

**SUPREME COURT-STATE OF NEW YORK
SHORT FORM ORDER**

Present:

HON. TIMOTHY S. DRISCOLL
Justice Supreme Court

-----x
SANJANA ABRAHAM,

Plaintiff,

-against-

WERNER J. WILHELM WICKER,

Defendant.

-----x
WERNER J. WILHELM WICKER,

Third Party Plaintiff,

-against

SHASHI ABRAHM,
REBECA INC a/k/a REBECA INC,
a/k/a REBECA, INC., DR. PRASAD CHALISANI,

Third Party Defendants.

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The following papers having been read on these motions:

- Notice of Motion, Affirmation in Support,
Attorney’s Affirmation of Legal Fees and Expenses and Exhibits.....x**
- Notice of Cross Motion, Affirmation in Opposition/Support,**
- Affidavit of W. Wicker and Exhibits.....X**
- Affidavit of P. Chalasani.....X**
- Affirmation in Opposition/Reply.....X**
- Reply Affirmation in Further Support.....X**

This matter is before the Court for decision on 1) the motion filed by Plaintiff Sanjana Abraham (“Abraham” or “Plaintiff”) on July 31, 2018, and 2) the cross motion filed by Defendant Werner J. Wilhelm Wicker (“Wicker” or “Defendant”) on August 21, 2018, both of which were submitted on August 24, 2018. For the reasons set forth below, the Court 1) denies Plaintiff’s motion to impose sanctions but directs that Defendant provide sworn responses to

**TRIAL/IAS PART: 11
NASSAU COUNTY**

Index No: 608360-15

**Motion Seq. Nos. 13 and 14
Submission Date: 8/24/18**

Plaintiff's discovery demands by October 12, 2018; and 2) with respect to Defendant's motion: a) denies Defendant's motion to amend his answer; b) denies Defendant's motion for summary judgment; c) directs that the deposition of the Defendant shall be conducted via videoconference on or before November 2, 2018, or live on or before December 10, 2018, at the sole discretion of Plaintiff; and d) denies Defendant's application for sanctions. **The conference scheduled on December 4, 2018 is hereby adjourned to December 14, 2018 at 9:30 a.m.**

BACKGROUND

A. Relief Sought

Plaintiff moves for an Order imposing sanctions against Defendant, pursuant to CPLR § 3126 and or 22 NYCRR Part 130, due to his willful and contumacious misconduct and frivolous conduct.

Defendant cross moves for an Order 1) denying Plaintiff's motion; 2) permitting Defendant to amend his Amended Verified Answer and Counterclaims to assert a Statute of Frauds Defense pursuant to General Obligations Law ("GOL") § 5-703 in the form annexed to Defendant's cross motion; 3) awarding summary judgment to Defendant dismissing Plaintiff's sole cause of action based on the Statute of Frauds or, in the alternative, granting Defendant leave to move for summary judgment based upon its Second Amended Answer and Counterclaim; or 4) in the alternative, granting Defendant the opportunity to renew and modify the Court's order and transcript dated June 11, 2018 based on changed circumstances, specifically permitting Defendant to be deposed either by video conference before October 31, 2018 or in person in Switzerland on or before December 15, 2018, instead of September 28, 2018; and 5) imposing costs, fees and sanctions against Plaintiff for refusing to resolve discovery issues in good faith and for filing repetitive motions seeking the same relief.

B. The Parties' History

The parties' history is outlined in detail in prior decisions ("Prior Decisions") of the Court, and the Court incorporates the Prior Decisions by reference as if set forth in full herein. As noted in the Prior Decisions, the Complaint alleges that Defendant was and is the owner of property ("Property") located at 299 Oakley Court, Mill Neck, New York, and that the parties entered into an agreement pursuant to which Defendant hired Plaintiff to manage the Property. In the first cause of action, the sole remaining viable cause of action, Plaintiff alleges that Defendant owes Plaintiff no less than \$450,000.00 pursuant to the parties' agreement.

In its Prior Decision dated January 29, 2016, the Court denied the prior motion by

Plaintiff to consolidate the above-captioned action (“Instant Action”) with the related action titled *Werner J. Wilhelm Wicker v. Shashi Abraham, Sanjana Jon a/k/a Rebecca Jon, John Doe and Jane Doe.*, Nassau County District Court Index Number LT- 002021/15 (“Summary Proceeding”). In its Prior Decision dated July 26, 2016 (Ex. J to Malik Aff.), the Court granted the prior motion by Defendant to dismiss the second and third causes of action in the Complaint, but denied Defendant’s motion to dismiss the first cause of action in the Complaint.

In its Prior Decision dated June 30, 2017 (Ex. K to Malik Aff.), the Court denied the prior motions by Plaintiff and Defendant to compel disclosure. In addition, in light of Defendant’s affirmation that he might seek to amend his answer and/or file a third-party action, the Court set a schedule for the filing of an amended answer, or the filing of a motion to amend. Defendant subsequently filed a motion to amend his answer which the Court granted in its Prior Decision dated January 2, 2018 (Ex. L to Malik Aff.), deeming Defendant’s proposed Amended Verified Answer & Counterclaims filed and served. The Court noted in its January 2, 2018 decision that at the time that Defendant’s motion to amend was filed, Defendant was represented by Peter S. Sanders, Esq. of the law firm of Capell Barnett Matalon & Schoenfeld (“Capell Firm”). Subsequent to the filing of the motion to amend, Ms. Malik (“Malik”) replaced Mr. Sanders as counsel for Defendant, and Malik filed the reply papers to Defendant’s prior motion to amend.

In its Prior Decision dated February 5, 2018 (Ex. B to Desiderio Aff. in Supp.), the Court denied Plaintiff’s prior motion for an Order imposing sanctions against Defendant and/or Malik, pursuant to CPLR § 3126 and or 22 NYCRR Part 130, for discovery misconduct and/or frivolous conduct, and striking all documents in this matter filed by Malik’s law firm, Warshaw Burstein, LLP. The Court denied that motion based on its conclusion that, in light of Defendant’s affirmations regarding his age, language barrier and difficulties in communicating with prior counsel, and in further consideration of Defendant and Malik’s affirmations regarding their efforts to uncover relevant evidence which led to the discovery of a document referred to as the Chalasani Letter, Plaintiff had not demonstrated that Defendant’s initial failure to produce the Chalasani letter was willful and contumacious, or that Defendant or Malik engaged in frivolous conduct.¹ Nevertheless, given the understanding that Defendant professed as to his

¹ As outlined in the Court’s Prior Decision dated February 5, 2018, the Chalasani Letter was a letter from Wicker listing numerous items that were addressed at the Property which was

obligations in this case, and his positive relationship with his current counsel, the Court noted that it might take a dim view of any future recalcitrance by the Defendant with respect to any future discovery requests.

In support of Plaintiff's motion now before the Court, counsel for Plaintiff ("Plaintiff's Counsel") affirms that on June 11, 2018, the Court issued an Order (the "June 11 Order") (transcript at Ex. A to Desiderio Aff. in Supp.) which directed that:

...On or before June 22nd, the close of business June 22nd, 2018, Miss Malik will produce as the defendant's attorney any documents previously requested by the plaintiff, as well as originals of the two letters at issue that the plaintiff has sought for some time with respect to Dr. Chalasani.

Tr. at p. 3.

The transcript of the June 11, 2018 proceedings also contains the following colloquy between Plaintiff's Counsel and the Court (Tr. at p. 8):

MR. DESIDERIO: If I may have one more request, June 22nd response, may I ask your Honor require a sworn response to each of our document requests by the defendant.

THE COURT: Yes. Absolutely granted. So ordered.

Plaintiff's Counsel affirms that Defendant failed to comply with the June 11 Order. Plaintiff's Counsel submits that this is consistent with Defendant's prior conduct in this action, in that Defendant has failed to comply with the Court's directives. Plaintiff's Counsel affirms that he has not received any of the discovery at issue from Defendant or his counsel, including the original letters or Defendant's sworn response. Plaintiff's Counsel submits that Defendant continues to be in violation of the Court's directives, including 1) the Preliminary Conference Order, which required Defendant's compliance with Plaintiff's discovery demands by December 25, 2016, 2) the Court's February 5, 2018 Decision, in which the Court stated that it would take a dim view of any future recalcitrance by Defendant with respect to any future discovery request, and 3) the June 11 Order.

Plaintiff's Counsel notes that Malik, in response to Plaintiff's prior motion for sanctions, represented to the Court that she and Defendant had begun a comprehensive search for

signed by Dr. Prasad Chalasani.

documents responsive to Plaintiff's document demands. Plaintiff's Counsel outlines other representations made by Defendant and his counsel regarding discovery, including Defendant's prior assertion that he was not in possession of any responsive documents, which proved to be inaccurate. Plaintiff's Counsel also submits that Defendant and his counsel are in violation of CPLR § 3101(b) which requires a party to amend or supplement a response previously given to a request for disclosure promptly upon obtaining information that the response was incorrect or incomplete when made, or is no longer correct and complete. Plaintiff's Counsel affirms that he has made numerous good faith efforts to obtain discovery from Defendant and his counsel, all of which have been ignored.

Plaintiff's Counsel affirms that it has been one year since Defendant undertook his comprehensive search of his records for responsive documents. Plaintiff's Counsel submits that, despite the passage of a year, and the June 11 Order, Defendant "continues in his willful and contumacious discovery non-compliance in this case" (Desiderio Aff. in Supp. at ¶ 14). Thus, Plaintiff's Counsel submits, the Court should impose sanctions pursuant to CPLR § 3126. Specifically, Plaintiff contends, the Court should strike Defendant's pleadings and enter judgment by default in favor of Plaintiff and against Defendant.

Plaintiff's Counsel submits, further, that in light of Defendant's persistent refusal to comply meaningfully with Plaintiff's discovery demands, and Defendant's knowingly false statements in responding to Plaintiff's discovery demands, the Court should impose financial sanctions. Plaintiff submits that she is entitled to an award of her legal fees and costs. Plaintiff's Counsel provides an Affirmation of Legal Fees and Expenses in which he affirms that Plaintiff has incurred the total sum to date of \$17,800 in legal fees, together with costs of \$45.00 for each of the motions outlined in that Affirmation, for a total of \$17,980.00 to date. Thus, Plaintiff asks the Court to impose sanctions against Defendant and in favor of Plaintiff in the sum of \$17,980.00.

In opposition to Plaintiff's motion, and in support of Defendant's cross motion, Wicker affirms that he became acquainted with Plaintiff through their mutual friend Prabhu Parmatma ("Prabhu"), who was very sympathetic to Plaintiff and her mother. In or about December 2013, Wicker purchased the property ("Property") at issue as an investment property. The Property was one of the first properties that Wicker purchased for this purpose. The seller of the Property was Chalasani, and Plaintiff was introduced to Wicker as Chalasani's niece, Rebecca Chalasani, and as a friend of Prabhu. As an act of friendship, Wicker permitted Plaintiff and her mother to

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