

**Star Funding, Inc. v Fortress Group LLC**

2023 NY Slip Op 34087(U)

November 15, 2023

Supreme Court, New York County

Docket Number: Index No. 653261/2022

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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STAR FUNDING, INC.,

Plaintiff,

- v -

FORTRESS GROUP LLC, JETHMAL D. VASWANI, DANNY  
VASWANI aka DILIP VASWANI

Defendants.

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INDEX NO. 653261/2022

MOTION DATE 11/13/2023

MOTION SEQ. NO. 003

**DECISION + ORDER ON  
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 003) 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79

were read on this motion to/for STRIKE PLEADINGS.

Plaintiff’s motion for an order rendering the verification of defendants Fortress Group LLC and Jethmal D. Vaswani a nullity due to improper verification, striking this answer and counterclaims for not appearing for a deposition and to strike the answer and counterclaims of defendant Danny Vaswani for failure to respond to discovery is granted as described below.

**Background**

Plaintiff contends that it entered into a factoring agreement with defendant Fortress Group LLC (“Fortress”) whereby plaintiff would occasionally loan Fortress money. It claims that nearly \$200,000 remains due and owing by Fortress and that the individual defendants signed guarantees in connection with this agreement.

In this motion, plaintiff points out that the parties entered into a preliminary conference order in June 2023 but that defendants failed to comply by not producing documents and

refusing to schedule depositions. The parties then entered into a stipulation and order dated September 13, 2023 in which defendants agreed *inter alia* to produce a verification signed by Jethmal Vaswani and to produce an affidavit from Jethmal Vaswani or his treating physician by September 27, 2023 explaining when (and if) he would be available for a virtual deposition (NYSCEF Doc. No. 59).

Plaintiff explains that the answer and counterclaims need to be verified by Jethmal Vaswani (as opposed to Danny Vaswani) because Danny admitted at his deposition that Fortress is 100% owned by Jethmal and that Danny is not a member of Fortress. According to plaintiff, that rendered the purported verification by Danny as a nullity. Plaintiff observes that is why the September 13, 2023 order (NYSCEF Doc. No. 59) required verification from Jethmal.

With respect to the deposition of Jethmal, plaintiff argued that it wanted to balance its desire to take his deposition with any ongoing health concerns but that defendants failed to produce an affidavit from Jethmal or his doctor by the deadline in the stipulation. Plaintiff also points out that the September 13, 2023 stipulation and order required defendants to produce a Jackson affidavit for missing documents but that defendants failed to meet that deadline (by October 13, 2023).

In opposition, defendants attach a verification from Jethmal and contend that Danny mistakenly signed the verification. They argue that Danny ran the day-to-day operations for his ailing and elderly father Jethmal. Defendants insist that Jethmal suffered a heart attack and point the Court to a doctor's note included in their opposition papers. They insist they produced responses to outstanding document requests as well.

In reply, plaintiff emphasizes that defendants have not produced an affidavit from Jethmal or from his physician about his availability for a virtual deposition. It argues that the

“verification” from Jethmal purports to verify the summons and complaint when it should have verified the answer and counterclaims. Plaintiff emphasizes that the September 13 order required defendants to produce documents and that they have not done so. They also point out that the purported Jackson affidavit was sworn to on November 6, 2023 well after the October 13, 2023 deadline and that this is plaintiff’s second discovery motion arising out of defendants’ refusal to comply with discovery orders.

### **Discussion**

The Court grants the motion—the fact is that defendants did not come close to complying with the stipulation it signed on September 13, 2023 that was so-ordered by this Court and did not cite a reasonable excuse for this failure. Moreover, even considering the late submissions, defendants have failed to preserve their defenses and counterclaims.

As plaintiff points out, the verification is a nullity. First, it was not submitted by the deadline. Second, and more importantly, it does not verify the answer and counterclaims. Instead, it verifies the summons and complaint (NYSCEF Doc. No. 77) although Jethmal Vaswani is a defendant. A verified complaint needs a verified answer; without a verification, the answer is a nullity. And defendants have had many chances to submit a verification but declined to do so.

Moreover, there is no dispute that defendants did not turn over an affidavit from Jethmal or his treating physician regarding his availability for a virtual deposition as required under the September 13 order. Instead, the defendants blew past the September 27, 2023 deadline for this submission and now, in opposition to this motion, upload documents about Jethmal’s medical history. However, these documents were not submitted in admissible form nor do they address

the key issue—if Jethmal is available for a virtual deposition. The Court observes that plaintiff expressly noted in its moving papers that it wanted to account for Jethmal’s apparent medical issues. But rather than simply comply with the directive, defendants ignored their obligations and now send along inadmissible documents that don’t comply with the stipulation so-ordered by this Court. Because Jethmal has ignored his obligation to discuss the scheduling of his testimony, he has waived any such testimony and is precluded from offering it.

Defendants also don’t adequately dispute that they failed respond to plaintiff’s documents demands by September 27, 2023. In fact, defendants appear to claim that they need not turn over any documents because plaintiff already has copies of the requested records in its possession. But the September 13 order explicitly limited defendants to raising objections based on only on attorney-client privilege. And defendants did not make a motion to vacate or modify that directive. But since defendants have not produced any documents, they are precluded from offering any documents.

Defendants’ untimely Jackson affidavit dated November 6, 2023 from Danny Vaswani also compels the Court to grant the instant motion. Danny claims he was travelling (NYSCEF Doc. No. 76) but does not explicitly cite a justification for this late submission. And the affidavit offers only conclusory assertions about his efforts to locate responsive documents. Even if the Court credited it, then the result is that defendants have done the search and have nothing; if they have nothing, then the preclusion agreed to in the September 13 order does them no harm.

Not testifying and not producing any documents are failures, which, taken together, compel the Court to strike defendants’ answer and counterclaims. Defendants’ inability to timely comply with a single one of their discovery obligations as laid out in the September 13 order evidences a clear disregard for a Court order. It shows that defendants want to pursue this

case as they wish even when they agree to take steps by specific dates. This disdain is most evident in defendants' bizarre argument raised in opposition that "One would think this was a 2017 index number" (NYSCEF Doc. No. 75, ¶ 11) as if to argue that they need not comply with court orders because the case has not dragged on for half a decade. That argument is as outrageous as it is meritless.


And even if the responses were timely, it all points to defendants who cannot properly verify their pleadings, will not schedule a deposition, and will not or cannot produce any documents.

To be sure, the deteriorating health condition of a party can absolutely justify an extension of discovery deadlines provided that those health conditions are documented and that party's attorney takes the appropriate steps to inform the Court and the opposing side. Here, defendants missed deadlines again and again and only took minimal steps after plaintiff made this motion. In "opposition", they did not submit a proper verification, admissible or relevant evidence about Jethmal's ability to take a deposition or produce any documents. The Court has little choice but to grant the motion under these circumstances. To hold otherwise would be to undermine every court order in this case and send the message that deadlines are mere suggestions that can be ignored based upon hollow opposition.

Accordingly, it is hereby

ORDERED that plaintiff's motion to strike defendants' answer and counterclaims is granted and the answer and counterclaims are hereby stricken, and the Clerk is directed to enter judgment in favor of plaintiff and against defendants jointly and severally in the amount of

\$146,479.22 plus interest at the contractual rate of 2.5% from July 1, 2022 along with costs and disbursements upon presentation of proper papers therefor.

11/15/2023					
<b>DATE</b>			<b>ARLENÉ P. BLUTH, J.S.C.</b>		
CHECK ONE:	<input checked="" type="checkbox"/>	CASE DISPOSED	<input type="checkbox"/>	NON-FINAL DISPOSITION	
	<input checked="" type="checkbox"/>	GRANTED	<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