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Order Granting Plaintiffs' Motion to Strike Defendants' Answer to Complain and for Entry of Judgment in Plaintiffs' Favor (LESLEY HARRIS)

Elizabeth E. Long
Superior Court of Fulton County

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IN THE SUPERIOR COURT OF FULTON COUNTY
STATE OF GEORGIA

FILED IN OFFICE
OCT 24 2008
DEPUTY CLERK SUPERIOR COURT
FULTON COUNTY, GA

LESLEY HARRIS and RODERICK BATISTE,	)	
Plaintiffs,	)	CIVIL ACTION FILE
vs.	)	NO.: 2007-CV-135799
CLR DEVELOPMENT GROUP, INC. a Georgia corporation; and CHET JONES, Individually, and in his capacity as an officer of CLR DEVELOPMENT GROUP, INC.,	)	
Defendants.	)	

ORDER GRANTING PLAINTIFFS' MOTION TO STRIKE DEFENDANTS' ANSWER TO THE COMPLAINT AND FOR ENTRY OF JUDGMENT IN PLAINTIFFS' FAVOR

This matter having come before the Court upon the Motion to Strike Defendants' Answer to the Complaint filed by Plaintiffs Lesley Harris and Roderick Batiste (collectively "Plaintiffs") and the Court having reviewed the pleadings and briefs, and having considered the record, along with the arguments of counsel at the hearing held on October 21, 2008, the Court HEREBY GRANTS Plaintiffs' Motion to Strike.

On November 17, 2008, Plaintiffs filed a motion to compel discovery seeking an order from the Court compelling Defendants CLR Development Group, Inc. ("CLR") and Chet Jones ("Jones") to fully and completely respond to Plaintiff's First Request for Production of Documents Nos. 1, 2, 5, 6, 7, and 9 and First Set of Interrogatory Nos. 3 and 6. The Court held a hearing on the Motion to Compel on July 15, 2008. On or around July 17, 2008, the Court entered an order (the "July 17 Order") granting Plaintiffs' Motion to Compel and directing Defendants to produce responses to [Plaintiffs'] requests numbered 1, 5, 6, 7 and 9 within thirty

(30) days of the date of the order. Defendants failed to timely produce responses to any of the document requests listed in the July 17 Order. Consequently, Plaintiffs' filed the instant Motion to Strike Defendants' Answer to the Complaint as a sanction for violating the July 17 Order.

"Discovery is an integral and necessary element of our civil practice." Int'l. Harvester Co. v. Cunningham, 245 Ga. App. 736, 738, 538 S.E.2d 82, 84-85 (2000). "A party's failure to comply with discovery will not be excused on the ground that the discovery sought is objectionable unless the party applied for a protective order." Cash Am., Inc. v. Strong, 286 Ga. App. 405, 415 S.E.2d 548 (2007). Under O.C.G.A. § 9-11-37(b)(2), the trial court has authority to strike a party's pleadings and impose the sanction of a default judgment in circumstances where that party willfully fails to comply with a court order compelling discovery. City of Atlanta v. Paulk, 274 Ga. App. 10, 616 S.E.2d 210, (2005); Riches to Rags, Inc. v. McAlexander & Assocs., Inc., 249 Ga. App. 649, 652, 549 S.E.2d 474, 477 (2001). "The sanction of [default] for failure to comply with the Civil Practice Act requires only a conscious or intentional failure to act, as distinguished from an accidental or involuntary non-compliance." Stolle v. State Farm Mutual Automobile Ins. Co., 206 Ga. App. 235, 236, 424 S.E.2d 807, 809 (1992). Moreover, "the existence of willfulness or nonexistence of willfulness should be considered not only in the context of the time period prescribed in the order compelling answers, but in the context of the entire period beginning with the service of [the discovery requests] and ending with the service of answers." Thurman v. Unicare, Inc., 151 Ga. App. 880, 881, 261 S.E.2d 785 (1979); see also Motani v. Wallace Enterp., Inc., 251 Ga. App. 384, 386, 554 S.E.2d 539, 541 (2001).

Plaintiffs' discovery requests were served upon Defendants CLR and Jones in June 2007. Defendants have had sixteen (16) months to respond to Plaintiffs' requests for discovery and have failed to do so. Defendants contend that they could not fully respond to Plaintiffs'

discovery requests because Defendants former counsel, Mr. Brant Jackson, withdrew from the case in July 2008 and some of the documents Plaintiff sought were in the possession of third parties. Defendants also contend that striking their answer is not warranted here because their current counsel had made diligent efforts to obtain responsive documents and had actually produced documents to Plaintiffs since entering an appearance as counsel on September 22, 2008.

The record in this case indicates that Mr. Jackson was the second lawyer to enter an appearance on behalf of Defendants. Indeed, at the time Plaintiffs served Defendants with their discovery requests and their subsequent motion to compel, Defendants were represented by Mr. Kenneth Tapscott. Mr. Tapscott filed a motion to withdraw as counsel for Defendants in February 2008. In a letter addressed to Defendants notifying them of his intent to withdraw, Mr. Tapscott stated that he and his law firm were withdrawing as counsel in the case

> **because of our repeated and continued inability to communicate with you dependably when needed (including not being able to even leave you voice messages on your telephone(s) for multiple days in a row; and because of our inability to convince you to produce the evidence necessary to comply with the discovery requirements in these cases.**

Under Georgia law, "'failure to maintain contact and cooperate with [] counsel about the pending litigation so that discovery can be made [was] willful misconduct." Addington v. Anneewakee, Inc., 204 Ga. App. 521, 420 S.E.2d 60, 420 S.E.2d 521, 522 (1992); Thurman, 151 Ga. App. at 881, 261 S.E.2d at 785. "'The result is the same even though the party may claim that it was counsel who failed to communicate with him. [A party] may authorize his attorney to act for him but he cannot transfer his responsibility to act." Id.

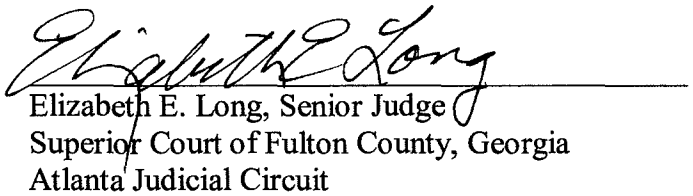
The court finds no merit in Defendants' argument that the sanction of striking their answer should not be imposed because Defendants have recently obtained and produced some

documents through the efforts of their current counsel. "'If that were the law, then a defendant could endlessly respond to a motion to compel by partially complying while asserting various forms of privilege or unavailability or difficulty of production in order to 'stay in the game.'" Fowler v. Atlanta Napp Deady, Inc., 283 Ga. App. 331, 335, 641 S.E.2d 573, 576 (2007). Further, "[o]nce a motion for sanctions has been filed, their imposition cannot be precluded by a belated response made by the opposite party." Rogers v. Sharpe, 206 Ga. App. 353, 354, 425 S.E.2d 391, 392 (1992).

The record in this case supports a finding that Defendants willfully failed to respond to Plaintiffs' discovery requests and to comply with the Court's order compelling discovery, Defendants' Answer to the Complaint is hereby stricken and judgment is entered against Defendants and in Plaintiffs' favor as to each and every count in the Complaint.

IT HEREBY ORDERED, that Plaintiffs' Motion to Strike Defendants' Answer and for entry of judgment against Defendants and in Plaintiffs' favor is GRANTED as to Counts I through V of Plaintiffs' Complaint. Counsel for the parties are hereby ORDERED to appear in Courtroom 9J at 9:00 a.m on Wednesday, November 12, 2008 for a hearing on the matter of Plaintiffs' damages in this case.

SO ORDERED, this 24th of December, 2008



Elizabeth E. Long, Senior Judge
Superior Court of Fulton County, Georgia
Atlanta Judicial Circuit

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