

SH575 Holdings LLC v Reliable Abstract Co., L.L.C.
2022 NY Slip Op 33968(U)
November 18, 2022
Supreme Court, New York County
Docket Number: Index No. 651246/2019
Judge: Margaret Chan
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (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
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 49M

-----X
SH575 HOLDINGS LLC,

Plaintiff,

- v -

RELIABLE ABSTRACT CO., L.L.C., YAKOV
DECKELBAUM, RICHMOND STUYVESANT HOLDINGS,
LLC, CARL CALLER, THE MARCAL GROUP LLC, MARK
CALLER, JAYSUKHLAL DOMADIA, ROBINSON BROG
LEINWAND GREENE GENOVESE & GLUCK P.C., TISSA
16TH CORP, TISSA FUNDING, CORP., HOWARD
HERSHKOVICH, PINCUS CARLEBACH, JOHN AND
JANE DOES, ABC COMPANIES

Defendant.
-----X

INDEX NO. 651246/2019

MOTION DATE 04/01/2022

MOTION SEQ. NO. 006

**DECISION + ORDER ON
MOTION**

HON. MARGARET CHAN:

The following e-filed documents, listed by NYSCEF document number (Motion 006) 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179

were read on this motion to/for

SANCTIONS

Plaintiff moves pursuant to CPLR 3126 for discovery sanctions against defendants Richard Stuyvesant Holdings, LLC (Richard Stuyvesant), Carl Caller, The Marcal Group, LLC, and Mark Caller (together, the Caller Defendants). The Caller Defendants oppose the motion.

Background

This action arises out of a conversion by defendant Pincus David Carlebach (Carlebach), a disbarred bankruptcy attorney, of \$1 million deposited by plaintiff into Carlebach's IOLA account under a March 10, 2017 Agreement for the purchase of real property (the Property) from Carlebach's client, Liberty Towers Realty LLC (Liberty) in connection with a bankruptcy proceeding (NYSCEF # 48-Amended Verified Complaint).

With regard to the Caller Defendants, the Amended Verified Complaint alleges as follows. On August 16, 2016, before plaintiff's contract to purchase the property, Richard Stuyvesant entered into a purchase contract for the Property and deposited \$500,000 into Carlebach's IOLA account (*id.*, ¶ 110). The Caller Defendants had worked with Carlebach to achieve their aligned interests for a

substantial period of time of at least one year (*id.*, ¶¶ 106-108). Richard Stuyvesant's purchase contract for the Property was cancelled on January 13, 2017 (*id.*, ¶¶ 114-119). However, when its \$500,000 deposit was not returned by 5:00 pm the next day, rather than report the failure, the Caller Defendants continued to work with Carlebach to either acquire the Property or to receive \$500,000 upon Carlebach's further deposits into his IOLA account (*id.*, ¶¶ 120, 125). On or about March 22, 2017, or 12 days after plaintiff's deposit of \$1 million into Carlebach's escrow account, Richard Stuyvesant was repaid its \$500,000 that it should have received more than two months earlier (*id.*, ¶¶ 126, 130-31).

On June 27, 2017, plaintiff's purchase contract for the Property was canceled, and when plaintiff did not receive the \$1 million deposit back, plaintiff reported Carlebach to the authorities (*id.*, ¶¶ 29, 43). Based on Carlebach's escrow account statements subpoenaed by plaintiff from Citibank, N.A. (Carlebach's financial institution), the Caller Defendants received \$500,000 of the plaintiff's \$1 million (*id.*, ¶¶ 35-44, 126-131).

Seven of the defendants¹ moved to dismiss the amended complaint pursuant to CPLR 3211(a)(1) and (7). By Decision and Order dated April 15, 2020, Hon. O. Peter Sherwood (ret.) granted the motions (NYSCEF # 125). The dismissal was affirmed on appeal (NYSCEF # 138).

By Stipulation of Discontinuance dated June 9, 2021, the parties agreed to discontinue any and all claims and counterclaims against defendant Robinson Brog Leinwand Greene Genovese & Gluck P.C. (NYSCEF # 137). Carlebach, who has been released from prison but cannot be located, is in default. Therefore, the only claims being pursued are against the Caller Defendants to recover the \$500,000 of plaintiff's \$1 million deposit.

On July 22, 2021, a preliminary conference was held. The Caller Defendants were ordered to produce responses to discovery demands by December 3, 2021 (NYSCEF # 141). On January 12, 2022, a compliance conference was held and the Caller Defendants were ordered to produce discovery documents by February 11, 2022. The Caller Defendants were advised that failure to comply with the discovery deadline could result in penalties pursuant to CPLR 3126 (NYSCEF # 142). At the time of a status conference held on March 17, 2022, the documents had not been produced and the order provided that "upon consent of the parties, and with permission of the court, plaintiff may move for discovery sanctions pursuant to CPLR 3126" (NYSCEF # 143).

¹ These defendants were Reliable Abstract Co., L.L.C. Yakov Deckelbaum a/k/a Jacob Deckelbaum, Jaysukhlal Domadia a/k/a Jay Domadia a/k/a Jay Sukhlal J. Domadia, Tissa 16th Corp. and Tissa Funding, Corp. and Howard Hershkovich
651246/2019 SH575 HOLDINGS LLC vs. RELIABLE ABSTRACT CO., L.L.C.
Motion No. 006

On April 1, 2022, plaintiff moved pursuant to CPLR 3126 for discovery sanctions against the Caller Defendants for failure to produce document discovery (NYSCEF #s 144-172). The Caller Defendants filed untimely opposition consisting of their attorney's affirmation in which it was asserted that striking the pleadings was too harsh a remedy because they had produced 102 pages of documents on February 11, 2022. At the same time, the Caller Defendants conceded that their responses was deficient in certain respects, and asserted that the cause of the deficiency was their counsel's busy work schedule due to the pandemic (NYSCEF # 173, ¶¶ 3-6). In its reply, plaintiff pointed out that during the status conference in March 2022, defense counsel did not raise his work schedule as the cause of his clients' failure to comply with discovery (NYSCEF #s 175-176).

After the motion was marked fully submitted, the Caller Defendants submitted a supplemental affirmation from their attorney who states that since their originally opposition was filed, the Caller Defendants supplemented their "discovery response, consisting of 992 pages, which were produced to plaintiff on May 9, 2022 [and that] [t]he documents consist principally of emails, litigation documents and materials relating to the various proceedings and transactions underlying this matter" (NYSCEF # 177, ¶¶ 3,4). The attorney also affirms that the production is "based on a complete search by defendants of the email accounts of defendants Carl Caller and Mark Caller, and non-party Aryeh Fried (an attorney employed by Carl Caller)," and lists the email addresses searched (*id.*, ¶ 5).

In his letter response to the supplemental affirmation, plaintiff's attorney states that "the purported 992-page document production -- received without any notice to, or discussion with, plaintiff's counsel -- does not appear to be in good faith. Most documents are public filings. There are almost no internal e-mails, and the little ESI that was produced appears to be paper printouts, often lacks attachments, and in some cases, there appears to be text missing or altered documents. It appears that no ESI whatsoever was produced from defendant Mark Caller, or Aryeh Fried. Other deficiencies appear as well" (NYSCEF # 179).

After the submission of the motion, a conference was held on July 28, 2022, at which the parties agreed to attempt to settle the action (NYSCEF # 180). On September 17, 2022, a meeting was held between the parties and their counsel regarding mediating the dispute; however, the matter was not mediated reportedly because after plaintiff chose a mediator from a list of five provided by the Caller Defendants, the Caller Defendants failed to respond to schedule the mediation.

Discussion

CPLR 3126 (3) provides that if a party "refuses to obey an order for disclosure or willfully fails to disclose information which the court finds ought to have been disclosed pursuant to this article, the court may make such orders with regard to

the failure or refusal as are just,” including “an order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or any part thereof, or rendering a judgment by default against the disobedient party.” Under CPLR 3126 (1)(2), the court is also authorized to order that the issues encompassed by the disclosure demand “be deemed resolved,” in the favor of the party seeking the discovery or that the party be precluded from introducing certain evidence or from supporting or opposing certain claims. (see *Husovic v Structure Tone, Inc*, 171 AD3d 559, 560 [1st Dept 2019][deeming certain factual issues resolved in plaintiff’s favor because “Supreme Court issued three separate discovery orders directing defendant to produce documents, including one order that expressly laid out what documents needed to be provided and warned that failure to comply may result in sanctions”] *Crawford v Toyota Motor Credit Corp.*, 283 AD2d 184 [1st Dept 2001][appropriate sanction for failing to appear at deposition was an order precluding trial testimony]). In addition, a monetary sanction of an award of reasonable attorneys’ fees and costs is appropriate under CPLR 3126 to compensate counsel for time expended related to a failure to provide discovery (*Maxim, Inc. v Feifer*, 161 AD3d 551, 554 [1st Dept 2018][“A monetary sanction, including costs and counsel fees, may be imposed under the statutory language in CPLR 3126”][citations omitted])

“The drastic sanction of striking pleadings is justified only when the moving party shows conclusively that the failure to disclose was willful, contumacious or in bad faith” (*Roman v City of New York*, 38 AD3d 442 [1st Dept 2007][citation omitted]); see also, *Marks v Vigo*, 303 AD2d 306 [1st Dept 2003][noting that “[i]n view of the strong preference in our law that actions be decided on their merits... a court should not resort to the drastic remedy of striking a pleading for failure to comply with discovery directives unless the noncompliance is established to be both deliberate and contumacious”] cf, *Couri v Siebert*, 48 AD3d 370 [1st Dept 2008][holding that plaintiff’s “dilatatory, evasive, obstructive, and ultimately contumacious conduct” warranted striking his complaint][internal citations omitted]). At the same time, “[i]f the credibility of court orders and the integrity of our judicial system are to be maintained, a litigant cannot ignore court orders with impunity” (*Kilh v Pheffer*, 94 NY2d 118, 123 [1999]).

Here, the Caller Defendants have prolonged this case by failing to produce the outstanding discovery as ordered by the court. They missed the discovery deadline by failing to produce discovery by December 3, 2021. And, after they were granted an extension to produce discovery by February 11, 2022, the production was incomplete. The Caller Defendants were granted until March 17, 2022, to produce the outstanding discovery, but failed to do so, and the parties consented to plaintiff moving for sanctions pursuant to CPLR 3126. It was only after plaintiff moved for sanctions that the Caller Defendants argued that their failure to comply with court ordered discovery should be excused because of their attorney’s workload. On May 9, 2022, after plaintiff’s sanctions motion was marked fully submitted, the Caller

Defendants produced a supplemental discovery response. However, the response was deficient since it did not include most of the ESI sought by plaintiffs, except for some print outs, and appears to lack most, if any, internal emails (Commercial Div. Rule 11-c; Commercial Div. Rule, Appendix A, VI).

Under these circumstances, plaintiffs' request for discovery sanctions is granted to the extent of requiring the Caller Defendants (i) to pay the plaintiff reasonable attorney's fees and expenses incurred on this motion, (ii) to supplement their document response, including by providing ESI in a readable and searchable format and providing an affidavit from a person with knowledge as to the devices searched and the format of the information on the devices, or, in the alternative, to furnish an affidavit from a representative of an e-discovery vendor or information technology expert who can attest to reviewing the relevant devices belonging to the Caller Defendants and Mr. Fried, the search terms used to obtain the information, the result of the search and whether any of the information has been deleted from the devices, and to the extent ESI cannot be provided in a readable and searchable format, the reason that it cannot be provided in such a format. Defense counsel shall provide plaintiffs' counsel with the credentials of the vendor or expert.

Conclusion

Accordingly, it is

ORDERED that within 30 days of entry of this order the Caller Defendants shall supplement their document response, including by providing ESI in a readable and searchable format, or furnish an affidavit from an e-discovery vendor or an Information Technology expert who can attest to reviewing the relevant devices belonging to the Caller Defendants and Mr. Fried, and the search terms used to obtain the information, the result of the search and whether any of the information has been deleted from the devices and to the extent ESI cannot be provided in a readable and searchable format, the reason that it cannot be provided in such a format; and it is further

ORDERED that before providing an affidavit from an e-discovery vendor or expert, defense counsel shall provide plaintiffs' counsel with the credentials of the vendor or expert; and it is further

ORDERED that the Caller Defendants' failure to timely comply with this order shall result in the imposition of further discovery sanctions absence further order of the court; and it is further

ORDERED that plaintiff shall have judgment against the Caller defendants as to liability for reasonable attorneys' fees and expenses incurred by plaintiff in connection with this motion, with an amount to be determined by the court upon

plaintiff's submission of invoices and an affirmation(s) from counsel regarding the basis for the fee charged and its reasonableness; and it is further

ORDERED that a status conference shall be held on December 22, 2022 at noon using the same call-in number as provided for the previous conferences in this matter.

11/18/2022

DATE



MARGARET GHAN, J.S.C.

CHECK ONE:

CASE DISPOSED

GRANTED

SETTLE ORDER

INCLUDES TRANSFER/REASSIGN

DENIED

NON-FINAL DISPOSITION

GRANTED IN PART

SUBMIT ORDER

FIDUCIARY APPOINTMENT

OTHER

REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: