

166 A.D.3d 873

Supreme Court, Appellate Division,
Second Department, New York.

Sian MALIAH–DUPASS, Plaintiff,

v.

Jahiz DUPASS, Appellant.

2017–04053

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(Index No. 8089/12)

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Submitted—October 9, 2018

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November 21, 2018

Synopsis

Background: In divorce and ancillary relief action brought by wife against husband, wife failed to comply with orders directing her to respond to husband's discovery demands. The Supreme Court, Queens County, [Anna Culley, J.](#), denied husband's motion for discovery sanctions precluding wife from producing certain physical evidence or testimony at trial and for interim counsel fees. Husband appealed.

Holdings: The Supreme Court, Appellate Division, held that:

[1] husband complied with requirements for bringing of motions;

[2] husband was entitled to discovery sanction against wife precluding her from producing certain evidence or testimony at trial; and

[3] husband was not entitled to wife's payment of interim counsel fees as discovery sanction.

Affirmed as modified.

West Headnotes (6)

[1] **Divorce** 🔑 **Discovery**

Husband complied with requirements for the bringing of motions when he brought motion to preclude wife from producing certain physical evidence or testimony at trial and for interim counsel fees in the sum of \$5,000 in response to wife's failure to respond to husband's letter requesting specific items in discovery and two court orders in action for divorce brought by wife; husband's motion was supported by the affirmation of his attorney, which contained an adequate statement explaining his good faith effort to resolve the issues raised by the motion. [N.Y. CPLR § 3126](#); [N.Y. Comp. Codes R. & Regs. tit. 22, § 202.7](#).

3 Cases that cite this headnote

[2] **Pretrial Procedure** 🔑 **Facts taken as established or denial precluded; preclusion of evidence or witness**

Husband was entitled to discovery sanction precluding wife from producing physical evidence or testimony at trial related to certain limited items previously requested but not disclosed in divorce action brought by wife; husband demonstrated that wife failed to comply with court-ordered discovery over an extended period of time, and the willful and contumacious character of wife's conduct could be inferred from her failure to respond to husband's letter, despite two court orders directing her to do so, and her failure to proffer any excuse for her failure. [N.Y. CPLR § 3126](#).

4 Cases that cite this headnote

[3] **Appeal and Error** 🔑 **Failure to Disclose; Sanctions**

Although the nature and degree of the penalty to be imposed as a discovery sanction rests within the discretion of the trial court, the Appellate Division may substitute its own discretion for that of the trial court in such matters, even in the absence of an abuse of that discretion. [N.Y. CPLR § 3126](#).

- [4] **Pretrial Procedure** ← Facts taken as established or denial precluded; preclusion of evidence or witness

Before a court invokes the drastic remedy of precluding evidence, there must be a clear showing that the failure to comply with court-ordered discovery was willful and contumacious. N.Y. CPLR § 3126.

3 Cases that cite this headnote

- [5] **Pretrial Procedure** ← Facts taken as established or denial precluded; preclusion of evidence or witness

Willful and contumacious character of a party's conduct warranting the drastic remedy of precluding evidence can be inferred from either: (1) the repeated failure to respond to demands or comply with court-ordered discovery, without a reasonable excuse for these failures, or (2) the failure to comply with court-ordered discovery over an extended period of time. N.Y. CPLR § 3126.

4 Cases that cite this headnote

- [6] **Divorce** ← Discovery

Husband was not entitled to wife's payment of interim counsel fees in the sum of \$5,000 as a discovery sanction for wife's failure to produce physical evidence requested by husband despite two court orders in divorce action brought by wife, where wife was the less-monied spouse. N.Y. Dom. Rel. Law § 237(a); N.Y. CPLR § 3126.

****437** In an action for a divorce and ancillary relief, the defendant appeals from an order of the Supreme Court, Queens County (Anna Culley, J.), entered March 2, 2017. The order, insofar as appealed from, denied those branches of the defendant's motion which were pursuant to CPLR 3126 to preclude the plaintiff from producing certain physical evidence or testimony at trial and for interim counsel fees in the sum of \$5,000.

Attorneys and Law Firms

Law Offices of **Eyal Talassazan**, P.C., Garden City, NY, for appellant.

LEONARD B. AUSTIN, J.P., SHERI S. ROMAN, SANDRA L. SGROI, HECTOR D. LASALLE, JJ.

DECISION & ORDER

874** ORDERED that the order is modified, on the facts and in the exercise of discretion, by deleting the provision thereof denying that branch of the defendant's motion which was to preclude the plaintiff from producing physical evidence or testimony at trial relating to her bank statements *438** for the past three years, her credit card statements for the past three years, the monthly bills listed on her statement of net worth, any financial contribution made by anyone other than the defendant toward her dental hygienist license, and the social security disability benefits she is receiving on behalf of the parties' children, and substituting therefor a provision granting that branch of the motion; as so modified, the order is affirmed insofar as appealed from, without costs or disbursements.

The parties were married in 2002 and have three children. In 2012, the plaintiff commenced this action for a divorce and ancillary relief. On August 21, 2012, the defendant served the plaintiff with discovery demands. Between March 20, 2013, and December 14, 2014, the Supreme Court issued five compliance conference orders, inter alia, directing the plaintiff to respond to the defendant's discovery demands. Pursuant to a compliance conference order dated June 19, 2014, the defendant's attorney sent a letter to the plaintiff's attorney requesting specific items of discovery. After the plaintiff failed to comply with the compliance conference order dated December 14, 2014, directing her to comply with the June 19, 2014, order and the defendant's discovery demands, the defendant moved, inter alia, pursuant to CPLR 3126 to preclude the plaintiff from producing certain physical evidence or testimony at trial and for interim counsel fees in the sum of \$5,000. The court denied the defendant's unopposed motion on the ground that he did not comply with the requirements of 22 NYCRR 202.7. The defendant appeals.

[1] The Supreme Court should not have denied the defendant's motion on the ground that he did not comply with 22 NYCRR 202.7. The defendant's motion was supported by

the affirmation of his attorney, which contained an adequate statement explaining his good faith effort to resolve the issues raised by the defendant's motion (*see* 22 NYCRR 202.7; *Giordano v. Giordano*, 140 A.D.3d 699, 700, 30 N.Y.S.3d 896; *Matter of Greens at Washingtonville, Ltd. v. Town of Blooming Grove*, 98 A.D.3d 1118, 1119, 951 N.Y.S.2d 201; *Matter of Saratoga Prop. Devs., LLC v. Assessor of City of Saratoga Springs*, 62 A.D.3d 1107, 1108, 879 N.Y.S.2d 234).

***875** [2] [3] The Supreme Court also should not have denied that branch of the defendant's motion which was to impose a penalty upon the plaintiff pursuant to CPLR 3126. Although the nature and degree of the penalty to be imposed pursuant to CPLR 3126 rests within the discretion of the trial court, the Appellate Division may substitute its own discretion for that of the trial court in such matters, even in the absence of an abuse of that discretion (*see Household Fin. Realty Corp. of N.Y. v. Cioppa*, 153 A.D.3d 908, 910, 61 N.Y.S.3d 259; *Javeed v. 3619 Realty Corp.*, 129 A.D.3d 1029, 1033, 12 N.Y.S.3d 219; *Clarke v. Clarke*, 113 A.D.3d 646, 979 N.Y.S.2d 124).

[4] [5] A court may prohibit a party “from producing in evidence designated things or items of testimony” if the 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[2]; *see Patino v. Carlyle Three, LLC*, 148 A.D.3d 1175, 1177, 50 N.Y.S.3d 478; *Argo v. Queens Surface Corp.*, 58 A.D.3d 656, 871 N.Y.S.2d 657; *Carabello v. Luna*, 49 A.D.3d 679, 853 N.Y.S.2d 663). Before a court invokes the drastic remedy of precluding evidence, there must be a clear showing that the failure to comply with court-ordered discovery was willful and contumacious (*see HSBC Bank USA, N.A. v. Oscar*, 161 A.D.3d 1055, 1057, 78 N.Y.S.3d 428; ****439** *Household Fin. Realty Corp. of N.Y. v. Cioppa*, 153 A.D.3d at 910, 61 N.Y.S.3d 259;

Zakhidov v. Boulevard Tenants Corp., 96 A.D.3d 737, 739, 945 N.Y.S.2d 756). The willful and contumacious character of a party's conduct can be inferred from either (1) the repeated failure to respond to demands or comply with court-ordered discovery, without a reasonable excuse for these failures, or (2) the failure to comply with court-ordered discovery over an extended period of time (*see Candela v. Kantor*, 154 A.D.3d 733, 734, 64 N.Y.S.3d 36; *Pesce v. Fernandez*, 144 A.D.3d 653, 654, 40 N.Y.S.3d 466; *Gutman v. Cabrera*, 121 A.D.3d 1042, 1043, 995 N.Y.S.2d 180).

Here, the defendant demonstrated that the plaintiff failed to comply with court-ordered discovery over an extended period of time. The willful and contumacious character of the plaintiff's conduct may be inferred from her failure to respond to the defendant's letter dated July 16, 2014, despite two court orders directing her to do so, and her failure to proffer any excuse for her failure. Accordingly, that branch of the defendant's motion which was to preclude the plaintiff from producing physical evidence or testimony at trial relating to certain limited items previously requested but not disclosed should have been granted.

[6] We agree, however, with the Supreme Court's denial of that branch of the defendant's motion which was to direct the ***876** plaintiff to pay interim counsel fees in the sum of \$5,000, since the plaintiff is the less-monied spouse (*see Domestic Relations Law* § 237[a]; *Maliah–Dupass v. Dupass*, 140 A.D.3d 832, 833, 33 N.Y.S.3d 391).

AUSTIN, J.P., ROMAN, SGROI and LASALLE, JJ., concur.

All Citations

166 A.D.3d 873, 88 N.Y.S.3d 436, 2018 N.Y. Slip Op. 08018