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| <b>I &amp; M Kosher Catering LLC v BHNG Inc.</b>                                                                                                                                                                               |
| 2022 NY Slip Op 30831(U)                                                                                                                                                                                                       |
| February 24, 2022                                                                                                                                                                                                              |
| Supreme Court, Kings County                                                                                                                                                                                                    |
| Docket Number: Index No. 523834/19                                                                                                                                                                                             |
| Judge: Leon Ruchelsman                                                                                                                                                                                                         |
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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF KINGS : CIVIL TERM: COMMERCIAL PART 8

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I & M KOSHER CATERING LLC,

Plaintiff,

Decision and order

- against -

Index No. 523834/19

BHNG INC. and KARIEN GANAH a/k/a KARIEN  
NADAV,

Defendants,

February 24, 2022

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PRESENT: HON. LEON RUCHELSMAN

The plaintiff has moved pursuant to CPLR §3126 seeking to strike the defendants answer or to preclude any testimony for the failure to comply with discovery demands. Alternatively, the plaintiff moves pursuant to CPLR §3124 seeking to production of discovery sought. The defendants oppose the motion. Papers were submitted by the parties and arguments held. After reviewing all the arguments this court now makes the following determination.

As recorded in a prior order, the plaintiff sued the defendants alleging essentially the defendants withheld vital financial information concerning the purchase of a bagel store in Kings county which induced the plaintiffs to pay more than it was actually worth. Pursuant to the complaint the defendants represented the bagel store generated profits of \$250,000 a year and pursuant to the Asset Purchase Agreement the parties agreed upon a sale price of \$800,000. The plaintiff paid \$500,000 by the time of closing and the remaining "three hundred thousand and 00/100 dollars (\$300,000.00) balance of the Purchase Price was made in the form of a promissory note from Plaintiff to

Defendants" (see, Verified Complaint, ¶24). The complaint further alleges that indeed the business did not generate any income at all. The complaint alleges causes of action for fraud and breach of contract. This action was joined for purposes of discovery with another action instituted by the seller alleging the purchaser has failed to make payments pursuant to the agreement.

This motion has been filed wherein the plaintiff alleges the defendants have failed to provide necessary discovery sought. The defendants oppose the motion on the grounds they did not act in bad faith. Further, defendant Karlen Ganah submitted an affidavit and conceded that she left the United States in July 2020 and that "the prior business records for the business were no longer in our possession following the 2018 sale" (see, Affirmation of Karlen Ganah, ¶16). The plaintiff counters that affirmation is essentially an admission the documents have been spoliated necessitating a strict sanction.

#### Conclusions of Law

It is well settled that a motion to compel should not be granted where the information sought is irrelevant, overly broad or burdensome. (Accent Collections Inc., v. Cappelli Enterprises Inc., 84 AD3d 1283, 924 NYS2d 545 [2d Dept., 2011]). Thus, the party seeking discovery must demonstrate the disclosure sought.

contains relevant evidence or information that is reasonably calculated to lead to information relevant to the claims in the case at hand (Pesce v. Fernandez, 144 AD3d 653, 40 NYS3d 466 [2d Dept., 2016]). There is no question the information sought in this case is highly relevant. It is well settled that corporate tax returns and all corporate financial statements are properly the subject of discovery where the information cannot be obtained for any other source (see, Latture v. Smith, 304 AD2d 534, 758 NYS2d 135 [2d Dept., 2003]). Further, personal tax returns are likewise discoverable where the information cannot be maintained from other sources. The defendants have failed to present any reason why the tax returns should not be discoverable in this case (Pugliese v. Mondello, 57 AD3d 637, 871 NYS2d 174 [2d Dept., 2008]). Therefore, the plaintiff's motion seeking to compel production of all personal and corporate tax and financial information in unredacted form is granted. The defendant must provide all the tax returns sought within thirty days of when this order is uploaded.

Turning to the remainder of the discovery sought the defendants really do not provide a sufficient reason why they have delayed in providing the discovery and have insufficiently argued they have provided all the discovery sought. Indeed, the overwhelming majority of discovery remains outstanding. Consequently, the plaintiff has been almost completely frustrated

in being afforded the opportunity to pursue its claims. Thus, such frustration is precisely the conduct that warrants a sanction. The defendant's chief reason in opposition is that the documents are no longer in the defendant's possession. This has prompted a request for further sanctions based upon spoliation of evidence. Regarding the spoliation issue, sanctions may be imposed where a party has negligently disposed of evidence before the opposing party has had an opportunity to inspect such evidence (Hartford Fire Insurance Co., v. Regenerative Building Construction Inc., 271 AD2d 862, 706 NYS2d 236 [3<sup>rd</sup> Dept., 2000]). Moreover, it must be demonstrated that the party without access to the evidence is "prejudicially bereft of appropriate means to confront a claim with incisive evidence" (Foncette v. LA Express, 295 AD2d 471, 744 NYS2d 429 [2d Dept., 2002]). The court has broad discretion regarding whether, and to what extent, spoliation of physical evidence should give rise to sanctions (Iannucci v. Rose, 8 AD3d 437, 778 NYS2d 525 [2d Dept., 2004]), and Allstate Ins. Co. v. Kearns, 309 AD2d 776, 765 NYS2d 806 [2d Dept., 2003]). Factors properly considered by the court include the extent of the prejudice imposed on the party due to the missing evidence and the degree of willfulness of the spoliator (Iannucci, supra, at 438). As noted, the defendant Ganah asserts that the records sought are no longer in her possession. While that admission certainly appears to support the assertion that

spoliation has taken place the court is reluctant to impose a severe sanction without a clearer understanding why she no longer claims to possess those documents. Therefore, the court is ordering an updated affirmation from Ms. Ganah, to be provided within two weeks from the date this order is uploaded, explaining precisely what happened to all those documents. The spoliation request as well as any sanction is held in abeyance pending that submission.

So ordered.

ENTER:

DATED: February 24, 2022  
Brooklyn N.Y.

  
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Hon. Leon Ruchelsman  
JSC