

Kalamotousakis v. Karp

Supreme Court of New York, New York County

March 31, 2023, Decided

INDEX NO. 655880/2019

Reporter

2023 N.Y. Misc. LEXIS 1479 *; 2023 NY Slip Op 31031(U) **

[1]** THOMAS J KALAMOTOUSAKIS, Plaintiff, - v -
CHAD L KARP, MARK D LAZARUS, LAZARUS KARP,
LLP, Defendant.

Notice: THIS OPINION IS UNCORRECTED AND WILL
NOT BE PUBLISHED IN THE PRINTED OFFICIAL
REPORTS.

Core Terms

Pre-Trial, witness list, defendants', parties, exhibits,
deadline, disputes, motion in limine, discovery, orders,
noncompliance, documents, pretrial order, preclusion,
witnesses, willful, contumacious, discovery obligations,
admissible evidence, further order, trial exhibit,
obligations, warned, email

Judges: **[*1]** PRESENT: HON. MELISSA A. CRANE,
Justice.

Opinion by: MELISSA A. CRANE

Opinion

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF
document number (Motion 004) 119, 120, 121, 122,
123, 124, 125 were read on this motion to/for
PRECLUDE.

Motion Seq. No. 04 is plaintiff's pre-trial motion in limine.
Pursuant to this court's April 9, 2022 pretrial order, the
parties were required to file and serve their witness lists
and exhibit books by the March 3, 2023 deadline (Doc
121 [Pre-Trial Order]). Plaintiff timely submitted his
proposed exhibits and witness list, but defendants
apparently did not file or serve any exhibit books at all
and failed to submit a witness list until March 24, 2023,
after the March 3rd deadline and after this motion was

filed. Defendants did not file any motion in limine or
object to any of plaintiff's proposed trial exhibits or
witnesses.

Plaintiff now moves for an order precluding defendants
from proffering exhibits and witnesses at trial, precluding
defendants from objecting to the admissibility of
plaintiffs exhibits, and striking defendants' answer and
counterclaims. As discussed below, the court grants
plaintiff's motion in limine to the extent that
defendants **[*2]** are precluded from introducing exhibits
and witnesses at trial, and defendants will not be
permitted to object to the admissibility of **[**2]** plaintiff's
trial exhibits. The court denies the motion to the extent
that it seeks an order striking defendants' answer and
counterclaims.

Factual Background

This case concerns claims between plaintiff Thomas J.
Kalamotousakis and defendants Chad Karp, Mark D.
Lazarus, and Lazarus Karp, LLP (collectively, the
"Defendants"). The parties are attorneys who previously
operated the law firm partnership Lazarus, Karp &
Kalamotousakis, LLP. This 2019 action has involved
countless discovery delays and disputes that have
necessitated court intervention. At every step of this
litigation, defendants have attempted to thwart this
court's orders and evade their discovery obligations.

On July 16, 2021 and September 23, 2021, the court
conducted discovery conferences as a result of the
parties' document disputes. Following the September
2021 conference, the court directed production of
certain outstanding documents by October 6, 2021, and
that the parties were to provide detailed *Jackson*
Affidavits from persons with knowledge for the
categories where no documents existed **[*3]** (see Doc
70 [9/23/21 Conference Order]). On October 1, 2021,
the court confirmed via email that that during the
conference the Court had ordered Defendants to
produce account statements for two bank accounts
through December 2019. Defendants ultimately failed to

produce several documents that were required to be produced pursuant to the court's September 2021 conference order, such as the bank statements, emails, text messages, printouts, and invoices plaintiff sought.

On October 21, 2021, plaintiff requested another discovery conference in light of defendants' noncompliance with their obligations under the September 23, 2021 order. A conference was held afterhours at 6:00 p.m. pm the following day, at which time the court warned defendants' counsel of the consequences of further non-compliance with its orders and directed **[**3]** Defendants to either produce the missing documents or update the Court by October 27, 2021. Ultimately, Defendants neither produced those missing documents by the deadline, nor updated the court as directed.

On November 23, 2021 and December 3, 2021, the court held pre-motion conferences following, again, defendants' noncompliance with this court's discovery orders **[*4]** and directives. Plaintiff then moved, by Order to Show Cause [MS 02], for an order of civil contempt against the Defendants based on their repeated failure to produce the documents set forth in the courts September 23, 2021 order (see Docs 71-85 [plaintiff's OSC and supporting papers]). After yet another conference with the court, Plaintiff agreed to withdraw the contempt motion (MS 02) and "defendants agree[d] to [various] provisions to bring them into compliance with the terms of the 9/23/21 Order" (Doc 86 [12/3/21 order resolving MS 02]). Specifically, defendants were required to produce various outstanding documents, provide outstanding privilege logs, and serve detailed Jackson affidavits (*id.*). All deadlines in the December 3, 2021 order were final.

Defendants ultimately failed to comply with their obligations under the December 3, 2021 order. As a result, the court issued an order on December 13, 2021, stating:

"Defendants have repeatedly failed to comply with this court's orders and satisfy their discovery obligations. Defendants did not comply with the court's 9/23/21 order, 10/21/21 order, and most recently, the court's 12/3/21 Order. Specifically, defendants did not timely **[*5]** serve the *Jackson* affidavits outlined in [the 12/3/21 order] and their late, incomplete affidavits are plainly deficient"

(Doc 87 [12/13/21 Order]).

The court also explained that defendants failed to meet other discovery obligations in that order and ruled that

"Defendants are precluded from producing any documents not timely produced" and imposed an adverse inference against defendants in connection with certain missing documents (*id.*). Finally, the court expressly warned defendants that their "continued failure to **[**4]** comply with their discovery obligations or the court's orders will result in their answers being stricken, monetary sanctions being imposed, and/or other penalties as appropriate" (*id.*).

On April 19, 2023, the court held a pre-trial conference and issued an April 19, 2022 dated pre-trial order (the "Pre-Trial Order") that set a trial date and a schedule for the submission and exchange of all pretrial materials [including witness lists and exhibit books], as well as motions in limine. In the pretrial order, the court:

"ORDERED that the parties will serve and file witness lists on or before **March 3, 2023**, and shall not be permitted to call any witness not previously disclosed; **[*6]** and it is further

ORDERED that the parties will provide to all counsel and to the Court exhibit books on or before **March 3, 2023**. All pages should be bates stamped. Counsel shall pre-mark each exhibit and must provide an exhibit list that includes for each exhibit, inter alia, if that document is agreed to or disputed between the parties as admissible evidence. **If counsel do not designate a document as disputed as admissible evidence in this submission, they will not be permitted oppose its use at trial;** and it is further

ORDERED that failure to meet the deadlines above will result in preclusion, pursuant to CPLR Section 3126. The Court explicitly notes that this may include a default judgment against the disobedient party, striking pleadings, or dismissing the action"

(Doc 94 [Pre-Trial Order] [emphasis added]).

The parties were also ordered to serve and file any motions in limine by 3/17/23, and the court stated expressly: "Counsel must address any objections or disputes regarding witness lists and exhibits by motion in limine, by this deadline, or those objections or disputes will be deemed waived" (*id.*). The pretrial order also stated that "[i]f issues or problems develop, the parties must immediately **[*7]** email the court" (*id.*).

On March 3, 2023, Plaintiff timely filed his witness list and submitted his exhibit list and exhibit books to the court (see Doc 118 [Plaintiff's Proposed Witness List];

Doc 124 [Exhibit List Cover Letter detailing defendants' failure to cooperate with plaintiff's counsel with regard to pretrial deadlines and materials]). In response to plaintiff's letter explaining the situation, the court responded, in an email to the parties, that "[y]ou cannot wholesale object to all the exhibits. That **[**5]** is a waiver. If defendants have not put in their exhibits by the deadline, then they have none" (Doc 122 [copy of 3/4/23 Email]).

Defendants failed to submit their exhibit books, exhibit lists, and exhibit charts (required by the Part Rules and pretrial order). Defendants submitted a witness list three weeks late, on 3/24/23, without explanation and without ever seeking court permission to file any late pretrial materials. Given that the bench trial in this case is set to commence on 4/17/23, and that the motions in limine were due on 3/17/23, it was completely inappropriate for defendants to serve their witness list three weeks late.

Discussion

Plaintiff moves to preclude defendants **[*8]** from offering exhibits or witnesses at trial, to preclude defendants from objecting to plaintiff's exhibits at trial, and to strike the defendants' answer and counterclaims. In opposition, defendants first argue that it is an abuse of discretion to enter a preclusive order, even with a Pre-Trial Order that warns of sanctions for failure to timely file certain materials, without a finding that a party's actions were willful, contumacious, or due to bad faith. Defendants also contend that sanctions are not appropriate because "plaintiff cannot show that Defendants' late production of its witness list and evidence compromised their ability to prove their case" (Doc 125 [Epner Affirmation in Opp.] ¶ 7). Defendants conclude their opposition by claiming that "[their] belated production of [their] witness list and identification of witnesses was not the product of contempt or willfulness, but rather excusable law office error" (*id.* ¶ 8). Defendants do not provide any detail about that law office error or otherwise explain their noncompliance with this court's pretrial order.

The court finds that preclusion is an appropriate remedy for defendants' noncompliance with their pretrial obligations **[*9]** given their extensive history of flouting this court's prior orders. **[**6]** Defendants' and defendants' counsel's ongoing pattern of discovery and pretrial noncompliance demonstrates their utter disregard for their obligations, both as attorneys and as parties in this litigation, and the court finds that their

failure to comply with the deadlines in the Pre-Trial Order was willful and contumacious.

"It is well settled that in order to impose the drastic remedy of preclusion, the court must determine that the offending party's failure to comply with discovery demands was willful, deliberate and contumacious" ([*Siegmán v. Rosen*, 270 AD2d 14, 15, 704 N.Y.S.2d 40 \[1st Dept 2000\]](#) [internal quotation marks and citations omitted]). "[W]illfulness can be inferred when a party repeatedly fails to respond to discovery demands and/or to comply with discovery orders, coupled with inadequate excuses for those defaults" (*id.*).

Throughout this case's litigation, the court has held numerous discovery conferences as a result of defendants' noncompliance with the court's orders. This includes the conferences attended on June 22, 2021, July 16, 2021, November 23, 2021, December 3, 2021, and directives contained in the court's orders dated September 23, 2021, October 21, 2021, **[*10]** December 3, 2021, and December 13, 2021, as well as the March 19, 2022 dated Pre-Trial Order. Additionally, the December 3, 2021 dated decision resolving MS 02, as well as prior and subsequent orders to it, also contained clear and express language that effectively warned defendants that their continued failure to comply with their discovery obligations or to follow the court's directives and orders would result penalties, as appropriate, such as waiver or preclusion (Does 69-70, 86-87). Importantly, defendants never asked the court for an extension of time to file and serve their witness lists or exhibit books, and their paper-thin excuse of "law office failure" is supported by nothing other than that bald statement in defense counsel's affirmation in opposition to this motion.

[7]** Moreover, the cases that defendants cite in their opposition are inapplicable. The cases that defendants rely on all involve striking a non-compliant party's answer (see [*Bassett v. Bando Sangsa Co., Ltd.*, 103 AD2d 728, 478 N.Y.S.2d 298 \[1st Dept 1984\]](#) [reversing lower court's order striking an answer where the party had only "not replied expeditiously to notices for discovery and inspection"]; [*Haynes v. City of New York*, 145 AD3d 603, 605, 45 N.Y.S.3d 387 \[1st Dept 2016\]](#) [finding that trial court abused discretion by striking defendant's answer "in the midst of a **[*11]** the jury trial based on his belated production of the memo book" absent sufficient "evidence of willful or contumacious conduct on (defendant's) part, or prejudice to plaintiff, to warrant the drastic remedy]). Here, the court is not striking the defendants' pleadings, and, in any event, the

court finds that defendants' noncompliance with the pretrial order is willful and contumacious.

The court also finds that plaintiff has been prejudiced by defendants' willful and contumacious discovery and pretrial failures. Plaintiff has, at least, been prejudiced in his preparation for trial because he was not provided with defendants' proposed exhibits or witness lists within the time permitted to object, as this court requires, in a motion in limine. Permitting the defendants to serve late witness lists and exhibit books at this stage would require delaying the trial, which this court will not consider in this long-delayed 2019 case. Importantly, the defendants are, themselves, attorneys. They have been warned over and over by this court that their noncompliance will be punished by waiver, preclusion, or other penalties as appropriate.

Accordingly, defendants are precluded from calling any witnesses [*12] at trial. Their witness list was not submitted by the deadline in the court's Pre-Trial Order, which expressly states that "the parties will serve and file witness lists on or before **March 3, 2023** and shall not be permitted to call any witness not previously disclosed" (Doc 94 [Pre-Trial Order]).

[**8] Defendants are also precluded from offering exhibits at trial. The Pre-Trial Order required "that the parties...provide to all counsel and to the Court exhibit books on or before **March 3, 2023**. . . and [to] [also] provide an exhibit list that includes for each exhibit, *inter alia*, if that document is agreed to or disputed between the parties as admissible evidence" by that same date (*id.*). Further, "[i]f counsel do not designate a document as disputed or admissible evidence in this submission, they will not be permitted [to] oppose its use at trial" (*id.*). The pretrial order also stated, in language that could not be more clear, "that **failure to meet the deadlines above will result in preclusion, pursuant to CPLR Section 3126**," and that "may include a default judgement against the disobedient part, striking pleadings, or dismissing the action" (*id.*).

Finally, Defendants have waived any objections they may have [*13] raised as to plaintiff's proposed trial exhibits by failing to raise any objections in an exhibit list, exhibit chart, and a timely motion in limine. Thus, defendants are precluded from objecting to plaintiffs proposed trial exhibits. The Pre-Trial Order expressly stated that "**Counsel must address any objections or disputes regarding witness lists and exhibits by motion in limine**, by [the 3/17/23] deadline, **or those objections or disputes will be deemed waived**" (Doc

94 [Pre-Trial Order]). Part Rule 11 of the Part 60 Practices and Procedures provides, in pertinent part, that the parties must address any objections or disputes regarding witness lists and exhibits by motion in limine, and that the parties must submit an exhibit chart that identifies each exhibit, states whether the parties dispute the document's admissibility, and indicates objections, if any (see Part Rule 11). Part Rule 11 also provides that if a party does not designate a document as disputed as admissible evidence, they will not be permitted to oppose its use at trial and that wholesale objections to evidence without specificity are insufficient (*id.*).

The court has considered the parties' remaining arguments and finds them unavailing.

[**9] Accordingly, it [*14] is

ORDERED that plaintiffs motion in limine [MS 04] is granted in part, and defendants are precluded from introducing exhibits and witnesses at trial, and defendants have waived any objections to plaintiff's proposed trial exhibits; and it is further

ORDERED that the portion of the motion to strike the defendants' answer and counterclaims is denied; and it is further

ORDERED that there shall be no further motion practice without prior notice to the court; and it is further

ORDERED that all other pre-trial dates, deadlines, and obligations set forth in the court's Pre-Trial Order remain final and effective.

3/31/2023

DATE

/s/ Melissa A. Crane

MELISSA A. CRANE, J.S.C.

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