489 (1<sup>st</sup> Dept. 1998); see CDR Creances S.A. v Cohen, 104 AD3d 17 (1<sup>st</sup> Dept. 2012); Reidel v Ryder TRS, Inc., 13 AD3d 170 (1<sup>st</sup> Dept. 2004). The court can infer willfulness from repeated failures to comply with court orders or discovery demands without a reasonable excuse. See LaSalle Talman Bank, F.S.B. v Weisblum & Felice, 99 AD3d 543 (1<sup>st</sup> Dept. 2012); Perez v City of New York, 95 AD3d 675 (1<sup>st</sup> Dept. 2012); Figiel v Met Food, 48 AD3d 330 (1<sup>st</sup> Dept. 2008); Ciao Europa, Inc. v Silver Autumn Hotel Corp., Ltd., 270 AD2d 2 (1<sup>st</sup> Dept. 2000). Furthermore, CPLR 3101(a) provides that “there shall be full disclosure of all matter material and necessary in the prosecution or defense of an action” and this language is “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.” Osowski v AMEC Constr. Mgt., Inc., 69 AD3d 99, 106 (1<sup>st</sup> Dept. 2009) quoting Allen v Crowell-Collier Publ. Co., 21 NY2d 403, 406-407 (1968).

Upon considering this authority and the facts and circumstances of this case, the motion is granted to the extent that the defendant’s answer is stricken unless it provides all outstanding discovery set forth in the court’s orders, or a Jackson affidavit where appropriate, within thirty (30) days of service of this order on the defendant’s counsel by e-mail. The plaintiff’s request for sanctions pursuant to 22 NYCRR 130.1.1 is denied.

In so ruling, the court takes into account that the plaintiff made a prior motion for relief under CPLR 3126, which resulted in the defendant being precluded from offering evidence at trial, that the defendant provided some, albeit limited, discovery prior to January 27, 2020, that the January 30, 2017, order warned the defendant that non-compliance would result in the striking of the answer, and that the final deadline provided to the defendant extended to March 25, 2020, after the COVID-19 health crisis had begun to accelerate in the U.S..

The court also considers that the plaintiff had filed a Note of Issue on December 12, 2019, representing that all discovery was complete, the same day it filed the prior motion seeking further discovery. A Note of Issue may not be filed while any discovery is outstanding. Counsel are reminded that when the court gives a Note of Issue deadline, it means that the Note of Issue may be filed on or before that date *provided that all discovery is complete*. It is not a directive to file a Note of Issue notwithstanding outstanding discovery, as doing so would

require counsel to make a misrepresentation in the Certificate of Readiness. In any event, the COVID-19 health crisis presents "unusual or unanticipated circumstances" warranting the post-note discovery ordered herein. See 22 NYCRR 202.21(d).

Finally, this order shall be self-executing, and will become absolute upon the defendant's failure to comply with the court's directives, without the necessity of further motion practice. See Standard Fire Ins. Co. v Federal Pacific Electric Co., 14 AD3d 213 (1st Dept. 2004); Lopez v City of New York, 2 AD3d 693 (2nd Dept. 2003). The plaintiff may file an affirmation of non-compliance and shall notify chambers of any such filing.

Accordingly, and upon the foregoing papers, it is

ORDERED that the plaintiff's motion to strike the defendant's answer pursuant to CPLR 3126 is granted to the extent that the answer is stricken unless the defendant provides all outstanding discovery directed in this court's prior orders, or a Jackson affidavit where appropriate, within 30 days of service of this order on the defendant's counsel by e-mail, and the motion is otherwise denied, it is further

ORDERED that the Clerk shall mark the file accordingly.

This constitutes the Decision and Order of the court.

  
NANCY M. BANNON, J.S.C.  
HON. NANCY M. BANNON

9/4/2020  
DATE

CHECK ONE:

CASE DISPOSED  
 GRANTED  DENIED

NON-FINAL DISPOSITION  
 GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE