

**Lynx Capital Partners of NJ, LLC v Bayes Capital
LLC**

2022 NY Slip Op 31214(U)

April 11, 2022

Supreme Court, New York County

Docket Number: Index No. 650722/2019

Judge: Andrew Borrok

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 53

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LYNX CAPITAL PARTNERS OF NJ, LLC,

Plaintiff,

- v -

BAYES CAPITAL LLC, DOUGLAS SANZONE, JOHN GERACI, JOHN GRIFONETTI, G2 INVESTMENT FUND, LLC, G FUND, LLC, BARDOWN CAPITAL, LLC, F/K/A BAYES CAPITAL MARKETS, LLC, HOCKEYTOWN, LLC, BCM HOLDINGS, LLC, A/K/A BAYES CAPITAL HOLDINGS, LLC

Defendant.

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INDEX NO. 650722/2019

MOTION DATE 01/05/2022

MOTION SEQ. NO. 005

DECISION + ORDER ON MOTION

HON. ANDREW BORROK:

The following e-filed documents, listed by NYSCEF document number (Motion 005) 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 239, 240, 241, 242, 243, 244, 245, 246, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289

were read on this motion to/for RENEW/REARGUE/RESETTLE/RECONSIDER.

Upon the foregoing documents, Lynx Capital Partners of NJ, LLC’s (**Lynx**) renewed motion for sanctions, seeking to strike the defendant’s answer, enter default judgment in plaintiff’s favor, and award attorneys’ fees must be granted. The defendants have engaged in a pattern of willful and contumacious conduct continually flouting court orders for a significant period of time following admonition from the court. Their document production has been totally inadequate – document dumps – failing to identify to which requests they have responded and they have otherwise improperly ignored multiple last chances to supplement and fix their responses. As such the motion must be granted.

To wit, in the November 23, 2021 decision and order, the defendants were given one final opportunity to fix their deficiencies. They did not and have not. No extension was granted by this court beyond the date and instead of fixing the discovery delinquencies, the defendants have belatedly filed a procedurally defective cross-motion to dismiss. As such, striking their answer is warranted.

The Relevant Facts and Circumstances

On February 5, 2019, Lynx commenced this action by filing summons and complaint (NYSCEF Doc. No. 1). By decision and order dated January 4, 2021 (NYSCEF Doc. No. 76), the court granted the defendants' motion to dismiss except as to the cause of action for breach of contract, ordered the defendants to file an answer within 20 days, and ordered the parties to appear for a preliminary conference on February 23, 2021. On January 22, 2021, Lynx served the defendants with its first Notice of Discovery and Inspection (NYSCEF Doc. No. 86) including 39 separate requests for documents. On January 28, 2021, Lynx served Subpoenas to Produce Documents on Douglas Arthur Sanzone, John Grifonetti, and John Charles Geraci (the **Individual Defendants**), who were then non-parties in this case, to be responded to by February 27, 2021 (NYSCEF Doc. No. 88).

At the February 23, 2021 preliminary conference, the parties were ordered to serve demands by March 16, 2021, respond to demands by April 30, 2021, complete depositions by June 25, 2021, and complete fact discovery by July 9, 2021 (NYSCEF Doc. No. 80). On March 17, 2021, the defendants served their Responses and Objections to Lynx's First Notice for Discovery and Inspection objecting to 34 of the 39 requests for production of documents.

On March 23, 2021, Lynx filed a motion to compel the production of documents pursuant to CPLR 3122, 3124 and 3126. Specifically, Lynx's motion to compel sought to compel Bayes Capital LLC (**Bayes**) to produce (i) documents responsive to Lynx's document requests 1-23, 25-31, 33-34, and 36-37 from its first Notice for Discovery and (ii) all documents responsive to document requests 24, 32 and 35 and/or a privilege log for any documents withheld on the basis of privilege. Additionally, Lynx sought to compel the Individual Defendants, who were non-parties at the time, to respond to Lynx's subpoenas to produce documents.

By decision and order dated June 23, 2021, the court held that Lynx's motion to compel was granted to the extent of compelling Bayes to produce the documents requested, except the documents responsive to document requests 1-4, 12-18, 20, 26-27, 29, 31, 36-37, within 45 days of the decision. The parties were also ordered to appear for a status conference on September 15, 2021, in order to provide Lynx 30 days to review the product. By letter to the court on August 9, 2021, two days after the production was due, Bayes requested a two-week extension to finalize the production (NYSCEF Doc. No. 120). The defendants' request for an extension was not granted. On August 23, 2021, the defendants provided a 34,000-page document production which did not indicate which documents were responsive to which requests. Additionally, many of these documents were password protected and the defendants failed to provide the passwords until October 6, 2021 (NYSCEF Doc. No. 266).

On September 15, 2021, the court ordered the parties to meet and confer about any outstanding discovery by September 30, 2021, and if any disagreement arose, Lynx had leave to file an order

to show cause seeking appropriate relief by October 4, 2021 (NYSCEF Doc. No. 124). On October 4, 2021, Lynx moved by order to show cause for sanctions against defendant Bayes (NYSCEF Doc. No. 156) for failure to comply with the June 23, 2021 decision and order.

By decision and order, dated November 23, 2021 (NYSCEF Doc. No. 173), the court denied Lynx's motion for sanctions but ordered (i) that the parties meet and confer by December 5, 2021, at which point Lynx would provide a deficiency letter, (ii) that Lynx should file an amended complaint by December 13, 2021, (iii) that defendants have one final opportunity to properly respond to discovery deficiencies (including providing any necessary sworn affidavits) and indicate which documents in the previous document production responded to which discovery request by December 31, 2021, and (iv) that if any deficiencies remain, Lynx may renew its motion for sanctions by January 17, 2022.

On December 13, 2021, Lynx served its second amended complaint (NYSCEF Doc. No. 175). On December 29, 2021, by email to the court, the defendants requested an additional week, until January 7, 2022, to complete their document production and an extension of the defendants' time to respond to the second amended complaint. The court did not grant the defendants' request for an extension.

On January 5, 2022, Lynx filed its renewed motion for sanctions to strike the defendants' answer. On January 7, 2022, the defendants provided another inadequate document production. On January 28, 2022, the defendants opposed Lynx's renewed motion for sanction and cross-moved to dismiss Lynx's second amended complaint (NYSCEF Doc. Nos. 248 & 249).

To date, the defendants have failed to produce the following types of documents: (i) tax returns for any of the defendants, (ii) bank statements for the three Individual Defendants, G FUND, LLC, or Hockeytown, LLC, (iii) affidavits explaining why certain databases have not been searched, including the Individual Defendants' text messages and (iv) documentation to evidence the loans that the defendants allege are the basis for the conveyances from Bayes to the other defendants. Further despite the defendants agreeing to search for Bayes' tax returns, they subsequently admitted they knew that Bayes did not file taxes because as a subsidiary of BCM Holdings, Bayes' financial statements are consolidated into BCM Holdings' financial statements. However, despite acknowledging BCM Holdings files tax returns, none were provided.

Discussion

Pursuant to CPLR 3126(3), when a party willfully refuses to comply with a court order to provide disclosure that the court finds relevant, the court may strike out pleadings, dismiss the action, or render a judgment by default against the disobedient party. Repeated failure to produce in the face of express orders constitutes prejudice sufficient to justify sanctions such as striking the defendants' answer (*Oasis Sportswear, Inc. v Rego*, 95 AD3d 592, 592 [1st Dept 2012]). While striking the pleadings is a drastic remedy, it may be appropriate after an attorney repeatedly ignored warnings at compliance conferences (*Goldstein v CIBC World Mkts. Corp.*, 30 AD3d 217, 217 [1st Dept 2006]). Striking the pleadings is warranted when the court finds willful and contumacious noncompliance (*Gliklad v Cherney*, 113 AD3d 505, 506 [1st Dept 2014]).

The defendants' pattern of willful and contumacious conduct by failing to provide documents, defying court orders, and producing incomplete and noncompliant document productions despite numerous "last chances" following the granting of motions to compel warrants striking their answer. The defendants simply have and continue to flout the orders of this court and to deny Lynx the ability to seek discovery relevant to its theory of the case.

Accordingly, it is

ORDERED that the plaintiff's motion for sanctions is granted and the defendants' cross-motion to dismiss is denied; and it is further

ORDERED that the defendants' answer is struck; and it is further

ORDERED that a Judicial Hearing Officer ("JHO") or Special Referee shall be designated to determine the amount of damages and attorneys' fees to which plaintiff is entitled; and it is further

ORDERED that the powers of the JHO/Special Referee shall not be limited beyond the limitations set forth in the CPLR; and it is further

ORDERED that this matter is hereby referred to the Special Referee Clerk (Room 119, 646-386-3028 or spref@nycourts.gov) for placement at the earliest possible date upon the calendar of the Special Referees Part (Part SRP), which, in accordance with the Rules of that Part (which are posted on the website of this court at www.nycourts.gov/supctmanh at the "References" link),

shall assign this matter at the initial appearance to an available JHO/Special Referee to determine as specified above; and it is further

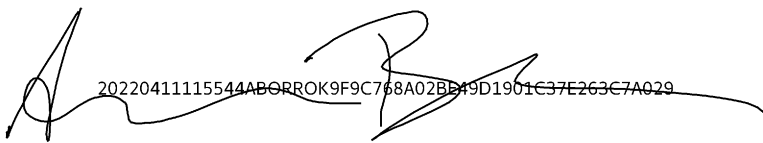
ORDERED that counsel shall immediately consult one another and counsel for plaintiff shall, within 15 days from the date of this Order, submit to the Special Referee Clerk by fax (212-401-9186) or e-mail an Information Sheet (accessible at the “References” link on the court’s website) containing all the information called for therein and that, as soon as practical thereafter, the Special Referee Clerk shall advise counsel for the parties of the date fixed for the appearance of the matter upon the calendar of the Special Referees Part; and it is further

ORDERED that the plaintiff shall serve a proposed accounting within 24 days from the date of this order and the defendants shall serve objections to the proposed accounting within 20 days from service of plaintiff’s papers and the foregoing papers shall be filed with the Special Referee Clerk prior to the original appearance date in Part SRP fixed by the Clerk as set forth above; and it is further

ORDERED that the parties shall appear for the reference hearing, including with all witnesses and evidence they seek to present, and shall be ready to proceed with the hearing, on the date fixed by the Special Referee Clerk for the initial appearance in the Special Referees Part, subject only to any adjournment that may be authorized by the Special Referees Part in accordance with the Rules of that Part; and it is further

ORDERED that, except as otherwise directed by the assigned JHO/Special Referee for good cause shown, the trial of the issues specified above shall proceed from day to day until completion and counsel must arrange their schedules and those of their witnesses accordingly; and it is further

ORDERED that counsel shall file memoranda or other documents directed to the assigned JHO/Special Referee in accordance with the Uniform Rules of the Judicial Hearing Officers and the Special Referees (available at the "References" link on the court's website) by filing same with the New York State Courts Electronic Filing System (see Rule 2 of the Uniform Rules).



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4/11/2022

DATE

ANDREW BORROK, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED DENIED

GRANTED IN PART OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE