

**M13 & M15 Holdings, LLC v Athanson**

2023 NY Slip Op 33790(U)

October 25, 2023

Supreme Court, New York County

Docket Number: Index No. 151634/2021

Judge: Arlene P. Bluth

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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. ARLENE P. BLUTH PART 14**

*Justice*

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M13 & M15 HOLDINGS, LLC,

Plaintiff,

- v -

JENNIFER ATHANSON, MICHAEL ATHANSON

Defendants.

-----X

INDEX NO. 151634/2021

MOTION DATE 10/24/2023

MOTION SEQ. NO. 002

**DECISION + ORDER ON  
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 002) 130, 131, 132, 133, 134, 135, 136, 137, 138, were read on this motion to/for PRECLUDE.

Plaintiff's motion to preclude is granted.

**Background**

In this breach of lease case, plaintiff seeks to recover against defendants based on Debtor Creditor Law causes of action. It claims that defendants (who were connected in some way to the tenant and guarantor) stalled plaintiff's efforts to recover unpaid rent by threatening bankruptcy and transferring assets from the tenant and guarantor to render them judgment proof.

Here, plaintiff moves to preclude defendants from offering any evidence on the ground that defendants failed to comply with Court-ordered discovery stipulations. Plaintiff explains that defendants agreed to respond to its discovery demands in a December 2022 discovery stipulation but never fully complied with this order. Then, at a conference on August 8, 2023, both parties signed a stipulation (so-ordered by this Court) in which defendants agreed to provide documents or a *Jackson* affidavit by August 31, 2023. Defendants did not satisfy this obligation.

Plaintiff claims that defendants' counsel requested a one-week extension of this deadline and counsel for plaintiff agreed.

However, after that week had passed plaintiff inquired as to the status of this pending discovery on September 12, 2023. Apparently, counsel for defendants indicated he would reach out to his clients but nothing was turned over. Plaintiff insists that it contacted defendants again on September 19, 2023 but again received a response that defendants were working on it. Plaintiff maintains it again reached out on September 24, 2023 but did not receive a response.

In opposition, defendants admit they entered into the August 8, 2023 stipulation but blames plaintiff for filing the instant motion on October 5, 2023 without first reaching out to defendants. They claim that on October 6, 2023, counsel for defendants called plaintiff's attorney to discuss the outstanding discovery requests. Defendants insist they are working on compiling additional responses and that on October 16, 2023 (the day before the opposition was filed), defendants submitted an additional document production although they admit more documents have not yet been produced.

In reply, plaintiff observes that defendants' opposition confirms that they did not comply with the August 8, 2023 or December 19, 2022 conference stipulations. It also claims that defendants should be compelled to produce their personal financial records and points out that the parties entered into a confidentiality order with this issue in mind.

### **Discussion**

The Court observes that after this motion was marked submitted, defendants submitted a sur-reply without permission and so the Court will not consider it.

Turning to the merits, the Court grants the motion to the extent that defendants are precluded from offering any evidence at trial or on a dispositive motion based on their failure to

timely produce responsive documents or a *Jackson* affidavit. There is no dispute that the parties entered into a discovery order in December 2022 whereby defendants were to respond to the subject document demands by January 31, 2023 (NYSCEF Doc. No. 116). This was *after* the parties had already entered into a confidentiality agreement (NYSCEF Doc. No. 117).

Defendants did not comply with this order as indicated in the August 8, 2023 so-ordered stipulation, which required them to produce responsive documents or a *Jackson* affidavit by August 31, 2023 (NYSCEF Doc. No. 128). Defendants clearly ignored this deadline also and did not produce anything by the August 31, 2023 deadline or by the one-week extension provided by plaintiff.

Instead, on September 12, 2023 counsel for defendants claimed that he was going to “call my clients today to get this expedited” (NYSCEF Doc. No. 134). Such a response is confounding; at this point the deadline had long passed. And yet, nothing was expedited as a follow up the next week by plaintiff resulted in a response from counsel for defendants that “We are working on getting all of the statements together” (*id.*).

The continued and repeated defiance of this Court’s orders did not stop there. Defendants apparently produced some documents the day before they filed their opposition in mid-October 2023, about six weeks after the Court-ordered deadline (NYSCEF Doc. No. 137). But, critically, defendants’ opposition indicates that they have still not yet fully complied with this Court’s order—defendants argue that they “are working on compiling what should satisfy [counsel for plaintiff’s] requests” (NYSCEF Doc. No. 135, ¶ 13).

The August 31, 2023 deadline set *by the parties* and *so-ordered by this Court* was not a suggestion or wishful thinking. It was a deadline. If defendants had trouble gathering the documents, they could have taken many, many steps to seek an extension; first, they could have

just asked plaintiff – the procedural history here shows that plaintiff’s counsel is reasonable and courteous, and in fact granted an initial extension. Second, if that didn’t work, defendants could have filed an order to show cause for an extension. At the very least, defendants should have sought a specific and realistic extension instead of offering vague assertions that they were working on it (*see* NYSCEF Doc. No. 134) and forcing counsel for plaintiff to continuously follow up and eventually make this motion.

Defendants even attempt to argue that some of the demands are irrelevant, overly broad or unduly burdensome despite the fact that the time to raise these objections has long passed (*see Holness v Chrysler Corp.*, 220 AD2d 721, 722, 633 NYS2d 986 (Mem) [2d Dept 1995] [noting that the only objections a party can raise after the deadline prescribed by CPLR 3122 are objections based upon a privilege or that the demand is palpably improper]).

The Court also observes that defendants’ opposition does not address the missed deadline at all or bother to cite a reasonable excuse for missing the deadline. Instead, defendants bizarrely appear to blame plaintiff for asking for discovery that defendants agreed to produce by a date certain at a discovery conference.

Defendants are surely correct that cases should be decided on the merits. But cases can only be decided on the merits if parties comply with their discovery obligations. Here, defendants have ignored multiple Court orders and dragged out discovery for nearly a year about this singular issue. This is a case brought because plaintiff claims defendants transferred money in contravention of the Debtor Creditor Law. And for nearly a year defendants have essentially played whack-a-mole by delaying, avoiding and ignoring their discovery obligations. As plaintiff correctly observed, defendants never moved for a protective order; they simply decided to engage in discovery on their own timeline in direct contravention of Court orders.


“Pursuant to CPLR 3126, a court may impose discovery sanctions, including the preclusion of evidence, 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. The nature and degree of a penalty to be imposed under CPLR 3126 for discovery violations is addressed to the court's discretion” (*Mikhailov v Katan*, 116 AD3d 744, 745, 983 NYS2d 614 [2d Dept 2014]). In this Court's discretion preclusion is the appropriate sanction for repeatedly ignoring this Court's orders and not providing a reasonable excuse for this failure.

That defendants may have produced some documents is of no moment (*see id.*). The fact is that defendants admit they have not yet fully complied with this Court's order and are still in the process of turning over some discovery (that is, they want to continue to force plaintiff to keep asking for a complete production) although they object to turning over certain records about defendants' personal finances. Documents about defendants' finances are, of course, highly relevant in this case as plaintiff's theory of recovery is based on allegations that defendants transferred monies to render the tenant and guarantor judgment proof.

In light of the Court's finding that preclusion is warranted, the Court finds that plaintiff's request for the personal financial records is moot (although it may be relevant should plaintiff prevail and need this information in a post-judgment subpoena). Moreover, the Court finds that a note of issue should be filed on or before December 13, 2023.

Accordingly, it is hereby

ORDERED that plaintiff's motion is granted to the extent that defendants are precluded from offering any evidence at trial or in a dispositive motion and that a note of issue shall be filed on or before December 13, 2023.

10/25/2023 DATE		 ARLENE P. BLUTH, J.S.C.
CHECK ONE:	<input type="checkbox"/> CASE DISPOSED	<input checked="" type="checkbox"/> NON-FINAL DISPOSITION
	<input checked="" type="checkbox"/> GRANTED <input type="checkbox"/> DENIED	<input type="checkbox"/> GRANTED IN PART <input type="checkbox"/> OTHER
APPLICATION:	<input type="checkbox"/> SETTLE ORDER	<input type="checkbox"/> SUBMIT ORDER
CHECK IF APPROPRIATE:	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/> FIDUCIARY APPOINTMENT <input type="checkbox"/> REFERENCE