

SUPREME COURT-STATE OF NEW YORK
SHORT FORM ORDER
Present:

HON. TIMOTHY S. DRISCOLL
Justice Supreme Court

-----x
ALLEN LIPP,

TRIAL/IAS PART: 25
NASSAU COUNTY

Plaintiff,

-against-

Index No: 011435-05

ROBERT ZIGMAN a/k/a ROBERT ARONSON
a/k/a ROBERT ARENSEN, AUTO BODY CORP.,
EPA AUTO SALES, INC. and COLLISION
DEPOT, INC.,

Motion Seq. Nos: 1 and 2
Submission Dates:
Mot. Seq. No. 1: 9-18-09
Mot. Seq. No. 2: 9-9-09

Defendants.

-----x

The following papers having been read on these motions:

Motion Sequence Number 1

Order to Show Cause, Verified Petition and Exhibits.....x
Verified Answer to Petition and Exhibits.....x

Motion Sequence Number 2

Notice of Motion, Affirmation in Support and Exhibits.....x
Letter dated August 20, 2009.....x

This matter is before the Court for decision on 1) the Order to Show Cause filed by Petitioner Allen Lipp on July 28, 2005, which was submitted before this Court on September 18, 2009,¹ and 2) the Motion filed by Petitioner Allen Lipp on June 10, 2009, which

¹ This Court assumed responsibility for this case in May 2009.

was submitted on September 9, 2009. For the reasons set forth below, the Court refers the Order to Show Cause and the Motion to trial.

BACKGROUND

A. Relief Sought

In the Order to Show Cause, Petitioner Allen Lipp (“Lipp”) seeks an Order 1) awarding Lipp lost salary and profits derived from Collision Depot, Inc. (“Collision”); 2) awarding Lipp compensation for his shares of Collision; 3) awarding Lipp compensation for the value of certain of his personal property located at 600 Atlantic Avenue, Oceanside, New York, the premises of Collision (“Premises”); 4) ordering replevin of that personal property; 5) ordering the dissolution of Collision, pursuant to New York Business Corporations Law (“BCL”) § 1104; 6) awarding Lipp damages for Respondent Robert Zigman’s (“Zigman’s”) alleged breach of his fiduciary duties with respect to Collision; 7) ordering Zigman to account for the books and records, for the preceding three years, of Collision, pursuant to BCL § 1104-a(c); 8) ordering Zigman to account for the books and records, for the preceding three years, of Auto Body Corp. (“Auto Body”), pursuant to BCL § 1104-a(c); 9) ordering Zigman to account for the books and records, for the preceding three years, of EPA Auto Sales, Inc. (“EPA”), pursuant to BCL § 1104-a(c); (10) awarding Lipp punitive damages; and 11) awarding Lipp counsel fees incurred in the prosecution of this action.

Zigman opposes Lipp’s application and, as outlined below, disputes many of his factual allegations.

In the Motion, Lipp seeks an Order 1) striking Zigman’s Verified Answer to Petition (“Answer”) in light of Zigman’s allegedly wilful failure to comply with a prior court order (Austin, J.); and/or 2) precluding Zigman from testifying at trial regarding any relevant issues; and 3) directing Lipp to proceed to Inquest.

Zigman has submitted no response to Lipp’s Motion.

B. The Parties’ History

1. Order to Show Cause

Lipp and Zigman are equal owners of the outstanding shares of Collision, an auto body business located at the Premises. Lipp alleges that Zigman has improperly diverted Collision’s assets, in part through Zigman’s operation of Auto Body and EPA, whose offices are also

located at the Premises. The Petition contains six (6) causes of action, which are as follows:

First Cause of Action - Zigman has deprived Lipp of his salary and share of Collision's profits, for which Lipp seeks damages of \$200,000

Second Cause of Action - Zigman has improperly converted Collision's assets to his own benefit, to Lipp's detriment, for which Lipp seeks damages of \$20,000,000

Third Cause of Action - Zigman has wrongfully detained Lipp's personal property, consisting of two automobiles and a boat, for which Lipp seeks damages of \$200,000

Fourth Cause of Action - Lipp seeks replevin for the return of the personal property referred to in the third cause of action

Fifth Cause of Action - Lipp seeks dissolution of Collision based on the parties' division regarding the management of Collision and Zigman's allegedly improper conduct

Sixth Cause of Action - Zigman has violated his fiduciary duty to Lipp by, *inter alia*, misappropriating Collision's assets, for which Lipp seeks damages of \$20,000,000

Seventh Cause of Action - Zigman has failed to account to Lipp for the assets of Collision, for which Lipp seeks a three year accounting of the books and records of Collision, Auto Body and EPA

Eighth Cause of Action - Lipp seeks punitive damages in the sum of \$5,000,000 for Zigman's allegedly wilful and fraudulent diversion of Collision's profits

Lipp also seeks counsel fees in the sum of \$10,000 that he has incurred in the pursuit of this action.

In his Answer, Zigman denies or disputes many of Lipp's allegations. Zigman alleges, *inter alia*, that 1) Lipp has failed to pay his share of Collision's debts and expenses; 2) Lipp failed to contribute capital, work, labor or services to Collision, in violation of the parties' agreement; 3) Zigman never deprived Lipp of his personal property at the Premises; rather, Zigman asked Lipp to remove that property, which Lipp failed to do; and 4) Zigman made a loan to Collision, for which Lipp has failed to contribute his share.

2. Motion

Prior to this Court's assignment to this matter, the matter was referred to a Special Referee for mediation. The parties were unable to resolve the matter and subsequently agreed to the appointment of a court-ordered accountant. Specifically, the parties executed a stipulation

dated September 24, 2008, that was so-ordered by the Judge Austin (“Stipulation”). That Stipulation, Exhibit C to Lipp’s motion, reflects the parties’ agreement “[f]or the appointment of a court selected forensic accountant to prepare and issue a report relative to this matter[.] The report shall be issued for mediation purposes only, but either or both parties may call the independent court appointed forensic accountant at trial[.] The parties will share 50/50 the costs of the court appointed forensic accountant.” Judge Austin appointed Joel Rakower (“Rakower”) as the independent forensic accountant.

As outlined by the letter of Lipp’s counsel dated August 20, 2009 (“Counsel’s Letter”), and reflected in correspondence from Rakower that is part of Lipp’s motion, Zigman failed to pay his share of Rakower’s fee, or to otherwise comply with the Stipulation, notwithstanding the efforts of the Referee to secure Zigman’s cooperation. Lipp affirms that he has fully complied with the Stipulation “to the extent practicable in light of [Zigman’s] continued refusal to do so “

In addition, as outlined in his Letter, Counsel submits that he extended every courtesy to counsel for Zigman in granting him extensions of time to respond to the instant motion, despite an apparent lack of reciprocity of that courtesy. Notwithstanding those extensions, Zigman has submitted no opposition, or other response to Lipp’s motion. Moreover, Lipp affirms that Zigman persists in his failure to comply with the Stipulation.

C. The Parties’ Positions

With respect to the Order to Show Cause, Lipp submits that he has established grounds for dissolution of Collision, as well as the other causes of action he alleged in the Petition.

Zigman opposes Lipp’s Petition, disputing many of Lipp’s allegations.

With respect to the Motion, Lipp submits that, in light of Zigman’s persistent failure to comply with the terms of the Stipulation, the Court should 1) strike Zigman’s Answer; and/or 2) preclude Zigman from testifying at trial regarding any relevant issues; and 3) direct Lipp to proceed to an inquest.

RULING OF THE COURT

A. Motion for Sanctions is Referred to Trial

A trial court has broad discretion to oversee the discovery process. *Maiorino v. City of New York*, 39 A.D.3d 601 (2d Dept. 2007), quoting *Castillo v. Henry Schein, Inc.*, 259 A.D.2d 651 (2d Dept. 1999). A court may strike all or part of a pleading as a sanction against a party

who refuses to obey an order for disclosure or wilfully fails to disclose information which the court finds ought to have been disclosed. *Maiorino*, 39 A.D.3d at 601; CPLR § 3126. While the nature and degree of the sanction to be imposed on a motion pursuant to CPLR § 3126 is in the discretion of the court, striking an answer is inappropriate absent a clear showing that the failure to comply with discovery demands is wilful and contumacious. *Maiorino*, 39 A.D.3d at 601, quoting *Harris v. City of New York*, 211 A.D.2d 663 (2d Dept. 1995).

While Zigman's persistent failure to comply with the Stipulation is troublesome, the Court declines, at this juncture, to strike the Answer, which raises factual issues regarding the appropriateness of dissolution of Collision, and the other relief that Lipp seeks, sufficient to warrant a trial on these issues. Moreover, the Court concludes that it will be better able to determine at trial whether Zigman's failure to comply with the Stipulation was wilful. Accordingly, the Court refers to trial the issues of 1) Zigman's wilfulness, and 2) any potential sanction that would be appropriate if the Court determines that Zigman wilfully disobeyed a court order.

B. The Answer Raises Factual Issues Warranting a Trial on the Petition

In light of the disputed issues of fact with respect to the merits of Petitioner's application, a hearing is required. See *In the Matter of Kournianos*, 175 A.D.3d 129 (2d Dept. 1991) (trial court abused discretion in granting dissolution without a hearing in light of disputed issues of fact). Accordingly, the Court directs that Petitioner's application for dissolution, and the other causes of action in the Petition, are referred to trial.

All matters not decided herein are hereby denied.

This constitutes the decision and order of the Court.

The Court directs counsel to appear before the Court for a Certification Conference on November 24, 2009 at 9:30 a.m., at which time the Court will schedule this matter for trial. At the Certification Conference, the Court will direct the filing of a Note of Issue, notwithstanding any existing discovery disputes, with the understanding that the Court will consider the imposition of sanctions at trial upon a determination that a party has failed to comply with its discovery obligations.

ENTERED 
NOV 12 2009
HON. TIMOTHY S. DRISCOLL
NASSAU COUNTY
COUNTY CLERK'S OFFICE