| **Columbia Consultants, LLC v Danucht Entertainment, LLC** |
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| 2024 NY Slip Op 32779(U) |
| August 7, 2024 |
| Supreme Court, New York County |
| Docket Number: Index No. 655526/2018 |
| Judge: Andrea Masley |
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 48

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COLUMBIA CONSULTANTS, LLC and SCOTT SARTIANO,

Plaintiffs,

- v -

DANUCHT ENTERTAINMENT, LLC, RICHARD AKIVA, and TKNY GLOBAL, LLC,

Defendants.

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**INDEX NO.** 655526/2018

**MOTION DATE** --

**MOTION SEQ. NO.** 018

**DECISION + ORDER ON MOTION**

HON. ANDREA MASLEY:

The following e-filed documents, listed by NYSCEF document number (Motion 018) 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 370, 373, 385, 386, 387, 388, 389, 390, 391, 392, 399, 400, 401, 402, 403, 404, 405, 414, 415, 416, 417, 418

were read on this motion to/for DISMISS.

In motion sequence 018, defendants Danucht Entertainment, LLC and Richard Akiva move (i) pursuant to CPLR 3126(3) to dismiss all claims against them for

"Plaintiffs' willful and contumacious conduct including:

1. Violating the Court's June 27 Order by not producing the 2021 Schreiber Affidavit by July 3;

2. Violating the Court's July 14 Order by not producing the 2021 Schreiber Affidavit by July 17 at noon;

3. Violating their discovery obligations by not producing the 2021 Schreiber Affidavit in response to Defendants' Discovery Request No. 15;

4. Making false statements to the Court during conferences held on June 27 and July 14 including that Plaintiffs had no documents from the Katz Group in their possession when, in fact, they had the 2021 Schreiber Affidavit;

5. Making false and misleading statements to the Court in response to dispositive motions about Plaintiffs' knowledge of the timing of the Katz Transaction;

6. Obfuscating both offensive and defensive discovery through false and misleading statements about their knowledge of the timing of the Katz Transaction at great expense and cost to Defendants; and

7. Doing so to hide from disclosure the substance of the 2021 Schreiber Affidavit which was contrary to both their theory of the case and justification for wide-ranging discovery"

and (ii) pursuant to Rules of the Chief Administrator of the Courts (22 NYCRR) § 130-1.1 for attorneys' fees and costs beginning in November 2021 for plaintiffs' frivolous conduct listed above.[1] (NYSCEF 370, OSC at 2.)

**Background**

Central to this motion is a two-page affidavit by Jurgen Schreiber, Senior Managing Director of nonparty Katz Group, dated November 8, 2021 (NYSCEF Doc. No. [NYSCEF] 346, Schreiber aff ¶ 1), which plaintiffs have had in their possession since "[s]ometime after November 2021." (NYSCEF 385, Kramer[2] aff ¶ 13.)

During an oral argument before this court on April 13, 2022, plaintiffs' counsel stated that "we allege in the complaint and we now obtained <u>documentation</u> from the actual purchaser [i.e. the Katz Group] that as early as December 2016 … negotiations were going on between the Katz Group … and Mr. Akiva regarding the sale of that interest." (NYSCEF 210, So Ordered Tr at 11:5-9 [mot. seq. nos. 008, 009] [emphasis added].)

Defendants requested that plaintiffs produce "[a]ll Documents including communications concerning and/or with the Katz Group" on October 26, 2022; plaintiffs

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[1] In a supplemental attorney affirmation (NYSCEF 361, Stach aff), defendants assert several additional allegedly false and misleading statements made by plaintiffs' counsel in an affirmation filed in support of plaintiffs' motion to compel (sequence 014) (NYSCEF 336, Kramer aff).

[2] Michael B. Kramer is plaintiffs' counsel. (NYSCEF 385, Kramer aff ¶ 1.)

responded that they will "search and produce all documents in their possession, custody or control responsive to this request." (NYSCEF 351, Responses to Defendants' First Requests for Production at 9 [request #15].) Defendants contend that plaintiffs' productions on April 3, May 23, June 13, July 16 and July 17, 2023 did not include the Schreiber affidavit.

During a June 27, 2023 conference,[3] plaintiffs' counsel represented to the court that he did not receive any discovery from Katz Group. (NYSCEF 332, So Ordered Tr at 29:16-18 ["THE COURT: So, two things. Mr. Kramer, did you get discovery from the Katz Group? MR. KRAMER: I did not"].) The court ordered plaintiffs to produce any Katz Group discovery, whether received in response to subpoena or an informal request, by July 3, 2023. (*Id.* at 30:2-7; 32:22-33:4.)

During an oral argument on July 14, 2023, plaintiffs' counsel stated that

> "Vis-a-vie documents from the Katz Group, your Honor, I think that point was made moot when you Honor asked whether – directly during our conference, you asked me whether I was in possession of any such documents and I said no. So, I mean, we will comply with the order, but I don't think there's going to be anything to be produced." (NYSCEF 334, So Ordered Tr at 5:5-11 [mot. seq. nos. 014, 015].)

When the court asked plaintiffs' counsel about his previous statement made during the April 13, 2022 oral argument that plaintiffs received "documentation" from the Katz Group, plaintiffs' counsel stated that that he "surely have received information but no documents and no texts and no anything" from the Katz Group. (*Id.* at 6:12-14; *see also id.* at 13:17-18 ["I am in possession of no documents from the Katz Group"].) The

[3] The court held a conference with the parties to discuss defendants' OSC (mot. seq. no. 010). The court declined to sign the OSC as the court resolved the issues presented at the June 27, 2023 conference. (NYSCEF 272, Declined OSC [mot. seq. no.010].)

court ordered that plaintiffs to produce all documents responsive to the court's prior orders, including the Katz Group documents, by July 17, 2023. (*Id*. at 15:11-15, 15:18-22, 16:17-19; see also NYSCEF 317, Declined OSC at 2 [mot. seq. no 015] [although the court declined to sign this OSC, it made certain directives including producing documents by July 17, 2023.) A stipulation subsequently submitted by the parties pursuant to the court's authorization extended plaintiffs' production deadline for Katz documents to July 24, 2023. (NYSCEF 330, So Ordered Stipulation; *see also* NYSCEF 334, So Ordered Tr at 16:21-17:8, 18:18-19:1.) The Schreiber affidavit was produced on July 24, 2023.

**Discussion**

1. *Dismissal under CPLR 3126*

> "If the credibility of court orders and the integrity of our judicial system are to be maintained, a litigant cannot ignore court orders with impunity.... Although actions should be resolved on the merits whenever possible, the efficient disposition of cases is not advanced by hindering the ability of the trial court to supervise the parties who appear before it and to ensure they comply with the court's directives." (*Fish & Richardson, P.C. v Schindler*, 75 AD3d 219, 220 [1st Dept 2010] [internal quotation marks and citations omitted].)

Accordingly,

> "CPLR 3126 provides various sanctions for violations of discovery orders, the most serious of which are striking a party's pleadings or outright dismissal of the action.... However ... the extreme sanction of dismissal is warranted only where a clear showing has been made that the noncompliance with a discovery order was willful, contumacious or due to bad faith." (*Corner Realty 30/7 v. Bernstein Mgmt. Corp.*, 249 AD2d 191, 193 [1st Dept 1998] [citations omitted].)

A party's "pattern of noncompliance with discovery demands and a court-ordered stipulation supports an inference of willful and contumacious conduct, which further justifies imposition of sanctions." (*Jackson v Open Communications Omnimedia, LLC*, 147 AD3d 709, 709 [1st Dept 2017] [citations omitted].) Although that party may "tender

a reasonable excuse to overcome defendants' showing of willfulness" (*Menkes v Delikat*, 148 AD3d 442, 442 [1st Dept 2017] [citation omitted]), "failure to offer a reasonable excuse for … noncompliance with discovery requests gives rise to an inference of willful and contumacious conduct that warrant[s] the striking of the [pleading]." (*Turk Eximbank-Export Credit Bank of Turkey v Bicakcioglu*, 81 AD3d 494, 494 [1st Dept 2011] [citations omitted].) "It is within the trial court's discretion to determine the nature and degree of the penalty." (*Merrill Lynch, Pierce, Fenner & Smith, Inc. v Global Strat Inc.*, 22 NY3d 877, 880 [2013] [citation omitted].)

Defendants have demonstrated plaintiffs' pattern of failing to comply with defendants' discovery demand and this court's order of June 27, 2023. Plaintiffs, in turn, fail to offer a reasonable excuse for not producing the Schreiber affidavit. Instead, plaintiffs assert that the affidavit "was part of work product or an exchange pursuant to a joint interest understanding and Mr. Schreiber's counsel … had asked that it not be produced." (NYSCEF 392, Opp MOL at 5; *see* NYSCEF 385, Kramer aff ¶¶ 18, 22.) This is not a reasonable excuse. Indeed, plaintiffs' counsel admits that the affidavit was not included in the privilege log. (NYSCEF 414, tr at 10:25-11:3 [mot. seq. nos. 017, 018].) Counsel's assertation that the affidavit was not a "document from The Katz Group" but rather a "work product" is meritless. (NYSCEF 385, Kramer aff ¶ 22.) "An attorney's work product encompasses materials which are uniquely the product of a lawyer's learning and professional skills, such as materials which reflect his legal research, analysis, conclusions, legal theory or strategy. Such material may consist of 'interviews, statements, memoranda, correspondence, briefs, mental impressions, personal beliefs, and countless other tangible and intangible things." (*Acwoo Intl. Steel*

*Corp. v Frenkel & Co.*, 165 AD2d 752, 753 [1st Dept 1990] [internal quotation marks and citations omitted].)

Further, the fact that the parties stipulated to extend the deadline to produce such documents to July 24, 2023 does not excuse plaintiffs' failure to comply with previous demands and court order.

Nevertheless, given that the Schreiber affidavit was ultimately produced, the remedy of dismissal would be disproportionate. (*See Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 22 NY3d at 880 ["The sanction should be commensurate with the particular disobedience it is designed to punish, and go no further than that" (internal quotation marks and citation omitted)].) Moreover, as defendants admit, the Schreiber affidavit "goes directly into the heart of [p]laintiffs' fraud claim" (NYSCEF 344, MOL at 20), and that claim has since been dismissed. (*See Columbia Consultants, LLC v Danucht Entertainment, LLC*, 1 Dept, Dec. 14, 2023, Case No. 2022-02969, at 1 [NYSCEF 413].) Accordingly, the motion is denied to the extent defendants seek dismissal.

2. *Sanctions under 22 NYCRR § 130-1.1*

A court may award a party "costs in the form of reimbursement for actual expenses reasonably incurred and reasonable attorney's fees, resulting from frivolous conduct." (22 NYCRR § 130-1.1 [a].) "In addition to or in lieu of awarding costs, the court, in its discretion may impose financial sanctions upon any party or attorney in a civil action or proceeding who engages in frivolous conduct." (*Id.*) "The court, as appropriate, may make such award of costs or impose such financial sanctions against either an attorney or a party to the litigation or against both." (*Id.* 130-1.1 [b].)

> "[C]onduct is frivolous if: (1) it is completely without merit in law and cannot be supported by a reasonable argument for an extension, modification or reversal of

existing law; (2) it is undertaken primarily to delay or prolong the resolution of the litigation, or to harass or maliciously injure another; or (3) it asserts material factual statements that are false." (*Id*. § 130-1.1 [c].)

The decision whether to impose costs or sanctions against a party for frivolous conduct, and the amount of any such costs or sanctions, "is generally entrusted to the court's sound discretion." (*See Matter of Khan-Soleil v Rashad*, 111 AD3d 727, 728 [2013] [citations omitted].)

The court finds that plaintiffs engaged in frivolous conduct in withholding the Schreiber affidavit in violation of the June 27, 2023 order and misrepresenting to this court on June 27, 2023 and July 14, 2023 that plaintiffs have no documents from the Katz Group in their possession.[4] (*See Asim v City of NY*, 117 AD3d 655, 656 [1st Dept 2014] [sanctioning defendant who "[f]or four years and despite discovery orders … failed to acknowledge ownership of the MTA police vehicle that caused plaintiff's injuries or to disclose the name of the driver of the vehicle" and "repeatedly denied ownership and employment of the vehicle's driver"].) As discussed, plaintiffs contend that the affidavit "was part of work product or an exchange pursuant to a joint interest understanding [between plaintiffs and Schreiber] and Mr. Schreiber's counsel … had asked that it not be produced." (NYSCEF 392, Opp MOL at 5; *see* NYSCEF 385, Kramer aff ¶¶ 18, 22.) Such request by Schreiber's counsel, however, does not provide plaintiffs and their counsel a license to assert false factual statements before this court.

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[4] Defendants also contend that plaintiffs misrepresented in their memoranda of law and during oral arguments the negotiation timeline between defendants and the Katz Group, which was contradicted by the Schreiber affidavit. However, given that Schreiber states in his affidavit that preliminary discussions between Akiva and the Katz Group regarding the "potential business relationship" started in November 2016 (NYSCEF 346, 347, Schreiber aff ¶ 2), it cannot be said that the affidavit contradicts plaintiffs' statements that defendants have been negotiating with the Katz Group as early as December 2016.

As to the remedy sought, defendants' request for reimbursement for their attorneys' fees and costs beginning from November 2021 is denied as defendants have not established that such attorneys' fees and costs are "resulting from [this] frivolous conduct." (Rules of Chief Admr of Cts [22 NYCRR] § 130-1.1 [a].) As stated on the record, however, plaintiffs shall reimburse defendants for actual expenses reasonably incurred and reasonable attorneys' fees incurred in making this motion, which was filed in connection with plaintiffs' failure to produce the affidavit. (NYSCEF 414, Tr at 41:25-42:3 [mot. seq. nos. 017, 018].) Plaintiffs likewise shall reimburse defendants for actual expenses reasonably incurred and reasonable attorneys' fees incurred in making cross-motion sequence 015, to the extent the cross-motion sought the final deadline for plaintiffs' production of documents received from the Katz Group.

Although defendants do not seek sanctions against plaintiffs' counsel, his conduct in making false factual statements to the court on June 27, 2023, and July 14, 2023, that plaintiffs have no documents from the Katz Group in their possession, is troubling. The court in its discretion sanctions Kramer in the amount of $1,000 for his conduct. (*See* Rules of Chief Admr of Cts [22 NYCRR] § 130-1.1 [a], [b].) Kramer is reminded that he shall not engage in conduct involving dishonesty or misrepresentation. (Rules of Prof Conduct [22 NYCRR 1200.0] rule 8.4 [c].)

The court has considered the balance of the parties' arguments and finds that they have no merit or do not affect the outcome.

Accordingly, it is

ORDERED that the motion is granted, in part, to the extent that plaintiffs Columbia Consultants, LLC and Scott Sartiano shall reimburse defendants Danucht

Entertainment, LLC and Richard Akiva for actual expenses reasonably incurred and reasonable attorneys' fees incurred in (i) making motion sequence 018 and (ii) making cross-motion sequence 015, to the that extent the cross-motion sought the final deadline for plaintiffs' production of documents received from the Katz Group; the balance of motion sequence 018 is denied; and it is further

ORDERED that Danucht Entertainment, LLC and Richard Akiva shall submit an affirmation of services, attorney biographies, and invoices within 10 days of the date of this order or otherwise waived. Columbia Consultants, LLC and Scott Sartiano may submit opposition within 7 days of defendants' submissions or otherwise waived; and it is further

ORDERED that Michael B. Kramer, Esq. without any charge to his client, is hereby sanctioned in the amount of $ 1,000, payable to the Lawyer's Fund for Client Protection, 119 Washington Avenue, Albany, New York 12210; and it is further

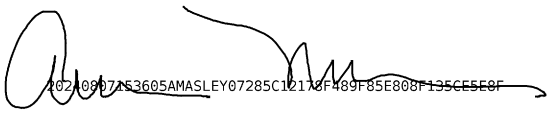
ORDERED that written proof of the payment of this sanction be provided to the Clerk of Part 48 and opposing counsel within 30 days after service of a copy of this order with notice of entry; and it is further

ORDERED that, in the event that such proof of payment is not provided in a timely manner, the Clerk of the Court, upon service upon him of a copy of this order with notice of entry and the Lawyer's Fund's affirmation or affidavit reciting the fact of such non-payment, shall enter a judgment in favor of the Lawyer's Fund and against said counsel in the aforesaid sum; and it is further

ORDERED that such service upon the Clerk of the Court and the Clerk of the Part be made in accordance with the procedures set forth in the Protocol on Courthouse

and County Clerk Procedures for Electronically Filed Cases (accessible at the “E-Filing” page on the court’s website)]; and it is further

ORDERED that, in accordance with Section 130-1.3, a copy of this order will be sent by the Part to the Lawyer’s Fund for Client Protection.




| 8/7/2024 | | | | | | |
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| DATE | | | | ANDREA MASLEY, J.S.C. | | |
| CHECK ONE: | ☐ | CASE DISPOSED | | X | NON-FINAL DISPOSITION | |
| | ☐ | GRANTED | ☐ DENIED | X | GRANTED IN PART | ☐ OTHER |
| APPLICATION: | ☐ | SETTLE ORDER | | ☐ | SUBMIT ORDER | |
| CHECK IF APPROPRIATE: | ☐ | INCLUDES TRANSFER/REASSIGN | | ☐ | FIDUCIARY APPOINTMENT | ☐ REFERENCE |