

Bellino v Doromet, Inc.

2024 NY Slip Op 32651(U)

July 8, 2024

Supreme Court, New York County

Docket Number: Index No. 655873/2021

Judge: Robert R. Reed

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
 COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 43

-----X
 STEVEN BELLINO,

Plaintiff,

- v -

DOROMET, INC., FRANK GIANNUZZI, and BRUBEYK
 GARCIA NASCIMENTO,

Defendants.
 -----X

INDEX NO. 655873/2021

MOTION DATE 11/21/2022

MOTION SEQ. NO. 004

**DECISION + ORDER ON
 MOTION**

HON. ROBERT R. REED:

The following e-filed documents, listed by NYSCEF document number (Motion 004) 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 69, 71, 72, 73, 74, 75, 76 were read on this motion to STRIKE PLEADINGS.

In this action arising from a business venture among the parties to import gold from South America, plaintiff Steven Bellino asserts causes of action including, *inter alia*, breach of contract, fraud and conversion. In motion sequence number 005, plaintiff moves pursuant to CPLR 3126 for sanctions against defendants Doromet, Inc. and Frank Giannuzzi (herein, defendants) for their failure to comply with court orders requiring them to respond to plaintiff's discovery demands, including (1) striking of their answer; (2) entry of default judgment against them; (3) financial sanctions; and (4) attorneys' fees and costs to plaintiff. Defendants oppose the motion. For the reasons set forth herein, the motion is denied in its entirety.

I. BACKGROUND

After plaintiff commenced this action on October 7, 2021, the parties conducted discovery. On December 2, 2021, plaintiff served a Notice of Discovery and Inspection (First Notice) on the Doromet defendants (*see* Maggio aff, exhibit C).

After defendants failed to respond, plaintiff sent them a letter on January 4, 2022 asking for responses (*see* Maggio aff, exhibit D). They still did not respond.

On March 28, 2022, the court issued a Preliminary Conference Order, ordering defendants to respond to the First Notice “within 7 days of the date of this Order”—*i.e.*, by April 4, 2022 (*see* NYSCEF doc. no. 23). Defendants did not comply.

On May 17, 2022, the court held a compliance conference with the parties and ordered defendants to respond to the outstanding discovery demands by June 17, 2022 (*see* NYSCEF doc. no. 26). Defendants timely responded on Jun 17, 2022 with a letter objecting to all demands and without producing a single document. Plaintiffs responded with a deficiency letter served on July 5, 2022 (*see* Maggio aff, exhibit I). In reply, defendants served amended responses and objections on July 29, 2022 (*see* Maggio aff, exhibit K).

On September 20, 2022, the court held a status conference with the parties, ordering defendants to “respond and produce documents responsive to plaintiff’s notice of discovery and inspection dated December 2, 2021 by October 4, 2022” (NYSCEF doc. no. 35). Further, the court ordered that, “[i]f defendants’ responses are not served by October 4, 2022, plaintiff is granted leave to file a motion seeking preclusion, sanctions, and any other appropriate relief without further leave of court” (Maggio aff, exhibit M).

Defendants failed to respond or produce documents responsive to plaintiff’s First Notice by October 4, 2022.

Plaintiff filed the instant motion on October 5, 2022.

Soon thereafter, on October 11, 2022, defendants’ counsel at the time, Mark Doerr, moved by motion sequence number 005 for an order to be relieved as counsel, citing “[s]ignificant and irreconcilable differences” between and among himself, the Doromet

defendants' long-time counsel, Adam Kenner, and defendants as to the appropriate approach to their representation, including "near-complete disagreement regarding compliance with the ongoing discovery process in this case, including compliance with the discovery requests and orders that undergird [p]laintiff's now-pending motion to strike the pleadings [the instant motion]" (NYSCEF doc. no. 64).

On October 11, 2022, Jason L. Abelove, appeared as counsel for defendants by a consent to change attorneys dated October 11, 2022, replacing Doerr. In light of the consent letter, the court denied Doerr's motion to be relieved by a decision dated October 20, 2022.

Soon thereafter, Counselor Abelove filed his opposition to the instant motion (seq. no. 004). Counselor Abelove affirms that, upon substituting in as counsel for the Doromet defendants, he obtained files pertaining to this action from his predecessor counsel, Doerr. Abelove affirms that, after obtaining the file, he "observed that documents provided by [d]efendants to counsel were not turned over in discovery" (Abelove affirmation ¶ 4). According to Abelove, he then gathered documents and telephoned plaintiff's counsel to attempt to resolve the outstanding demands, expressing that he would provide certain documents not previously provided and asking for a confidentiality agreement as to some of the documents (*see* NYSCEF doc. no. 70). The court has so-ordered the confidentiality agreement. In his affirmation, Abelove represents that he is ready to turn over certain documents but is unable to produce others due to fraudulent record-keeping by Doromet's former CFO, and attaches transcripts from a proceeding before the Criminal Court of the City of New York, in which the former CFO pleaded guilty (Abelove affirmation, exhibit A). In addition, Abelove represents that "there was a substantial breakdown in the communication between [d]efendant[s] and [their] predecessor counsel" in that "[d]ocuments my client believed were turned over were not."

In addition, the court, on May 19, 2023, granted an application by attorney Kenner to be relieved as counsel for defendants.

Notably, on July 20, 2023, plaintiff moved by order to show cause in part to compel defendants to produce documents in response to his First Notice.

II. DISCUSSION

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.” It is “axiomatic that the imposition of CPLR 3126 sanctions is within the sound discretion of the court” and courts are empowered to “make such orders with regard to the refusal or failure as are just” (*Gross v Edmer Sanitary Supply Co.*, 201 AD2d 390, 390 [1st Dept 1994]). A failure to comply with discovery, particularly after a court order has been issued, may constitute the “dilatory and obstructive, and thus contumacious, conduct warranting the striking of its answer” (*Pigott v J.C. Happy Garden Corp.*, 216 AD3d 413, 414 [1st Dept 2023]). However, “[s]triking an answer . . . is a drastic penalty used sparingly because of our strong policy aimed at determining actions on their merits” (*Croce v Abraham & Straus*, 123 AD2d 561, 562 [1st Dept 1986]) “and is inappropriate when the contumacious behavior or noncompliance is attributable to defendant's counsel rather than to the defendant” (*Lowitt v Korelitz*, 152 AD2d 506, 507-508 [1st Dept 1989]).

Here, based on the representations of counselor Abelow, defendants’ previous failure to respond to document requests might plausibly be attributed to their previous counsel rather than to the defendants themselves, since defendants’ counsel was in possession of documents that defendants had transferred to him (*see* Abelow affirmation ¶ 4). Furthermore, Abelow’s willingness to produce the documents he can produce, responsive to plaintiff’s demands, exhibits

a good faith effort to overcome these issues. Plaintiff does not dispute the veracity of Abelove's representation. It is also notable that defendants' previous failures were not so repetitive as to comprise willful noncompliance, as they did timely respond the First Notice as ordered in the compliance conference order and timely responded to plaintiff's deficiency letter. Furthermore, the court notes that plaintiff has filed a motion by order to show cause to compel defendants to produce the documents, which may address the issues raised herein (*see* mot. seq. no. 007).

Accordingly, it is hereby

ORDERED that plaintiff's motion is denied in its entirety.

7/8/24

DATE

ROBERT R. REED, 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