

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

PRESENT:

HON. DAWN JIMENEZ, J.S.C.

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AVANZA GROUP, LLC,

Trial/IAS Part 24

Plaintiff,

DECISION/ORDER

-- against --

Index No. 605058/20

Mot. Seq. 3

Mot. Date: 2/28/24

SIMONXPRESS PIZZA LLC d/b/a HUNGRY
HOWIES and FAWZI SIMON,

Defendants.

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The following e-filed papers read herein:

NYSCEF Doc. Nos.

Notice of Motion/Order to Show Cause/

Petition/Cross Motion and

Affidavits (Affirmations) Annexed _____

52 - 64

Opposing Affidavits (Affirmations) _____

65

Reply Affidavits (Affirmations) _____

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In this action for breach of contract, plaintiff moves for an order, pursuant to CPLR 3126, striking defendant's answer for failure to comply with the parties' so-ordered stipulation, dated September 6, 2023, and for costs and fees incurred in the making of the motion. In the stipulation, it was agreed that defendants would provide PDF copies of bank statements from March 2020 to present from a Chase Bank account ending in #9599 within 30 days. Defendants exchanged certain bank statements from other unknown bank accounts but not the subject bank statements for the agreed upon time period. Defendants oppose the motion, arguing, among other things, that they should not have to produce the statements and the striking of their answer is unwarranted. The motion is determined as follows.

Pursuant to CPLR 3126, a court may impose discovery sanctions where a party refuses to obey an order for disclosure or willfully fails to disclose information which should have been disclosed (see Gorbator v Tsirelman, 206 AD3d 887, 889 [2d Dept 2022]). "The nature and degree of a penalty to be imposed under CPLR 3126 for discovery violations is addressed to the court's discretion" (Crupi v Rashid, 157 AD3d 858, 859 [2d Dept 2018]). "However, the drastic remedy of striking a pleading or even precluding evidence pursuant to CPLR 3126 should not be imposed absent a clear showing that the failure to comply with discovery demands or orders was willful and contumacious" (U.S. Bank N.A. v Hadar, 206 AD3d 688, 690 [2d Dept 2022] [internal quotation marks omitted]).

Here, the record demonstrates that defendants failed to comply with the so-ordered stipulation. Although defendants now argue that they should not be required to produce the bank statements, their opposition does not set forth any basis to vacate the so-ordered stipulation pursuant to which they previously agreed to produce said records. It is clear that this evidence is relevant to the issue of whether the limited liability company defendant had sufficient receipts to satisfy its obligations under the agreement. Nevertheless, the drastic sanction of striking defendants' answer is not warranted. Additionally, considering the affirmative defense that the agreement constitutes a criminally usurious loan, the matter should be determined on the merits. Based on the foregoing, the Court finds that the appropriate sanction is a conditional order that the limited liability defendant shall be deemed to have had generated sufficient receivables during the relevant period to have satisfied defendants' obligations under the agreement and repaid the purchase price unless the requested discovery is produced (*see Robert v Azoulay Realty Corp.*, 209 AD3d 781 [2d Dept 2022]).

Accordingly, it is

ORDERED that plaintiff's motion is granted to the extent indicated herein; and it is further

ORDERED that unless defendants exchange the bank statements which are the subject of the so-ordered stipulation, dated September 6, 2023, within 30 days after service of a copy of this order with notice of entry upon them, the limited liability defendant shall be deemed to have had generated sufficient receivables during the relevant period to have satisfied defendants' obligations under the agreement and repaid the purchase price. This order is self-executing.

This constitutes the Decision and Order of the Court.

Dated: March 15, 2024
Mineola, N.Y.

E N T E R,


Dawn Jimenez, J.S.C.
HON. DAWN JIMENEZ
J.S.C.

ENTERED

Mar 21 2024

**NASSAU COUNTY
COUNTY CLERK'S OFFICE**