

**Marathon Strategies, LLC v Centennial Props. NY,  
Inc.**

2023 NY Slip Op 32223(U)

June 29, 2023

Supreme Court, New York County

Docket Number: Index No. 656191/2021

Judge: Nancy M. Bannon

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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. NANCY M. BANNON PART 42**

*Justice*

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MARATHON STRATEGIES, LLC

Plaintiff,

- v -

CENTENNIAL PROPERTIES NY, INC.,  
 f/k/a 9300 REALTY MANAGEMENT INC.,

Defendant.

-----X

INDEX NO. 656191/2021

MOTION DATE 3-22-23

MOTION SEQ. NO. 002

**DECISION + ORDER ON  
 MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 002) 17, 18, 19, 20, 21, 22, 23, 25, 26, 27, 28, 29, 30

were read on this motion to/for STRIKE/PRECLUDE.

The plaintiff commenced this action in October 2021 seeking \$60,000.00 in damages for an alleged breach of a consulting services agreement. The defendant answered, asserting nine affirmative defenses. The plaintiff served a Bill of Particulars in January 2022. By an order dated April 21, 2022, the court denied a motion by the plaintiff pursuant to CPLR 3025(b) to amend the complaint to, *inter alia*, correct the name of the defendant and denied a cross-motion by the defendant to dismiss the complaint pursuant to CPLR 3211(a)(1) and (a)(7) “upon the defendant’s failure to properly e-file its motion papers and to establish entitlement to that relief.” (MOT SEQ 001). In MOT SEQ 001, both parties improperly e-filed papers by failing to separately file and label all documents, including affirmations, affidavits and exhibits.

The court’s preliminary conference order dated August 4, 2022, *inter alia*, directs the defendant to provide a Bill of Particulars on or before October 15, 2022. In a compliance conference order dated December 1, 2022, the court noted, *inter alia*, that the defendant had failed to provide a verified Bill of Particulars without reasonable excuse and directed it to comply on or before December 21, 2022, or the “answer may be stricken per CPLR 3126, 3043.” The defendant failed to comply.

On January 4, 2023, the plaintiff moved to strike the answer or, in the alternative, preclude the defendant from introducing any evidence at trial relating to matters addressed in plaintiff's demand for Bill of Particulars (MOT SEQ 002). On January 28, 2023, the defendant cross-moved to dismiss the complaint pursuant to CPLR 3211(a)(1), a defense upon documentary evidence, 3211(a)(7), failure to state a cause of action, and (a)(10), failure to name a necessary party. On the same day, the defendant filed a Bill of Particulars, which was just two days before the Note of Issue filing deadline. The defendant's Bill of Particulars consists mostly of objections. The defendant makes no cogent argument in opposition to the plaintiff's motion – it states only that the plaintiff's motion “should be denied based upon the defendant's response to plaintiff's demand for a verified Bill of Particulars.” However, a noted, that Bill of Particulars was quite thin, offering little beyond objections.

After that motion was filed, further discovery was conducted. A status conference order dated February 23, 2023, noted the defendant's delay in serving a Bill of Particulars, that no reasonable excuse was proffered for the defendant's failure to serve demands and responses as directed, and depositions were not conducted. The court stated that depositions were now waived, and that all demands were to be served by March 6, 2023, and responses by March 17, 2023, and extended the Note of Issue filing deadline to March 31, 2023, marking it “Final 2X”. The same order states that “as per order dated 12-1-22, any further non-compliance by defendant shall result in preclusion (CPLR 3126).”

A final status conference was held on March 23, 2023, and an order of that date states that the parties disputed the sufficiency of some interrogatory responses of defendants, directed certain responses by April 7, 2023, noted that the defendant waived service of any demands, and extended the Note of Issue filing deadline to April 28, 2023, marking it “Final 3X.” That order also noted that it resolved MOT SEQ 002 in part, leaving the cross-motion for decision. The defendant filed revised responses to interrogatories on April 6, 2023, which again consist mostly of objections. The plaintiff filed a Note of Issue on April 10, 2023.

CPLR 3126 authorizes the court to sanction a party who “refuses to obey an order for disclosure or wilfully fails to disclose information which the court finds ought to have been disclosed” and that “a failure to comply with discovery, particularly after a court order has been issued, may constitute the “dilatatory and obstructive, and thus contumacious, conduct warranting

the striking of the [pleading].” Kutner v Feiden, Dweck & Sladkus, 223 AD2d 488, 489 (1<sup>st</sup> Dept. 1998); see CDR Creances S.A. v Cohen, 104 AD3d 17 (1<sup>st</sup> Dept. 2012); Reidel v Ryder TRS, Inc., 13 AD3d 170 (1<sup>st</sup> Dept. 2004). The court can infer willfulness from repeated failures to comply with court orders or discovery demands without a reasonable excuse. See LaSalle Talman Bank, F.S.B. v Weisblum & Felice, 99 AD3d 543 (1<sup>st</sup> Dept. 2012); Perez v City of New York, 95 AD3d 675 (1<sup>st</sup> Dept. 2012); Figiel v Met Food, 48 AD3d 330 (1<sup>st</sup> Dept. 2008); Ciao Europa, Inc. v Silver Autumn Hotel Corp., Ltd., 270 AD2d 2 (1<sup>st</sup> Dept. 2000). A plaintiff’s failure to serve a bill of particulars after one has been demanded gives rise to the same sanctions. See CPLR 3042.

While the defendant finally complied with the court’s order of March 23, 2023, by serving revised responses to interrogatories, it did so several months late, the day before the last deadline for that was to expire, and consisted mostly of objections. This followed the defendant’s failure to comply with the court’s order of August 4, 2022, and a pattern of recalcitrance throughout the litigation. Therefore, the plaintiff’s motion pursuant to CPLR 3126 is granted to the extent that the defendant shall be precluded from offering evidence in its defense at trial or any dispositive motion in regard to any matter raised in the plaintiff’s interrogatories.

The defendant’s cross-motion to dismiss the complaint is denied in its entirety. On a motion to dismiss for failing to state a cause of action under CPLR 3211(a)(7), the pleading is to be afforded a liberal construction and the court should accept as true the facts alleged in the complaint, accord the pleading the benefit of every reasonable inference, and only determine whether the facts, as alleged, fit within any cognizable legal theory. See Hurrell-Harring v State of New York, 15 NY3d 8 (2010); Leon v Martinez, 84 NY2d 83 (1994). Just as on its first motion for the same relief, the defendant fails to meet its burden on either ground. The complaint adequately alleges causes of action for, *inter alia*, breach of contract and unjust enrichment. While the plaintiff may not ultimately prevail on the claims, they are sufficiently pleaded to warrant denial of the instant motion.

Dismissal under CPLR 3211(a)(1) is warranted only where the documentary evidence submitted “resolves all factual issues as a matter of law, and conclusively disposes of the plaintiff’s claim.” Fortis Financial Services, LLC v Fimat Futures USA, 290 AD2d 383, 383 (1<sup>st</sup> Dept. 2002); see Amsterdam Hospitality Group, LLC v Marshall-Alan Assoc., Inc., 120 AD3d 431 (1<sup>st</sup> Dept. 2014). The defendant fails to identify any document that could conclusively

dispose of the plaintiff's claim. Indeed, while the defendant appears to argue that the plaintiff was required by the parties' agreement to mediate this claim, it also disputes the validity of the agreement. It also fails to mention whether it participated in the court-ordered mediation.

As to the final ground raised for dismissal, failure to name a necessary party, CPLR 3211(a)(10), the defendant fails to name any party it believes to be necessary. To the extent that the defendant is arguing that the necessary party is "Centennial Properties NY, Inc.", the name it uses in filed papers, the court notes that this is the corrected name the plaintiff sought to add in MOT SEQ 001. The defendant now appears to support an amendment. For that reason, and pursuant to CPLR 305(c) and 2001, the court corrects the misnomer such the name of the defendant shall be "Centennial Properties NY, Inc.. f/k/a 9300 Realty Management." It is well settled that where, as here, pleadings have been served under a misnomer upon the party which the plaintiff intended as a defendant, and the misnomer could not possibly have misled the defendant as to who it was that the plaintiff was in fact seeking to sue, the court should allow an amendment to correct the error. See CPLR 305(c); 3025(b); Tsoumpas 1105 Lexington Equities, LLC v 1109 Lexington Avenue LLC, 189 AD3d 524 (1<sup>st</sup> Dept. 2020).

Accordingly, upon the foregoing papers and this court's prior orders, it is

ORDERED that the plaintiff's motion pursuant to CPLR 3126 is granted to the extent that the defendant is precluded from offering evidence in its defense at trial or on any dispositive motion in regard to any matter raised in the plaintiff's interrogatories, and it is further

ORDERED that the defendant's cross-motion pursuant to CPLR 3211(a)(1), (a)(7) and (a)(10), is denied in its entirety, and it is further

ORDERED that, upon the court's own motion pursuant to CPLR 2001 and CPLR 305(c), the caption shall be amended to correct the name of the defendant to "**Centennial Properties NY, Inc. f/k/a 9300 Realty Management**", and it is further

ORDERED that the Clerk shall mark the file accordingly to reflect the amendment, and it is further

ORDERED that the parties meet and confer to explore settlement.

This constitutes the Decision and Order of the court.

*Nancy M. Bannon*  
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6/29/2023

DATE

NANCY M. BANNON, 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