

**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY: COMMERCIAL DIVISION**

PRESENT: HON. JENNIFER G. SCHECTER

PART 54

Justice

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INDEX NO. 651584/2023

TSUNG TSIN ASSOCIATION, INC.,

MOTION SEQ. NO. 009

Plaintiff,

- v -

TIAN XIANG ZHU AKA TIN CHEUNG CHU, JIANQIANG
LU, HON WAI YUEN, HON CHO YUEN, MOON WING LAU,
SHEK HUNG YUEN,

**DECISION + ORDER ON
MOTION**

Defendants.

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The following e-filed documents, listed by NYSCEF document number (Motion 009) 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 172, 175, 206, 207

were read on this motion to/for STRIKE PLEADINGS.

As reflected in numerous orders on the docket, attempting to induce the defendants to comply with their discovery obligations has been difficult in this case. While many of the defendants have finally begun to come into compliance after significant court intervention, defendant Tian Xiang Zhu appears impervious to the court's efforts. In short, after months of delay, by order dated September 28, 2023, the court ordered Zhu to promptly confer with plaintiff regarding his discovery responses and to address any unresolved issues in a joint letter (Dkt. 132). Zhu ignored that order (*see* Dkts. 135, 136). By order dated October 4, 2023, the court directed Zhu's counsel to file a letter explaining why he violated the court's directive to confer with plaintiff's counsel (Dkt. 139). Remarkably, counsel also ignored that order (*see* Dkt. 140). The court therefore granted plaintiff leave to file a motion to address this misconduct (*see id.*).

Plaintiff filed this motion on October 17, 2023, seeking, among other things, to strike Zhu's answer. Instead of filing substantive opposition to the motion or explaining why multiple court orders were violated, Zhu's counsel filed a four-paragraph affirmation contending that this motion was mooted by his service of updated discovery responses (*see* Dkt. 172). Those responses, however, were not filed as an exhibit, which is unsurprising since they are clearly insufficient. Shortly after Zhu's opposition, the parties filed a joint letter updating the court on the status of discovery (Dkt. 173 [setting forth the basis for Zhu's deficient response with which "counsel for Zhu disagrees" without any explanation]).

The court issued an interim order dated October 27, 2023, recounting Zhu's problematic approach to this case and making clear that "enough is enough" (Dkt. 175 at 1). The court then explained what Zhu needed to do to come into compliance with his discovery obligations: that "by November 3, 2023, he must serve a further supplemental discovery response, produce all documents in his possession, custody or control responsive to plaintiff's demands, and personally (i.e., not his counsel) file a detailed Jackson affidavit" and that "Zhu's counsel shall then promptly meet and confer with plaintiff's counsel and file a joint letter addressing any further issues by November 8, 2023" (*id.*). The order further provided that "given Zhu's history of disregarding court orders, anything short of complete compliance with this order will result in the striking of his pleadings" and that "for the avoidance of doubt, this is a conditional order--and counsel should explain to his client what that means" (*id.* at 2). Moreover, that same day, the court issued another discovery order applicable to various defendants, including Zhu, directing them to meet and confer with plaintiff to discuss ESI search parameters (Dkt. 174).

After reviewing the parties' next joint update (Dkt. 177), the court issued an order dated November 3, 2023 that, among other things, addressed Zhu's failure to comply with the court's ESI order and noted that "this is particularly troubling in light of the conditional order that was issued addressing Zhu's other discovery misconduct" (Dkt. 178). While the court was clear that the ESI directives did not "affect Zhu's obligations under the October 27 conditional order" (*id.*), unsurprisingly, Zhu also did not comply with that order (*see* Dkt. 209).

On November 8, 2023, plaintiff and Zhu filed a joint letter as directed in the October 27 conditional order (Dkt. 206). As plaintiff explains, "neither Zhu nor his attorney have taken any of the actions required under the order" (*id.* at 1). Zhu's counsel contends that his client being in China affected his ability to comply with some of the court's directives (*id.* at 2). However, counsel does not explain why he yet again failed to timely confer with plaintiff's counsel or request an extension before the November 3 deadline. Indeed, counsel still has never explained why he ignored the September 28 and October 4 orders, the latter of which was directed to him personally.

There is no question that if any of Zhu's discovery violations were merely isolated incidents, a lesser sanction than striking his answer would be more appropriate. But here, for the last few months, Zhu and his counsel have ignored and violated virtually every one of the court's discovery directives. "If the credibility of court orders and the integrity of our judicial system are to be maintained, a litigant cannot ignore court orders with impunity" (*Kihl v Pfeffer*, 94 NY2d 118, 123 [1999]). "Compliance requires a timely response and one that evinces a good-faith

effort to address [discovery] requests meaningfully" (*CDR Creances S.A.S. v Cohen*, 23 NY3d 307, 318 [2014]; *see Gibbs v St. Barnabas Hosp.*, 16 NY3d 74, 81 [2010] ["The failure to comply with deadlines not only impairs the efficient functioning of the courts and the adjudication of claims, but it places jurists unnecessarily in the position of having to order enforcement remedies to respond to the delinquent conduct of members of the bar, often to the detriment of the litigants they represent. Chronic noncompliance with deadlines breeds disrespect for the dictates of the Civil Practice Law and Rules and a culture in which cases can linger for years without resolution"]). Thus, when an attorney repeatedly ghosts opposing counsel and the court and does not comply with court orders, and then finally serves discovery responses that leaves little doubt that a reasonable search was never performed, the court is left with no confidence that a lesser sanction will impel compliance. On the contrary, the court infers that such conduct is willful and contumacious.

Yet, the court did not immediately grant plaintiff's motion to strike Zhu's pleadings when it was originally submitted, but rather afforded Zhu a reasonable opportunity to come into compliance. And the court did so in the usual way when faced with a party that appears willing to flout court orders with impunity absent any consequence--Zhu was ordered to provide a Jackson affidavit and warned in a conditional order that non-compliance would result in his answer being stricken (*see Vaca v Villiage View Hous. Corp.*, 145 AD3d 504, 505 [1st Dept 2016]). Yet, Zhu still did not comply.

The automatic implication of Zhu's violation of the conditional order is well settled (*see Citizen Watch Co. of Am., Inc. v Zapco 1500 Inv., L.P.*, 216 AD3d 562, 562-63 [1st Dept 2023]; *see also Mehler v Jones*, 181 AD3d 535 [1st Dept 2020]). Notably, Zhu does not address that issue and has not taken any of the requisite steps to be relieved from the consequences of violating a conditional order (*see Cedeno v 155 W. 162, LLC*, 215 AD3d 585, 585-86 [1st Dept 2023] [conditional order "directing the striking of the answer upon defendant's failure to comply with discovery directives within 30 days **was self-executing and absolute**. Defendant failed to comply with numerous court orders and so-ordered stipulations agreeing to provide the requested discovery. Defendant also failed to submit an affidavit from someone with personal knowledge of the efforts it made to locate the requested materials"] [emphasis added]; *see also Humble Monkey, LLC v Rice Sec., LLC*, 184 AD3d 498 [1st Dept 2020] ["When defendants failed to comply with the **self-executing**, conditional order striking their answer if they did not produce a witness for deposition by a date certain, **the order became absolute**. Defendants' proper recourse was to move to vacate the conditional order on the ground of excusable default. They did not seek that relief. In any event, the excuses for failing to comply with the court's order that defendants asserted in opposition to plaintiff's motion were

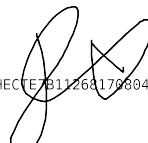
not reasonable, and defendants failed to seek an adjournment from the court or take any other action to avoid their knowing default"] [emphasis added]). Under these circumstances, Zhu's answer must be stricken.

Given the pending discovery issues with the other defendants, failure to impose serious sanctions for Zhu's misconduct will undermine any incentive they have to comply. Hopefully, this order will make clear that further similar conduct will have serious consequences.

To be clear, a proper motion for a default judgment against Zhu will still need to be made to demonstrate the legal merit of plaintiff's claims notwithstanding that all of plaintiff's traversable allegations will be deemed true. Moreover, the court assumes an inquest will be necessary to determine the proper amount of damages. Plaintiff therefore still has a need for discovery from Zhu. Thus, notwithstanding this decision, Zhu is still strongly urged to provide plaintiff with discovery since, if he does not, the court will entertain a motion to bar him from participating in the inquest (*see Herman v Herman*, 144 AD3d 433 [1st Dept 2016]).

Accordingly, it is ORDERED that plaintiff's motion is GRANTED, defendant Tian Xiang Zhu's answer is stricken, and plaintiff may file a motion for a default judgment against him.

11/16/2023
DATE


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JENNIFER G. SCHECTER, J.S.C.

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