

Go N.Y. Tours, Inc. v Tour Cent. Park Inc.

2023 NY Slip Op 34303(U)

November 29, 2023

Supreme Court, New York County

Docket Number: Index No. 655689/2021

Judge: Nancy M. Bannon

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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. NANCY M. BANNON PART 42

Justice

-----X

GO NEW YORK TOURS, INC.

Plaintiff,

- v -

TOUR CENTRAL PARK INC.,

Defendant.

-----X

INDEX NO. 655689/2021

MOTION DATE 11-29-23

MOTION SEQ. NO. 006

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 006) 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 193, 194, 195, 196

were read on this motion to/for SANCTIONS.

In this breach of contract action, the plaintiff claims that the defendant, who is in the same bicycle renting and touring business as the plaintiff, has since 2008 provided services under the name "Bike Rental Central Park", a name and logo trademarked by the plaintiff, and uses the name and logo in promotional materials and in-person solicitations. This action concerns an alleged breach by the defendant of a Settlement Agreement entered into by the parties in 2020 in a trademark infringement action commenced in United States District Court for the Southern District of New York.

Discovery was commenced in 2021. By an order dated January 3, 2022, the court denied a motion by the defendant for a protective order and directed the defendant to respond to the plaintiff's discovery demands (MOT SEQ 001). In a preliminary conference order dated March 4, 2022, the court noted that the defendant had only partially complied with the January 3, 2022, order, without excuse, and directed it to comply on or before April 15, 2022, or sanctions may be imposed pursuant to CPLR 3126. The parties thereafter stipulated that all but four of the defendant's affirmative defenses would be withdrawn.

In a status conference order dated September 1, 2022, the court noted that the defendant failed to fully comply with the court's prior orders and cautioned the defendant that it

would be precluded from using any such evidence at trial or in a dispositive motion on if it did not comply within ten days. By an order dated September 2, 2022, the court granted the plaintiff's motion pursuant to CPLR 3124 and 3126 to compel the defendant to produce discovery as per prior orders, to the extent provide in the September 1, 2022, order, and otherwise denied the motion without prejudice (MOT SEQ 003).

By an order dated October 6, 2022, the court denied the defendant's motion for summary judgment pursuant to CPLR 3212 and granted the plaintiff's cross-motion for summary judgment on the issue of liability, damages to be determine at trial (MOT SEQ 002). The defendant filed an appeal. In light of the nature of the plaintiff's claims, extensive discovery was required and warranted on the issue of damages.

In a status conference order dated November 10, 2022, the court noted that the defendant had still not complied with the courts' discovery orders, without excuse, improperly filed a cross-motion for a protective order in MOT SEQ 003, and failed to cooperate with the plaintiff in uploading a proposed conference order as required by Part Rules and as previously expressly directed. The court (1) precluded the defendant from using any evidence it has not produced to date in support of its defense in a dispositive motion or at trial, (2) directed the defendant to produce all outstanding discovery within ten days, as the discovery was relevant to the plaintiff's damages, and (3) again cautioned the defendant that failure to comply shall result in further sanctions, which may include attorney's fees, an adverse inference instruction or striking of the answer. The defendant failed to comply in full.

By an order dated November 14, 2022, the court granted a motion by the plaintiff to punish the defendant for contempt for failure to comply with discovery to the extent provided in the November 10, 2022, order, without prejudice to seek further relief against the defendant for any further non-compliance. In the same order, the court also denied as meritless the defendant's cross-motion for a stay of the action, including discovery, and for sanctions against the plaintiff.

On November 15, 2022, the plaintiff served a Notice of Deposition on the defendant which the defendant improperly rejected as "defective and insufficient notice."

On December 19, 2022, the Appellate Division, First Department, granted a temporary stay pending hearing of the motion by full bench. By order dated May 9, 2023, the Appellate Division affirmed this court's order dated October 6, 2022. The stay was lifted.

In a status conference order dated September 14, 2023, the court, *inter alia*, determined that the defendant did not comply with the November 10, 2022, order without reasonable excuse, and had still not produced the relevant outstanding discovery. The court imposed sanctions against the defendant in the form of attorney's fees, again directed the defendant to provide the discovery and again cautioned the defendant that failure to comply would result in further sanctions. The defendant had also not produced any witness for deposition.

By an order dated October 18, 2023, the court granted a motion by the plaintiff pursuant to CPLR 3126 to strike the defendant's answer and for other relief, to the extent of extending the Note of Issue deadline to November 30, 2023 (MOT SEQ 006). Oral argument was held on November 14, 2023. An interim order of that date again precludes the defendant from using undisclosed evidence and directs it to turn over the discovery previously demanded and as directed by the court, this time delineating the precise documents to be turned over. As per counsel, the defendant had turned over a small portion of what it was required to turn over. In the same order, the court directed that the defendant produce its Chief Executive Officer, Mergen Saryev, for a deposition on November 28, 2023. Saryev was not produced, and no medical proof was submitted to support any claim of illness or emergency. The plaintiff's motion was otherwise adjourned to November 29, 2023.

On November 29, 2023, counsel for the plaintiff described the documents that the defendant did turn over and listed all of the documents that were not turned over. No reasonable excuse was proffered. It became clear to the court that the defendant was not cooperating with counsel or heeding advise. The plaintiff's counsel requested that the court grant the requested relief in the motion, striking the defendant's' answer. That relief is now granted.

CPLR 3126 authorizes the court to sanction a party who "refuses to obey an order for disclosure or willfully 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 (1st Dept.

1998); see CDR Creances S.A. v Cohen, 104 AD3d 17 (1st Dept. 2012); Reidel v Ryder TRS, Inc., 13 AD3d 170 (1st 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 (1st Dept. 2012); Perez v City of New York, 95 AD3d 675 (1st Dept. 2012); Figiel v Met Food, 48 AD3d 330 (1st Dept. 2008); Ciao Europa, Inc. v Silver Autumn Hotel Corp., Ltd., 270 AD2d 2 (1st Dept. 2000). Here, the defendant has defied several court orders with clear directives over the course of two years, including a failure to appear for a deposition, all without reasonable excuse. The defendant has been afforded multiple opportunities to bring itself into compliance, received multiple warnings, and chose not to comply. This is the very definition of willfulness.

The court has already granted the plaintiff summary judgment on liability, thus requiring an inquest only on the issue of damages. In any event, the answer having been stricken, the defendant “admits all traversable allegations in the complaint, including the basic allegation of liability, but does not admit the plaintiff’s conclusion as to damages.” Rokina Optical CO., Inc. v Camera King, Inc., 63 NY2d 728, 730 (1984); see Amusement Bus. Underwriters v American Intl. Group, 66 NY2d 878 (1985); Ramos v Stern, 100 AD3d 409 (1st Dept. 2012); Cillo v Resjefal Corp., 13 AD3d 292 (1st Dept. 2004). Thus, at the inquest, a defendant is generally entitled to contest damages and to offer proof on that issue. See Law Firm of Ravi Batra, P.C., v Rabinowich, 77 AD3d 532 (1st Dept. 2010); Toure v Harrision, 6 AD3d 270 (1st Dept. 2004). However, here, the defendant was precluded, in several court orders, from using any undisclosed documents in its defense on any issue, including damages, thus further limiting its role at the inquest. Furthermore, a negative inference will be drawn as to any evidence that was demanded by the plaintiff and not produced by the defendant per the court’s orders.

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 and the defendant’s answer is stricken, and it is further

ORDERED that the plaintiff shall file a Note of Issue on or before December 20, 2023, and it is further

ORDERED that an in-person inquest on the issue of damages shall be held on January 30, 2024, at 10:00 a.m., and it is further

ORDERED that counsel shall appear for a pre-inquest conference on January 10, 2024, at 2:30 p.m.; to be conducted via Microsoft Teams, and it is further

ORDERED that the Clerk shall mark the file accordingly.

This constitutes the Decision and Order of the court.



NANCY M. BANNON, J.S.C.
HON. NANCY M. BANNON

11/29/2023
DATE

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"/>	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