

Geyyas v Westmount Establishment (U.S.A.) Corp.

2024 NY Slip Op 34171(U)

November 25, 2024

Supreme Court, New York County

Docket Number: Index No. 162106/2018

Judge: Lynn R. Kotler

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This opinion is uncorrected and not selected for official publication.

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

PRESENT: HON. LYNN R. KOTLER PART 08

Justice

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INDEX NO. 162106/2018

OLAY GEYYAS,

MOTION DATE 11/01/2023

Plaintiff,

MOTION SEQ. NO. 002

- v -

WESTMOUNT ESTABLISHMENT (U.S.A.) CORP, DAVID
EISENSTEIN REAL ESTATE CORP.,

**DECISION + ORDER ON
MOTION**

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 002) 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 93, 94, 95, 99, 100, 101, 102, 103, 104, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121

were read on this motion to/for STRIKE PLEADINGS.

Upon the foregoing documents, this motion is decided as follows.

On October 31, 2023, plaintiff filed note of issue in this personal injury action. That same day, plaintiff filed a motion striking the answers of the defendants Westmount Establishment (U.S.A.) Corp. (“Westmount”) and David Eisenstein Real Estate Corp. (“Eisenstein”) as well as the Answer of the third-party defendant Simit Sarayi 435, LLC (“Simit”) pursuant to CPLR §3126 for failure to comply with the Orders of this Court dated January 20, 2023, March 31, 2023, and July 5, 2023, and more particularly, for the failure of defendants Westmount and Eisenstein and third-party defendant Simit to respond to plaintiff’s January 18, 2023 Notices to Produce; or, in the alternative, ordering that all liability issues be resolved in plaintiff’s favor against defendants Westmount and Eisenstein and third-party defendant Simit and precluding said defendants and third-party defendant from offering any evidence or defenses to liability issues at trial and setting this matter down for a trial on the sole issue of plaintiff’s damages as against said defendants and

third-party defendant. Alternatively, plaintiff moves for an order directing Westmount, Eisenstein and Simit to comply with the above outstanding discovery directives and to serve full and complete responses to plaintiff's Notices to Produce, including Jackson Affidavits with regard to any of the demanded discovery items which defendants and/or third-party defendant claim they are unable to produce.

In opposition, Westmount and Einstein claim that they provided sufficient responses, including a Jackson Affidavit, to the discovery plaintiff seeks and that the motion is moot. Simit's counsel proffers that Simit has provided all responsive documents in its possession and that no other documents exist, although no Jackson Affidavit has been provided.

After a conference with the court, the parties submitted sur replies as per the court's order dated February 28, 2024. Westmount and Einstein maintain in an attorney's affirmation that no further responsive documents exist and has provided an updated affidavit from defendants' property manager and an affidavit from the President of Westmount. Simit has also provided a Jackson Affidavit from a manager explaining the search for responsive document that do not otherwise exist.

Although the court cannot order the defendants and Simit to produce documents which do not exist, plaintiff maintains in a sur reply that defendants and Simit's answers should be stricken. With respect to the defendants, plaintiff complains that: [1] defendants withheld that Einstein was the property manager until after the statute of limitations had run, although there is no prejudice because plaintiff did timely assert claims against Einstein; [2] that Einstein's affidavit

is “totally vague about the retention policies and procedures for hard copies of documents, which would include the architectural plans for the Simit buildout which Mr. Einstein admitted to having received and stored in the tenant file in a filing cabinet at his office”; and [3] distinctions/differences and/or gaps between Einstein’s two affidavits and defendant failure to comply with prior order warrants the relief plaintiff seeks. The court disagrees. The fact that Einstein’s affidavit provides additional detail regarding further searches does not mean that Einstein made any material misrepresentations. To assume otherwise would mean that parties would be punished for engaging in further efforts to comply with their discovery obligations in the face of a legitimate dispute simply because they made additional efforts to comply. On this record, the court finds that sanctions are not warranted at this juncture, without prejudice to requesting an adverse inference from the trial judge.

With respect to Simit, the court reaches the same result. Plaintiff’s counsel attempts to highlight inconsistencies between Nilay Olali’s deposition testimony and the affidavit submitted in connection with this motion. The records which plaintiff seeks are apparently unavailable because Simit went out of business in July 2021, well after this action was commenced. In the event that missing documents were not preserved and they go to material issues in this case, plaintiff would be entitled to an adverse inference at the time of trial, which the court reserves decision on in favor of the trial judge. Otherwise, the court disagrees that plaintiff has demonstrated the type of prejudice that would warrant additional sanctions against Simit in the form of an order striking Simit’s answer.

Accordingly, it is hereby

ORDERED that plaintiff's motion is granted only to the extent that plaintiff may request an adverse inference against defendants and Simit at the time of trial; and it is further

ORDERED that the motion is otherwise denied.

Any requested relief not expressly addressed herein has nonetheless been considered and is hereby denied and this constitutes the decision and order of the court.

11/25/2024
DATE


LYNN R. KOTLER, J.S.C.

CHECK ONE:

CASE DISPOSED

GRANTED

DENIED

SETTLE ORDER

INCLUDES TRANSFER/REASSIGN

NON-FINAL DISPOSITION

GRANTED IN PART

SUBMIT ORDER

FIDUCIARY APPOINTMENT

OTHER

REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: