

Escrow Servs., Inc. v Camovic
2024 NY Slip Op 35494(U)
October 17, 2024
Supreme Court, Westchester County
Docket Number: Index No. 56152/2023
Judge: Charles D. Wood
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To commence the statutory time period for appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

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

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ESCROW SERVICES, INC., ESCROW SERVICES, INC., as Trustee of the First Street Trust, ESCROW SERVICES, INC., as Trustee of the First Avenue MV Trust, ESCROW SERVICES, INC., as Trustee of the First Street Trust Dated May 1, 2016, ESCROW SERVICES, INC., as Trustee of the Hillcrest Trust, ESCROW SERVICES, INC., as Trustee of the Lone Ranger Trust, CHRISTIAN GENITRINI, as Trustee of the Eden Tax Escrow Trust, CHRISTIAN GENITRINI a/k/a CHRISTIAN FASSETTA, EDEN TAX, INC., ESCROW TAX, INC., and EDEN TAX ESCROW TRUST,

Plaintiff,

-against-

NIKA CAMOVIC, ABACUS CONSTULTING GROUP, INC., 193 YONKERS LLC, 123 S 1st LLC, 127 S 1st LLC, 133 S 1st LLC, and ROSA SANTOS,

Defendants.

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WOOD, J.

New York State Courts Electronic Filing ("NYSCEF") Document Numbers 87 and 93-122 were read in connection with plaintiffs' motion for an order, pursuant to CPLR 3126, striking the defendants'¹ amended answer for failure to comply with this court's discovery orders.

Plaintiffs commenced this action to recover damages arising out of defendant Nika Camovic's alleged breach of his fiduciary duties as trustee for numerous trusts. The complaint alleges that in 2015, Camovic and plaintiff Christian Genitrini entered into an agreement related to the buying, renovating, and

¹ Plaintiffs seek relief against all defendants except Rosa Santos. Unless specified herein, all references to "defendants" are solely to Nika Camovic, Abacus Consulting Group, Inc., 193 Yonkers LLC, 123 S 1st LLC, 127 S 1st LLC and 133 S 1st LLC.

reselling of single-family homes in Westchester County. Over the course of the next two years, Camovic and Genitrini purchased ten properties in the names of various revocable trusts. Defendant Abacus Consulting Group, Inc. was named the trustee of each trust and defendant Camovic was the sole shareholder and director of Abacus. After five of the ten properties were sold, plaintiffs discovered that Camovic and Abacus breached their fiduciary duties by, among other things, wrongfully removing three parcels of real estate (the “three properties”) held by the different trusts and conveying the properties to three separate entities owned and solely controlled by Camovic (the “three LLCs”). The complaint alleges that Camovic refinanced the three properties and thereafter absconded with 100% of the refinancing proceeds in the sum of \$1,078,250.

In support of the motion, plaintiffs argue defendants’ amended complaint should be stricken based on defendants’ repeated, willful failure to provide discovery responses in compliance with this court’s discovery orders. Plaintiffs contend that they served defendants with a notice of discovery and inspection (“D&I notice”) dated May 8, 2023 which sought documents essential to the action. On July 10, 2023, the court so-ordered a preliminary conference stipulation with deadlines of August 18, 2023 for the exchange of paper discovery, and November 15, 2023 for the completion of party depositions. On September 1, 2023, after plaintiffs’ attorney sent defense counsel three emails seeking a response to the demands, defendants served a preliminary document production which, according to plaintiffs, was missing almost all of the requested documents. On September 19, 2023, plaintiffs’ attorney sent another email to defense counsel demanding a full and complete response to the D&I notice. On September 27, 2023, defendants served a 1,027-page pdf that plaintiffs argue again failed to include critical documents sought by plaintiffs.

Plaintiffs contend that defendants thereafter refused to commence depositions until after plaintiffs’ motion to amend the complaint was decided, then again until after defendants had received and reviewed subpoenaed documents from two non-parties. Defendants were ultimately deposed over a three-day period

in February 2024. During his deposition, Camovic disclosed that he had failed to produce certain documents in his possession or control, including documents from his personal bank account into which Camovic admitted he deposited the refinancing proceeds from the three properties. On May 6, 2024, plaintiffs served a post-deposition demand for various documents, including those related to the refinancing of the three properties, the transfer of the three properties to the three LLCs, and bank statements for all bank accounts held by and relating to the three LLCs. The court directed defendants to respond to the May 6 demand by May 28, 2024. Defendants failed to timely respond and were granted an additional deadline of July 5, 2024. As of July 15, 2024, defendants had failed to respond to the May 6 demand, thereby necessitating the filing of this motion.

In opposition, defendants argue that their actions are in no way willful, contumacious or the product of bad faith. Defendants argue that they have been actively engaged in obtaining the discovery sought by plaintiffs. Indeed, defendants maintain that they disclosed over one thousand pages of documents in response to plaintiffs' May 8, 2023 D&I notice, which contained 72 separate requests. Defendants also provided plaintiffs with additional sought-after documents during defendant Rosa Santos' deposition. Moreover, at his deposition, Camovic testified that many of his records were destroyed when a pipe burst in his office and caused water damage. Defendants further explain that Camovic has frequently needed to travel out of the country to help care for his sick mother and that this travel has made it difficult for Camovic to stay in contact with counsel's office. In addition, defendants attached a response to the May 6 demand as an exhibit to their opposition, although conceding that the response omits the personal bank statements which defendants were still working to obtain.

On August 1, 2024, one day before plaintiffs' motion was marked fully submitted, defendants filed a letter correspondence to the court along with a supplemental response to the May 6 demand (NYSCEF Doc. Nos. 120-121). Plaintiffs submitted a letter in response on August 10, 2024 asking the court not to

consider defendants impermissible sur-reply and noting, in any event, that the supplemental response remains incomplete (NYSCEF Doc. # 122).

CPLR 3126 provides that if any party willfully fails to disclose information which the court finds ought to have been disclosed, the court may sanction that party by issuing an order of preclusion or an order striking the pleadings, dismissing the action, or rendering judgment by default against the disobedient party. While the nature and degree of the penalty to be imposed against a party for their willful failure to disclose is a matter generally left to the discretion of the Supreme Court (*Carbajal v Bobo Robo*, 38 AD3d 820 [2d Dept 2007]), “the drastic remedy of striking a pleading or even precluding evidence . . . should not be imposed unless the failure to comply with discovery demands or orders is clearly willful and contumacious” (*Gutierrez v Good Bar, LLC*, 203 AD3d 803 [2d Dept 2022] [internal citation omitted]). A party’s willful and contumacious character “may be inferred from the party’s repeated failure to comply with court-ordered discovery and the absence of any reasonable excuse for those failures, or a failure to comply with court-ordered discovery over an extended period of time” (*Palmieri v Piano Exch., Inc.*, 124 AD3d 611, 612 [2d Dept 2015]).

Here, defendants’ failure to fully and timely respond to plaintiffs’ discovery demands demonstrates a laxity that this Court does not condone. However, in considering the sequence of events and various discovery disputes that arose during the course of this litigation, as well as the excuses for the delays, as proffered by defense counsel, this court does not find defendants’ conduct to be willful and contumacious so as to support the drastic remedy of striking defendants’ amended answer. In reviewing the compliance conference orders, it is clear that not every delay in this litigation can be attributed solely to defendants. At the first conference held on September 28, 2023, plaintiffs’ counsel advised the court that defendants had failed to fully respond to plaintiffs D&I notice until September 27, 2023. Counsel for defendants attributed the delay to the fact that Camovic is a non-native English speaker and was out of the country

caring for a relative at the time (NYSCEF Doc. # 101). On December 6, 2023, the parties appeared for a second compliance conference during which the parties disagreed over whether depositions should go forward as scheduled, despite the existence of plaintiffs' pending motion to amend the complaint (NYSCEF Doc. # 103). Thereafter, the parties agreed to stipulate to amend the complaint and defendants served a demand for information related to the newly pled allegation, and served subpoenas for documents on two non-parties. At the third compliance conference on January 17, 2024, plaintiffs again raised concerns that defendants wished to delay depositions pending receipt of the subpoenaed documents. The court order directed party depositions to be completed by February 21, 2024 and non-party depositions by March 29, 2024 (NYSCEF Doc. # 106). Defendants' depositions were subsequently held over the course of three days on February 20, 2024, February 22, 2024, and February 23, 2024.

On February 28, 2024, the parties appeared for their fourth compliance conference and the resulting order stated that plaintiffs' deposition was still outstanding due to defendants' receipt and ongoing review of voluminous subpoenaed records (NYSCEF Doc. # 87). Plaintiffs' deposition was rescheduled to March 21, 2024 and the parties were directed to complete non-party depositions by April 15, 2024. On April 24, 2024, the parties appeared for a fifth compliance conference at which time they advised the court that they were engaged in settlement negotiations and therefore, the remaining depositions had not yet been held. The resulting compliance conference order stated that if the action was not settled by May 14, 2024, the parties must provide a firm date for plaintiffs' deposition, which must be completed on or before May 31, 2024 (NYSCEF Doc. # 90). At the sixth compliance conference held on May 14, 2024, the parties reported that they were not settled and plaintiffs' deposition was scheduled for May 30, 2024. Defendants were also ordered to respond to plaintiffs' May 6, 2024 post-deposition demands by May 28, 2024 (NYSCEF Doc. # 108).

defendant failed to respond to plaintiffs' May 6, 2024 demand by May 28, 2024, as directed in the prior order. Defendants were granted an additional opportunity to respond to the May 6, 2024 demand by July 5, 2024 (NYSCEF Doc. # 92) and in the absence of a timely response, plaintiff was permitted to file any appropriate CPLR article 31 motion.

Although plaintiffs' motion to strike the defendants' amended answer is denied based on all of the above, defendants are directed to supplement their response to the May 6, 2024 post-deposition demands as follows. First, for each response in which defendants state that they are not in possession of any responsive documents, which include checks in the name of Abascus signed by Camovic prior to and during 2016 and all documents relating to the transfers of the three properties to the three LLCs (NYSCEF Doc. # 121 at ¶¶ 5 and 8), defendants must serve a "Jackson" affidavit. The affidavit must be from an individual with personal knowledge who can attest to where the subject records were likely to be kept, what efforts, if any, were made to preserve them, and whether a search had been conducted in every location where the records were likely to be found (*Jackson v City of New York*, 185 AD2d 768 [1st Dept 1992]). In essence, the affidavit must provide sufficient information to demonstrate that defendants' search for the documents "had been a thorough one" and "that it had been conducted in a good faith effort to provide these necessary records to plaintiff[s]" (*id.* at 770). The affidavit must also detail with the utmost specificity what efforts, if any, defendants made to search their cloud-based email accounts for the various email correspondence sought by plaintiffs in demand nos. 1, 6, 7, 11 and 12, and how the search was actually conducted.

Second, because defendants' response to demand no. 9 is incomplete and only discloses the personal bank statement reflecting the *deposit* of the funds received from the refinancing of the three properties, defendants must supplement this response by providing all such personal bank statements that reflect the *disbursement* of the funds. If no such statements are in defendants' possession, custody or

control, defendants must state so in their supplemental response.² Additionally, by not objecting to the items sought in demand no. 9, defendants have in effect conceded the relevancy of the sought-after documents. As such, if defendants do not have Camovic's personal bank statements reflecting the disbursement of funds in their possession, custody or control, there is nothing to prevent plaintiffs from subpoenaing said personal bank statements. Third, by also not objecting to demand no. 10, defendants concede the relevancy of all bank statements for all bank accounts held by and relating to the three LLCs. However, because defendants state that they are not in possession of statements other than the most recent six months, plaintiffs may also be required to subpoena the remainder of these sought-after bank statements.

As to the balance of defendants' responses, defendants state that they are not in possession of any documents other than those previously provided in various exhibits annexed to their response to plaintiffs' D&I notice. It is axiomatic that a party can only be required to produce those items which are in his possession, custody, or control (CPLR 3120; *Rosado v Mercedes-Benz of North America*, 103 AD 2d 395 [2d Dept 1984]). To the extent that the failure to maintain the sought after documents and records is a violation of Camovic's fiduciary duties, such a breach goes to the merits of the action which is not yet before the court.

Accordingly, it is hereby

ORDERED that plaintiffs' motion is **denied**; and it is further

ORDERED that defendants shall supplement their response to plaintiffs' May 6, 2024 post-deposition demand and serve a Jackson affidavit, consistent with this decision and order, **within 30 days** of the date this order is uploaded to NYSCEF; and it is further

² It is unclear whether defendants inadvertently or intentionally omitted additional personal bank statements in response to demand no. 9 or if defendants do not have any other personal bank statements in their possession that are responsive to this demand.

ORDERED that in the event defendants fail to timely comply with this directive, they shall be **precluded** from offering evidence or testifying in their defense at trial on the issues to which they failed to supplement their response; and it is further

ORDERED that **within 20 days** of receipt of defendants' supplemental response, plaintiff shall file a letter via NYSCEF confirming that the supplemental response and Jackson affidavit have been received and the court shall thereafter issue a trial readiness order.

This constitutes the decision and order of the court.

Dated: White Plains, New York
October 17, 2024



HON. CHARLES D. WOOD
Justice of the Supreme Court

TO: All Parties by NYSCEF