

**Cyngiel v Krigsman**

2021 NY Slip Op 30772(U)

March 9, 2021

Supreme Court, Kings County

Docket Number: 523029/2016

Judge: Richard Velasquez

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.

This opinion is uncorrected and not selected for official publication.

At an I.A.S. Trial Term, Part 66 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, located at Civic Center, Borough of Brooklyn, City and State of New York, on the 9 day of MARCH , 2021

P R E S E N T :

Hon. Richard Velasquez

Justice

MORDECHAI CYNGIEL as EXECUTOR OF THE ESTATE OF SHLOMO CYNGIEL

Plaintiff(s)

-against-

Cal. No.  
Index No. 523029/2016

RIMA KRIGSMAN as EXECUTOR OF THE ESTATE OF DORA AVRUMSON, RIMA KRIGSMAN, MICHAEL AVRUMSON,

Defendant(s)

The following papers NYSCEF Doc #'s 173 to 202 read on this motion:

<u>Papers</u>	<u>NYSCEF DOC NO.'s</u>
Notice of Motion/Order to Show Cause	
Affidavits (Affirmations) Annexed_____	173-187
Opposing Affidavits (Affirmations)_____	190-197
Reply Affidavits (Affirmations)_____	200-202

After having heard Oral argument on December 21, 2020, and upon review of the foregoing papers this court finds as follows:

Plaintiff, moves pursuant to CPLR 3126 for an order (1) striking defendants answer and resolving counterclaim in favor of the plaintiff in their entirety; or in the alternative: (2) compelling the defendants to provide personal tax returns from 2003 to present by a date certain since there have been admissions of co-mingling of moneys; and (3) granting a negative inference against defendants for the contents of each document demanded and

not provided; and (4) precluding the defendants from testifying or entering any evidence on issues for which discovery was demanded but not provided. (MS#8). Defendant opposes the same.

It is well established that pursuant to CPLR 3126; "If any party, or a person who at the time a deposition is taken or an examination or inspection is made is an officer, director, member, employee or agent of a party or otherwise under a party's control, refuses to obey an order for disclosure or **willfully fails to disclose information which the court finds ought to have been disclosed pursuant to this article**, the court may make such orders with regard to the failure or refusal as are just, among them: (1) an order that the issues to which the information is relevant shall be deemed resolved for purposes of the action in accordance with the claims of the party obtaining the order; or (2) an order prohibiting the disobedient party from supporting or opposing designated claims or defenses, from producing in evidence designated things or items of testimony, or from introducing any evidence of the physical, mental or blood condition sought to be determined, or from using certain witnesses; or (3) an order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or any part thereof, or rendering a judgment by default against the disobedient party.

It is well settled that a court has broad discretion in determining the nature and degree of the penalty to be imposed where a party has refused to comply with discovery demands (see, CPLR 3126[2]; *Robustelli v. Robustelli*, 262 AD2d 390, 691 NYS2d 159; *Maillard v. Maillard*, 243 AD2d 448, 663 NYS2d 67); quoting *Pearl v. Pearl*, 266 AD2d 366, 366, 698 NYS2d 160 (2 Dept. 1999); (see *Nicoletti v. Ozram Transp.*, 286 AD2d 719, 730 NYS2d 165; *Pearl v. Pearl*, 266 AD2d 366, 698 NYS2d 160; *DeJulio v. Wulf*, 260

AD2d 425, 687 NYS2d 727; *Brady v. County of Nassau*, 234 AD2d 408, 650 NYS2d 802).

“Absent an improvident exercise of discretion, a determination to impose sanctions for conduct which frustrates the disclosure scheme of the CPLR should not be disturbed” (see *Miller v. Duffy*, 126 AD2d 527, 528, 510 NYS2d 651), quoting *Jaffe v. Hubbard*, 299 AD2d 395, 396, 751 NYS2d 491, 491–92 (2<sup>nd</sup> Dept. 2002). However, striking an answer is a drastic remedy. Courts have found, it must be shown that a defendant's failure to comply with disclosure was the result of willful, contumacious and deliberate conduct (see CPLR 3126; *Cianciolo v. Trism Specialized Carriers*, 274 AD2d 369, 370, 711 NYS2d 441; *Vancott v. Great Atl. & Pac. Tea Co.*, 271 AD2d 438, 705 NYS2d 640). Additionally, “the penalty of preclusion is extreme and should be imposed only when the failure to comply with a disclosure order is the result of willful, deliberate, and contumacious conduct or its equivalent” (see, *Halley v Winnicki*, 255 AD2d 489, 681 NYS2d 60; *Garcia v Kraniotakis*, 232 AD2d 369, 648 NYS2d 156; *Vatel v City of New York*, 208 AD2d 524, 617 NYS2d 61).

In the present case, Defendant Rima Krigsman As Executor Of The Estate Of Dora Avrumson, Rima Krigsman, and Michael Avrumson’s (“Defendant”) conduct since the commencement of this matter regarding failure to provide documents absent motions to compel, incomplete answers, admissions as to co-mingling of personal and estate funds, admissions of failure to comply with discovery orders dated October 2, 2017; February 14, 2018; March 7, 2018, and testimony establishes there was no meaningful effort to comply with the discovery demands and further demonstrates the defendants conduct is willful and deliberate and warrants sanctions.

Accordingly, plaintiffs motion is granted to the extent that plaintiff request compelling the defendants to provide personal tax returns from 2003 to present is hereby granted. It is further ordered that said tax returns must be provided by July 9, 2021 since there have been admissions of co-mingling of moneys; Plaintiff's request granting a negative inference against defendants for the contents of each document demanded and not provided is hereby granted; Plaintiff's request precluding the defendants from testifying or entering any evidence on issues for which discovery was demanded but not provided is hereby granted, for the reasons stated above. (MS#8)

For Clerks use only

MG \_\_\_\_\_

MD \_\_\_\_\_

Motion Seq.#

8

ENTER FORTHWITH:



RICHARD VELASQUEZ, J.S.C.