

Rasolli Footwear Corp. v COD Capital Corp.
2021 NY Slip Op 30703(U)
March 1, 2021
Supreme Court, New York County
Docket Number: 655554/2017
Judge: John J. Kelley
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. JOHN J. KELLEY PART IAS MOTION 56EFM

Justice

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INDEX NO. 65554/2017

RASOLLI FOOTWEAR CORP.,
Plaintiff,

MOTION DATE 01/08/2021

- v -

MOTION SEQ. NO. 004

COD CAPITAL CORP., also known as COD FRIENDLY, and
LOWELL BURK

DECISION AND ORDER

Defendants.

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The following e-filed documents, listed by NYSCEF document number 50, 51, 52, 53, 54, 55, 56 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, and 99 (Motion 004)

**IMPOSITION OF PART 130 AND DISCOVERY
SANCTIONS/CROSS MOTION TO COMPEL
DISCOVERY AND IMPOSE DISCOVERY
SANCTIONS**

were read on this motion to/for

In this action to recover damages for breach of contract and conversion, the defendants move pursuant to 22 NYCRR 130-1.1 and CPLR 3126 for imposition of monetary and other sanctions upon the plaintiff for its failure to comply with this court's April 18, 2019 discovery order. The plaintiff cross-moves pursuant to CPLR 3124 and 3126 to compel the defendant Lowell Burk fully to comply with that order, or, in the alternative, for the imposition of sanctions for his failure to comply. The motion and cross motion are denied.

By order dated September 25, 2018, the court granted Burk's motion pursuant to CPLR 3211(a)(7) to dismiss the complaint insofar as asserted against him, albeit without prejudice to a motion for leave to amend the complaint to properly assert a breach of contract and conversion causes of action against him based on piercing COD's corporate veil (SEQ 001). By order dated January 30, 2019, the court denied that branch of the plaintiff's motion seeking to amend its complaint to add a cause of action against the defendant COD Capital Corp. (COD) to allege a violation of General Business Law § 349(h), but held in abeyance that branch of the motion

seeking to add contentions against Burk that would support piercing COD's corporate veil (SEQ 002). In that order, the court directed Burk to produce financial documents concerning both COD's and his own accounts, and directed him to appear for a deposition within 45 days, to aid the court in ascertaining whether such allegations could be added against Burk.

Since some of the discoverable material likely involved Burk's personal finances, the court, by order dated April 18, 2019 (SEQ 003), issued directives protecting Burk's confidential information (see 22 NYCRR 202.5[e][1][i], [ii], [iv]; *Rice v Rice*, 288 AD2d 112 [1st Dept 2001]; see generally *Camenos v. F.W. Woolworth Corp.*, 233 AD2d 212 [1st Dept 1996]; *Finch, Pruyn & Co. v Niagara Paper Co.*, 228 AD2d 834 [3d Dept 1996]), and rescheduled the deadline for Burk's deposition and production of documents. The limited purpose of the discovery that was directed by the court was to enable the plaintiff to ascertain whether Burk dominated COD Capital Corp., a/k/a COD Friendly, whether he used his domination of that corporation to commit a wrong against the plaintiff, whether he commingled personal assets with those of the corporation, whether he employed that corporation to pay personal debts, and whether he disregarded the corporate form or dispensed with requirements of the corporations law of the state of incorporation of COD Capital Corp., a/k/a COD Friendly. To that end, the court directed Burk to produce, prior to the deposition, bank accounts, cancelled checks, corporate records, and financial records of COD Capital Corp., a/k/a COD Friendly, for 2016 and 2017.

On May 24, 2019, Burk provided the document discovery to the plaintiff by providing the plaintiff's counsel with a computer file and a decryption password. In accordance with the April 18, 2019 order, Burk's deposition was rescheduled for on or before June 10, 2019.

During the 16 months between Burk's rescheduled deposition date and the date that Burk made the instant motion, the plaintiff did not conduct Burk's deposition. The preliminary conference that initially had been scheduled in 2018 in connection with the main claims against COD was adjourned on numerous occasions, and has yet to be conducted.

At first, Burk agreed to travel to New York from his home state of Texas to submit to the limited deposition. When the plaintiff did not respond to Burk's proposal as to dates on which the deposition could be conducted, the court convened a conference on February 25, 2020 to ascertain the status of Burk's limited deposition. At that conference, it directed that Burk was to be deposed within 30 days. On March 17, 2020, the courts closed down due to the COVID-19 pandemic, and did not reopen until June 10, 2020. On May 5, 2020, the court notified the parties that they should conduct Burk's deposition remotely. On August 13, 2020, the court contacted the parties to ascertain whether the deposition had been conducted, directed the parties to complete the deposition in 30 days, and file briefs with the court as to why the limited discovery did or did not provide a basis for piercing COD's corporate veil. On September 9, 2020, having received no response from the parties, the court again contacted them and attached the August 13, 2020 message. On September 10, 2020, Burk's counsel wrote to the court, informing it that the plaintiff had made no attempt to contact him to schedule the deposition since February 2020, and that the deposition had not been conducted. The plaintiff's counsel responded that same date, asserting that he and his entire staff had contracted COVID-19, and were ill for two months. He further asserted that Burk never responded to the email request for additional documents that he had sent out on February 26, 2020.

Even taking account of the COVID-19 pandemic, the parties have provided no reasonable excuse as to why Burk's deposition could not have been conducted at any time between June 10, 2019 and March 17, 2020, or why it could not have been conducted remotely at any time before the plaintiff's counsel contracted COVID-19 or after he recovered therefrom. Nor has the plaintiff set forth a reasonable explanation as to why it waited 19 months, or until December 15, 2020---the date when it made the instant cross motion---to assert that Burk's May 14, 2019 document production was insufficient or inadequate or that Burk should be compelled to comply with its informal February 26, 2020 document request.

CPLR 3126 authorizes the court to sanction parties who “refuse[] to obey an order for disclosure or wilfully fail[] to disclose information which the court finds ought to have been disclosed” (*Kutner v Feiden, Dweck & Sladkus*, 223 AD2d 488, 489 [1st Dept 1998]). “The nature and degree of the penalty to be imposed pursuant to CPLR 3126 lies within the sound discretion of the Supreme Court” (*Lazar, Sanders, Thaler & Assoc., LLP v Lazar*, 131 AD3d 1133, 1133 [2d Dept 2015]; see *Maxim, Inc. v Feifer*, 161 AD3d 551, 554 [1st Dept 2018]). 22 NYCRR part 130 permits the court to impose sanctions upon a party for The court notes that the discovery that it had directed to be conducted was limited to one deposition of Burk and the production of COD’s bank and financial records for a two-year period. The subject matter of the deposition was limited to issues concerning whether Burk treated COD as his alter ego. The long delays here were occasioned by the conduct of all parties. All parties ignored the numerous deadlines set for Burk’s deposition.

The parties’ conduct, however, was far from the willful and contumacious behavior required for the imposition of a sanction pursuant to CPLR 3126 (*Amini v Arena Constr. Co., Inc.*, 110 AD3d 414, 415 [1st Dept 2013]) or the frivolous behavior required to impose sanctions pursuant to 22 NYCRR Part 130 (see *Lombardi v Lombardi*, _____ AD3d _____, 2021 NY Slip Op 00426 [2d Dept, Jan. 27, 2021]). Hence, no monetary sanction or the striking of pleadings is warranted here.

Nonetheless, inasmuch as it was the plaintiff that was given the right to conduct limited discovery for a limited purpose in aid of establishing the sufficiency and potential merit of its claim that COD’s corporate veil should be pierced, and the plaintiff was far from proactive since April 2019 in seeking the court’s assistance to complete this limited disclosure, the plaintiff has waived its right to any further special disclosure in connection with the issue of piercing the corporate veil. Hence, the court denies the branch of the plaintiff’s cross motion seeking to compel Burk’s limited deposition and the production of additional document. Consequently, the court, in a companion order under SEQ 002, also dated March 1, 2021, denies that branch of

the plaintiff's motion seeking to amend the complaint so as to add claims against Burk in his personal capacity, based on the theory of piercing COD's corporate veil.

Accordingly, it is,

ORDERED that the defendants' motion is denied; and it is further,

ORDERED that the plaintiff's cross motion is denied.

This constitutes the Decision and Order of the court.

3/1/2021
DATE



JOHN J. KELLEY, J.S.C.

MOTION:

CASE DISPOSED
GRANTED DENIED
SETTLE ORDER
INCLUDES TRANSFER/REASSIGN
CASE DISPOSED
GRANTED DENIED
SETTLE ORDER
INCLUDES TRANSFER/REASSIGN

NON-FINAL DISPOSITION
GRANTED IN PART
SUBMIT ORDER
FIDUCIARY APPOINTMENT
NON-FINAL DISPOSITION
GRANTED IN PART
SUBMIT ORDER
FIDUCIARY APPOINTMENT

OTHER
 REFERENCE
 OTHER
 REFERENCE

APPLICATION:

CHECK IF APPROPRIATE:

CROSS MOTION:

APPLICATION:

CHECK IF APPROPRIATE: