

COURT VACATES ORDER AND AWARDS SANCTIONS FOR ABUSE OF DISCOVERY IN SCAROLA V. BERNARD

Featuring Peter Sanders, Partner, Capell Barnett Matalon & Schoenfeld LLP



DOCKET

- Practice Area: Civil Procedure
- Date filed: 2022-02-24
- Court: Supreme Court, Suffolk
- Attorneys: for plaintiff: Plaintiffs' Attorney: Capell Barnett Matalon & Schoenfeld LLP, New York, NY.; for defendant: Defendants' Attorney: Richard Kraslow, PC, Melville, NY.
- Judge: Justice Jerry Garguilo
- Case Number: 17/612520

CASE DIGEST SUMMARY

The parties' discovery disputes led the court to appoint a discovery referee, who issued an order and required defendants to produce specific documents. Plaintiffs later moved for leave to reargue the prior order requiring them to file a note of issue, claiming that they will be severely prejudiced if they are required to file the note of issue without the necessary discovery. Plaintiffs also stated that defendants

had omitted whole years of documents, such as bank records, for a corporation, many of the statements and invoices were missing pages, and such omissions can only be inferred to be an attempt to hide damaging information.

The instant court granted the motion to reargue and, upon reargument, vacated the prior order and granted plaintiff's motion for summary judgment on the issue of liability, determining defendants failed to justify failure to produce the records and documents sought. The court granted plaintiffs' request to stay the filing of the note of issue and held plaintiffs entitled to obtain further discovery in order to demonstrate their damages at inquest. Finally, the court ordered defendants to pay plaintiff \$168,239 in attorneys' fees and costs.

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FULL CASE DIGEST TEXT

The Court has considered the following in consideration of its determination:

1. Notice of Motion (Mot. Seq. 015): Doc. 328, 329, 330, 331-363 Opposition to Motion: Doc. 381, 382-383, 384, Reply: 387-388
2. Notice of Motion (Mot. Seq. 016): Doc. 365-380 Opposition to Motion: Doc. 384-386, Reply: Doc. 389
3. Order to Show Cause (Mot. Seq. 017) to reargue: Doc. 440-480, 508, 509, 530, 531, Opposition to Motion: Doc. 487, 521-526
4. Decision and Order of Discovery Referee, May 27, 2020: Doc. 239

5. So-Ordered Decision and Order of Discovery Referee, May 27, 2020, dated July 1, 2020 (Garguilo, J.): Doc. 251

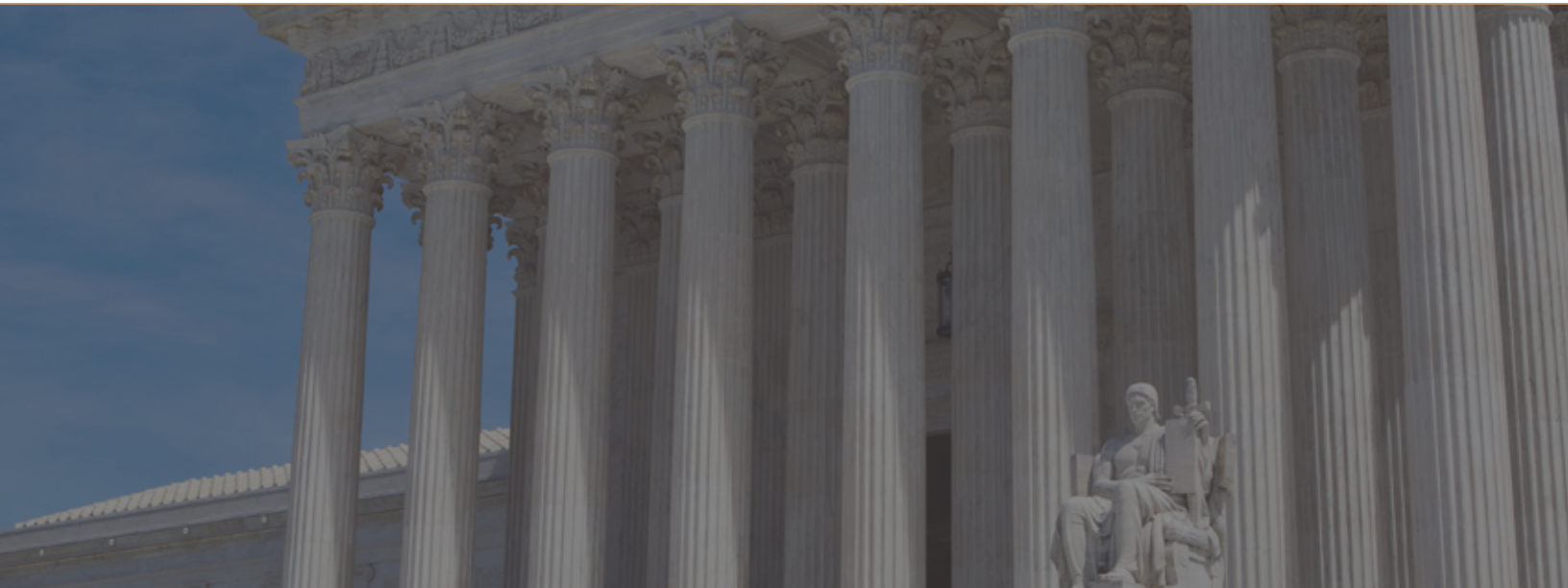
6. Decision and order of Discovery Referee, January 19, 2022: Doc. 534

It is, ORDERED that the Plaintiff's motion (Mot. Seq. 017) seeking leave to reargue the prior order (Mot. Seq. 015 and 016), dated May 3, 2021 (Garguilo, J.), wherein this Court denied the parties' motions for summary judgment, and for a stay of the Compliance Conference Order directing the Plaintiff to file a Note of Issue is granted; and it is further ORDERED so-ordered by the Court on February 2, 2022.

It is further ORDERED that upon reargument, the Order dated May 3, 2021 is vacated; and in its place, this Court inserts the following: that the Plaintiff's motion (Mot. Seq. 015) for partial summary judgment is granted in their favor on the issue of liability; that pursuant to CPLR 3126 the Defendants' Second Amended Verified Answer, the twenty-six affirmative defenses, and the two counterclaims are stricken; that the Defendants' motion (Mot. Seq. 016) for partial summary judgment is denied as moot; that pursuant to CPLR 3126 the issues as to which undisclosed information sought from Defendants Lawrence Bernard, Faith Bernard, AB Oil, Inc., AB Oil Service Ltd., Able Environmental, Inc., Able Environmental Services, Inc. And Fairway Environmental LLC is relevant shall be deemed resolved in Plaintiffs' favor for purposes of this action on each one of the Plaintiffs' remaining causes of action in the

First, Second, Fourth, Fifth, Sixth, Seventh, Ninth, Eleventh, Twelfth, Thirteenth, Fourteenth, Fifteenth, and Sixteenth causes of action; and it is further ORDERED that the Defendants are directed to pay to the Plaintiff the amount of \$168,239.15 in attorney fees to the Plaintiff forthwith in accordance with the Order dated September 15, 2020 and modified on October 2, 2020 (Garguilo, J.); and it is further.

ORDERED that pursuant to CPLR 3105, the Plaintiff is entitled to demand discovery in advance of an inquest, whether for direct use as evidence in proving its damages or for the procurement of information that might lead to such evidence, within two weeks of this Order's notice of entry; and Defendants shall respond within two weeks of service of Plaintiffs' demands; and it is further



ORDERED that the parties are directed to appear at a pretrial conference on April 11, 2022 at 10 a.m.

The Plaintiffs move for leave to reargue the prior Order, dated May 3, 2021, which resulted in the denial of the parties' motions for partial summary judgment and seeks a stay of the Compliance Conference Order dated May 19, 2021 requiring the Plaintiffs to file a note of issue on June 11, 2021. The Plaintiffs reiterate their request to strike the Defendants' answer, affirmative defenses, and counterclaims for failure to comply with this Court's discovery order dated July 1, 2020, which is based upon the Discovery Referee's findings of noncompliance in his Decision and Order of Discovery Referee dated May 27, 2020.

The record reveals that the parties have had discovery disputes, which led this Court to appoint Mr. Theodore Sklar, Esq. as Discovery Referee on October 3, 2018. The Referee issued a decision and order concerning discovery disputes on November 29, 2018 and required the Defendants to produce specific documents. On March 22, 2019, the Court confirmed this decision and order and directed the

Defendants to comply or face sanctions. On August 9, 2019, the Plaintiffs filed a motion for sanctions pursuant to CPLR 3126 due to the Defendants' failure to comply with the discovery order. On December 3, 2019, the Court issued an order directing the parties to meet with the Referee. However, after a series of conferences with the Referee and numerous filings by the Plaintiffs and the Defendants regarding the Referee's directives, the Referee granted the Plaintiffs motion for sanctions in his Decision and Order dated May 27, 2020 after finding that the Defendants were still not in full compliance with the Referee's November 29, 2019 Decision and Order. Upon finding that the Defendants' conduct was willful, contumacious and in bad faith, the Referee issued a conditional order requiring the Defendants to strictly comply or face the consequences of the conditional order. On July 28, 2020 the Defendants produced substantially incomplete document production and filed a discovery response with accompanying affidavits with the Court. The Plaintiffs filed a letter memorandum on August 4, 2020 with the Court detailing the continued deficiencies with the Defendants' production.



The Discovery Referee, in his order dated May 27, 2020, directed the Defendants to strictly comply with the directives contained in Subparagraph A, and that failure to comply would result in the imposition of the sanctions, as follows:

1. ORDERED, that plaintiffs' motion for sanctions against defendants pursuant to CPLR 3126 is granted to the extent set forth in the decision and rulings above.
2. ORDERED, that within thirty (30) days after plaintiffs' counsel serves defendants' counsel with a copy of Justice Garguilo's order so-ordering this Decision and Order together with notice of entry of same, defendants shall:
 - A. Serve plaintiffs' counsel with documents and/or affidavit(s) of due diligence responding to all outstanding discovery demands and the books and records demand, and complying with all prior court orders as set forth in particular in each one of the rulings in the decision above;
 - B. Tender payment of the amount of the monetary sanction that is approved by Justice Garguilo; and
 - C. Defendants shall strictly comply with the directives contained in subparagraph A, above. Partial compliance and any failure or omission to comply, including failure to comply with CPLR 3122 C, shall result in the imposition of the sanctions set forth in paragraph 4, below. Defendants' responses and documents shall be organized in such a manner as to make it easy to determine whether they in fact address each one of

the rulings in this Decision and Order. Defendants' responses and documents shall be submitted under cover of a statement by their counsel that those submissions comply with the rulings in this Decision and Order and with the rulings in the previous discovery orders in this case, and the statement shall be signed in accordance with 22 NYCRR §130-1.1a.

3. ORDERED, that within seven days of the e-filing of this Decision and Order. Plaintiffs' counsel shall serve and e-file an affirmation of all reasonable legal fees and costs incurred to litigate this motion and to compel compliance with the court's discovery orders and plaintiffs' discovery requests including, but not limited to, motion papers, letter applications, emails, court appearances and telephone conferences, exclusive of such legal fees and costs that are related to Plaintiffs' Second Notices to Produce. Within seven days after plaintiffs have e-filed their affirmation, defendants' counsel may serve and e-file an affirmation contesting the amount of plaintiffs' legal fees and costs. The matter shall then be submitted to Justice Garguilo for determination of the amount of the monetary sanction in paragraph 2[B], above.

4. ORDERED, that defendants' failure to comply with the directives in paragraph 2, above, shall result in the following sanctions pursuant to CPLR 3126:



A. An order pursuant to 3126 that the issues as to which undisclosed information sought from defendants Lawrence Bernard, Faith Bernarde, AB Oil, Inc., AB Oil Service Ltd., Able Environmental, Inc., Able Environmental Services, Inc., and Fairway Environmental LLC (“defendants”) is relevant shall be deemed resolved in Plaintiffs’ favor for purposes of this action on each one of the Plaintiffs’ remaining causes of action: the First, Second, Fourth, Fifth, Sixth, Seventh, Ninth, Eleventh, Twelfth, Thirteenth, Fourteenth, Fifteenth, and Sixteenth causes of action and

B. An order pursuant to CPLR 3126 (3) striking defendants’ Second Amended Verified Answer, the twenty-six affirmative defenses, and the two counterclaims contained therein.

5. ORDERED that this conditional order is self-executing and defendants’ failure to produce the responses and documents required by paragraph 2, above, by the date certain shall render this conditional order absolute.

In support of the motion, the Plaintiffs claim, inter alia, that they will be severely prejudiced if they are required to file a note of issue without the necessary discovery. Plaintiffs based their second motion for summary judgment on the July 1, 2020 order, and

sought to strike the Defendants’ pleadings in reliance of the conditional order. The Plaintiffs state that in their July 28, 2020 production, the Defendants omitted whole years of documents, such as bank records, for 1599 Ocean Corporation, many of the statements and invoices were missing pages, and state that such omissions can only be inferred to be an attempt to hide damaging information.

The Plaintiffs affirm by counsel that due to the Defendants’ failure to produce the very documents that referee Sklar identified as “material and necessary to the prosecution of this action,” Plaintiffs have been unable to fully construct a picture of how Defendants’ businesses have benefitted by their use of the property without the payment of fair market rent. Plaintiffs are also unable to determine how much money, if any, Defendants paid toward the property or the types of payments made as the Defendants failed to produce any documents containing identifiable payments. The Plaintiffs also reargue the Court’s decision to reserve sanctions for trial, since the Defendants were ordered to pay legal fees and costs to the Plaintiffs within thirty days of the order by this Court dated September 15, 2020 (Garguilo, J.).

In addition, the Plaintiffs state that to force them to file a note of issue would have the effect of accepting the Defendants' deficient discovery production. Mr. Scarola, in his personal affidavit, states, among other things, that the Defendants have not yet paid the legal fees and costs in the amount of \$168,239.15, as determined by this Court by order dated September 15, 2020 (Garguilo, J.) and modified on October 2, 2020 (Garguilo, J.).

In opposition, the Defendants contend, *inter alia*, that the Plaintiffs have not, at any time relevant thereto, identified deficiencies in Defendants' responses to Plaintiffs' notice to produce dated September 20, 2017, and that Defendants have complied by serving several Bates Stamped documents, and searched for records. In addition, the Defendants state that neither this Court nor the Discovery Referee have issued an order or direction tending to confirm, or suggest, that Defendants' service of responsive documents failed to comply with the Decision and Order of the Discovery Referee, dated May 27, 2020, sufficient to result in sanctions pursuant to CPLR 3126.

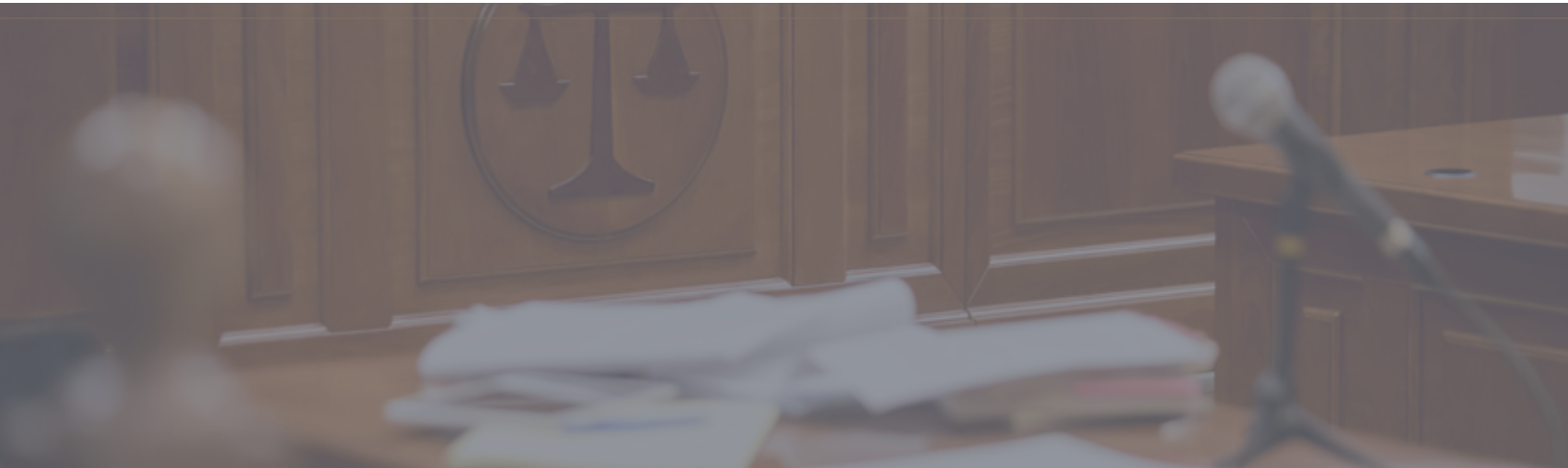
The motion to reargue is granted. Upon reargument, the Court agrees that it overlooked the Plaintiff's request to strike the Defendants' answer, affirmative defenses, and counterclaims based upon deficiencies in Defendants' discovery production, and referred the Defendants' discovery responses dated July 28, 2021 to the Discovery Referee, Mr. Theodore Sklar, Esq., who has supervised the parties' discovery throughout the pendency of this matter since October 3, 2018. After careful consideration of the submissions, the Discovery Referee issued a one-hundred page Decision and Order on January 19, 2022 and found in every instance that the Defendants failed to comply with his prior order dated May 27, 2020, and so ordered by this Court on July 1, 2020. Referee Sklar cites *WMC Mortgage v. Vandermulen* (32 Misc3d 1206(A), 932 NYS2d 764, 2011 NY Slip Op 51196 (U) [Supr Ct, Suff Co., 2011]) and *Jackson v. City of New York* (185 AD2d 768, 586 NYS2d 952 [1st Dept 1992]), and states that

"the boilerplate and conclusory statements contained in Defendants' affidavits regarding a 'diligent search' for responsive records does not constitute 'a detailed statement, under oath, by someone with direct knowledge of the facts setting forth the past and present status of the relevant documents.

Instead, the Defendants stated that "a diligent search has been performed of records maintained on their computer database, to the extent existing." Referee Sklar states that "such a conclusory response states some but not all the elements of a Jackson affidavit as developed by the applicable case law." Therefore, Mr. Sklar states, "Defendants' submission of inadequate Jackson affidavits as their responses to the discovery orders dated May 27, 2020 and July 1, 2020 does not constitute compliance with those orders." This Court accepts Mr. Sklar's findings and has so ordered same on February 2, 2022.

Where a party willfully fails to disclose information which the court finds ought to have been disclosed, the court may strike pleadings or parts thereof, dismiss the action or any part thereof or enter a default judgment against the insubordinate party (CPLR 3126 [3]). Although actions should be disposed on the merits, the court may strike a pleading against a party who does not comply with court ordered disclosure (see *Reidel v. Ryder TRS, Inc.*, 13 AD3d 170, 171, 786 NYS2d 487 (1st Dept 2004)). A court may strike an answer as a sanction where the moving party establishes that the failure to comply was "willful, contumacious or in bad faith" (*Rodriguez v. United Bronx Parents, Inc.*, 70 AD3d 492, 492, 895 NYS2d 57 [2010]).

Willful and contumacious conduct can be inferred from a party's repeated failure to comply with court ordered disclosure coupled with the party's inadequate excuses offered to justify the default (see *Maiorino v. City of New York*, 39 AD3d 601, 834 NYS2d 272 [2d Dept 2007]). Upon such showing, the burden "shifts to the nonmoving party to demonstrate a reasonable excuse" (*Reidel v. Ryder TRS, Inc.*, 13 AD3d 170, 171, 786 NYS2d



487 [2004]). IAS courts have substantial deference to compel compliance with discovery orders and, absent a clear abuse of discretion, any penalty imposed pursuant to CPLR 3126 will not be disturbed (see *Arts4All, Ltd. v. Hancock*, 54 AD3d 286, 863 NYS2d 193 [1st Dept 2008]).

The Court has considered the papers by the parties and finds that the Defendants have not offered any excuse to justify their failure to produce the records and documents sought by the Plaintiff's, and instead, state that the Plaintiffs have misrepresented the facts, and point to gaps in the Plaintiffs' evidence.

Although the Defendants have failed to comply with discovery orders, "it does not follow that the Plaintiff is to be handicapped in the proof of their damages by the Defendants' defiance, and the Plaintiffs if they choose to do so, could press their right of discovery in advance of inquest as to the amount of damages, whether for direct use as evidence in proving damages or for the procurement of information that might lead to such evidence" (CPLR 3105; *Reynolds Securities, Inc. v. Underwriters Bank and Trust Company*, 44 NY2d 568, 573, 406 NYS2d 743 [1978]).

"If the Plaintiffs' ability to prove their affirmative case with a fair degree of precision is seriously hampered by the defendants' obstructiveness, the court, in order that a just result be achieved, is not without power, where necessary to rely on lesser and more informal proofs" (*Id.*, at 574). "A defendant whose conduct has both caused injury to another and put obstacles in the path of the plaintiffs

recovery is hardly in a position to complain when, as a consequence, the damages cannot be established with exactitude" (*Matter of Rothko*, 43 NY2d 305, 323, 401 NYS2d 449 [1977]). Further obstruction of discovery prior to an inquest may result in preclusion from offering any evidence at the inquest (CPLR 3126; see *Brown v. Hilton Hotels Corp.*, 25 AD2d 646, 269 NYS2d 930 [1st Dept 1966]; *Reynolds Securities, Inc. v. Underwriters Bank and Trust Company*, *supra*).

Applying these principles to the instant matter, the Defendants' noncompliance with the Court's July 1, 2020 order constitutes wilful and contumacious conduct (*Maiorino v. City of New York*, *supra*). The conditional order has been rendered absolute, and the sanctions set forth in Paragraph 4 of the Court's July 1, 2020 order are in effect as against the Defendants.

Accordingly, the prior order dated May 3, 2021 is vacated, and in its place this Court inserts the following: the Plaintiff's motion (Mot. Seq. 015) for summary judgment is granted on the issue of liability, the Defendants' Second Amended Answer, Affirmative Defenses and Counterclaims are stricken pursuant to CPLR 3126, and the Defendants' motion for summary judgment (Mot. Seq. 016) is denied as moot (*Hudson View II Assocs. v. Miller*, 282 AD2d 345, 723 NYS2d 641 [1st Dept 2001]).

Pursuant to CPLR 3126, the issues as to which undisclosed information sought from defendants Lawrence Bernard, Faith Bernard, AB Oil, Inc., AB Oil Service Ltd.,



Able Environmental, Inc., Able Environmental Services, Inc., and Fairway Environmental LLC (“defendants”) is relevant shall be deemed resolved in Plaintiffs’ favor for purposes of this action on each one of the Plaintiffs’ remaining causes of action: the First, Second, Fourth, Fifth, Sixth, Seventh, Ninth, Eleventh, Twelfth, Thirteenth, Fourteenth, Fifteenth, and Sixteenth causes of action. The Defendants are directed to pay to the Plaintiff the amount of \$168,239.15 in attorney fees and costs to the Plaintiff forthwith in accordance with the Order dated September 15, 2020 and modified on October 2, 2020 (Garguilo, J.)

Plaintiffs’ request to stay the filing of the note of issue is granted until further notice. Plaintiffs are entitled to obtain further discovery in order to demonstrate their damages at inquest, and may serve a demand for discovery upon the Defendants within two weeks of this Order’s notice of entry. The Defendants shall serve discovery responses within two weeks of service of the Plaintiffs’ demand.

The parties are directed to appear in person for a pre-inquest conference with the undersigned on April 11, 2022 at 10:00 a.m. The foregoing constitutes the decision and ORDER of this Court.

DATED: FEBRUARY 24, 2022

CBM&S

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