

**Grober v Bronson**

2013 NY Slip Op 32935(U)

November 8, 2013

Sup Ct, New York County

Docket Number: 651184/2012

Judge: Melvin L. Schweitzer

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This opinion is uncorrected and not selected for official publication.





withdrew due to the lack of communication and cooperation from the defendant. In July, defendant failed to appear at a conference, either by counsel or *pro se*. Next, the court afforded defendant with yet another opportunity to comply with discovery demands. By order dated August 30, 2013, the court scheduled a conference for September 18, 2013, and stated that the failure of the defendant to appear would result in the striking of his pleading. Defendant appeared at the conference, assured the court of his intent to disclose, and the court ordered compliance by September 28, 2013 or suffer a default judgment. September 28, 2013 came and went without, according to plaintiffs, "production of a single document."

After defendant Bronson retained Ivan Fisher as counsel, the latter belatedly responded to the court's order on October 20, 2013; however, plaintiffs' counsel asserts that the documents produced were duplicative of documents that she had received in 2012. She cites thousands of missing documents relating to communications regarding the use of plaintiffs' funds, and banking and brokerage records.

Next, Mr. Fisher filed a motion to extend the return date of plaintiffs' motion for a default judgment. He cites "significant medical issues" for his failure to timely comply with discovery demands or to file an Answer. According to his physician, Mr. Fisher suffers from Myalgic Encephalomyelitis, which he characterizes as a "massive fatigue debilitating illness." Exh. 1. Mr. Fisher claims that he has suffered from this condition for five years, he has remained in bed for twenty hours a day for four weeks, and that he struggled just to read plaintiff's motion.

#### *Discussion*

##### *Motion for Extension*

While Mr. Fisher's condition certainly impairs his ability to represent defendant in the litigation, the New York Rules of Professional Conduct states that if a lawyer's mental or

physical condition renders it unreasonably difficult to carry out the duties of employment effectively, the lawyer should not accept the representation. *See* NY CLS Jud Appx R 1.1 (2013). In his supporting affidavit, Mr. Fisher makes it clear that his condition has rendered him debilitated, bed ridden, and unable to complete task in a timely fashion. After more than a year of delays, failures to provide discovery and to appear in court, in violation of court orders, defendant now seeks to delay further because he has chosen, at the last minute, to retain a lawyer who is too ill to provide effective representation. Defendant's motion is denied.

*Motion for Sanctions and Default*

The Civil Practice Law and Rules provide remedies for parties who fail to appear, plead, proceed to trial, or comply with discovery demands and orders. CPLR §3216 addresses sanctions for failure to disclose. If any party refuses to obey an order to disclose, or willfully fails to disclose, the court may, among other things, dismiss the action or render a judgment by default against the disobedient party. Furthermore, Rule 202.27 of the Uniform Rules of the Supreme Court authorizes the entry of a default judgment for failure to appear, proceed or announce readiness for trial. Likewise, Rule 12 of the Rules of the Commercial Division authorizes dismissal, the striking of an answer, or direction for a default judgment for failure to appear at a conference.

It is clear that defendant has no intention to proceed or disclose and the court finds this failure willful and contumacious. Since no answer has been entered, it cannot be stricken. Lacking that avenue, entry of a default judgment in favor of the plaintiffs is appropriate. Accordingly, it is

ORDERED that plaintiffs' motion is granted in part in that judgment on the First, Second and Fourth Causes of Action in the Complaint as to liability is entered and the damages claim is severed; and it is further

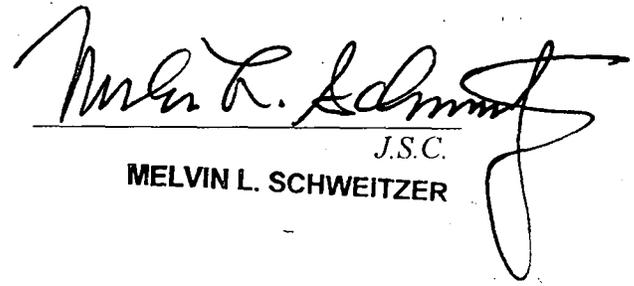
ORDERED that plaintiffs' claims for damages, interest, costs and disbursements will be referred to a Special Referee to hear and report with recommendations, except that, in the event of and upon the filing of a stipulation of the parties, the Special Referee shall determine the aforesaid issues; and it is further

ORDERED that a copy of this order shall be served upon the Clerk of the Reference Part (Rm. 119)<sup>M</sup> to arrange a date for the reference to a Special Referee; and it is further

ORDERED that the Clerk shall notify all parties of the date of the hearing.

ENTER:

Dated: November 8, 2013

  
J.S.C.  
MELVIN L. SCHWEITZER