

<b>Courtney v Board of Mgrs. of the Chadwin House</b>
2020 NY Slip Op 33418(U)
October 15, 2020
Supreme Court, New York County
Docket Number: 151677/17
Judge: Lynn R. Kotler
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**SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY**

PRESENT: HON. LYNN R. KOTLER, J.S.C.

PART 8

TODD COURTNEY

INDEX NO. 151677/17

- v -

MOT. DATE

THE BOARD OF MANAGERS OF THE CHADWIN HOUSE

MOT. SEQ. NO. 004

The following papers were read on this motion to/for _____	
Notice of Motion/Petition/O.S.C. — Affidavits — Exhibits	ECFS DOC No(s). _____
Notice of Cross-Motion/Answering Affidavits — Exhibits	ECFS DOC No(s). _____
Replying Affidavits	ECFS DOC No(s). _____

Plaintiff is a former resident of the defendant condominium. Plaintiff asserts causes of action for conversion of personal property, breach of contract, breach of duty of good faith and fair dealing, negligence and negligent supervision/retention, assault, defamation and *prima facie* tort. Plaintiff now moves to strike the defendant’s answer and/or for an adverse inference at trial as well as for costs. Defendants oppose the motion.

Plaintiff’s motion is prolix and an affront to the court’s limited resources during normal times, let alone in the midst of a global pandemic. Plaintiff requests oral argument, which is granted in the court’s discretion. Oral argument is an opportunity to propound one’s arguments, not establish them in the manner they should have been made in the first instance. Plaintiff’s motion papers fail to clearly identify what items of discovery remain outstanding, when the demands were made, when the responses were due, and what, if anything was provided. The court is not in a position to waste its limited resources to rectify the errors made by plaintiff’s counsel in seeking extraordinary and drastic relief such as striking the defendant’s answer. Nonetheless, the court will consider the motion in the interests of moving this case towards its logical conclusion.

This case has been ongoing for nearly three years. Plaintiff’s counsel largely takes issue with responses that were made and/or due long ago. He has annexed every conference order in this case which obfuscates the record. Defense counsel for the condominium defendants states in opposition: “Plaintiff has brought a motion to strike Defendants’ Answer and draw adverse inferences after a seventh (sic) month silence following one e-mail and a post-EBT demand in January for information either previously exchanged or not in Defendants’ possession as attested to in an Affidavit of Diligent Search.” Meanwhile, counsel for co-defendant Koubti admits that to the extent that he has failed to properly respond to outstanding demands, his actions were not willful and contumacious and “we remain amenable to scheduling co-defendants’ deposition on a mutually agreeable date, as well as an extension of

Dated: 10/15/20

  
\_\_\_\_\_  
HON. LYNN R. KOTLER, J.S.C.

- 1. Check one:  CASE DISPOSED  NON-FINAL DISPOSITION
- 2. Check as appropriate: Motion is  GRANTED  DENIED  GRANTED IN PART  OTHER
- 3. Check if appropriate:  SETTLE ORDER  SUBMIT ORDER  DO NOT POST  
 FIDUCIARY APPOINTMENT  REFERENCE

time for Plaintiff to file his note of issue.”

Pursuant to Uniform Rules for Trial Courts (22 NYCRR) §202.7 [a], a party seeking to compel disclosure is required to serve and file an affirmation of a good faith effort to resolve the underlying discovery dispute. Such an affirmation must indicate the time, place and nature of the consultation, the issues discussed and any resolutions, or must show good cause why no such conferral with opposing counsel was held (Uniform Rules for Trial Cts. [22 NYCRR] §202.7 [c]; *Natoli v. Milazzo*, 65 AD3d 1309 [2nd Dept 2009]; *148 Magnolia v. Merrimack Mut. Fire Ins. Co.*, 62 AD3d 486 [1st Dept 2009]).

The "good faith" requirement is intended to remove from the court's workload all but the most significant and unresolvable disputes over what has been the most prolific generator of pretrial motions: discovery issues. Most seasoned litigators know that, with a modicum of good sense, discovery disputes can and should be resolved by the attorneys without the necessity of judicial intervention (*Eaton v. Chahal*, 146 Misc 2d 977, 982, 553 N.Y.S.2d 642 [Sup Ct., Rensselaer County, 1990])

The Court finds plaintiff's counsel's affirmation of good faith deficient. The affidavit references emails annexed to plaintiff's motion-in-chief. The emails are dated December 10, 2019, which contains a laundry list of items supposedly outstanding:

This includes the following: (1) per the attached 5/28/19 Compliance Conference Order, a response to the attached 5/21/19 Fourth Notice for Discovery and Inspection (e.g. inspection and surveillance records); (2) insurance information and documents per the attached 4/23/19 compliance conference order (the 1/22/19 Order referenced therein is also attached hereto); documents responsive to number "4" of plaintiff's 8/23/17 Notice for Discovery and Inspection attached hereto (within "Combined Demands") (employment files of defendant Sam Koubti), as required in the 1/22/19 Order attached hereto. Please produce same by email or alternative expedited manner at your earliest convenience and in any event at least 5 days prior to the 12/19/19 deposition of Sam Koubti so it can be reviewed prior to that deposition.

On January 2, 2020, plaintiff's counsel sent another email which stated:

Counselors - this serves as an additional good faith effort to secure rye outstanding discovery again demanded below as I still have not received same from you. Also I served deposition notices of the remaining defendants and write to confirm tomorrow's deposition of David Richman. Please confirm by noon today so I can arrange for a court reporter. Further violations of the most recent Compliance Conference Order will immediately be brought to Judge Kotler's attention.

Finally, in an email dated March 5, 2020, just weeks before the entire state of New York was shut down to non-essential business, plaintiff's counsel wrote:

Counselors – this is a good faith effort to secure outstanding discovery, in addition to other remaining outstanding discovery noted previously. The most recent Court Order required a meet and confer by 2/15/20. I did not hear from you. Also, Mr. Scanga the Court required your response to our post-ebt demand by 2/14/20. You did not respond. Kindly respond and comply with the foregoing ASAP or we will move the Court as appropriate. Aaron M. Schlossberg, Esq.

Plaintiff's correspondence as to what discovery items are outstanding or what was provided is largely amorphous and unclear. To the extent that the 3/5/20 email does identify that a response to plaintiff's post-EBT demand remains outstanding, the court does not find that plaintiff has made a good faith effort to resolve his discovery disputes with the defendants prior to bringing the motion. This takes into account the Covid-19 pandemic and Governor Cuomo's executive orders regarding the closure of

non-essential business, and the fact that plaintiff has failed to identify any efforts made since March 5, 2020 to remedy defendants' alleged non-compliance with outstanding discovery prior to bringing the instant motion on August 10, 2020.

To the extent that plaintiff seeks an order striking the defendants' answers, the motion is denied. "Striking the answer of a party is an 'extreme and drastic penalty,' warranted where the conduct is 'clearly deliberate or contumacious'" (*Hunter Mechanical Corp. v. Salkind*, 237 AD2d 180 [1st Dept 2000]). Where the discovery not provided will not "deprive the plaintiff of the means of proving his claim", an adverse inference may be an appropriate remedy rather than striking a pleading (see *i.e. Mylonas v. Town of Brookhaven*, 305 AD2d 561 [2d Dept 2003]).

Plaintiff wants defendants' employee file for defendant Koubti. Meanwhile, the defendants have provided an affidavit dated April 22, 2019 from David Richman, Property Manager at defendant Mark Greenberg Real Estate Co. LLC, who claims that he searched for responsive documents in compliance with the court's 1/22/19 order and states:

All responsive information and documents yielded in this search have been provided to defendants' attorneys for production in this matter, with the exception of documents related to the tax certiorari ease, which the defendants are attempting to obtain from counsel in that case.

The court cannot order the defendants to produce that which does not exist. The court will direct defendants to respond to plaintiff's outstanding post-EBT demand to the extent not already provided. Otherwise, the court finds that plaintiff has failed to show that any of the remaining discovery he complains has not been provided will deprive him of the opportunity to prove his claims. Accordingly, that portion of the motion to strike defendants' answers is denied and the issue of whether plaintiff is entitled to an adverse inference for missing documents or any other discovery is hereby referred to the trial judge to determine at the time of trial.

As was previously noted, this case is three years old, and depositions have still not yet been completed. Accordingly, the motion is otherwise granted to the following extent: [1] all outstanding depositions previously noticed and/or specified in a prior court order shall be completed within 60 days remotely, or in-person if all parties and witnesses agree; [2] plaintiff is directed to file note of issue on or before January 29, 2021. No further extensions of this deadline will be granted except on good cause shown upon a formal application via notice of motion or order to show cause. The motion is otherwise denied.

## CONCLUSION

In accordance herewith, it is hereby

**ORDERED** that the motion is granted to the following extent:

[1] defendants are directed to respond to all outstanding post-EBT demands to the extent not already provided within 20 days;

[2] all outstanding depositions previously noticed and/or specified in a prior court order shall be completed within 60 days remotely, or in-person if all parties and witnesses agree;

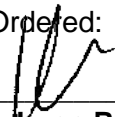
[3] plaintiff is directed to file note of issue on or before January 29, 2021. No further extensions of this deadline will be granted except on good cause shown upon a formal application via notice of motion or order to show cause; and

[4] plaintiff may request an adverse inference for any missing documents or other discovery at the time of trial to the trial judge assigned to this case.

And it is further **ORDERED** that the motion is otherwise denied.

Any requested relief not expressly addressed herein has nonetheless been considered and is hereby expressly denied and this constitutes the Decision and Order of the court.

Dated: 10/15/20  
New York, New York

So Ordered:  
  
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Hon. Lynn R. Kotler, J.S.C.