

# SHORT FORM ORDER

## SUPREME COURT - STATE OF NEW YORK

Present:

**HON. STEPHEN A. BUCARIA**

Justice

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TRIAL/IAS, PART 4  
NASSAU COUNTY

INDEX No. 010854/04

MOTION DATE: May 30, 2008  
Motion Sequence # 004, 005, 006

VIC ROSADO and VIC ROSADO, doing  
business as ROSADO TOWING, FREEPORT  
TOWING, INC. and ROSADO COLLISION  
AND SALES, INC.,

Plaintiffs,

-against-

ROBERT LIVINGSTONE, CHRIS MIGNONE,  
STEVEN PODLAS, CPA and MARK  
SILVERMAN,

Defendants.

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The following papers read on this motion:

|  |       |
|--|-------|
| Notice of Motion.....                    | X     |
| Cross-Motion.....                        | XX    |
| Affirmation/Affidavit in Opposition..... | XX    |
| Reply Affirmation/Affidavit.....         | XXXXX |
| Memorandum of Law.....                   | X     |

This motion, by plaintiffs, for an order pursuant to CPLR 3126: A) enforcing the relief granted to the plaintiff in the Court's conditional preclusion order dated September 26, 2007 and striking defendant Mark Silverman's answer for failing to

comply with said order, granting plaintiff summary judgment against Mark Silverman and setting the matter against Mark Silverman down immediately for an inquest and an assessment of money damages; and B) striking defendants Chris Mignone and Robert Livingstone's answer for failing to respond to plaintiff's (continued) Notice to Take Deposition on Oral Examination and for such other and further relief as to the Court may deem just and proper, and attorney fees together with the costs of this motion; and a cross-motion, by defendant Chris Mignone, for an order pursuant to CPLR §3212 granting the defendant, Christopher Mignone summary judgment dismissing the first and second causes of action in the plaintiff's complaint; and a cross-motion, by defendant Mark Silverman, for an order pursuant to CPLR §3212 granting the defendant, Mark Silverman, summary judgment dismissing the sixth, seventh and eighth causes of action in the plaintiffs complaint, are all determined as hereinafter set forth.

### FACTS

The instant action arises from a proposed sale of business assets of plaintiff's towing and auto repair establishment in Freeport, New York. In 2002, plaintiff hired defendant, Mark Silverman, Esq. (hereinafter as "Silverman"), to represent him in the sale of his business' assets. Subsequently, plaintiff entered into negotiations with defendants, Robert Livingstone (hereinafter as "Livingstone") and Chris Mignone (hereinafter as "Mignone"). During negotiations, plaintiff received notices of liens from the New York State Department of Taxation and Finance regarding unpaid sales taxes. The plaintiff referred the matter to his accountant, defendant Steven Podlas, CPA (hereinafter as "Podlas") and Silverman. Additionally, upon UCC inspection, the parties were notified of outstanding judgments against the business.

In May, 2003 Silverman informed the plaintiff that a closing was scheduled for May 20, 2003. At the closing, the business assets would be sold, and a lease agreement would be assigned to Mignone and Livingstone. Prior to closing, on May 19, 2003, an agent from the New York State Department of Taxation and Finance advised Mignone and Livingstone that the state was seizing the plaintiff's assets in order to satisfy the outstanding tax liens. The scheduled closing never occurred; however, Mignone executed a lease agreement with the landlord of the subject property, and began to operate his own auto repair and towing business.

As a result, the plaintiff commenced the instant action. The plaintiff alleges causes of action against Mignone and Livingstone for unlawful conversion of his business and

assets, and entitlement to punitive damages for breach of contract. Additionally, the plaintiff is claiming negligence, malpractice, breach of trust, breach of fiduciary responsibilities, and punitive damages against Silverman.

Following commencement of the instant action, the parties engaged in discovery. However, there are disputes with respect to compliance with discovery demands by the parties. In the interim, defendant Podlas passed away on February 22, 2006, and a motion to dismiss his estate from the instant case was granted by this Court on March 15, 2007. Subsequently, this court issued an order dated, September 26, 2007 conditionally granting plaintiff's motion pursuant to CPLR 3126 to strike Silverman's answer for failing to respond to plaintiff's Demand for Discovery and Inspection. Additionally, said order granted Mignone's cross motion for the return of his \$10,000 deposit that was held in escrow by plaintiff's current attorney, Robert A. Baumann.

### **PLAINTIFF'S CONTENTIONS**

The plaintiffs' counsel contends that Silverman has not responded to plaintiffs' discovery demands in accordance with this court's conditional order dated September 26, 2007. Therefore, Silverman's failure to comply with said order warrants his answer being stricken, with prejudice; and summary judgment is warranted in favor of plaintiff and setting the matter down for inquest to determine damages. Counsel argues that Silverman's responses to plaintiff's discovery demands that are annexed to his Affirmation in Opposition are minimal, and the excuses that he tenders for his non-compliance are non-specific. Counsel requests that the court award the plaintiff attorney's fees in the amount of \$2500 if Silverman's conduct is deemed to be excusable.

Additionally, counsel contends that Mignone and Livingstone have willfully failed to comply with the plaintiffs' Notices to Take Deposition upon Oral Examination dated October 24, 2007. Counsel claims that said defendants did not attend the scheduled depositions, and their attorneys have not attempted to reschedule them. Therefore, Mignone and Livingstone's answer should be stricken.

### **DEFENDANT SILVERMAN'S CONTENTIONS**

In response to plaintiff's motion, Silverman claims that his failure to comply with plaintiff's discovery and inspection demands was neither willful nor contumacious. He alleges that he had personal and professional problems that prevented him from

responding to plaintiff's requests in a timely manner. Additionally, Silverman explains that the law firm that represented plaintiff with respect to the sale of his business assets dissolved. As such, the circumstances made it difficult for Silverman to obtain documentation necessary to comply with plaintiff's demands. Annexed to his Opposition, Silverman submitted documentation in response to the plaintiff's Demand for Discovery and Inspection.

Additionally, Silverman contends that he is entitled to summary judgment dismissing the sixth, seventh and eighth causes of action in plaintiff's complaint against Silverman. Specifically, the causes of action are for negligence, malpractice and breach of fiduciary duty. Furthermore, he supports Mignone's motion for summary judgment. Silverman requests that in making its determination, that the court considers the arguments and supporting documentation set forth in Podlas' previous motion for summary judgment and Mignone's current motion before the court, and claims that said motions substantiate Silverman and Mignone's entitlement to summary judgment.

Silverman claims that triable issues of fact do not exist herein. He argues that the transaction was never completed with respect to the sale of the business assets, and as such the plaintiff is seeking to obtain a benefit from a transaction that was never effectuated. Moreover, the plaintiff has not proffered evidence to sustain the causes of action against Silverman and Mignone.

#### **DEFENDANT MIGNONE'S CONTENTIONS**

Counsel for Mignone argues that summary judgment dismissing the first and second causes of action for unlawful conversion and punitive damages for malicious and intentional breach of contract in the plaintiffs' complaint is warranted because there are no material issues of fact. With respect to the claim for unlawful conversion, Mignone alleges, in his Reply Affidavit, that at the time he executed the lease agreement, the plaintiff's business did not exist due to the fact that plaintiff allowed the lease to lapse, and that most of the equipment at the premises was not owned by plaintiff. Furthermore, Mignone claims that he did not operate the business under plaintiff's license; he formed his own corporation and obtained a new license. Therefore, plaintiff cannot sustain a cause of action for unlawful conversion.

With respect to plaintiff's claim of malicious and intentional breach of contract, counsel for Mignone contends that said cause of action cannot be maintained by plaintiff because there was never a contract between the parties. Moreover, Mignone has not acted willfully in failing to promptly respond to the plaintiffs' discovery demands.

### DECISION

It is well settled that certain penalties may be imposed upon parties who fail to comply with a court order or to disclose. (see, Montgomery v City of New York, 296 AD2d 386, 745 NYS2d 464, 2<sup>nd</sup> Dept., 2000). Particularly, it is within the court's discretion to strike a pleading or dismiss the action, in whole or in part, when a party "refuses to obey an order for disclosure or willfully fails to disclose information which the court finds ought to have been disclosed." **CPLR § 3126(3)**.

At bar, this court previously issued a conditional order dated September 26, 2007 granting plaintiff's motion to strike Silverman's answer for failure to respond to plaintiff's discovery requests, unless Silverman complied with said demands within ten days from service of the order. Silverman has not complied with the terms of the order. However, annexed to his Affirmation in Opposition to the instant motion, he has submitted his response to plaintiff's Demand for Discovery and Inspection. It is the prevailing standard, that "[w]here a party disobeys a court order and by his conduct frustrates the disclosure scheme provided by the CPLR, dismissal of the complaint is within the broad discretion of the trial court." (Eagle Star Insurance Company of America v. Behar, 207 AD2d 326, 615 NYS2d 418, 2<sup>nd</sup> Dept., 1994).

Upon review of the documentation tender by Silverman, he has not sufficiently complied with plaintiff's demands. Particularly, he does not substantiate his responses wherein he indicates that he does not have documentation requested. Accordingly, plaintiff's motion to strike is hereby granted, unless, Silverman produces the documents not therefore supported, or supplies an affidavit categorically stating that such documents or records do not exist. Failure to comply within 20 days from service of a copy of this order upon Silverman shall result in such relief granted herein to plaintiffs.

Plaintiffs' counsel's request for attorneys' fees, as made herein, is not based upon any particular statute or rule, and counsel has not sought such relief pursuant to an application for sanctions (22 NYCRR§130). Additionally, based upon this record, such an award is not warranted.

Turning to plaintiff's motion to strike Mignone and Livingstone's answers for failure to appear or complete their oral depositions as requested by plaintiff, said depositions shall be held in the Supreme Court House, 100 Supreme Court Drive, Mineola, New York, 11501 at the lower level on September 12, 2008 at 9:30a.m. Failure to attend and complete said depositions may result in their respective answers being stricken.

Determination of Silverman and Mignone's cross motions for summary judgment is not warranted as it is apparent that further discovery is necessary. (CPLR 3212(f)).

Accordingly, the plaintiffs' motion is granted and denied as set forth herein; the cross-motions by the defendants Silverman and Mignone are denied without prejudice to renewal upon completion of discovery.

A Certification conference is scheduled for October 7, 2008 at 9:30 a.m., by which date all disclosure shall be completed.

Dated AUG 05 2008

Stephen A. Sacaria  
J.S.C.

**ENTERED**

AUG 07 2008

**NASSAU COUNTY  
COUNTY CLERK'S OFFICE**