

**Shendell v 906 W. Beech Bldg., LLC**

2022 NY Slip Op 31215(U)

April 11, 2022

Supreme Court, New York County

Docket Number: Index No. 652402/2020

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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MATTHEW SHENDELL, FONDUE 26, LLC, AINSPH, LLC,  
AINS KC, LLC, AINS NASHVILLE, LLC, AINS NEWARK,  
LLC, RONBON, LLC, PARK 33, LLC, BURGER FULTON,  
LLC

Plaintiff,

- v -

906 WEST BEECH BUILDING, LLC, JOHN SULLIVAN,  
CHRISTOPHER GRAVAGNA, CALIGARA CAPITAL, LLC,  
AINSWORTH 33, LLC, AINSWORTH FULTON,  
LLC, 4WALLEBITDA, LLC,

Defendant.

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INDEX NO. 652402/2020  
MOTION DATE 08/30/2021,  
09/21/2021  
MOTION SEQ. NO. 004 005

**DECISION + ORDER ON  
MOTION**

HON. ANDREW BORROK:

The following e-filed documents, listed by NYSCEF document number (Motion 004) 81, 82, 83, 84, 85, 86, 87, 117, 127

were read on this motion to/for STRIKE PLEADINGS.

The following e-filed documents, listed by NYSCEF document number (Motion 005) 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 113, 114, 118, 119, 120, 121, 122, 123, 124, 125, 126, 128, 129, 130, 131, 132

were read on this motion to/for DISCOVERY.

Upon the foregoing documents, Plaintiffs’ motions to strike the answer (Motion 004) and compel discovery (Motion 005) from 906 West Beech Building, John Sullivan, Ainsworth 33, LLC, Ainsworth Fulton, LLC, and 4Wallebitda, LLC (the **Sullivan Defendants**) are granted. The Sullivan Defendants have engaged in a course of willful and contumacious conduct to avoid complying with Plaintiffs’ discovery demands, despite numerous court orders directing compliance and additional opportunities given by the Court to provide relevant documents during the time that they managed Plaintiffs’ restaurants and before the closing occurred (*Oasis*

*Sportswear, Inc. v Rego*, 95 AD3d 592, 592 [1st Dept 2012]; *Gliklad v Cherney*, 113 AD3d 505, 506 [1st Dept 2014]).

The instant motions were necessitated by the Sullivan Defendants' failure to comply with four prior court orders directing responses to Plaintiffs' demands before specific deadlines, the last of which was no later than August 20, 2021 [NYSCEF Docs. No. 76, 78, 79, 80]. The parties appeared before the Court to discuss the instant motions on February 4, 2022 [the **February 4 Conference**], March 1, 2022 [the **March 1 Conference**] and March 29, 2022 [the **March 29 Conference**].

At the February 4 Conference, Plaintiffs' counsel, Mr. Keating, informed the Court that the Sullivan Defendants had only provided a "document dump" of 411 pages in response to Plaintiffs' demands that were unlabeled, which he attached as exhibits to his motion papers [NYSCEF Docs. No. 101-102]. Mr. Avery, counsel for the Sullivan Defendants, insisted that the pages were, in fact, responsive to Plaintiffs' demands. The Court signed an Interim Order dated February 10, 2022 [NYSCEF Doc. No. 117], which allowed the Sullivan Defendants to clarify which of the 411 pages responded to specific demands made by Plaintiffs before February 14, 2022 at 10:00 a.m. Plaintiffs were directed to upload a letter thereafter identifying deficiencies in the responses by February 17, 2022, and the Sullivan Defendants were given an opportunity to supplement any deficiencies before February 22, 2022.

Mr. Avery uploaded a letter to NYSCEF on February 14, 2022 [NYSCEF Doc. No. 119] identifying documents that purported to respond to 7 out of 10 of Plaintiffs' demands, but

provided no explanation why documents had not been provided in response to all of Plaintiffs' demands. Mr. Keating filed a letter on February 17, 2022 [NYSCEF Doc. No. 120], which described the substantial deficiencies in the responses provided by the Sullivan Defendants and reiterated their failure to respond at all to at least three of Plaintiffs' demands.

At the March 1 Conference, the Court asked Mr. Avery to explain why his clients had failed to respond in any capacity to three of Plaintiffs' demands for financial information during the period that the Sullivan Defendants operated Plaintiffs' restaurants. Mr. Avery argued that the Sullivan Defendants disputed the timeline over which Plaintiffs believed they were entitled to documentation. The Court signed a second Interim Order dated March 1, 2022 [NYSCEF Doc. No. 127], which granted Plaintiffs' motion to compel and directed that the Sullivan Defendants respond to Plaintiffs' demands numbered eight, nine and ten by March 22, 2022. The Court admonished that, if the Sullivan Defendants failed to respond, their pleadings would be struck. The Court set another status conference for March 29, 2022.

No documents or letters were uploaded to NYSCEF by either party between the March 1 and March 29 Conferences.

At the March 29 Conference, Mr. Keating advised the Court that the Sullivan Defendants had produced another 181 pages of documents, which he contended were generally non-responsive to the remaining demands to which the Court had directed responses. The Court requested that he upload a letter to NYSCEF specifying in detail the ways in which the new documents failed to respond. By letter dated March 29, 2022 [NYSCEF Doc. No. 129], Mr. Keating uploaded his

letter with the additional 181 document production attached as an exhibit [NYSCEF Doc. No. 131].

The Court has reviewed all of the documents produced by the Sullivan Defendants thus far. It is abundantly clear from the record that the Sullivan Defendants have no intention of producing documents pertinent to Plaintiffs' demands despite numerous court order directing them to do so.

The first document dump of 411 pages consisted largely of irrelevant emails containing complaints from customers and vendors about the restaurant [NYSCEF Doc. No. 101, Bate Stamp No. D000120-141, D000172-176; NYSCEF Doc. No. 102 at Bate Stamp No. D000304-305], a copy of the Management Handbook for restaurant staff, complete with restaurant menus [NYSCEF Doc. No. 101-102 at Bate Stamp No. D000178-D000226]; pictures of the Ainsworth website [NYSCEF Doc. No. 102 at Bate Stamp No. D000306-337]; Legal documents from separate unrelated actions to which Plaintiffs were parties [NYSCEF Doc. No. 101 at Bate Stamp No. D000086-118; NYSCEF Doc. No. 102 at Bate Stamp No. D000249-284]; and motion papers in the instant action which Plaintiffs filed [NYSCEF Doc. 102 at Bate Stamp No. D000230-239], among other things. In essence, the documents provided were largely available to Plaintiffs from other sources, and in no way responsive to Plaintiffs' demands for correspondence between the Sullivan Defendants that would shed some light on the relationship between the Sullivan Defendants and the claims asserted in this action.

With respect to Plaintiffs' demands for financial information, the second 181 production of documents by the Sullivan Defendants was just as unresponsive as the initial document dump. In

the second document dump, the Sullivan Defendants provided bank statements for the operating accounts of the entities that managed two of Plaintiffs' restaurant locations [NYSCEF Doc. No. 131 at Bate Stamp No. D000412-484], which do not reflect the restaurants' income or payments made by the Sullivan Defendants relative to operating costs of the restaurants. Additionally, the Sullivan Defendants produced redacted Paycheck Protection Plan (PPP) loan applications hiding gross sale information [*Id.* at Bate Stamp No. D000485-526] and quarterly state tax returns showing zero dollars in non-taxable sales [*Id.* at Bate Stamp No. D000544-593]. The only possible relevant documents to Plaintiffs' demands were charts purportedly showing sales tax and gross weekly sales for two of the restaurant locations [*Id.* at Bate Stamp No. D000532-543], but those charts do not indicate expenses for those same weeks. The Sullivan Defendants did not produce payroll records, credit card receipts, net worth statements, federal or state income tax filings, profit and loss statements, balance sheets, additional supporting documentation for the PPP loan, or proof of any payments having been made on behalf of the PPP loan.

After being given numerous opportunities to comply with the Court's discovery directives, the Sullivan Defendants have willfully and contumaciously defied all of the Court's orders and have been extremely uncooperative in the adjudication of this matter. For this reason, it is wholly appropriate that their answer be struck (*Oasis*, 95 AD3d at 592; *Gliklad*, 113 AD3d at 506). Plaintiffs are directed to issue the necessary subpoenas to obtain relevant documents proving the damages owed in this matter.

Accordingly, it is

ORDERED that Plaintiffs' motion to strike the Sullivan Defendants' pleadings (Motion 004) is granted; The Sullivan Defendants' Answer is hereby stricken; and it is further

ORDERED that Plaintiffs' motion to compel discovery (Motion 005) is granted as confirmed by the Court's Interim Order dated March 1, 2022; and it is further

ORDERED that a Judicial Hearing Officer ("JHO") or Special Referee shall be designated to determine the issue of damages and attorneys' fees with regard to all Defendants, including those defendants who defaulted, which are hereby submitted to the JHO/Special Referee for such purpose; 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](mailto: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](http://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

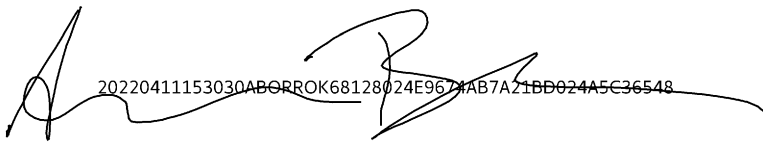
ORDERED that counsel shall immediately consult one another and counsel for plaintiff shall, within 15 days from the date of this Order, submit to the Special Referee Clerk by fax (212-401-

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 on the initial appearance in the Special Referees Part the parties shall appear for a pre-hearing conference before the assigned JHO/Special Referee and the date for the hearing shall be fixed at that conference; the parties need not appear at the conference with all witnesses and evidence; and it is further

ORDERED that, except as otherwise directed by the assigned JHO/Special Referee for good cause shown, the trial of the issue 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

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ANDREW BORROK, J.S.C.

CHECK ONE:	<input checked="" type="checkbox"/>	CASE DISPOSED	<input type="checkbox"/>	NON-FINAL DISPOSITION	<input type="checkbox"/>
	<input checked="" type="checkbox"/>	GRANTED	<input type="checkbox"/>	GRANTED IN PART	<input type="checkbox"/>
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>	SUBMIT ORDER	<input type="checkbox"/>
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/>
			<input type="checkbox"/>	DENIED	OTHER
					REFERENCE