

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

PRESENT: HON. ROBERT R. REED PART 43

Justice

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DONALD MILLER, MARIA MILLER,
Plaintiff,

INDEX NO. 652056/2017

MOTION DATE 08/02/2019

MOTION SEQ. NO. 005

- v -

BARRY MARTIN 546 CORP., NATHAN FISHMAN, CHAD
FEINSTEIN, ROBERT CEDANO

**DECISION + ORDER ON
MOTION**

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 005) 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126

were read on this motion to DISMISS

Upon the foregoing documents, it is ordered that this motion is granted.

In this action for breach of contract, defendants move for an order to preclude plaintiffs from presenting evidence in support of their claims and striking the complaint pursuant to CPLR 3126. Defendants assert that plaintiffs have failed to comply with this court's conditional order, dated April 29, 2019, and have continually failed to properly respond to defendants' discovery demands. Plaintiffs oppose, arguing that they have properly complied with all discovery demands.

On or about April 14, 2017, plaintiffs commenced the instant action, and defendants timely served and answer and counterclaims. On or about June 21, 2017, defendants served plaintiffs with discovery demands. Plaintiffs failed to respond. On December 21, 2017, the parties appeared at a preliminary conference, and defendants agreed to serve plaintiffs courtesy copies of their discovery demands. On or about January 16, 2018, plaintiffs served responses to defendants' discovery demands. Defendants alleged that plaintiffs' responses were incomplete

and unverified. On or about January 18, 2018, the parties appeared for a status conference, where defendants raised the deficiencies present in plaintiffs' responses. On or about February 1, 2018, defendants served plaintiffs with a deficiency letter and requested that plaintiffs supplement their responses within thirty days. Plaintiffs responded by sending a letter which reiterated the objections raised in plaintiffs' initial response. On or about March 22, 2018, the parties appeared for a status conference and defendants attempted to resolve the outstanding discovery issues. However, the parties were unsuccessful in resolving the dispute.

On or about May 11, 2018, defendants filed their first motion to strike the complaint, as a result of plaintiff's failure to fully and properly respond to defendants' discovery demands. On April 29, 2019, this court granted defendants' motion in part, ordering that plaintiffs would be precluded from presenting evidence at trial unless plaintiffs fully responded to defendants' discovery demands by June 7, 2019. This court also ordered both plaintiffs to appear in person or by counsel at the next status conference, and that failure to appear in person or by counsel shall be cause to strike the complaint. Plaintiffs filed partial responses on June 7, 2019. Defendants argue, however, that plaintiffs' responses were incomplete and referenced a USB that was provided to only one of the counsel, and not to all -- and even then not until June 19th, 2019. Defendants state that other documents were unsworn and not signed before a notary, similar to previous responses by plaintiffs. On June 20, 2019, plaintiff Donald Miller appeared for a status conference, but plaintiff Maria Miller did not, and no prior notice was given to the court or to counsel. On June 24, 2019, plaintiffs sent a letter to defendants concerning providing the USB, and defendants responded by providing plaintiffs with a link where the files could be transferred. Defendants assert that plaintiffs have to date failed to respond to that email.

To invoke the drastic remedy of preclusion or striking a pleading under CPLR 3126, this court must determine that the offending party's failure to comply with a discovery order was willful, deliberate and contumacious. Upon review of the record and all submitted papers, the court finds that plaintiffs have continually failed to engage in meaningful discovery. Defendants have established to the court's satisfaction that plaintiffs have willfully failed to comply with this court's order dated April 29, 2019, in that plaintiffs' mandated responses are untimely, are procedurally improper, lack specificity as to which documents are responsive to the demands made, and do not include or provide an appropriate and meaningful mechanism for accessing the corresponding materials. Plaintiffs have also failed to comply with this court's April 29, 2019 order in that plaintiff Maria Miller failed to appear in person or by counsel without prior notice on the most recent status conference date.

Accordingly, it is

ORDERED that defendants' motion is granted and plaintiffs' complaint is hereby stricken; and it is further

ORDERED, therefore, that the Clerk is respectfully requested to mark his files accordingly.

This constitutes the decision and order of the court.

8/26/2019			
DATE			ROBERT R. REED, J.S.C.
CHECK ONE:	<input checked="" type="checkbox"/> CASE DISPOSED	<input type="checkbox"/> DENIED	<input type="checkbox"/> NON-FINAL DISPOSITION
APPLICATION:	<input checked="" type="checkbox"/> GRANTED		<input type="checkbox"/> GRANTED IN PART
CHECK IF APPROPRIATE:	<input type="checkbox"/> SETTLE ORDER		<input type="checkbox"/> OTHER
	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN		<input type="checkbox"/> SUBMIT ORDER
			<input type="checkbox"/> FIDUCIARY APPOINTMENT
			<input type="checkbox"/> REFERENCE