

Navatar Group, Inc. v Seale & Assoc., Inc.
2020 NY Slip Op 34138(U)
December 11, 2020
Supreme Court, New York County
Docket Number: 653643/2018
Judge: Nancy M. Bannon
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PRESENT: HON. NANCY M. BANNON **PART** **IAS MOTION 42EFM**

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INDEX NO. 653643/2018

MOTION DATE 12/11/2020

MOTION SEQ. NO. 004

**DECISION + ORDER ON
MOTION**

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were read on this motion to/for

DISMISS

The plaintiff served discovery demands on the defendant, and the defendant responded, but the plaintiff responded to the defendant's demands late or not at all. By an order dated October 23, 2019, the court granted a motion by the defendant to compel discovery to the extent of directing the plaintiff to respond to the interrogatories and other demands served by the defendant on or before November 1, 2019 (MOT SEQ 001). The court denied that branch of the motion which sought sanctions, costs and attorney's fees, without prejudice to renew in a separate motion. A preliminary conference order also dated October 23, 2019, noted the plaintiff's recalcitrance and directed it to "respond fully" before November 1, 2019.

Several more months ensued without compliance. An order issued following a compliance conference on January 16, 2020, states that “discovery is not complete because Navatar has not abided by the court’s order to respond to discovery requests, interrogatories and notices to admit. The court directed the plaintiff to respond on or before February 3, 2020, and cautioned that “failure to comply may result in preclusion or other sanctions pursuant to CPLR 3126.” Rather than comply, the plaintiff moved to reargue the defendant’s motion to compel discovery and sought a protective order (MOT SEQ 003). By an order dated April 30, 2020, the court denied the plaintiff’s motion in its entirety, crediting the defendant’s arguments that the requested discovery was “material and necessary” (CPLR 3101[a]) and that the plaintiff’s objections were untimely and therefore waived. See CPLR 3122(a)(1). The court again directed the plaintiff to respond “to the defendant’s notices to admit, interrogatories and other documents demands within 45 days.” The court extended the Note of Issue deadline to provide the plaintiff a final opportunity to comply. It did not.

On June 23, 2020, the defendant filed the instant motion pursuant to CPLR 3126, its second such motion, seeking to strike the complaint and the plaintiff’s answer to the defendant’s counterclaims. The plaintiff failed to timely respond to the motion and then claimed in a letter that counsel was “away on vacation for twelve days and did not have sufficient time to prepare opposition papers.” In a response letter, counsel for the defendant points out that the plaintiff’s counsel “repeatedly sought extensions, missed deadlines, and refused to cooperate with discovery and now seeks further delay by asking for three additional weeks to prepare his opposition.” The defendant nonetheless agreed to an extension. After several months, during which time the plaintiff’s counsel could have prepared opposition, the court granted yet another extension, this time to November 30, 2020, for the plaintiff to file opposition. It was not until that very final date, November 30, 2020, that plaintiff filed the opposition. In his brief, three-page affirmation, counsel makes no excuses for the delays and does not dispute the recalcitrant conduct attributed to him, but merely protests against the striking of a complaint as a draconian measure and expresses hope that this motion will be rendered moot if his appeal from the prior order is successful. However, the appeal also appears untimely (see CPLR 5513) and lacking in merit (see CPLR 5501[a]). The plaintiff then makes a final plea for another 30 days to produce the outstanding discovery.

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” 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 (1st Dept. 1998); see CDR Creances S.A. v Cohen, 104 AD3d 17 (1st Dept. 2012); Reidel v Ryder TRS, Inc., 13 AD3d 170 (1st 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 (1st Dept. 2012); Perez v City of New York, 95 AD3d 675 (1st Dept. 2012); Figiel v Met Food, 48 AD3d 330 (1st Dept. 2008); Ciao Europa, Inc. v Silver Autumn Hotel Corp., Ltd., 270 AD2d 2 (1st 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 (1st Dept. 2009) quoting Allen v Crowell-Collier Publ. Co., 21 NY2d 403, 406-407 (1968).

Notably, although the plaintiff attempts to invoke the delays and temporary courthouse closures occasioned by the COVID-19 public health emergency, it provides no detail of how this prevented it from filing opposition sooner than November 30, 2020, or from providing the subject discovery. In that regard, on June 22, 2020, the Chief Administrative Judge of the Courts issued an Administrative Order directing that “counsel and litigants are strongly encouraged to pursue discovery in a cooperative fashion and to employ remote technology whenever possible.” See Administrative Order of the Chief Administrative Judge of the Courts AO/129/20. The plaintiff failed to comply with that order as well.

In light of the plaintiff’s conduct over the course of discovery in this action, as outlined in the defendant’s submissions and this court’s prior orders, and considering the above referenced authority and the other facts and circumstances of this case, the defendant’s motion is granted to the extent that the complaint and the plaintiff’s answer to the defendant’s counterclaims are stricken pursuant to CPLR 3126 unless the plaintiff provides all outstanding discovery within 20 days of this order.

Accordingly, it is

ORDERED that the defendant's motion to strike the complaint pursuant to CPLR 3126 is granted to the extent that the complaint and the plaintiff's answer to the defendant's counterclaims will be stricken unless the plaintiff provides all outstanding discovery within 20 days of the date of this order.

This constitutes the Decision and order of the court.


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

<u>12/11/2020</u>			
DATE			
CHECK ONE:	☐ CASE DISPOSED	☒ NON-FINAL DISPOSITION	
	☐ GRANTED ☐ DENIED	☒ GRANTED IN PART	☐ OTHER
APPLICATION:	☐ SETTLE ORDER	☐ SUBMIT ORDER	
CHECK IF APPROPRIATE:	☐ INCLUDES TRANSFER/REASSIGN	☐ FIDUCIARY APPOINTMENT	☐ REFERENCE