

**Friends of Petrosino Sq. v Soho Hummus LLC**

2022 NY Slip Op 33283(U)

September 28, 2022

Supreme Court, New York County

Docket Number: Index No. 155973/2021

Judge: Sabrina Kraus

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This opinion is uncorrected and not selected for official publication.

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

**PRESENT: HON. SABRINA KRAUS PART 57TR**

*Justice*

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FRIENDS OF PETROSINO SQUARE, GEORGETTE  
FLEISCHER, CHRISTINE SPERRY, MARNA LAWRENCE,  
PAUL HALLASY

Plaintiff,

- v -

SOHO HUMMUS LLC, EYAL HEN, FONTANA REALTY  
LLC, JOHN ILIBASSI, DAVID CHEN,

Defendant.

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INDEX NO. 155973/2021

MOTION DATE 08/22/2022

MOTION SEQ. NO. 003

**DECISION + ORDER ON  
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 003) 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150

were read on this motion to/for DISCOVERY

**BACKGROUND**

Plaintiff commenced this action against Defendants SOHO Hummus, doing business as 19 Cleveland by Nish Nush and Eyal Hen (Restaurant Defendants), Fontana Realty LLC, John Ilibassi and David Chen (Landlord Defendants) for a declaratory judgment that Defendants are violating the law, an injunction, intentional infliction of emotional distress, breach of warranty of habitability as against Landlord Defendants and legal fees.

Although discovery demands had already been served, on January 5, 2022 a preliminary conference was held and the parties agree to a discovery schedule, with an end date of May 19, 2022 for all disclosure. A compliance conference was held on April 7, 2022, requiring the parties to serve deficiency notices within thirty (30) days and to respond to the same thirty (30) days thereafter, as well as setting a further schedule of depositions.

On June 28, 2022, the court held a status conference, wherein the Restaurant Defendants maintained that their discovery demands were still outstanding and expressed their intention to move for discovery relief.

### **PENDING MOTIONS**

On August 15, 2022, Restaurant Defendants moved pursuant to CPLR §3126(3) to strike Plaintiffs' summons with notice and complaint for failure to comply with discovery, or in the alternative, pursuant to CPLR §3126(2) to preclude Plaintiffs from introducing any evidence relating to any of the topics or information outlined in Restaurant Defendants delinquency notices, or in the alternative pursuant to CPLR §3124, compelling Plaintiffs to provide discovery outlined in Restaurant Defendants deficiency notices, and awarding Restaurant Defendants costs associated with the instant motion.

Plaintiffs' cross moved pursuant to CPLR§3126 (1), finding that Restaurant Defendants, have refused to comply with orders for disclosure and willfully failed to disclose information material to this case, by failing to provide responses to Plaintiffs' discovery demands and willfully refused to appear for depositions, and pursuant to CPLR §3126 (2) prohibiting Restaurant Defendants from supporting claims and/or defenses, or from introducing any evidence or using witnesses at trial or giving testimony at trial; and pursuant to CPLR §3126 (3), striking the pleadings of Restaurant Defendants and rendering judgment by default against said Defendants and in favor of Plaintiffs; and/or alternatively, ordering Restaurant Defendants to forthwith comply with the discovery order of April 29, and determining that Restaurant Defendants have waived any priority as to discovery and have waived the right to take depositions of Plaintiffs; mandating the Restaurant Defendants comply fully, and by a date certain, with Plaintiffs' discovery demands, and to remedy earlier deficiencies set forth in the

Deficiency Notice and ordering sanctions and the payment of Plaintiffs' reasonable legal fees in an amount to be determined by the Court for such willful and deliberately obstructive conduct.

On August 22, 2022, the motion was fully briefed and submitted to the court for determination.

### **DISCUSSION**

CPLR § 3101(a) provides for the “full disclosure of all evidence material and necessary in the prosecution or defense of an action regardless of the burden of proof.” CPLR § 3124 grants the court the power to compel a party to provide discovery demanded. CPLR § 3126 grants the court the power to sanction a party that fails to comply with a court's discovery order.

The striking of a pleading is a drastic remedy and is only warranted where a clear showing has been made that the noncompliance with an order was willful, contumacious or due to bad faith (*Mateo v City of New York*, 274 AD 2d 337, 711 NYS. 2d 396 [1st Dept 2000]).

#### ***Restaurant Defendants motion is granted to the extent Plaintiff is compelled to provide outstanding discovery***

Restaurant Defendants motion to strike or preclude is denied, however the motion is granted to the extent that Plaintiff is ordered to compel the following discovery.

Restaurant Defendants' argue that the documents provided by Plaintiffs were done so in the form of a “document dump” and not labeled as to what demand it was in response to. Plaintiffs offer do not deny that documents produced were done in an unorganized manner. CPLR § 3122 (c) provides in pertinent part, “ whenever a person is required pursuant to such notice or order to produce documents for inspection, that person shall produce them as they are kept in the regular course of business or shall organize and label them to correspond to the

categories in the request”. Plaintiff is ordered to organize discovery responses in such a way as to reflect the demand they are offered in response of.

Restaurant Defendants request documents relating to prior litigations involving Plaintiff Georgette Fleischer and Friends of Petrosino Square. In opposition, Plaintiff argues Restaurant Defendants are engaged in a fishing expedition. However, the court find that’s such information is relevant to the allegations being made and defenses raised in this action, and therefore Plaintiffs are ordered to produce documents in response to this document demand.

Restaurant Defendants request authorizations for the social media records of each Plaintiff. Plaintiffs object arguing the demand is improper, broad, overreaching and beyond the scope of permissible discovery. In deciding whether a court should allow disclosure of social media, the Court of Appeals has said,

[C]ourts should first consider the nature of the event giving rise to the litigation and the injuries claimed, as well as any other information specific to the case, to assess whether relevant material is likely to be found on the Facebook account. Second, balancing the potential utility of the information sought against any specific “privacy” or other concerns raised by the account holder, the court should issue an order tailored to the particular controversy that identifies the types of materials that must be disclosed while avoiding disclosure of nonrelevant materials

*Forman v Henkin*, 30 NY3d 656 (Ct of Appeals 2018).

Restaurant Defendants request for “all records; information, photographs, videos, comments, messages, and postings on Facebook, Twitter, MySpace, Instagram, and LinkedIn accounts” is overly broad. The discovery demand for social media posts is limited to those which are relevant to the parties and allegations involved in this litigation. Plaintiffs’ are to provide copies of any social media post which names any of the parties to this action or the involves or relates to the allegations raised in this action.

Restaurant Defendants' request for supplemental responses for interrogatories 6, 9 and 10 is granted. These include a recitation by each plaintiff of each occurrence that they claimed forms the basis of their claims in the lawsuit, including for the claims of conduct that allegedly amounted a public and private nuisance, and the incidents which claim interfered with Plaintiffs' use and enjoyment of their premises. For each occurrence, the Plaintiffs provide specific information regarding the date, time and location of the occurrence, along with the individuals allegedly involved.

Restaurant Defendants' request for supplemental responses to interrogatory 7, to identify the date the pictures were made, who made them, what is depicted in each photograph, where they were taken, and who currently has possession of them, is also granted.

Restaurant Defendants' request for supplemental responses to interrogatory 8, to identify when any oral communications occurred with Eyal Hen, the participants in those communications, where the communication took place, and a summary of what was said during those communications, is granted.

Restaurant Defendants' request for supplemental responses to interrogatory 12, detail each instance in which the Plaintiffs have appeared before any regulatory body (including the Community Board) to contest the operations of any commercial establishment within NYC, including the date and place of the appearance, the entity they appeared before, the claims that were made, anyone who appeared with them, and the result of any such appearances, is granted.

Restaurant Defendants' request to have to production of photographs supplemented by providing them in digital format with metadata in tact, as well as the name of the person who took the photograph, date it was taken and what demand it is in response to, is granted.

Restaurant Defendants' request for the individual Plaintiffs to provide separate responses to the combined demands is granted.

Restaurant Defendants' request for documents in demand 13, 16, 17, 20, 21, 26, 41, 42, 44, 45 and 46 are granted. Plaintiff's to provide an affidavit if no such document exists for the specific demand, or if the document requested is not in their possession or within their control to obtain.

***Plaintiffs' cross motion is granted to the extent of compelling discovery but denied in all other respects***

Plaintiffs' cross motion pursuant to CPLR§3126 (1), finding that Restaurant Defendants, have refused to comply with orders for disclosure and willfully failed to disclose information material to this case, by failing to provide responses to Plaintiffs' discovery demands and willfully refused to appear for depositions, and pursuant to CPLR §3126 (2) prohibiting Restaurant Defendants from supporting claims and/or defenses, or from introducing any evidence or using witnesses at trial or giving testimony at trial; and pursuant to CPLR §3126 (3), striking the pleadings of Restaurant Defendants is denied as Plaintiffs' have failed to establish a clear showing that Restaurant Defendants' noncompliance with previous discovery orders was willful, contumacious or due to bad faith.

To the extent that Plaintiffs' move for Restaurant Defendants to comply with outstanding discovery, the motion is granted. Wherever Restaurant Defendants allege documents are not within their possession, Defendants to provide an affidavit from a person with knowledge that the requested documents are not within their possession or not under their control or ability to obtain.

Plaintiff's demand 13, 14, 15 and 16 for payroll records and federal and state tax records and employment agreements is denied, as irrelevant to the complaint.

Plaintiffs' demand 17 and 18, for operating agreements for 1923 Cleveland Inc and employment records for Bambina Blue, is denied, as these entities are not a party to this action.

Plaintiffs' demand 19 and 20 is granted to the extent that Restaurant Defendants are to provide the results of the search for the records requested.

Plaintiffs' demand 24, 25, 30, 31, 32, 33, and 34 are denied as they relate to entities that are not a party to this litigation.

Plaintiffs' demand 36, 37 38, 39, 40, 41, 42, 43, 44 is granted only to the extent that it relates to any of the parties to this action or the subject matter of the communication is in relation or related to this litigation.

Plaintiffs' demand 45 and 46 is denied as it relates to entities that are not a party to this action.

Plaintiffs' demand 47 and 48 are granted to the extent that Defendants are to either produce the records demanded or an affidavit of a person with knowledge stating the same is not in their possession or within their control to obtain.

### CONCLUSION

Based on the forgoing, it is hereby

ORDERED that Restaurant Defendants' motion to strike and/or preclude is denied, however to the extent Restaurant Defendants moved to compel, the motion is granted to the extent provided above; and it is further

ORDERED Plaintiffs' motion to strike is denied, but in the alternative to compel is granted to the extent provided above; and it is further

