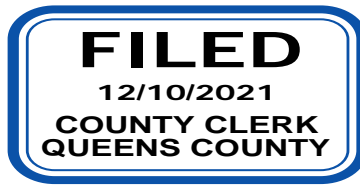


Moslem v DeMartino
2021 NY Slip Op 33099(U)
December 10, 2021
Supreme Court, Queens County
Docket Number: Index No. 705768/2016
Judge: Chereé A. Buggs
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Short Form Order

NEW YORK SUPREME COURT-QUEENS COUNTY

Present: **HONORABLE CHEREÉ A. BUGGS**
Justice

IAS PART 30

-----X
MEHDI MOSLEM AKA MICHAEL MOSLEM,
AND ACCEL MOTORS, INC.,

Index No. 705768/2016

Plaintiffs,

Motion
Date: October 27, 2021

-against-

Motion Cal. No.: 10

DANTE DEMARTINO, ET AL.,

Motion Sequence No.: 8

LDefendants.

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The following e-file papers numbered 169-195, 197-199, 201 submitted and considered on this motion by defendants Drew Smith (hereinafter “Smith”) seeking an Order pursuant to Civil Practice Law and Rules (“CPLR”) 3126 striking plaintiffs’ Mehdi Moslem a/k/a Michael Moslem and Accel Motors, Inc. (hereinafter referred to as “Moslem”, “Accel” or collectively as “Plaintiffs”) pleadings and for related relief; and the cross-motion of Plaintiffs seeking denial of the motion or in the alternative, pursuant to CPLR 2201, granting Plaintiffs’ cross-motion for a stay pending resolution of Moslem’s criminal proceeding.

Papers
Numbered

Notice of Motion-Affidavits-Exhibits.....	EF 169-189, 190-191
Cross-Motion-Affidavits-Exhibits.....	EF 192-195
Affirmation in Opposition-Affidavits.....	EF 197-198
Reply-Affidavits-Exhibits.....	EF 199, 201

Relevant Procedural History

This is an action for fraud, breach of fiduciary duty and for declaratory judgment related to properties located at 30-15 Thompson Avenue, Long Island City, New York, also known as 30-24 Skillman Avenue, Long Island City, New York and 1114 Fulton Street, Brooklyn, New York 11238. Moslem and Accel filed a summons and verified complaint on May 16, 2016. Co-defendant Dante

DeMartino (hereinafter “DeMartino”) filed a verified answer with counterclaims on June 7, 2016 and Smith filed a verified answer with counterclaims on July 14, 2016.

On or about November 17, 2016 Plaintiffs filed an Order to Show Cause seeking an Order canceling a Notice of Pendency filed by Smith against real property known as 30-15 Thompson Avenue, Long Island City, New York, also known as 30-24 Skillman Avenue, Long Island City, New York, Block 0275, Lot 35. Smith and DeMartino cross-moved, for an Order which would enjoin Plaintiffs from (1) withdrawing, pledging, conveying, dissipating, removing, paying, assigning, borrowing, loaning, pledging, hypothecating, or otherwise transferring or using without the consent of the other parties in writing, or by order of the court, any real or personal property owned or controlled by Accel other than in the ordinary course of business; (2) transferring, encumbering, assigning, removing, pledging, mortgaging or otherwise impairing (i) Accel’s fee interest in the land and improvements thereon known as 30-15 Thompson Avenue, Long Island City, New York 11101, Tax Block 275, Tax Lot 35, or (ii) any fee interest owned or controlled by either of the Plaintiffs in the land and improvements thereon known as 1114 Fulton Street, Brooklyn, New York 11238, Tax Block 2016, Tax Lot 35; and, from altering, concealing, relocating, destroying or otherwise impairing any books and records of Accel or any company having an interest in the Fulton Street property. By Order of the undersigned dated April 3, 2017, Plaintiffs’ motion to vacate the Notice of Pendency against the Thompson Avenue property was granted but denied as to the Fulton Street property, Smith and DeMartino’s cross-motion for injunctive relief was granted. On or about May 5, 2017, Plaintiffs moved pursuant to CPLR 2221 for leave to renew and reargue the Court’s April 3, 2017 decision. By Order of the undersigned dated September 14, 2017, Plaintiffs’ motion was granted to the extent that the Defendants were directed to post an undertaking in the amount of \$450,000.00 within fifteen days of the date of the Order.

Smith renews his application seeking an Order pursuant to CPLR 3126 striking Plaintiffs’ pleadings; dismissing Plaintiff’s claims in the action; prohibiting Plaintiffs from supporting or opposing his claims in this action and resolving all issues in the action in favor of the Defendants. DeMartino joins this application. By Order of the undersigned dated February 7, 2020 Smith’s prior motion was denied based upon Smith’s failure to submit a good faith affidavit evidencing a good faith effort to resolve any discovery dispute. DeMartino joins the application. Smith alleged that throughout the pendency of this litigation, Plaintiffs have exercised total control over the subject properties and have, upon information and belief, entered into lucrative commercial leases with commercial tenants; entered into financing agreements with various lending institutions, encumbering the properties, and have also engage in a variety of related financial and business transactions. Defendants alleged that they are particularly concerned about the management of Accel and the properties because on July 30, 2019, Moslem was indicted in a Federal Criminal action pending in the Southern District of New York, and a second superceding indictment was filed on April 6, 2021 in which he is charged in Count One with conspiracy to defraud the IRS from 2009 to 2018, and in Count Two, conspiracy to commit bank fraud. Defendants alleged that Plaintiffs have failed to produce any discovery whatsoever, and that Moslem may have engaged in similar conduct regarding the properties at issue in this litigation. Smith alleged that he has made numerous good faith efforts to resolve these issues without seeking Court intervention. Plaintiffs have willfully

failed to comply with discovery requests. A Preliminary Conference Order was entered into on August 25, 2016 wherein discovery, including depositions, was to be completed by December 2016. Defendants served combined discovery demands on September 1, 2016. A Compliance Conference was held on February 6, 2017, and pursuant to Court Order, the parties were directed to disclose all requested documents by March 6, 2017, to conduct deposition by March 16, 2017 and Plaintiffs were directed to file a Note of Issue on or before October 20, 2017. Plaintiffs filed a Note of Issue on October 20, 2017, and thereafter, Defendants filed a motion to vacate the Note of Issue on the grounds that significant discovery was still outstanding. DeMartino's counsel sent a letter Plaintiffs counsel on October 26, 2017 advising that Defendants had not received responses to demands so that the deposition scheduled in November 2017 could be held. According to Defendants, Plaintiffs failed to comply therefore depositions could not be held. Plaintiffs have failed to produce their corporate books and records; relevant tax returns; closing documents for real estate transactions; leases; a list of tenants; bank records and rent rolls. Defendants filed a motion to vacate the Note of Issue and while the motion was pending, Plaintiffs attempted to provide certain discovery, however same was inadequate. To resolve the motion, Plaintiffs agreed to enter into a stipulation which was so-ordered by the Court. The Note of Issue was vacated and Plaintiffs were required to produce the required documents and depositions to be concluded by April 30, 2018.

According to defendants, the depositions were adjourned several time because the documents were not produced, therefore, meaningful discovery could not e conducted. Defendants sought to move forward with Plaintiffs' depositions despite the outstanding discovery and based upon bank records obtained by a subpoena, on January 25, 2019, Defendants served a Notice of Deposition upon Plaintiffs to appear for depositions on February 20, 2019, however, Plaintiffs failed to appear. Thereafter, on May 16, 2019, after failed email attempts and telephone calls to schedule depositions, Defendants served another Notice of Deposition upon Plaintiffs to appear for deposition on June 12, 2019. On June 6, 2019, Defendants sent a letter to Plaintiffs' counsel to confirm their appearance at the deposition on June 12, 2019. Via email, on June 10, 2019, Plaintiffs counsel advised Defendants that Plaintiffs would not be appearing on June 12, 2019 for deposition. Defendants sent a good faith letter to Plaintiffs on September 5, 2019, seeking compliance before seeking Court intervention. On December 12, 2019 based upon Plaintiffs' noncompliance, Defendants filed and served a motion seeking an order pursuant to CPLR 3126 to strike the pleadings and for related relief. On February 7, 2020 the motion was denied on the grounds that Defendants failed to submit an affidavit of good faith pursuant to 22 NYCRR §202.7 (a). Following this, Defendants have sent several emails in 2020 and 2021 prior to filing the instant application, seeking the following:

- The corporate books and records of Accel for the period from 2011 to present;
- The tax returns for Accel for the years 2011 through 2020;
- The closing documents for the financing and re-financing of any loans in connection with the real property located at 30-15 Thomson Avenue, Long Island City, New York ("Thomson Avenue") and the real property located at 1114 Fulton Street, Brooklyn, New York ("Fulton Street") during the period from 2011 to present;
- All leases, rent rolls, and tenant lists for Thomson Avenue and Fulton Street;
- Bank records demonstrating Accel's income and expenses in connection with

- Thomson Avenue and Fulton Street for the period from 2011 to present;
- Documents related to the listing for sale of Thomson Avenue;
- Documents, including, without limitation, the contract of sale and closing statement for the sale of Fulton Street.

Defendants also requested convenient dates for Plaintiffs' deposition, and advised that Defendants were ready to go forward with their depositions. Plaintiffs have effectively refused to respond to discovery or appear for depositions, despite Defendants numerous efforts to obtain the outstanding discovery. Defendants contend that Plaintiffs' repeated failure to comply with discovery demands and appear for a deposition is deliberate, willful and contumacious warranting the striking of the pleading or preclusion under CPLR 3126 (*see generally U.S. Bank N.A. v Sirota*, 189 AD3d 927 [2d Dept 2020]; *Branch v Crabtree*, 197 AD2d 558 [2d Dept 1993]; *Wolfson v Nassau County Med. Ctr.*, 141 AD2d 815 [2d Dept 1988]; *Linwood Roofing & Const. Co., v Olit Assoc.*, 123 AD2d 840 [2d Dept 1986]).

Plaintiffs cross-move and oppose Defendants' application, seeking stay pursuant to CPLR 2201 pending resolution of Moslem's criminal proceeding. Initially, Plaintiffs alleged that the motion was procedurally improper because the case is marked "disposed" since it was stricken from the Court's calendar based upon the December 12, 2017 So-Ordered Stipulation, thus since the case is not active, the motion is improper and procedurally defective. Notwithstanding this, and relevant to the cross-motion, on or about July 30, 2019 Moslem was indicted in a federal criminal action which is pending in the Southern District of New York entitled *United States v Mehdi Moslem, a/k/a Mike Moslem and Saaed Moslem*, New York Southern District Court, Case No. 7:2019cr00547 and a second superseding indictment filed on April 6, 2021 in which Moslem was charged with two criminal counts for conspiracy to defraud the IRS and bank fraud. Defendants' counsel herein does not represent Moslem in the criminal case, which is allegedly based upon facts which are not related to this case. Moslem's counsel claims that he may have to exercise this Fifth Amendment rights until such time as his criminal proceeding is fully and finally determined. Thus absent a stay under CPLR 2201, Moslem will be significantly prejudiced in this litigation and potentially deprived of a defense against Defendants' asserted counterclaims. Also, this is Smith's second motion seeking the same relief, and, the attempts at additional discovery were made during the COVID-19 pandemic and while Moslem was defending the criminal proceeding, thus the communication with Plaintiffs' attorney was limited. Thus, Plaintiffs' non-compliance with discovery requests cannot be said to be willful, contumacious or in bad faith but the result of Moslem prioritizing his defense in the criminal proceeding, exacerbated by communication issues with the law firm and the pandemic. Further, Plaintiffs have provided all responsive documents in their possession on March 20, 2017 and a supplemental response on November 10, 2017. These responses were made in good faith and cannot be considered contumacious. Moreover, Defendants also failed to comply with discovery demands in the past.

In reply and in opposition to the cross-motion, Defendants maintain that Plaintiffs have failed to appear for depositions, and have failed to produce requested documents in response to several demands. Further, Plaintiffs' counsel had never claimed that the non-compliance with discovery was

due to Moslem's federal criminal prosecution or the pandemic. Thus their opposition and cross-motion are without merit. A stay of the proceedings is not appropriate being that Moslem has already been tried and convicted of the felony charges on June 3, 2021, and all that remains is sentencing, and Plaintiffs failed to comply with discovery prior to the indictment on July 30, 2019. Prior to the instant motion, Defendants had no knowledge that Moslem was a defendant in a pending federal criminal prosecution.

Plaintiffs submitted reply to the cross-motion, arguing that Moslem cannot litigate his case from jail and that his counsel for this case is severely limited to his access. The matter is marked disposed and is not active; Moslem must invoke his Fifth Amendment right to remain silent until his criminal sentencing and all appeals have been resolved; a discretionary stay is appropriate in order to avoid prejudice (*Access Capital v DeCicco*, 302 AD2d 48 [1st Dept 2002]). Plaintiffs claimed that they fully responded to all discovery, that any non-compliance was not willful, contumacious or in bad faith.

Discussion

The Court may strike a pleading as a discovery sanction if a party fails or refuses to obey an Order for disclosure or comply with discovery demands; the penalty to be imposed lies in discretion of the trial Court (CPLR § 3126; *Thompson v Dallas BBQ*, 84 AD3d 1221 [2d Dept 2011]). Under CPLR § 3126, the drastic remedy of striking a pleading is not appropriate absent a clear showing that the failure to comply with discovery demands or orders was willful or contumacious. (*See Teitelbaum v Maimonides Med. Ctr.*, 144 AD3d 1013 [2d Dept 2016].) Willful and contumacious conduct can be inferred from a party's repeated noncompliance with court-ordered discovery, coupled with either no excuses or inadequate explanations. (*See Arpino v F.J.F. & Sons Elec. Co., Inc.*, 102 AD3d 201 [2d Dept 2012].) "If the credibility of court orders and the integrity of our judicial system are to be maintained, litigant cannot ignore court orders with impunity." (*Kihl v Pfeffer*, 94 NY2d 118, 123 [1999]).

Article 16 of the New York State Constitution, which is essentially identical to that of the Fifth Amendment of the United States Constitution (U.S. Const. Amend. V) states that, "No person... shall ... be compelled in any criminal case to be a witness against himself or herself" The privilege to invoke the Fifth Amendment is available in a civil proceeding, and the test is whether any testimony can later subject the deponent/witness to criminal prosecution (*see Lefkowitz v Cunningham*, 431 US 801, [1977]). However, a witness invocation of the Fifth Amendment privilege in a civil action is more constrained and in a civil action can be subject to an adverse inference. In a civil suit a party has no inherent right to remain silent, and must if called as a witness, respond to virtually all questions (*see McDermott v Manhattan Eye, Ear and Throat Hosp.*, 15 NY2d 20 [1964]). "A party's invocation of the privilege against self-incrimination in a civil case may be considered by the finder of fact in assessing the strength of the evidence offered by the opposing party on the issue which the witness was in a position to controvert" (*see Kuriansky v Bed-Stuy Health Care Corp.*, 135 AD2d 160 [2d Dept 1988] *affd.*, 73 NY2d 875 [1988]; *see also El-Dehdan v El-Dehdan*, 114 AD3d 4 [2d Dept 2013]). "[T]hat a witness may invoke the privilege against self-

incrimination is not [necessarily] a basis for precluding civil discovery.” (*See State of New York v Carey Resources*, 97 AD2d 508 [2d Dept 1983]). “The Fifth Amendment privilege which exists as to private papers cannot be asserted with respect to records which are required, by law, to be kept and which are subject to governmental regulation and inspection” (*People v Doe*, 59 NY2d 655 [1983]; *Carver Federal Savings Bank v Shaker Gardens, Inc.*, 167 AD3d 1337 [3d Dept 2018]).

CPLR §2201 states the following:

“Except where otherwise prescribed by law, the court in which an action is pending may grant a stay of proceedings in a proper case, upon such terms as may be just.”

The Court denies the cross-motion in its entirety finding that discovery is not complete and a stay of the action is not warranted. This case cannot be restored to the active trial calendar without discovery, and Plaintiffs have failed to move forward with the discovery process despite filing this case in 2016. The matter is only marked “disposed” because the Note of Issue was vacated, and once a Note of Issue is re-filed, it will be restored to the active calendar. Plaintiffs counsel has stated that the Federal Case is totally unrelated to this case, therefore the Court finds that there is no good reason that Plaintiffs cannot provide the discovery or appear for depositions. Plaintiffs are always free to exercise their Fifth Amendment rights, that does not preclude them from appearing for depositions. The Fifth Amendment privilege cannot be asserted as a blanket refusal to provide discovery or appear at a deposition and the privilege “may only be asserted where there is reasonable cause to apprehend danger from a direct answer.” (*See Matter of Astor*, 62 AD3d 867 [2d Dept 2009]; *see also State of New York v Carey Resources*, 97 AD2d 508 [2d Dept 1983]; *Burgdorf v Kasper*, 83 AD3d 1553 [4th Dept 2011]; *Finger Lakes Racing Assn. v New York Racing Assn.*, 28 AD3d 1208, 1209 [4th Dept 2006]). Also, Smith’s first motion seeking similar relief was denied on procedural grounds, not on its merits. Therefore, upon the Court’s consideration of the arguments made in support of and in opposition to the motion and cross-motion, it is

ORDERED, that Defendants’ motion is granted to the extent that Plaintiffs are directed to provide complete responses to all outstanding discovery, subject to any valid claims of privilege based upon confidential and/or privileged documents within **thirty (30)** days of the date of this Order served with Notice of Entry; and it is further


ORDERED, that the cross-motion is granted to the extent that the parties shall within thirty **(30)** days of the date of this Order discern how Moslem may be produced for a virtual deposition in Federal prison; and it is further

ORDERED, that Moslem and Accel shall appear for depositions on or before **February 25, 2022**; and it is further

ORDERED, the failure of the Plaintiffs to comply may result in preclusion from offering any evidence or testimony in support of a dispositive motion or at the time of Trial upon further application to the Court.

The foregoing constitutes the decision and Order of the Court.

Dated: December 10, 2021



Hon. Chereé A. Buggs, J.S.C.

