

El-Gamssy v Ibrahim

2023 NY Slip Op 31405(U)

April 27, 2023

Supreme Court, Kings County

Docket Number: Index No. 508784/2022

Judge: Leon Ruchelsman

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS : CIVIL TERM: COMMERCIAL PART 8

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MOHAMMED EL-GAMSSY,
Plaintiff, Decision and order
- against - Index No. 508784/2022

MARY IBRAHIM,
Defendant, April 27, 2023

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PRESENT: HON. LEON RUCHELSMAN Motion Seq. #1 & #2

The defendant has moved pursuant to CPLR §3126 seeking to strike the plaintiff's complaint for his failure to engage in discovery. The plaintiff opposes the motion. Papers were submitted by the parties and after reviewing all the arguments this court now makes the following determination.

According to the complaint the plaintiff and defendant became partners in a retail food market located at 78-02 5th Avenue in Kings County in August 2019. The complaint asserts that in January 2022 the defendant abandoned the market. The complaint alleges two causes of action, one for conversion, asserting the defendant took \$13,300 and one alleging the defendant has failed to reimburse the plaintiff for half his investment and thus owes the plaintiff \$154,000.

On October 5, 2022 the defendant served discovery demands on the plaintiff. The defendant sent the plaintiff followup requests but insists the discovery has never been provided. The defendant now seeks to strike the complaint on the grounds the

plaintiff has failed to engage in discovery. The first response to the motion contained in an affirmation asserted that the discovery would be provided within thirty days (see, Affirmation in Opposition [NYSCEF Doc. No. 7]). Indeed, a court order dated January 23, 2023 stated that the plaintiff would provide the discovery by March 6, 2023.

On March 7, 2023 a second motion was filed asserting the plaintiff had failed to supply the discovery by the date of March 6 and thus renewed the request to strike the plaintiff's complaint. In opposition, the plaintiff's counsel submitted an affidavit wherein he stated that he personally mailed the discovery response on March 3, 2023 by regular mail. The defendant insists she never received such a response.

Conclusions of Law

It is well settled that the trial court maintains broad discretion concerning the discovery process and any sanction for any violation (Bouri v. Jackson, 177 AD3d 947, 113 NYS3d 232 [2d Dept., 2019]). The severe sanction of striking a pleading is appropriate where it can be demonstrated that the failure to comply with discovery was the result of wilful and contumacious conduct (Rosenblatt v. Franklin Hospital Medical Center, 165 AD3d 862, 85 NYS3d 488 [2d Dept., 2018]). Such conduct may be

inferred from a party's actions, specifically a long period of time passing without complying with the discovery coupled with the absence of any reasonable excuse to explain such failure to comply (Morson v. 5899 Realty LLC, 171 AD3d 916, 98 NYS3d 127 [2d Dept., 2019]). Generally, the failure of either party to provide sought after discovery and to follow the express order of the court demonstrates a pattern of wilful default and neglect concerning the outstanding discovery (Espinal v. New York City Health and Hospitals Corp., 115 AD3d 641, 981 NYS2d 569 [2d Dept., 2014]).


In this case there is no basis to conclude the plaintiff engaged in any wilful or contumacious conduct. First, there is no evidence to support the accusation the plaintiff simply did not mail the discovery as promised. Moreover, even if true, the plaintiff quickly remedied the defendant's failure to receive the discovery by furnishing additional discovery and by providing the full discovery sent as an exhibit to these motions. Thus, the defendant, at this time, has its possession all the discovery sought. The baseless allegations of improper conduct are unsupported by any evidence. More importantly, they do not concern the actual discovery but are really grievances about the method and practice of plaintiff's counsel. Those allegations are insufficient to warrant any sanction. Consequently, the

motion seeking to strike the complaint is denied.

So ordered.

ENTER:

DATED: April 27, 2023
Brooklyn N.Y.



Hon. Leon Ruchelsman
JSC.