

Musso v OTR Media Group, Inc.

2023 NY Slip Op 32896(U)

August 21, 2023

Supreme Court, Kings County

Docket Number: Index No. 523025/2018

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 8

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ROBERT J. MUSSO, Chapter 7 Trustee of the
Estate of Ladder 3 Corp.

Plaintiff, Decision and order

- against -

Index No. 523025/2018

OTR MEDIA GROUP, INC., AHARON NOE
a/k/a ARI NOE, SARAH NOE, ZYSHE NOE,
MOSHE MINZ, C & M CAPITAL GROUP, LLC.,
GUARDIAN LIFE INSURANCE COMPANY OF
AMERICA, UNITED STATES LIFE INSURANCE
COMPANY, INC., THE CITY OF NEW YORK,
GREENFIELD CUSTOM BUILDERS, INC.,
PARK NATIONAL CAPITAL FUNDING, LLC.,
WHOOPI U.S.A., INC., STERLING CATERERS, INC.,
DEAL BUSTER, INC., BLIZZARD COOLING, INC.,
AND OTR330 BRUCKNER, LLC.,

Defendants, August 21, 2023

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GUARDIAN LIFE INSURANCE COMPANY OF AMERICA,
Plaintiff,

-against-

Index No. 510481/2021

OTR MEDIA GROUP, INC., AHARON NOE a/k/a ARI
NOE, and ROBERT J. MUSSO, Chapter 7 Trustee of
the Estate of Ladder 3 Corp.

Defendant,

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PRESENT: HON. LEON RUCHELSMAN

Motion Seq. #8 & #10

The plaintiff has moved seeking to strike the defendants
answer for the failure to comply with an order of the court dated
February 6, 2020 requiring the defendant comply with discovery
within forty-five days. The defendant has cross-moved
essentially for more time in which to comply with discovery. The
motions have been opposed respectively. Papers were submitted by

the parties and after reviewing all the arguments this court now makes the following determination.

As recorded in a prior order, in 2017 the plaintiff obtained a judgement against defendant OTR Media Group Inc., in the amount of \$287,500 in a Chapter 7 proceeding in the United States Bankruptcy Court. That judgement was based upon OTR's breach of a stipulation of settlement executed in 2011 regarding breach of contract claims that took place in 2010. This current lawsuit alleges violations of the debtor-creditor law asserting that fraudulent conveyances were made by the individual defendants leaving OTR insolvent.

In a decision and order dated February 6, 2020 the court ordered the defendant to provide discovery requested within 45 days. The plaintiff has moved arguing the defendant has failed to comply with discovery for the ensuing three years. The defendant Aharon Noe has provided an affidavit wherein he states that "I have been waiting for the opportunity to fulfil the discovery demands including attending a deposition by Plaintiff, so I can effectively move for summary judgment" (see, Affidavit of Aharon Noe, ¶ 10 [NYSCEF Doc. No. 141]). However, defendant's eagerness to engage in discovery is belied by the record. Thus, on September 12, 2019 the plaintiff served discovery demands upon the defendant (see, Plaintiff's First Notice for Discovery and

Inspection [NYSCEF Doc. No. 55]). On October 2, 2019 the court issued an order requiring the defendant to respond to the plaintiff's demands within thirty days (NYSCEF Doc. No. 37). A good faith letter was served and when that yielded no discovery a motion seeking to strike the answer was filed. That motion resulted in the above noted decision which, again, required the defendant to comply with the discovery demands within forty-five days. A second good faith letter was served on July 29, 2020 informing the defendant that no discovery had yet been provided (NYSCEF Doc. No. 87). A second motion to strike the answer for the failure to provide any discovery and a third motion to strike for the failure to provide any discovery were both filed.

Conclusions of Law

It is well settled that the court may impose discovery sanctions where a party "refuses to obey an order for disclosure or wilfully fails to disclose information which the court finds ought to have been disclosed" (Amos v. Southampton Hospital, 198 AD3d 947, 156 NYS3d 349 [2d Dept., 2021]). The drastic remedy of striking a pleading is proper where there is a clear showing that a party's failure to comply with discovery is willful and contumacious (Kopelevich & Feldsherova, P.C. v. Geller Law Group, P.C., 191 AD3d 853, 142 NYS3d 577 [2d Dept., 2021]). Wilful and

contumacious conduct may be inferred from a party's repeated failure to comply with court ordered discovery as well as insufficient explanations regarding such non-compliance (Sanabria v. NYSARC Inc., 204 AD3d 716, 163 NYS3d 871 [2d Dept., 2022]). Therefore, where a party "'repeated[ly] fail[ed] to comply with court-ordered discovery' over 'an extended period of time[,]'" and the court itself found that the defendants offered "inadequate explanations for their failures to comply'" then striking the answer is proper (see, 255 Butler Associates LLC v. 255 Butler LLC, 208 AD3d 831, 173 NYS2d 672 [2d Dept., 2022]).


In this case there has clearly been an extended period of time wherein the defendant has failed to provide any discovery or appear for a deposition. As noted, the defendant asserts he wishes to engage in discovery. Indeed, defendant's counsel argues that "OTR and Noe are eager to complete the discovery so it can move swiftly to summary judgment" and that "OTR and Noe are willing to do whatever is necessary in order to complete all discovery that are allegedly past due, within thirty (30) days from the date the Court decides this motion" (Affirmation in Reply, ¶ 5 [NYSCEF Doc. No. 50]). However, there has been no explanation offered why discovery was not completed until this point, why numerous deficiency letters were unanswered and why numerous motions had to be filed, rendering the defendant's

readiness hollow. Thus, the only conclusion that can reasonably be drawn is that the defendant's conduct in failing to conduct discovery was wilful and contumacious. Consequently, the motion seeking to strike the answer is granted. The cross-motion seeking more time in which to engage in discovery is denied.

So ordered.

ENTER:

DATED: August 21, 2023
Brooklyn N.Y.



Hon. Leon Ruchelsman
JSC