

The Relevant Facts

2. Despite the avalanche of papers filed by Smart Win in opposition to the motion, the essential facts warranting the striking of plaintiff's Complaint and its Reply to the Counterclaims remain compelling.

3. *Willful Violation of the Explicit Order.* The Order was explicit: "Plaintiff [Smart Win] shall produce Mr. Cheng Kam Chieu a/k/a Stewart Cheng and Mr. Terence S. T. Kong a/k/a Kong Siu Tim for depositions in New York County Plaintiff chose New York County as the forum for this dispute and may not now complain that it is inconvenient to produce its witnesses here. *Plaintiff shall produce the witnesses on or before December 17, 2013.*" See annexed Exhibit 1, Order at 1; emphasis supplied.

4. Entered on October 3, 2013, the Order gave Smart Win *75 days in which to produce the witnesses in New York.* In a tactic of delay and obstruction consistent with its conduct from the outset of this case more than three years ago, Smart Win simply ignored the Order for approximately 60 days until, on November 29, 2013, its New York counsel sent a terse email, devoid of any explanation, which in effect cancelled the December 17 deadline and unilaterally re-scheduled the depositions for January 9 and January 10, 2014.

5. At no point did Smart Win seek re-argument or reconsideration of the Order, which was entered over Smart Win's strident opposition after extensive motion practice caused by Smart Win's longstanding failure to cooperate in pretrial discovery. Likewise, confronted with an unambiguous Order, Smart Win did *not* take the initiative to move for relief from the deadline set by the Order. Instead, it waited to cross-move to amend the Order after defendants served their underlying motion.

6. *Absence of Any Excuse for Non-Compliance.* While affidavits from the two deponents have suddenly materialized, there is no cogent reason given as to why – *for a period of 75 days* – Stewart Cheng and Terence Kong did not have the time to comply. Instead, the affidavits are replete with the refrain that they were both “too busy” and too important to obey an order entered in a lawsuit brought by their company. The long delay in providing an excuse, and the lack of any specificity at all in the reasons given, reveal a contemptuous disregard for the Court and its Order.

7. *Defense Counsel’s Repeated Requests for Compliance.* Contrary to the assertions of plaintiff’s counsel, there was and is no requirement that I “confer” with him before making the motion. I will not respond to the barrage of *ad hominem* attacks on me in plaintiff’s papers. From the outset of this case, I have treated plaintiff’s counsel with full professional courtesy. In fact, notwithstanding plaintiff’s counsel’s dedication of at least three quarters of his affirmation and brief to superfluous attacks on me, I will only note that it is a rich irony that plaintiff’s counsel for weeks simply ignored me as I sought to schedule the depositions in compliance with the Order. In a remarkable exercise of nerve, plaintiff’s counsel now claims that it was a professional discourtesy for me to move for relief on behalf of my clients when, on November 29, 2013, he for the first time, in the almost two months after entry of the Order, simply declared that his client had decided not to comply.¹

8. Defendants’ current motion does *not* seek to resolve a discovery dispute. It seeks to enforce an Order. This is not a disagreement regarding a witness’s refusal to answer specific questions at a deposition or the scope of document production, which is the type of issue

¹ It is offensive that plaintiff’s counsel would include in Smart Win’s papers, and thus put into the public record, emails and other information relating to my need for surgery in June 2013 and my lengthy recovery. It is even more offensive that Smart Win’s counsel would include emails and other information relating to my 92-year-old father’s protracted illness and death in September 2013.

on which lawyers can “confer.” There was and is no issue to discuss. Plaintiff violated an Order. Significantly, I do not have the power to amend an Order. Instead, I have an obligation to my clients to vindicate their rights, not just to accept fiats from Smart Win.

9. Moreover, plaintiff’s counsel’s lament that I did not cooperate with him sits like ashes in his mouth. Since the start of this action, I have repeatedly and futilely pursued his cooperation in scheduling the depositions of his clients, and he has consistently ignored me. As my underlying affirmation on this motion reveals, plaintiff’s counsel *never* responded to the original deposition notice served in November 2010. He never agreed to make Cheng and Kong available. And, with respect to the Order, he never responded to an email I sent in October 2013 requesting his cooperation.²

10. It was almost two months after the Order was entered that he deigned, on November 29 (the day after Thanksgiving), to communicate with me. It is important to stress the obvious – the Order was not directed at me and my clients. It was directed at him and his clients. It was incumbent on him to propose dates within the 75-day period. I had no obligation to chase him, but I did. As my October email to him revealed, I was perfectly willing to accommodate him and his clients on scheduling within the long 75-day period.

11. *Prejudice to Defendants.* Plaintiff insists that the denial of the underlying motion and granting of its cross-motion will not prejudice defendants. Even assuming that “prejudice” plays a role in the evaluation of a motion to enforce violations of an Order, it is plainly the case that defendants have and will suffer prejudice.

² Plaintiff’s counsel’s repeated references to my October 2013 email as having gone into his “junk” mail folder are absurd. I did not pull the email address *focchipinti@comcast.net* out of thin air. He gave it to me. I did not decide for the nefarious reasons he suggests to send my October 2013 email to an address he does not prefer and I certainly had no way of knowing that his computer would relegate to “junk” emails sent to that address. In any event, the October 2013 email was addressed to plaintiff’s counsel at his law firm email account.

12. Because of Smart Win's long intransigence, defendants have had to spend significant resources to secure the Order requiring appearances by Cheng and Kong. Defendants also had to spend their resources to make the March 2011 motion to compel which was necessitated by Smart Win's failure to respond in any way to the November 2010 deposition notice and defendants' sustained efforts throughout 2011 and 2012 to secure the appearance earlier this year of the two inadequate witnesses put forward by Smart Win. In reality, plaintiff has *never* cooperated in producing a witness.

13. Complying with an Order and cooperating in pre-trial discovery are a game for Smart Win. By its conduct, it has caused Empire and Mr. Bendall to expend legal fees in order to obtain what the usual discovery rules routinely require. That is sufficient prejudice to defendants .

14. Finally, it merits emphasis that Smart Win has violated the Order in one additional respect. The Order directed Smart Win to produce "an affidavit from a person with knowledge stating that Mr. [Fred] Kwok . . . has not been [under plaintiff's control] since prior to the service of the notice of deposition. *See* Exhibit 1, Order at 1.

15. The deposition notice was served on November 17, 2010 (*see* annexed Exhibit 2). In an affidavit dated December 6, 2013, Kong asserts that Kwok "is no longer employed by or under the control of Smart Win. Mr. Kwok was last employed by New Times Energy Corporation Limited, one of the entities that makes up the joint venture known as Smart Win, on November 26, 2010."

16. Smart Win appears to have made Kwok "disappear" from its control ten days *after* the deposition notice was served. This is both remarkable and troubling. In any event, Kwok was under Smart Win's control at the time the deposition notice was served. This is yet

another indication of the pervasive obstruction and gamesmanship in which Smart Win has engaged for years.

Conclusion

17. For the foregoing reasons, I respectfully request that (A) defendants' motion be granted in its entirety and (B) plaintiff's cross-motion be denied.

Dated: New York, New York
December 18, 2013



PAUL BATISTA

EXHIBIT 1

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

PRESENT: JEFFREY K. OING
Justice

PART 48

Smart Win International Limited

Plaintiff,

INDEX NO. 651479/2010

-- against --

MOTION SEQ. NO. 005

Empire Energy Corporation International
and Malcolm Bendall

Defendants.

The following papers, numbered 1 to _____ were read on this motion to/for _____

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

Cross-Motion: Yes No

Defendants Empire Energy Corporation International (“Empire”) and Malcolm Bendall, having moved by notice of motion dated April 30, 2013 for an order pursuant to CPLR 3126 compelling plaintiff Smart Win International Limited (“Smart Win”) to produce certain witnesses for examination before trial in New York County, and for an order pursuant to CPLR 3126 conditionally striking Smart Win’s complaint and reply to defendants’ counterclaims, or in the alternative precluding plaintiff from calling the abovementioned witnesses at trial or presenting evidence regarding certain contentions at trial,

It is hereby

ORDERED, that sufficient cause being shown, defendants’ motion to compel production is granted to the following extent:

1. Plaintiff shall produce Mr. Cheng Kam Chieu a/k/a Stewart Cheng and Mr. Terence S.T. Kong a/k/a Kong Siu Tim for deposition in New York County, unless the parties mutually agree to a video deposition. Plaintiff chose New York County as the forum for this dispute and may not now complain that it is inconvenient to produce its witnesses here. Plaintiff shall produce the witnesses on or before December 17, 2013;

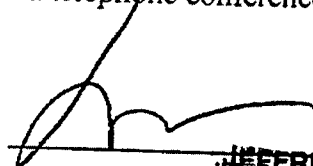
2. With respect to Mr. Fred Kwok, plaintiff shall produce an affidavit from a person with knowledge stating that Mr. Kwok is not under plaintiff’s control and has not been since prior to the service of the notice of deposition, and provide defendants with Mr. Kwok’s last known address. Plaintiff shall produce the affidavit on or before December 17, 2013; and it is further

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

ORDERED, that defendants' motion to strike plaintiff's pleadings, or in the alternative for discovery sanctions is denied. Defendants have not made the requisite showing of "willful, contumacious or ... bad faith" conduct to justify striking the pleadings (Fish & Richardson, P.C. v Schindler, 75 AD3d 219, 220 [1st Dept 2010]), and a ruling on what evidence may be offered at trial would be premature; and it is further

ORDERED, that the parties are directed to call chambers for a telephone conference on December 19, 2013 @ 11 AM.

Dated: 10/2/13



JEFFREY K. OING
J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION
Check if appropriate: DO NOT POST REFERENCES

EXHIBIT 2

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

-----X
SMART WIN INTERNATIONAL LIMITED, :

Plaintiff, :

Index No. 651479/10

- against - :

EMPIRE ENERGY CORPORATION :
INTERNATIONAL and MALCOMN BENDALL, :

Defendants. :

-----X
**FIRST NOTICE OF DEPOSITION
AND DEMAND FOR DOCUMENTS**

PLEASE TAKE NOTICE that, pursuant to Article 31 of the Civil Practice Law and Rules, defendants Empire Energy Corporation International and Malcolm Bendall, by their undersigned attorney, Paul Batista, P.C., will take the deposition upon oral examination, before a Notary Public or other officer authorized by law to administer oaths, of plaintiff by and through the following individuals at the dates, times and place specified below:

<u>Deponent</u>	<u>Date and Time</u>	<u>Place</u>
Cheng Kam Chieu, Stewart	January 12, 2011 – 10:00 a.m.	Offices of Paul Batista, P.C. 26 Broadway, Suite 1900 New York, New York 10004 (212) 980-0070
Fred Kwok	January 13, 2011 – 10:00 a.m.	Offices of Paul Batista, P.C. 26 Broadway, Suite 1900 New York, New York 10004 (212) 980-0070
Terrence S.T. Kong	January 26, 2011 -- 10:00 a.m.	Offices of Paul Batista, P.C. 26 Broadway, Suite 1900 New York, New York 10004 (212) 980-0070

Kong Siu Tim

January 27, 2011 – 10:00 a.m. Offices of Paul Batista, P.C.
26 Broadway, Suite 1900
New York, New York 10004
(212) 980-0070

Vincent Yu

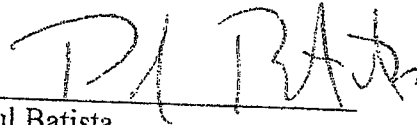
January 28, 2011 – 10:00 a.m. Offices of Paul Batista, P.C.
26 Broadway, Suite 1900
New York, New York 10004
(212) 980-0070

PLEASE TAKE FURTHER NOTICE that plaintiff is required to produce on or before January 12, 2011 documents relevant to the claims made in this action, including, without limitation, all documents (including emails) that relate, identify or refer to defendants

Dated: New York, New York
November 17, 2010

PAUL BATISTA, P.C.

By



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