

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS

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ALAYNE REAL ESTATE, INC. and SETAM
REALTY ASSOCIATES, L.L.C.,

CIVIL TERM, PART 11

DECISION and ORDER

Plaintiffs,

Index No. 11134/00

-against-

ALAN D. LASHER and ANGELA MILLWATER,

PRESENT:
HON. RANDOLPH JACKSON

Defendants.

December 9, 2004

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ANGELA MILLWATER,

Third-Party Plaintiff,

-against-

CHERYL UNTERBERG,

Third-Party Defendant.

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THE FOLLOWING PAPERS NUMBERED 1 TO 42 READ ON THIS
MOTION:

NO. 1 ON CALENDAR OF September 28, 2004 PAPERS NUMBERED
NOTICE OF MOTION - ORDER TO SHOW CAUSE - AFFIDAVIT(S)
AFFIRMATION(S) - PETITION - EXHIBITS ANNEXED 1-26
ANSWERING AFFIDAVIT(S) - AFFIRMATION(S) - EXHIBITS 27-29, 30
REPLY AFFIDAVIT(S) - AFFIRMATION(S) 31-41, 42
AFFIDAVIT(S) - AFFIRMATION(S) _____
EXHIBITS AND OTHER PAPERS _____

After oral argument and upon the foregoing papers:

Plaintiffs, ALAYNE REAL ESTATE, INC. ("ALAYNE") and SETAM REALTY ASSOCIATES, L.L.C. ("SETAM), and third-party defendant, CHERYL UNTERBERG ("UNTERBERG"), move, inter alia, for an order striking the defendants', ALAN LASHER ("LASHER") and ANGELA MILLWATER ("MILLWATER"), answer, the third-party complaint and grant judgment by default in their favor or, in the alternative, precluding the defendants from offering evidence at trial.

The underlying action is predicated on the allegation that the defendant, LASHER, breached his ethical obligation to plaintiffs while representing them as their attorney. As a result, a disciplinary proceeding was instituted and Mr. LASHER was suspended from the practice of law for five (5) years commencing June 18, 2002.

In a Decision and Order dated May 9, 2002, this Court specifically stated, at page 2, 2nd paragraph

Consequently, the motion of plaintiff is granted conditionally to the extent that defendants' answer is stricken unless the defendants comply fully with the plaintiff's discovery demands, as required by the Court's prior Order, within 45 days of service of this Decision and Order upon defendants. ...

In the instant motion, plaintiffs claim that defendants served insufficient responses to plaintiffs' document demands, and that defendants have blatantly disregarded all of this Court's Orders. Specifically, plaintiffs contend that for almost two and one-half (2½) years, defendants have consistently sought to avoid their obligations to produce documents and appear for depositions. In fact, several letters were forwarded to defendants regarding same. Mr. LASHER then responded alleging numerous excuses including: insufficient office staff and copying equipment; that he was sick; that his mother was sick; and then

that his wife was ill. Plaintiffs claim that to further delay discovery, defendants instructed a copy center to make multiple copies of the same documents, at plaintiffs' expense.

While Mr. LASHER has produced some of the requested documents, plaintiffs maintain that these documents were virtually all Court files concerning an eviction proceeding wherein Mr. LASHER represented the owner. Most importantly, plaintiffs claim that Mr. LASHER also had at least 5 lateral file cabinet drawers full of documents that were responsive to plaintiffs' discovery request which still have not been produced. Consequently, plaintiffs argue that based on the history of defendants' dilatory conduct, and the non-compliance with prior Court Orders, that the defendants' answer and third-party complaint should be stricken and judgment entered against them.

In opposition, defendants allege that this motion is a continuation of plaintiffs' fishing expedition, that boxes of documents which were copied were forwarded to plaintiffs' counsel, and that they have produced every document which was in their possession. Defendant, LASHER, claims that the "Hoffmans", his former clients, came to his home and took computer files and boxes full of documents. Mr. LASHER admits that there is a file which was not produced because it is his attorney work product and disclosure would violate a duty owed to the "Hoffmans". Defendants further maintain that they have at all times been ready, willing and able to appear for deposition, except during his illness and his wife's illness.

In reply, plaintiffs argue that defendants have conceded that they have not produced all of the requested documents and have demonstrated their wilful non-compliance of the Court's Order.

Moreover, plaintiffs assert that defendants have allowed spoliation of evidence as one cannot give documents to a third-party to avoid producing them.

C.P.L.R. §3126. **Penalties for refusal to comply with order or to disclose**

If any party, or a person at the time a deposition is taken or an examination or inspection is made, is an officer, director, member, employee or agent of a party or otherwise under a party's control, refuses to obey an order for disclosure or wilfully fails to disclose information which the court finds ought to have been disclosed pursuant to notice duly served, the court may make such orders with regard to the failure or refusal as are just, among them:

* * *

3. An order striking pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or any party thereof, or rendering a judgment by default against the disobedient party.

In Emanuel v. Broadway Mall Properties, 293 AD2d 708 (2nd Dept., 2002), the Court held that where a party disobeys a Court order and by its conduct frustrates the statutory disclosure schedule, dismissal of a pleading is within the broad discretion of the Court.

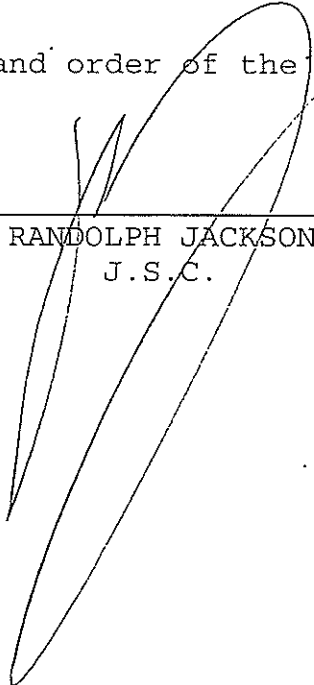
In the case at bar, the Court determines that defendants' opposition is without merit, as it is evident that defendants have failed to comply with any of the prior Orders scheduling the completion of discovery. Moreover, defendants' protracted delay in providing responses to plaintiffs' discovery request is not adequately explained. This supports the inference that defendants' failure to provide disclosure was willful and contumacious. See, Brandes v. Pirnie-Baker, 288 AD2d 413 (2nd Dept., 2001), where the Court held that a party's repeated failure to comply with Orders of the Court directing

disclosure, without sufficient excuse, supports an inference that the failure to provide disclosure was willful and contumacious. Nor have defendants submitted competent proof to support their contention that they were ready, willing and able to appear for deposition.

Accordingly, based upon the above, the plaintiffs' motion to strike the defendants' answer, third-party complaint and grant judgment by default is granted.

All other requests not specifically mentioned herein are denied.

This shall constitute the decision and order of the Court.



RANDOLPH JACKSON
J.S.C.