

Lisa and Robert Koch-Fraser v. Peter and Roxanne Nash
L-1748-10
Plaintiff's Motion to Enter Default and Defendants Cross-Motion to Extend Discovery
Oral Argument if Opposed
Opposed
Date: 1/20/12

PARTIES AND RELIEF SOUGHT

Plaintiffs, Lisa A. Koch-Fraser and Robert W. Fraser, represented by Barry A. Kozyra, Esq., move for entry of default.

Defendants, Peter and Roxanne Nash, *pro se*, oppose and move for an extension of discovery.

FACTS

Plaintiffs, Lisa Koch-Fraser and Robert Fraser, instituted suit against Roxanne and Peter Nash, Wolfgang Heimerl, Esq., and Cooperstown Monument, Inc. ("Cooperstown"), on or about October 20, 2010. Nash and Cooperstown had been involved in similar litigation in another case captioned: Nash v. Robert Edward Auctions, LLC, Somerset County, Law Division (Docket No. L-1039-07) ("REA Litigation"). The Counterclaims filed against Nash and Cooperstown alleged inter alia, Breach of Contract; Breach of Implied Covenant of Good Faith and Fair Dealing; Interference with Prospective Economic Advantage; Unjust Enrichment; Fraud, Deceit and Misrepresentation; and Bad Faith.

In or about February 27, 2008, at a deposition in the REA Litigation, Nash asserted his Fifth Amendment privilege against self-incrimination dozens of times to multiple questions regarding his acquisition, legal title to and authenticity of sports memorabilia pledged as security to Robert Edward Auctions, LLC ("REA"). As a result of Nash's repeated assertion of his Fifth Amendment, on November 26, 2008, the Honorable Yolanda Ciccone, A.J.S.C., entered an order

dismissing Nash's Complaint in its entirety and granting Defendant/Counterclaimant REA summary judgment on each of its counterclaims, including the claims for Fraud, Deceit and Misrepresentation. Here, as a matter of fact, Nash failed to even appear for a deposition or respond in any way to discovery demands despite being ordered to do so by the Court on multiple occasions.

On February 5, 2009, a Consent Order and Stipulation of Settlement was signed by Nash through his attorney, Wolfgang Heimerl, and entered by the Honorable Yolanda Ciccone, A.J.S.C., in favor of Robert Lifson and REA wherein the parties expressly agreed, among other things, that a judgment for fraud be entered against Nash and Cooperstown in the amount of \$760,227.08. On May 11, 2009, attorney Heimerl wrote a letter to Barry A. Kozyra with regard to the REA Litigation and again alleged Nash ownership of items in the Bruce Garland Collection, including the 1912 World Series Trophy and the other memorabilia from the Bruce Garland Collection for \$55,000. After Plaintiffs filed a Verified Complaint against Roxanne and Peter Nash, Wolfgang Heimerl, Esq., and Cooperstown Monument, Inc., on or about December 13, 2010, a Default was entered against Cooperstown. The default against Cooperstown has never been vacated. Voluntary dismissal without prejudice was entered as to Wolfgang Heimerl, Esq. on or about December 13, 2010. Defendants Nash and Roxanne are out-of-state defendants. On January 24, 2011, Plaintiffs served the Nash Defendants with Interrogatories and a First Request for Production of Documents. To date, Plaintiffs have not received answers to Interrogatories or any documents responsive to the First Request for Production of Documents.

On January 10, 2011, Plaintiffs attempted to have served upon Nash a Notice to take Oral Deposition requiring him to appear and produce documents on Monday, January 31, 2011 at 10:00 am at the law office of Kozyra and Hartz. On January 10, 2011, Plaintiffs attempted to

have served upon Roxanne a Notice to Take Oral Deposition requiring her to appear and produce documents on Monday, January 31, 2011 at 2:00 pm at the law office of Kozyra and Hartz. On January 18, 2011, the Notices to take Oral Depositions sent to Nash and Roxanne via certified mail were both returned indicating that there is "no mail receptacle" at their address. On February 9, 2011, Plaintiffs filed a Motion to Compel Discovery which was returnable on March 4, 2011. On March 4, 2011, the Honorable Margaret Goodzeit, J.S.C. denied said motion and directed that the Plaintiffs re-serve the Notices of Deposition on the Nash Defendants.

In compliance with Judge Goodzeit's Order, on March 9, 2011, Plaintiffs' counsel caused Notices of Oral Deposition to be served upon the Nash Defendants requiring them to appear for depositions and produce documents at the law office of Kozyra and Hartz on April 1, 2011. On March 31, 2011, a day before the scheduled depositions, Plaintiff's counsel received correspondence from Defendant Nash, unilaterally cancelling the scheduled depositions and advising that he and Roxanne had retained Keith McKenna, Esq., as their counsel in the matter. After receiving Nash's correspondence, Plaintiff's counsel attempted to contact Keith McKenna, Esq. by telephone and facsimile to determine if he had been retained as counsel for the Nash defendants. Plaintiff's counsel never heard back from Mr. McKenna. On April 15, 2011, Judge Goodzeit entered an Order extending the discovery end date to August 7, 2011 and ordering all written discovery to be exchanged by June 7, 2011, expert reports produced by July 7, 2011 and all depositions to be completed by August 7, 2011.

On April 5, 2011, Plaintiffs filed a motion seeking to Enforce Litigant's Rights, to Compel Discovery and Suppress Defendants' Answer for failure to make discovery. Judge Goodzeit entered an Order on May 13, 2011 compelling Defendants Peter and Roxanne Nash to appear for an oral deposition on June 7, 2011 at the offices of Kozyra and Hartz, LLC, and to

answer Interrogatories and produce documents as required by Schedule A to the Plaintiffs' Notice to Take Oral Deposition on or before May 31, 2011 regardless of whether Defendants had retained counsel. Defendants were also ordered to pay Plaintiffs' attorneys fees and costs in connection with the motion in the amount of \$1,800. by June 3, 2011. On May 31, 2011, Defendants failed to answer written discovery. On June 3, 2011, Defendants failed to pay Plaintiffs' attorneys' fees and costs in the amount of \$1,800. On or about June 2, 2011, Nash alone sent a facsimile letter to Judge Goodzeit's chambers once against requesting an adjournment of the depositions so they could retain counsel. On June 3, 2011, Judge Goodzeit responded and once again ordered Defendants to appear for their depositions on June 7, 2011. On June 6, 2011, Nash sent Plaintiffs' counsel an email and once again unilaterally cancelled the Defendants' depositions. Plaintiffs' counsel objected to the Nash Defendants' violation of the Court's Orders and advised the Nash Defendants that Plaintiffs would be making an application to the Court seeking a default judgment.

On June 7, 2011, Defendants failed to appear at the offices of Kozyra and Hartz, for their court ordered depositions. On June 8, 2011, Plaintiffs filed a Motion to Suppress Defendants' Answer and Seeking a Default Judgment against the Nash Defendants for failure to comply with Judge Goodzeit's May 13, 2011 Order. Defendants retained attorney Peter Siachos to represent them on June 30, 2011. Mr. Siachos submitted Opposition to Plaintiff's Motion for Suppression of Defendants' Answer and Seeking Default Judgment on July 5, 2011, and offered discovery dates to Plaintiffs. On July 8, 2011, the Honorable Thomas Miller, J.S.C., entered an Order denying Plaintiffs' Motion to Suppress and ordering Defendants to pay Plaintiffs costs in the amount of \$2,936.00. On July 11, 2011, Plaintiffs' counsel sent Mr. Siachos a letter agreeing to the discovery dates he had represented to the Court Defendants could comply with in his letter

brief dated July 5, 2011. Instead of complying with the offered discovery dates, the Nash Defendants moved to have the discovery end date extended.

The Nash Defendants' motion was granted and discovery was extended to October 1, 2011 over Plaintiffs' objections. In violation of numerous court orders, no written discovery was ever produced by Defendants prior to the discovery end date, and Defendants failed to appear for their depositions despite being represented by counsel. The Nash Defendants' counsel subsequently filed a motion to be relieved as counsel. This motion was granted. The pro se Nash Defendants noted in their objection that the discovery end date had passed, and that they have not turned over any discovery, however, they made no application to the Court to reopen discovery, nor did they attempt to serve discovery thereafter. A trial date of January 23, 2012 has been set by the Court. The Nash Defendants are in default of their discovery obligations and have failed to provide any admissible evidence in support of their answer to the Verified Complaint, the defenses asserted therein or the Counterclaim against the Plaintiffs.

DECISION

Pursuant to R. 4:23-2, if a party fails to obey an order to provide discovery, the court may enter,

[a]n order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or proceeding or any part thereof with or without prejudice, or rendering a judgment by default against the disobedient party

R. 4:23-2(b)(3). Courts however should be loath to impose the ultimate sanction of dismissal and should only do so "where the plaintiff's failure to comply with a court order was egregious, of long standing, willful and deliberate." Abtrax Pharmaceuticals, Inc. v. Elkins-Sinn, Inc., 139 N.J. 499 (1995). R. 4:23-4 authorizes an aggrieved party to file a motion for sanctions where an

adverse party failed to attend a deposition after being served with proper notice. The aggrieved party can apply to the Court for sanctions which include an order prohibiting the disobedient party from testifying or introducing Evidence at the time of trial, dismissing the complaint or striking the Answer.

As demonstrated by the above facts, a Complaint was filed on October 20, 2010. To date, Plaintiffs have not received an Answer. On January 24, 2011, Plaintiffs served the Nash Defendants with Interrogatories and a First Request for Production of Documents. To date, the Interrogatories and Request for Production of Documents was not answered by Defendants. Furthermore, Defendants failed to attend depositions on April 1, 2011 and June 7, 2011. Defendants were subsequently sanctioned for \$1,800.00 by Court Order on May 13, 2011 and for \$2,936.00 by Court Order of July 8, 2011. The Court further extended discovery for a period of sixty days by Court Order dated October 1, 2011. The Discovery End Date expired on October 1, 2011. Therefore, the Court finds that the Defendants have acted in "bad faith". For the above reasons and the reasons as stated on the record, the Plaintiffs' motion to Enter Default is hereby **GRANTED**. Defendants' motion to extend discovery is hereby **DENIED**.