SCANNED ON 7/17/2008

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: Ling - Cohan
Justice

PART 36

Barletta, Emilio

INDEX NO. 115329-07

MOTION DATE

- v -

MOTION SEQ. NO. 001

453 W. 17th Rest

MOTION CAL. NO.

The following papers, numbered 1 to ______ were read on this motion to/for Injunctive Relief

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1,2
Answering Affidavits — Exhibits	3
Replying Affidavits	

Cross-Motion: ☐ Yes ☑ No

Upon the foregoing papers, it is ordered that this motion for a preliminary injunction is denied in accordance with the attached memorandum decision. (motion consolidated with motion seq 002, 003, 004 & 005).

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

FILED
JUL 17 2008
COUNTY CLERK'S OFFICE
NEW YORK

HON. DORIS LING-COHAN

Dated: 7/11/08

J.S.C.

Check one: ☐ FINAL DISPOSITION ☑ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 36
---X
EMILIO BARLETTA,

Plaintiff,

-against-

Index No. 115329/07

453 WEST 17TH REST. CORP., JOHN YONKUS, RICHIE AKIVA, SCOTT SARTIANO, RONALD KAPLAN, EYTAN SUGARMAN,

Motion Seq.: 001, 002, 003, 004 & 005

Defendants.
---X

FILED
JUL 17 2008
COUNTY CLERK'S OFFICE
NEW YORK

DORIS LING-COHAN, J.:

Motion sequence numbers 001, 002, 003, 004, and 005 are consolidated herein for disposition. This matter arises in conjunction with a written agreement, as of January 25, 2007 (the Agreement),[1] for sale of certain assets of defendant 453 West 17th Rest. Corp. (Seller) to plaintiff/buyer, Emilio Barletta. Seller was the owner of a club operated at 453 West 17th Street, New York, New York (the Premises). Defendant John Yonkus was the owner of one hundred percent (100%) of the shares of Seller prior to the subject transactions.

The Agreement purports to sell all right, title, and interest of Seller in the personal property at the Premises (items that were to be more particularly specified in Exhibit B to the Agreement), the lease for the Premises, and Seller's

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[1]The Agreement bears the date January 25, 2006 on its face. However both parties agree that the actual date of the Agreement is January 25, 2007.

telephone number, for the sum of $800,000. Plaintiff paid $80,000 as a down payment.[2]

According to his affirmation, Yonkus sold 50% of the capital shares of Seller to non-party JIJ Consulting and Promotion LLC (JIJ) as of July 6, 2006. Defendants offer no documentation of this sale, but state that it was subject to the approval of the New York State Liquor Authority (NYSLA). As of July 12, 2006,[3] defendant Yonkus attempted to execute an irrevocable proxy (the Proxy) in which JIJ, also subject to the approval of the New York State Liquor Authority, gained the voting rights for 50% of Seller's capital stock, and, thus, apparently became entitled to vote all shares of the Seller.

As of January 31, 2007, some six days after the execution of the Agreement, defendant John Yonkus allegedly transferred 20% of the capital stock of Seller to defendants Richie Akiva, Scott Sartiano, Ronald Kaplan, and Eytan Sugarman (the Group), subject to the approval of the NYSLA. No evidence of this transaction has been submitted. In addition, no evidence has been submitted that the NYSLA ever approved of any the above-described

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[2] Such funds remain in escrow because attorney Mr. Terrence Flynn, Jr., Esq. (Flynn) has declined a request to return the funds being held, until he receives releases from all the parties involved in the Agreement. [Barletta Affidavit, Exhibit J, at 3].

[3] Yonkus's Affidavit identifies the date of execution of the proxy as July 6, 2007. However, the proxy itself bears the date July 12, 2006.

transactions.

Plaintiff attempted to set a closing date for the sale, but Seller refused. Plaintiff now brings this action for: (i) breach of the Agreement due to failure to set a closing date (first cause of action); (ii) tortious interference with the Agreement by Yonkus and the Group, who used the stock transfer as a reason not to close under the Agreement, and obtained the lease of the Premises for the Group (second and third causes of action); (iii) a declaration of the parties' respective rights (fourth cause of action); and (iv) an order enjoining the opening of a club on the Premises by the Group (fifth cause of action).

In motion sequence number 001, plaintiff seeks, via Order to Show Cause, to enjoin defendants from opening a club in the Premises. In motion sequence number 002, defendants seek to strike portions of the complaint and supporting affidavit. In motion sequence 003, defendants Sartiano and Kaplan move to dismiss the complaint upon documentary evidence and for failure to state a claim upon which relief can be granted. In motion sequence 004, defendants Akiva and Sugarman adopt the documents and arguments in support of motion sequence 003, and also move to dismiss the complaint. In motion sequence number 005: (i) defendants move, pursuant to CPLR 3103, for a protective order because plaintiff allegedly seeks disclosure of matters not relevant to the litigation and defendants' trade secrets; and

(ii) Barletta cross-moves, pursuant to CPLR 3126, to strike defendants' answer, or, alternatively, pursuant to CPLR 3124, to compel discovery.

Defendants argue that: (i) counsel for Barletta was the same as counsel for defendant Seller, and the conflict of interest was never waived; (ii) the Agreement was not binding because Yonkus had no authority to execute it on behalf of Seller; (iii) the Agreement was no more than a draft because certain schedules and exhibits had not been completed; (iv) the amount of compensation was inadequate; (v) the condition of the Agreement that a liquor license be obtained was not satisfied; and (vi) the entire transaction appeared to be a fraud on Seller.

Motion to Strike (*Motion Sequence Number 002*)

Defendants have moved to strike: (i) paragraphs 11, 15, 18, and subparagraphs (i)-(iii) of the prayer for relief of the complaint, which largely refer to plaintiff's claims for punitive damages;[4] and (ii) paragraph 30 and Exhibits L, M and N of Barletta's affidavit, which are alleged to contain highly scandalous and prejudicial allegations about defendants Akiva and Sartiano.

The motion to strike is partially granted as detailed below.

[4]Neither paragraph 11 nor subparagraph (i) of the complaint refer to punitive damages.

Punitive damages have the dual purpose of punishing the offending party and deterring similar conduct on the part of others. Ross v Louise Wise Servs., 28 AD3d 272 (1st Dept 2006), affd as mod 8 NY3d 478 (2007). Punitive damages are appropriate where the wrong complained of is "so gross, wanton or willful, or of such high moral culpability, as to justify an award of punitive damages." Bader's Residence For Adults v Telecom Equipment Corp., 90 AD2d 764, 764 (2nd Dept 1982); see also Walker v Sheldon, 10 NY2d 401 (1961); Henderson v United Parcel Serv., 252 AD2d 865 (3rd Dept 1998). However, the complaint makes no allegations that meet this high standard. The portions of paragraphs 15 and 18, and subparagraphs (ii) and (iii) of the prayer for relief, that seek punitive damages are stricken.

As a motion to strike generally applies to pleadings, and not to affidavits (see CPLR 3024[b]), the remainder of the motion to strike is denied. Compare Hillman v Hillman, 69 NYS2d 134 (Sup Ct, NY County 1947), affd 273 App Div 960 (1st Dept 1948).

Motion to Dismiss *(Motion Sequence Numbers 003 and 004)*

Defendants argue that Seller, Yonkus, and Barletta were all represented by attorney Flynn, and defendants did not sign any written conflict waivers. In the remainder of the motion to dismiss, defendants assert that: (i) the Agreement is only an unenforceable draft because it lacks essential terms; (ii)

plaintiff has not satisfied conditions precedent for the sale of the Premises; and (iii) shareholders of the Seller (i.e., JIJ and/or the Group) had not approved the sale, rendering the Agreement unenforceable.

Defendants also contend, with regard to the second and third causes of action, both sounding in tortious interference with contractual relations, that the Agreement is not enforceable. Alternatively, defendants state that if the Agreement was enforceable, since the Group are shareholders of the Seller, and not third parties, it is legally impossible for them to have tortiously interfered with the Agreement.

Conflict of Interest

Defendants offer no support for their implied contention that the Agreement is invalid due to the alleged conflict of interest that Flynn represented Seller, Yonkus, and Barletta. Defendants have not identified any specific improper actions taken by Flynn. This failure is critical, because where the same attorney represents separate parties in the preparation of an agreement, there is no automatic nullification of the agreement. Compare Levine v Levine, 56 NY2d 42 (1982) (upholding a separation agreement prepared by only one attorney). Thus, the conflict of interest arguments are without merit.

Essential Material Terms

Defendants argue that essential material terms of the

Agreement are missing, rendering it unenforceable. Specifically, defendants assert that the Agreement fails to: (i) identify the assets purchased in a prescribed schedule; (ii) indicate the terms and amount of leases and contracts to be assumed; (iii) allocate the purchase price among the assets; (iv) provide a calculation of the monthly payment to be made on the promissory note; (v) attach an executed purchase money chattel mortgage; or (vi) attach UCC-1 lien forms executed by plaintiff.

These items, however, are inessential to the creation of an agreement. A contract to lease or devise real property may consist of as little as a note or memorandum thereof, expressing the consideration, and subscribed by the party to be charged (or a lawful agent). McKinney's General Obligations Law §5-703(2) & (3). Here, as the parties gave an objective manifestation of an intent to be bound by signing the Agreement, the mere failure of the Agreement to include a formal listing of the personal property to be conveyed, in addition to the lease, is insufficient to obviate the Agreement. Garnot v LaDue, 45 AD3d 1080 (3rd Dept 2007); 160 Chambers St. Realty Corp. v Register of City of New York, 226 AD2d 606 (2nd Dept 1996).

Moreover, although copies of the existing contracts to be assumed might normally be provided at or before a closing, the actual terms of the contracts need not be reproduced within the Agreement. The allocation of the purchase price among the

assets, and the calculation of a monthly payment (for which the period, interest rate, and principal amount is given in the Agreement) are mere accounting technicalities. See e.g. Federal Deposit Ins. Corp. v Herald Square Fabrics Corp., 81 AD2d 168, 181 (2nd Dept 1981) ("[a] blank space in a written contract does not, as a matter of law, render the contract an incomplete or insufficient memorandum of the parties' whole agreement" [citation omitted]). And, while the provision of the UCC-1 lien forms seems to be required, there is no indication that those forms could not be executed and/or provided at closing.

All doubt as to an intention to be bound is removed by defendants' acceptance of a down payment pursuant to the contract. Rawcliffe v Aguayo, 108 Misc 2d 1027 (Sup Ct, Kings County 1981) (unless expressly conditional, acceptance of down payment in full creates obligation on the part of the seller to be bound by a promise to convey). Defendants have failed to establish that the Agreement is unenforceable due to missing essential terms.

Failure of Express Conditions Precedent

Defendants also argue that plaintiff failed to plead that he satisfied the express conditions of the Agreement.

CPLR 3015(a) provides that "[t]he performance or occurrence of a condition precedent in a contract need not be pleaded," but only proven at trial if denied. In any event, plaintiff alleges,

which allegation must receive the benefit of every doubt (See Leon v Martinez, 84 NY2d 83, 87-88 [1994]), that his performance under the Agreement was actively thwarted by defendants. Given defendants' own statements that they located plaintiff as a "backup purchaser" (Yonkus Affidavit, ¶6), it is not inherently incredible (See Mark Hampton v Bergreen, 173 AD2d 220 [1st Dept 1991]) that defendants may have engaged in such actions.

Shareholder Approval

Defendant John Yonkus affirms that in July of 2006, before the Agreement, he sold non-party JIJ 50% of the capital stock of the Seller and created the irrevocable Proxy for his remaining shares. Defendants argue that as Business Corporation Law §909(a)(3) requires the authorization of the shareholders to sell all, or substantially all, of the assets of a corporation, and such approval or authorization was not given by JIJ, the Agreement cannot be validated.

This argument fails for two reasons. First, upon their own motion to dismiss, defendants offer no documentation whatsoever of any sale of stock of the Seller. The mere allegations of an interested party are insufficient to dismiss a complaint. See Zuckerman v City of New York, 49 NY2d 557, 562 (1980). Second, the sale was admittedly subject to approval of the NYSLA. As no such approval has even been alleged, it is likely that approval was never given. As such, even with documentation of a sale, JIJ

would have no presumptive power to authorize any sale of assets.

Indeed, as the Proxy was also not approved by the NYSLA, the right to dispose of shares and assets remained at all times with Yonkus. As a result, plaintiff's reliance upon the assurance in the Agreement that Yonkus had "full power and authority to consummate this transaction," that "all necessary corporate action" had been taken, and that there is "no provision in any instrument or agreement whatsoever to which Seller is a party or by which it is bound that would be either violated or contravened by the execution, delivery and consummation of this [A]greement", was putatively well placed. Agreement, ¶7.

Tortious Interference with Contract

As of January 31, 2007, six days after the Agreement, defendant Yonkus affirms that Seller, Yonkus, and the Group entered into an agreement whereby 20% of the capital stock of Seller was sold to the Group. Defendants fail to indicate how this was possible if, as attested by Yonkus, as of July 2006, he had no power to sell the stock or assets of the Seller without the permission of JIJ. Indeed, defendants do not even plead that the entity JIJ was a party to this sale. Nevertheless, any such sale was admittedly, subject to the approval of the NYSLA.

Defendants maintain that they cannot have interfered with the Agreement because, as shareholders of Seller, they are not third parties to the Agreement. This argument is contradicted by

the submissions.

It seems clear that, the members of the Group are not current shareholders of Seller. By their own affirmation, Yonkus was not authorized to sell stock or assets of the Seller. Moreover, their purchase of the shares(which is undocumented), was nonetheless, by their own admission, subject to approval by the NYSLA. No such approval having been evidenced, the transaction is a mere allegation.

Additionally, to the extent that the Group's purchase of shares is eventually validated by the NYSLA, the alleged actions of interference with the Agreement will have taken place before they became shareholders. Therefore, as then-current third parties, they could have interfered with the Agreement, as alleged by plaintiff.

Moreover, it is inconsistent that defendants use their status as parties to an Agreement they claim does not exist, as a basis for their defense to plaintiff's interference claims. If the Group were parties to the Agreement, they were bound to perform under it; if they were not, then they were third parties capable of interfering with it. The motion to dismiss the second and third causes of action, both sounding in tortious interference with contractual relations, is denied.

The fifth cause of action is dismissed for the reasons set forth below.

Preliminary Injunction *(Motion Sequence Number 001)*

This court previously denied a temporary restraining order preventing defendants from opening and/or operating a nightclub on the Premises.[5] Herein, this court also denies the application for a preliminary injunction and dismisses the fifth cause of action for a permanent injunction.

In order to be granted preliminary injunctive relief, plaintiff is required to establish a clear right to it under the law and the undisputed facts found in the moving papers. Koultukis v Phillips, 285 AD2d 433, 435 (1st Dept 2001). To prevail on this motion, plaintiff must demonstrate: (i) the probability of success in the underlying action; (ii) danger of irreparable injury in the absence of a preliminary injunction; and (iii) that the balance of the equities is in his favor. Coinmach Corp. v Fordham Hill Owners Corp., 3 AD3d 312, 314 (1st Dept 2004).

As the defendants have failed to demonstrate that the Agreement is unenforceable, their entire defense on this motion relies on the incapacity of Yonkus to convey the assets of Seller to plaintiff under the Agreement. At the same time, defendants base their rights to the Seller's assets on conveyances from Yonkus before and after the Agreement. Not only were those

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[5] The order to show cause which declined to grant a temporary restraining order was signed by the Hon. John E.H. Stackhouse, JSC, on November 16, 2008.

transactions admittedly subject to the approval of the NYSLA, but, surprisingly, defendants offer no documentation of either sale. As such, the probability of success on the merits is decidedly with plaintiff.

Nonetheless, plaintiff has failed to demonstrate irreparable harm to be entitled to the granting of an injunction. In order to do so, plaintiff was required to show that his potential damages are not compensable in money. See SportsChannel Am. Assoc. v National Hockey League, 186 AD2d 417, 418 (1st Dept 1992). The complaint, however, not only prays for monetary damages, but even in the fourth cause of action (seeking a declaration) fails to ask for enforcement of, or any specific performance under, the Agreement. Rather, the fourth cause of action tellingly asks only for a declaration on whether the alleged purchases of stock nullify the Agreement.

Moreover, the cause of action for an injunction itself (fifth cause of action) fails to ask for any remedy unavailable at law. It simply states, and reiterates, that plaintiff will be deprived of his rights and benefits under the Agreement. Complaint, ¶¶25-26. In the first through third causes of action, plaintiff values those rights and benefits at $30,000,000. Thus, there is a remedy at law, and irreparable harm has not been proven.

Finally, plaintiff has not shown that the equities tip in

his favor, since the record affords no reason to believe that he invested any more than his initial down payment. Any injury to plaintiff, who would, at a minimum, be entitled to recoup his down payment, is unlikely to be more burdensome to him than to defendants, who allege that they have purchased stock in the Seller. See Credit Index v RiskWise Intl. L.L.C., 282 AD2d 246 (1st Dept 2001); Klein, Wagner & Morris v Lawrence A. Klein, P.C., 186 AD2d 631, 633 (2nd Dept 1992).

The motion for a preliminary injunction is denied and the fifth cause of action is dismissed.

Discovery (*Motion Sequence Number 005*)

Protective Order

Defendants seek, pursuant to CPLR 3103, a protective order because plaintiff allegedly seeks disclosure of matters not relevant to the litigation and seeks to abuse or disclose defendants' trade secrets. This motion is denied.

CPLR 3103 is designed to stay particularized, clearly-identified discovery that is in dispute. As a result, the burden of fully establishing the right to protection under this provision is on the party asserting it. Spectrum Systems Intl. Corp. v Chemical Bank, 78 NY2d 371, 377 (1991). "The proponent of such a motion must make an appropriate factual showing to be entitled to such relief." Willis v Cassia, 255 AD2d 800, 801

(3rd Dept 1998).

Here, defendants offer little more than the conclusory assertions that the nightlife industry in New York is competitive, and, as a result, defendants have developed unique and proprietary plans, strategies, and relationships which are crucial to their success. Defendants further assert that their trade secrets include designs, plans, formulae, patterns, contacts, agreements and compilations of information used in defendants' business; however, this vague description is patently insufficient to stay any particular discovery request. Compare Brossoit v O'Brien, 169 AD2d 1019 (3rd Dept 1991)(broad, conclusory assertions, without more, do not satisfy burden); Merrick v Niagara Mohawk Power Corp., 144 AD2d 878, 879 (3rd Dept 1988) (same); see also Willis v Cassia, 255 AD2d at 800.

Moreover, Barletta asserts, and defendants do not contest, that they have not produced any requested documentation during the course of discovery. In essence, defendants seek to forestall discovery in its entirety through the use of CPLR 3103. This is a clear distortion of the intended use and purposes of CPLR 3103. See CPLR 3103 (a motion for a protective order stays only the particular discovery in dispute).

The court need not read far into the requests for production, to see that defendants simply seek to abuse this procedural device to impede progress of the litigation. For

filed or sent to the New York State Liquor Authority concerning 10AK and/or [the Premises]." See Green Affirmation, Exhibit B, Request for Documents, ¶1. Defendants' response to this is that "[u]pon the full execution of a Confidentiality Agreement, Defendants shall produce responsive documents." See Green Affirmation, Exhibit D, Defendants' Responses, ¶1.

Significantly, however, as a matter of law, "documents that have been submitted to any governmental entity without request for confidential treatment", are not proper subjects of a protective order or promise of confidentiality. Mann v Cooper Tire Co., 33 AD3d 24, 36 (1st Dept 2006). Thus, defendants' response is frivolous, dilatory and without merit.

"It is beyond cavil that 'New York has long favored open and far-reaching pretrial discovery'." Anonymous v High School for Envtl. Studies, 32 AD3d 353, 358 (1st Dept 2006) (citations and internal quotation marks omitted). Moreover, the interpretation of the words "material and necessary" in CPLR 3101(a), which addresses the scope of disclosure, while not authorizing a "fishing expedition," is, traditionally, quite liberal, and encompasses any good faith request for information that will assist in the preparation for trial. Allen v Crowell-Collier Publ. Co., 21 NY2d 403, 406-407 (1968); Anonymous, 32 AD3d at 358; Twenty Four Hour Fuel Oil Corp. v Hunter Ambulance Inc., 226 AD2d 175 (1st Dept 1996); Roman Catholic Church of The Good

AD2d 175 (1st Dept 1996); Roman Catholic Church of The Good Shepherd v Tempco Sys., 202 AD2d 257, 258 (1st Dept 1994); Johnson v National R.R. Passenger Corp., 83 AD2d 916 (1st Dept 1981).

Having failed to make an appropriate factual showing of entitlement to a protective order, defendants' motion for such an order is denied.

Cross Motion to Compel Discovery or to Strike the Answer

On February 1, 2008, this court ordered that the "parties will produce documents in response to request for production by Feb. 15, 2008." Green Affirmation, Exhibit E, hereinafter, the Discovery Order. To date, it is uncontested that defendants have produced absolutely no documents.

Barletta moves, pursuant to CPLR 3126, to strike the answer, or, in the alternative, pursuant to CPLR 3124, to compel defendants' compliance with discovery requests.

Motion to Strike the Answer

Despite the ostensibly dilatory tactics of defendants, the extraordinary measure of striking the answer is reserved for when a party "refuses to obey an order for disclosure or wilfully fails to disclose information which the court finds ought to have been disclosed." CPLR 3126; see also Weissman v 20 East 9th Street Corp., 48 AD3d 242, 243 (1st Dept 2008) (striking complaint for failure to comply with discovery order appropriate

only where "non-disclosure was willful, contumacious, or due to bad faith"); *Henry Rosenfeld v Bower and Gardner*, 161 AD2d 374, 374 (1st Dept 1990) (striking answer is an "extreme and drastic penalty" warranted only where the conduct is "clearly deliberate or contumacious").

Here, while the Discovery Order has not been carried out, there has been no contumacious refusal to obey the Order, because the response was the coincident motion for an order of protection hereinabove denied. Thus, the motion to strike the answer pursuant to CPLR 3126 is denied at this juncture; however, the Court *will not tolerate any further delays* in the completion of discovery, and it is ordered that discovery shall be completed *on an expedited basis*. The parties are cautioned that the Court is prepared to strike pleadings for any future failure to comply with orders of this Court.

Motion to Compel Discovery

Similar to the policy behind protective orders, CPLR 3124 anticipates that the parties will go as far as they can mutually agree to go with the disclosure, and that only those items upon which the parties cannot agree will be made the subject of a subsequent CPLR 3124 motion to disclose.

However, where, as here, an intention to thwart discovery appears, it is within the purview of the court to order discovery pursuant to CPLR 3124, upon such terms and conditions as it may

deem just. See e.g. Alveranga-Duran v New Whitehall Apts., L.L.C., 40 AD3d 287 (1st Dept 2007).

"If the credibility of court orders and the integrity of our judicial system are to be maintained, a litigant cannot ignore court orders with impunity. Indeed, the Legislature, recognizing the need for courts to be able to command compliance with their disclosure directives, has specifically provided that a 'court may make such orders ... as are just,' including dismissal of an action." Kihl v Pfeffer, 94 NY2d 118, 123 (1999), quoting CPLR 3126.

It is hereinbelow ordered that the defendants comply with the Request of Plaintiff for Production and Inspection of Documents. "[W]e underscore that compliance with a disclosure order requires both a timely response and one that evinces a good-faith effort to address the requests meaningfully." Id.

As "[t]he nature and degree of the penalty to be imposed pursuant to CPLR 3126 lies within the sound discretion of the trial court" (McArthur v New York City Hous. Auth., 48 AD3d 431, 431 [2nd Dept 2008]), it is herein advised that failure to comply with this discovery order in good faith may result, in the granting of the sanctions requested by plaintiff; such issue shall be addressed by the Court, upon non-compliance, at the next appropriate discovery compliance conference . Kihl, 94 NY2d at 122-123; Rowell v Joyce, 10 AD3d 601 (2nd Dept 2004); My Carpet v

Bruce Supply Corp., 8 AD3d 248 (2nd Dept 2004); compare Zletz v Wetanson, 67 NY2d 711, 713 (1986) (when a party fails to comply with a court order and frustrates the disclosure scheme set forth in the CPLR, it is within the Trial Judge's discretion to dismiss the complaint).

Accordingly, it is hereby

ORDERED that the motion of plaintiff (sequence number 001), Emilio Barletta, for a preliminary injunction is denied; and it is further

ORDERED that the motions of defendants 453 West 17th Rest. Corp., Scott Sartiano, Ronnie Kaplan, Richie Akiva, and Eytan Sugarman (sequence numbers 003 and 004) to dismiss the complaint are granted to the extent that the fifth cause of action for an injunction is dismissed, and the motions are otherwise denied; and it is further

ORDERED that the motion to strike the complaint and affidavit of Barletta (sequence number 002) is granted to the extent that the portions of paragraphs 15, 18, and subparagraphs (ii)-(iii) of the prayer for relief in the complaint are stricken only to the extent that they seek punitive damages, and the motion is otherwise denied; and it is further

ORDERED that the motion of defendants (sequence number 005) for a protective order is denied; and it is further

ORDERED that the cross motion of plaintiff (sequence number

ORDERED that the cross motion of plaintiff (sequence number 005) for an order to compel discovery is granted, and defendants are directed to comply with the Request of Plaintiff for Production and Inspection of Documents within 30 days of service of a copy of this order with notice of entry; and it is further

ORDERED that the defendants are directed to serve an answer to the complaint within 10 days after service of a copy of this order with notice of entry; it is further

ORDERED that the discovery compliance conference scheduled for July 16, 2008, is adjourned to September 5, at 10 o'clock a.m., Room 428, 60 Centre Street, New York, NY, for compliance with this order; it is further

ORDERED that all discovery demands shall be complied with, within 30 days; EBT's on or before August 28, 2008; if counsel cannot agree, EBT's shall be held on August 25, 2008, and continue daily until completed.

ORDERED that within 20 days of entry of this order, plaintiff shall serve a copy of this order upon all parties with notice of entry.

Dated: **July 11, 2008**

Hon. Doris Ling-Cohan, JSC

Check One: [ ] FINAL DISPOSITION [X] NON-FINAL DISPOSITION

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