

47 Div. St. Trading, Inc. v CKD Div. Realty Corp.

2022 NY Slip Op 30197(U)

January 21, 2022

Supreme Court, New York County

Docket Number: 150209/2018

Judge: Nancy M. Bannon

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.

**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. NANCY BANNON PART 42

Justice

-----X

47 DIVISION STREET TRADING, INC.,
Plaintiff,

- v -

CKD DIVISION REALTY CORP.,
Defendant.

-----X

CKD DIVISION REALTY CORP.
Plaintiff,

-against-

NY MEI JIN INC. and 49 HUA XIA RESTAURANT INC.
a/k/a NEW HUA XIA SEAFOOD RESTAURANT, INC.
Defendant.

-----X

INDEX NO. 150209/2018
MOTION DATE 11/05/2021
MOTION SEQ. NO. 004

**DECISION + ORDER ON
MOTION**

Third-Party
Index No. 595513/2018

The following e-filed documents, listed by NYSCEF document number (Motion 004) 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 101, 102, 103

were read on this motion to/for STRIKE PLEADING.

This property damage action arising from flooding on the subject commercial premises was commenced in January 2018, discovery commenced in March 2018 when the first demand was served and a third-party action was commenced by the defendant in June 2018 seeking indemnification. A bankruptcy stay was in effect from October 2019 to March 2020, after third-party defendant NY Mei Jin, Inc. filed a Chapter 7 bankruptcy petition. A preliminary conference order, dated April 19, 2019, set a discovery schedule and set the Note of Issue deadline as December 6, 2019. Numerous discovery conferences ensued.

A compliance order dated December 5, 2019, states that the third-party defendant failed to appear for the conference, depositions were not conducted, and the Note of Issue date was

to remain December 6, 2019. An order dated December 10, 2020, states that depositions were still not conducted and the reason given was that the parties were discussing settlement. The parties were cautioned that settlement discussions do not stay discovery deadlines. The court set a new deposition schedule, all discovery to be completed on or before February 22, 2021. The Note of Issue date was extended to March 12, 2021, and marked "Final 2X".

An order dated April 8, 2021, indicates that depositions were still not conducted without excuse and directed that they be conducted on or before May 19, 2021, and third-party depositions be conducted on or before June 14, 2021. The order extended the Note of Issue deadline to July 30, 2021, and marked the date "FINAL 3X – absent motion practice, no extensions will be granted." Discovery was not completed and no Note of Issue was filed.

An order dated June 24, 2021, states that the deposition of the plaintiff's principal, Jefferson Li, was not conducted, and his counsel represented that Li serves in the military. Counsel represented that the deposition of the third-party defendant was not conducted as they were waiting for Li to appear for his deposition first. The order directed that all depositions and post-deposition discovery be completed prior to the Note of Issue deadline, July 30, 2021. The date was marked "FINAL 3X – absent motion practice, no extension of NOI will be granted."

On June 28, 2021, the plaintiff moved to extend the Note of Issue deadline (MOT SEQ 003). By an order dated July 7, 2021, the court granted the plaintiff's motion, set the new date as September 30, 2021, and directed that all discovery, including third-party discovery, be completed prior to that date or would be deemed waived. Discovery was not completed and no Note of Issue was filed. As such, discovery was waived.

On September 15, 2021, defendant/third-party plaintiff CKD Division Realty Corp. moved pursuant to CPLR 3126 to (1) strike the plaintiff's complaint and answer of third-party defendant NY Mei Jin, Inc. for failure to provide discovery as directed in the court orders; or (2) preclude the plaintiff from introducing evidence at trial with respect to those items to which the plaintiff has not provided discovery or particulars, or (3) compel the plaintiff and CKD Division Realty Corp to provide discovery and extend the Note of Issue deadline for that purpose. CKD counsel alleges that when she attempted to schedule plaintiff's deposition between July and September 2021, plaintiff's counsel informed her that his client was serving in the military and was working for FEMA that summer, and plaintiff's counsel thereafter failed to respond to CKD's counsel's

communications. Counsel further alleges that the remote deposition of the witness for the third-party defendant was scheduled for August 26, 2021, but the witness failed to appear. Despite numerous communications requests, the plaintiff and third-party defendant failed to contact CKD's counsel to set any new date.

Third-party defendant opposes the motion by an affirmation of counsel in which he states that on August 26, 2021, the witness for his client, a Mr. Jiang, was not deposed due to the witness' lack of computer equipment and miscommunications with the reporting service. Counsel claims he then rescheduled the deposition for September 17, 2021, but he soon canceled that date once he recalled that he had to be out of town.

The plaintiff cross-moves requesting yet another extension of the Note of Issue deadline. Counsel states, without benefit of any affidavit or documentary support, that the delays were caused by the plaintiff's "service on the United States Coast Guard." Counsel further claims that Mr. Li also served on a Grand Jury in New York County from September 14 -27, 2021, which made him unavailable to appear for a deposition for those two weeks and unable to collect necessary documents and provide them to counsel. Nothing more is offered.

CPLR 3126 authorizes the court to sanction a party who "refuses to obey an order for disclosure or wilfully 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 "dilatatory 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). Depositions are a method of discovery and the failure to appear for or cooperate in the scheduling or taking of a deposition may be a basis for the imposition of sanctions under CPLR 3126. See Rocco v Advantage Securities & Protection Incorp., 283 AD2d 317 (1st Dept. 2001).

Here, the plaintiff, who commenced this action four years ago, has wholly failed to comply with numerous discovery demands and court orders without reasonable excuse. The

most recent excuse, a witness' local Grand Jury service for two weeks in September 2021, falls far short of addressing the protracted delay. Counsel's present representation that his client was unavailable to be deposed for several years due to military service was not substantiated at any time, although it easily could have been. Deposition dates and the Note of Issue deadline were extended numerous times to accommodate the witness' or counsel's availability, yet no deposition was ever conducted. The court thus concludes that the plaintiff's dilatory, obstructive, and contumacious conduct warrants a sanction pursuant to CPLR 3126. Similarly, the third-party defendant fails to proffer any excuse, reasonable or otherwise, for failing to complete discovery as per the court's numerous orders issued since 2019, and now offers a thin explanation for failing to be deposed in September 2021. Notably, counsel for the third-party defendant submits an email from counsel for CKD suggesting September dates to reschedule the deposition, as she alleges, but the reply email purportedly sent by him to her is undated and suggests only October and November 2021 dates. Indeed, by September 30, 2021, discovery not completed had been waived per court order and this motion filed.

An order of preclusion would not be a strong enough sanction under the circumstances, and, in light of the prior order ruling that discovery would be waived if not completed, an order compelling discovery is also not appropriate. Therefore, the motion of defendant/third-party plaintiff CKD Division Realty Corp. pursuant to CPLR 3126 is granted and the plaintiff's complaint and the answer of third-party defendant NY Mei Jin, Inc. are stricken pursuant to CPLR 3126.

Accordingly, and upon the foregoing papers, it is

ORDERED that the motion of defendant/third-party plaintiff CKD Division Realty Corp. pursuant to CPLR 3126 is granted and the plaintiff's complaint and the answer of third-party defendant NY Mei Jin, Inc. are stricken, and it is further

ORDERED that the Clerk shall enter judgment accordingly.

This constitutes the Decision and Order of the court.

1/21/2022

DATE



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

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER