SHORT FORM ORDER

INDEX NO.: 611937-2016

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 38 - SUFFOLK COUNTY

PRESENT:

HON. WILLIAM G. FORD
JUSTICE OF THE SUPREME COURT

Motion Submit Date: 02/27/20
Mot Conf Held: 06/25/19
Mot Seq: 007 - Mot D; RTC

x

ALAN WUNDERLICH,

Plaintiff,

-against-

LIBERTY MEADOWS, LLC, DEMETRIUS TSUNIS & ENRICO SCARDA,

Defendants

THE HOWARD O. WUNDERLICH REVOCABLE LIVING TRUST, THE ADELINE E. WUNDERLICH REVOCABLE LIVING TRUST & ADELINE E. WUNDERLICH,

Nominal Defendants.

x

PLAINTIFF'S COUNSEL:
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DEFENDANT'S COUNSEL:
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In this electronically filed action, on plaintiffs motion to strike defendants' answer or in the alternative to compel discovery, the Court considered the following papers: NYCEF Docs. Nos. 161 – 180; and upon due deliberation and full consideration of the same; it is

ORDERED that as follows; and it is further

ORDERED that plaintiff's counsel is hereby directed to serve a copy of this decision and order with notice of entry via electronic filing and electronic mail upon all counsel forthwith; and it is further

ORDERED that, if applicable, within 30 days of the entry of this decision and order, that defendant's counsel is also hereby directed to give notice to the Suffolk County Clerk as required by CPLR 8019(c) with a copy of this decision and order and pay any fees should any be required.

The parties and their counsel are presumed knowledgeable of all the salient and material facts and circumstances underlying this matter, the same having been previously recited in this Court's prior decisions and orders. In the interest and furtherance of judicial economy, the same will not be

reiterated here.

As indicated previously by this Court in prior decisions, discovery in this matter is ongoing with depositions of defendants haven completed. That notwithstanding, plaintiff has moved to strike defendants' answer pursuant to CPLR 3126 for failure to produce demanded disclosure, or failing that, in the alternative to compel defendants' production of the requested discovery pursuant to CPLR 3124.

The discovery dispute forming the basis of plaintiff's motion deals with plaintiff's standing request for the production of certain documents, first requested in June 2017, and supplemented in August 2018, after defendant Tsunis' and Scarda's depositions in March and May 2018, relating to the corporate dealings of defendant Liberty Meadows concerning its management of its condominium community. Plaintiff, having learned new information concerning Tsunis and Scarda's corporate affairs in Liberty Meadows, bank borrowing and governance of the company, and relationship with a purchaser of a specific condo unit in the community which plaintiff contends should have been sold to him, sought production of documents such as the purchase agreement for that unit, emails and other correspondence and bank lending information for the company. Counsel for the parties agreed to meet and confer to devise search terms for Scarda and Tsunis to employ in their diligent search for responsive documentation. Defendants made voluminous production of documents alleged to be responsive, but plaintiff maintains that much of it is repetitive. Further plaintiff maintains that still outstanding is any documentation pertaining to the subsequent sale and conveyance of the condo unit plaintiff seeks to have specifically conveyed to him. Therefore, plaintiff seeks discovery sanctions or an order to compel, in addition to a binding representation of the defendants that the requested documentation does not exist.

Defendants oppose plaintiff's motion primarily on formalistic grounds. First they argue that a promotion conference required by this Court's rules was not held. However, counsel for both parties appeared and conferenced this matter on June 25, 2019, rendering that argument hollow. Next, defendants complain that plaintiff's application lacks a proper affirmation of good faith rendering it fatally defective. This contention too is unsuccessful, where as here, the matter was the proper subject of a subsequent court conference, negotiated stipulation between counsel, and the application itself contains evidence in writing of counsels' attempt to meet and confer to reach a resolution of the discovery impasse. Lastly, defendants contend that the sanction of striking a pleading is unwarranted here as too strict a penalty absent a prior conditional order. Moreover, defendants maintain that they have objected to plaintiff's discovery demands as burdensome, overbroad and seeking irrelevant information.

In response, plaintiff notes that this is the second such motion he has had to make to compel discovery, warranting some heightened relief. Additionally, plaintiff argues that many, if not all of defendants' objections are waived, having not been made timely on receipt of plaintiff's demands.

CPLR 3101(a) broadly mandates "full disclosure of all matter material and necessary in the prosecution or defense of an action." This provision is liberally interpreted in favor of disclosure (*see* ***Kavanagh v. Ogden Allied Maintenance Corp.***, 92 NY2d 952, 954; ***Allen v. Crowell–Collier Publ. Co.***, 21 NY2d 403, 406; ***Matter of Skolinsky,*** 70 AD3d 845, 892 NYS2d 913; ***Riverside Capital Advisors, Inc. v. First Secured Capital Corp.***, 292 AD2d 515, 739 NYS2d 281; ***Ural v Encompass Ins. Co. of Am.***, 97 AD3d 562, 566, 948 NYS2d 621, 625–26 [2d Dept 2012]).

It is well settled that a trial court is vested with broad discretion to supervise the discovery process, and its determinations in that respect will not be disturbed in the absence of demonstrated abuse (*see* ***United Airlines v. Ogden New York Servs.***, 305 AD2d 239, 240, 761 NYS2d 16; ***Cho v. 401–403 57th St. Realty Corp.***, 300 AD2d 174, 176, 752 NYS2d 55*);* ***Ulico Cas. Co. v. Wilson, Elser, Moskowitz, Edelman & Dicker***, 1 AD3d 223, 224, 767 NYS2d 228 [1st Dept. 2003]). However, the courts on the other hand recognized that "parties to a civil dispute are free to chart their own litigation course and, in so doing, they may stipulate away statutory, and even constitutional rights' " (***Astudillo v MV Transp., Inc.***, 136 AD3d 721, 721, 25 NYS3d 289, 290 [2d Dept 2016]). Thus, it has often been said that for "the credibility of court orders and the integrity of our judicial system are to be maintained, a litigant cannot ignore court orders with impunity" (***Jones v LeFrance Leasing Ltd. Partnership***, 110 AD3d 1032, 1033, 973 NYS2d 798, 800 [2d Dept 2013]).

The test to be employed by the Supreme Court when determining discovery issues is one based on usefulness and reason (*see* ***Andon v. 302–304 Mott St. Assoc.***, 94 NY2d 740, 746, 709 NYS2d 873). However, discovery demands which are unduly burdensome, lack specificity, or seek privileged and/or irrelevant information are improper and will be vacated (*see* ***Board of Mgrs. of the Park Regent Condominium v. Park Regent Assoc.***, 78 AD3d 752, 753, 910 NYS2d 654; ***Bell v. Cobble Hill Health Ctr., Inc.***, 22 AD3d 620, 621, 804 NYS2d 362; ***Lopez v. Huntington Autohaus***, 150 AD2d 351, 352, 540 NYS2d 874; ***H.R. Prince, Inc. v Elite Envtl. Sys., Inc.***, 107 AD3d 850, 850, 968 NYS2d 122, 123–24 [2d Dept 2013]).

The words 'material and necessary' as used in section 3101 must '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.' " Discovery is not unlimited, however, and the supervision of discovery is generally left to the broad discretion of the trial court. At the same time, a party is "not entitled to unlimited, uncontrolled, unfettered disclosure" (***Quinones v 9 E. 69th St., LLC***, 132 AD3d 750, 750, 18 NYS3d 106, 107–08 [2d Dept 2015]). Accordingly, the supervision of disclosure and the setting of reasonable terms and conditions therefor rests within the sound discretion of the trial court and, absent an improvident exercise of that discretion, its determination will not be disturbed" (***Gould v Decolator***, 131 AD3d 445, 446–47, 15 NYS3d 138, 140 [2d Dept 2015][internal citations omitted]).

It is incumbent on the party seeking disclosure to demonstrate that the method of discovery sought will result in the disclosure of relevant evidence or is reasonably calculated to lead to the discovery of information bearing on the claims" (***Crazytown Furniture v. Brooklyn Union Gas Co.***, 150 AD2d 420, 421, 541 NYS2d 30; *see* Seigel, N.Y. Prac. § 345; CPLR 3101[a]; ***Herbst v. Bruhn***, 106 AD2d 546, 483 NYS2d 363; ***Andon v. 302–304 Mott St. Assocs.***, 94 NY2d 740, 746, 709 NYS2d 873; ***Palermo Mason Constr. v. AARK Holding Corp.***, 300 AD2d 460, 751 NYS2d 599; ***Vyas v Campbell***, 4 AD3d 417, 418, 771 NYS2d 375, 376 [2d Dept 2004]).

A motion to compel discovery under CPLR 3124 should be denied where the document demands are overly broad, vexatious, and tend to confuse, rather than sharpen, the central issue of negligence (***Brandes v N. Shore Univ. Hosp.***, 1 AD3d 550, 551, 767 NYS2d 666, 667 [2d Dept 2003]). More importantly, where discovery requests are numerous, the court will not prune the requests even though some of them may be proper (***Chang v SDI Intern., Inc.***, 15 AD3d 520, 521, 789 NYS2d 892, 893 [2d Dept 2005]).

Generally, "public policy strongly favors the resolution of actions on the merits whenever possible, the striking of a party's pleading is a drastic remedy which is warranted only where there has been a clear showing that the failure to comply with discovery is willful and contumacious" (***Desiderio v Geico Gen. Ins. Co.***, 153 AD3d 1322, 1322, 61 NYS3d 309, 311 [2d Dept 2017]). On an application seeking striking of a party's pleading for refusal to comply with a court's discovery order, movant bears the burden of making a "clear showing" that the failure to comply was willful and contumacious (***Singer v Riskin***, 137 AD3d 999, 1001, 27 NYS3d 209, 211–12 [2d Dept 2016] [internal citations omitted]). Therefore, the drastic remedy of striking a pleading is warranted where a party's failure to comply with court-ordered disclosure is willful and contumacious (***Mangru v Schering Corp.***, 90 AD3d 621, 622, 933 NYS2d 897 [2d Dept 2011]). Such a determination of whether to strike a pleading lies within the sound discretion of the trial court (***JPMorgan Chase Bank, N.A. v New York State Dept. of Motor Vehicles***, 119 AD3d 903, 903, 990 NYS2d 577, 578 [2d Dept 2014]).

A party's refusal "to obey an order for disclosure or willfully fail[ure] to disclose information which the court finds ought to have been disclosed ... the court may ... strik[e] out pleadings ... or dismiss[ ] the action ... or render[ ] a judgment by default against the disobedient party" (CPLR 3126[3]). "Willful and contumacious conduct may be inferred from a party's repeated failure to comply with court-ordered discovery, coupled with inadequate explanations for the failures to comply, or a failure to comply with court-ordered discovery over an extended period of time (***Honghui Kuang v MetLife***, 159 AD3d 878, 881, 74 NYS3d 88, 92 [2d Dept 2018]).

The failure to comply with deadlines and provide good-faith responses to discovery demands "impairs the efficient functioning of the courts and the adjudication of claims." The Court of Appeals has also pointed out that "[c]hronic noncompliance with deadlines breeds disrespect for the dictates of the Civil Practice Law and Rules" and has also remarked that "[i]f the credibility of court orders and the integrity of our judicial system are to be maintained, a litigant cannot ignore court orders with impunity (***Arpino v F.J.F. & Sons Elec. Co., Inc.***, 102 AD3d 201, 207, 959 NYS2d 74, 79 [2d Dept 2012]).

The nature and degree of the penalty to be imposed pursuant to CPLR 3126 is a matter within the discretion of the trial court (***Estaba v Quow***, 101 AD3d 940, 940-41, 956 NYS2d 143, 144 [2d Dept 2012]). The drastic remedy of striking an answer is not appropriate absent a clear showing that the failure to comply with discovery demands was willful or contumacious (***JPMorgan Chase Bank, N.A. v New York State Dept. of Motor Vehicles***, 119 AD3d 903, 903, 990 NYS2d 577, 578-79 [2d Dept 2014]).

It is clear that the willful and contumacious nature of a party's conduct may properly be inferred from repeated delays in complying with the plaintiff's discovery demands and the Supreme Court's discovery schedule, the failure to provide an adequate excuse for such delays, and the proffer of inadequate discovery responses, which otherwise evince a lack of a good-faith effort to address the requests meaningfully (***Studer v Newpointe Estates Condominium***, 152 AD3d 555, 557, 58 NYS3d 509, 512 [2d Dept 2017]; ***Henry v Datson***, 140 AD3d 1120, 1122, 35 NYS3d 383, 385 [2d Dept 2016]; ***Stone v Zinoukhova***, 119 AD3d 928, 929, 990 NYS2d 567, 568 [2d Dept 2014]).

The Second Department has that part compliance with discovery requests may be sufficient to prevent preclusion or striking of pleadings noting that substantial compliance "with outstanding discovery requests, and [the inability to]to produce certain documents because they did not exist or

were not in its possession" militates against granting an application to strike a defendant's answer (***Maffai v County of Suffolk***, 36 AD3d 765, 766, 829 NYS2d 566, 567 [2d Dept 2007]; *see also* ***Euro-Cent. Corp. v Dalsimer, Inc.***, 22 AD3d 793, 794, 803 NYS2d 171, 173 [2d Dept 2005] [response to plaintiff's notice for discovery and inspection asserting that the documents requested by the plaintiff do not exist, are not in his possession, or cannot be located suffices since defendant cannot be compelled to produce documents which do not exist or are not in his possession]; ***Sparks Assoc., LLC v N. Hills Holding Co. II, LLC***, 74 AD3d 1183, 1184, 904 NYS2d 157, 158 [2d Dept 2010][motion court providently exercised its discretion in denying motion to strike pleadings or to preclude offer of evidence at time of trial where defendant adequately established the documents sought by the either were already produced or were represented not to exist]).

It is settled that defendants' failure to timely challenge the plaintiff's discovery demand forecloses inquiry into the propriety of the information sought except with regard to his requests that sought privileged information, or as to requests which were palpably improper (***Jordan v City of New York***, 137 AD3d 1084, 1084, 27 NYS3d 656, 657 [2d Dept 2016]; ***Fausto v City of New York***, 17 AD3d 520, 522, 793 NYS2d 165, 167 [2d Dept 2005]).

Here, the record presented by counsel on the motion amply supports granting of plaintiff's motion in part. Plaintiff first requested documentation, which defendant first objected to as overbroad, irrelevant, and burdensome. Subject to those objections, defendants served responsive documents. Depositions occurred and at those proceedings plaintiff's counsel learned new information leading to further document requests, which defense counsel took under advisement and requested that they be put into writing. Plaintiff's counsel did so. Counsel conferred as evidence by emails between the two attorneys in February 2019 to reach some sort of agreement or compromise over search terms defendants Tsunis and Scarda would employ to identify responsive documents. Defendants complied as further evidenced by their sworn affidavits. Defense counsel then sent over the alleged responsive production. Plaintiff may be correct that many of these documents were duplicative of prior production. However, despite delay, it cannot be objectively said that defendants have deliberately "stonewalled" plaintiffs in review of the present record. Accordingly, that branch of plaintiff's motion to strike defendants' answers for willful and contumacious refusal to provide demanded discovery is **denied**.

Missing however from the motion record is any binding representation from the defendants that the requested documentation, particularly the contract of sale for Unit 30 of the Liberty Meadows condominium community, and other ancillary requested corporate records of Liberty Meadows, do not exist in the form or format plaintiff has demanded. While both individual defendants have sworn by affidavit as to their conduct of a diligent search, plaintiff and the Court is left to guess as to the proper inference to be drawn from the fact that a search has occurred, and documents have still not been produced this far into the discovery phase of this matter. Therefore, that branch of plaintiff's motion to compel discovery concerning these outstanding items of document production is **granted**. Defendants are directed to conduct a diligent search and produce the demanded documents, or in the event they do not exist, to so state in a sworn affidavit.

Accordingly, this Court **grants** plaintiff's application to compel in the following manner:

It is

ORDERED that defendants Liberty Meadows, Demetrius Tsunis & Enrico Scarda are

directed to plaintiff's supplemental request for discovery & inspection and provide the material demanded as cited above **within 30 days of the receipt of this order with notice of entry**; and it is further

ORDERED that in the event that defendants fail to provide all outstanding discovery as cited above by that date, this Order shall be deemed self-executing and defendant's answer shall be deemed stricken for willful and contumacious refusal to provide discovery and abide this Court's orders pursuant to CPLR 3126 **without further need of motion practice on plaintiff's part**; and it is further

ORDERED that no further extensions or time or adjournments in the prosecution of this matter shall be granted by or among counsel **absent leave of this Court on good cause shown**; and it is further

ORDERED that counsel are hereby directed to appear before this Court remotely via teleconference and/or Skype for the purposes of a discovery compliance conference on **Wednesday, October 7, 2020** for counsel to report the status of the remaining and outstanding discovery preventing certification of this matter as ready for trial.

The foregoing constitutes the decision and order of this Court.

Dated: June 1, 2020
Riverhead, New York

WILLIAM G. FORD, J.S.C.

____ **FINAL DISPOSITION** ___X___ **NON-FINAL DISPOSITION**