

To be submitted.

**SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION: SECOND JUDICIAL DEPARTMENT**

In the Matter of the Application of

THE VILLAGE OF PORT CHESTER TO ACQUIRE
TITLE TO CERTAIN REAL PROPERTY LOCATED
IN THE VILLAGE OF PORT CHESTER, WESTCHESTER
COUNTY, STATE OF NEW YORK, AND DESIGNATED
ON THE TAX MAPS OF THE VILLAGE OF PORT
CHESTER AS SECTION 2, BLOCK 66, LOTS 7, 8, 9A,
10, 11, 12, 13, 14, 15, 16, 17, 18A, AND 18B,

Appellate Division
Docket Number
2003-03661

Petitioner-Condemnor-Respondent,

- against -

MARIA MARTINEZ d/b/a MARK ANTHONY RESTAURANT,

Respondent-Condemnee-Appellant.

**BRIEF OF PROPOSED *AMICUS CURIAE*
NOW LEGAL DEFENSE AND EDUCATION FUND**

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STATEMENT OF INTEREST OF PROPOSED *AMICUS CURIAE*

NOW Legal Defense and Education Fund (“NOW Legal Defense” or “*Amicus*”) submits this brief as proposed *amicus curiae* in support of Respondent-Condemnee-Appellant, Maria Martinez (“Ms. Martinez”), doing business as Mark Anthony Restaurant.

NOW Legal Defense is a leading national non-profit civil rights organization that for over thirty years has used the power of the law to define and defend women’s rights. NOW Legal Defense is dedicated to working to end violence against women. Through our Employment and Housing Rights for Survivors of Abuse project, we represent victims of domestic violence seeking to secure economic independence from their abusers by enforcing existing employment rights. We also advocate for legislation specifically addressing the employment-related needs of battered women. The National Judicial Education Project of NOW Legal Defense has long worked to eliminate gender bias in the courts through education and other efforts.

Amicus has an interest in this case because Ms. Martinez alleged that she was a victim of domestic violence and that she was unable to produce receipts and other documents demonstrating her ownership of the fixtures in question because she had left the records behind in fleeing from her home to escape the violence. The trial court dismissed Ms. Martinez’s trade fixtures claim, stating that even if it were true that she had lost access to the records due to her decision to leave an abusive husband, this would not excuse her “failure” to produce the records. The trial court’s absolute unwillingness to consider the significance of the alleged domestic violence sets a dangerous precedent that should be overruled.

FACTUAL SUMMARY AND SUMMARY OF DECISION BELOW

Maria Martinez owned and operated a small restaurant in a leased space located in a building in Port Chester, New York. The Village of Port Chester (“the Village”) condemned the building through an eminent domain procedure. Ms. Martinez submitted a trade fixtures claim, seeking to be compensated for fixtures that were installed in the space.

The trial court ordered that Ms. Martinez provide receipts or other documents supporting her claim. Ms. Martinez failed to do so. She testified at her deposition and in an affidavit that she had been a victim of domestic violence and had left her records behind in her sudden departure from the home of her abusive husband.¹

The Village then moved to dismiss Ms. Martinez’s trade fixtures claim and separately moved for a writ of assistance to remove her from the premises, which she had continued to occupy while the litigation was pending. Ms. Martinez cross-moved for compensation for the fixtures and to preclude the Village from submitting appraisals related to the fixtures on the grounds that the Village had failed to comply with a prior court order requiring that the parties exchange appraisals.

By Decision and Order dated April 15, 2003, the trial court granted both of the Village’s motions. In its decision, the court suggested two grounds for its dismissal of

¹ Although review of the transcripts suggests that there may appear to be some ambiguity regarding whether the documents were destroyed or whether they possibly remain in her husband’s home, Ms. Martinez is clear that she does not know where they are or have access to the documents. Review of the transcripts suggests that Ms. Martinez has a limited command of English, which may explain any supposed “inconsistencies.” Additionally, victims of domestic violence are often uncomfortable with discussing the details of their situations and the violence they may have experienced, feeling an intense shame at having to admit to themselves, to their families, and to their communities that the relationship has “failed.” Mary Ann Dutton & Catherine L. Waltz, *Domestic Violence: Understanding Why It Happens and How to Recognize It*, in *Domestic Violence Law* 66, 72 (Nancy K.D. Lemon ed., 2001). This may help explain Ms. Martinez’s reticence to discuss the issue in detail. In any case, the court’s ruling failed to even consider the sufficiency of the evidentiary basis for her claims, and for this reason the decision on this point should be reversed and remanded.

Ms. Martinez's trade fixtures claim: (1) that the lease Ms. Martinez had signed "appeared" to render her fixtures claim moot, and (2) that she had failed to produce receipts or other records in compliance with the court's discovery order. (Record on Appeal ("R.") 6.) Relying on its holding that the lease provision and the "failure" to produce documents merited dismissal of her trade fixtures claims, the court then granted the Village's motion for a writ of assistance. The court reasoned that because her trade fixtures claim was dismissed, Ms. Martinez was not owed advance payment prior to removal and thus could be removed from the premises. (R. 6-7.) The trial court then denied Ms. Martinez's cross motions as moot. (R. 7.)

It is not clear from the trial court's decision whether the lease provisions offer an independently sufficient basis for dismissal of Ms. Martinez's trade fixture claims, and, as proposed *amicus*, NOW Legal Defense takes no position regarding the sufficiency of that argument. We urge, however, that this Court reverse the trial court on the second ground supporting its ruling on the trade fixture claim, that even assuming Ms. Martinez's allegations that she was unable to produce records because of domestic violence were true, the "failure" to produce records in violation of a discovery order provided proper grounds for dismissing her claim.

ARGUMENT

THE TRIAL COURT’S DISMISSAL OF MS. MARTINEZ’S CLAIM FOR FAILURE TO PRODUCE RECORDS WAS AN ABUSE OF DISCRETION AND CONTRARY TO PUBLIC POLICY.

A. Dismissal Without a Showing that Ms. Martinez’s Failure to Produce Documents Was Willful, Contumacious, or in Bad Faith Is an Abuse of Discretion

The trial court’s dismissal of Ms. Martinez’s claim on the grounds that she had “failed” to produce records, without considering the significance of her allegation that she had lost access to those records in fleeing her abusive husband, was an abuse of discretion that should be reversed. Maria Martinez alleged that she could not produce receipts or other records demonstrating her ownership of fixtures installed in the restaurant she owned and operated because she was a victim of domestic violence and had left the records behind when she fled her home. Without assessing the evidentiary basis of this claim, the trial court stated:

[E]ven if the Court, *arguendo*, were to accept at face value respondent’s assertions that she left home to escape an abusive husband and in doing so, also left her records behind, this Court’s [prior] Decision and Order [ordering production of the records] simply affords no room to entertain such excuses.

(R. 6.) This holding displayed a shocking insensitivity to the devastation that domestic violence can wreak in an individual’s life and was an abuse of discretion that should be reversed.

C.P.L.R. § 3126 grants a court the authority to dismiss an action for failure to comply with a discovery order. However, the rule empowers the court only to make such orders “as are just.” N.Y. C.P.L.R. § 3126. Indeed, it is well-established that C.P.L.R. § 3126 permits the “extreme sanction” of dismissing a claim in its entirety only when the

moving party shows “conclusively that the failure to disclose was willful, contumacious or due to bad faith.” *Dauria v. City of New York*, 127 A.D.2d 459, 460 (1st Dep’t 1987). Dismissing a claim in the absence of such a showing is an abuse of discretion. *Id.*; see also, e.g., *Bach v. City of New York*, 304 A.D.2d 686, 687 (2d Dep’t 2003) (holding “the drastic remedy of the striking of a pleading should not be employed without a showing that the failure to comply with discovery demands was willful, contumacious, or in bad faith”); *Burgess v. Rainsford*, 221 A.D.2d 399, 400 (2d Dep’t 1995) (same). To demonstrate that failure to comply with a discovery order is “willful, contumacious or due to bad faith,” a party must show that the opposing party had “an ability to comply and [made] a decision not to comply.” *Dauria*, 127 A.D.2d at 460 (quoting 3A Weinstein-Korn-Miller, *NY Civ. Prac.* ¶ 3126.04). As this Court has noted, a party “may not be compelled to produce information that does not exist or which he [or she] does not possess,” *Romeo v. City of New York*, 261 A.D.2d 379, 380 (2d Dep’t 1999) (quoting *Corriel v. Volkswagen of America, Inc.*, 127 A.D.2d 729, 731 (2d Dep’t 1987)), and a motion to strike a pleading based on the failure to produce information that the party does not possess should be denied. *Id.*

The decision below to dismiss Ms. Martinez’s fixture claim does not meet these standards and should therefore be reversed. The trial court held that even if Ms. Martinez’s claim that she was unable to produce pertinent records because she had fled from her home to escape domestic violence were true, it would not excuse her “failure” to produce the documents in response to the discovery order. That ruling is correct only if simply being a victim of domestic violence and thus losing access to records is, in itself, an action that is willful, contumacious, or in bad faith. This holding is insupportable.

Clearly, assuming Ms. Martinez's claims were true, she could not be said to have had an ability to comply and to have made a decision not to comply. Without assessing the evidentiary basis for Ms. Martinez's claims, there is simply no way to determine the significance of her failure to comply with the discovery order. The court's dismissal of Ms. Martinez's claim on this basis should therefore be reversed and this matter should be remanded for further proceedings.

B. Dismissal in these Circumstances Is Contrary to Public Policy

C.P.L.R. § 3216 specifies that a court may only issue such orders regarding a failure to comply with a discovery directive "as are just." N.Y. C.P.L.R. § 3126. The lower court's holding should be reversed because it is manifestly unjust; indeed, it is directly contrary to this State's established public policy to protect victims of domestic violence and to enhance their ability to establish the economic independence they need to address the violence in their lives. The ruling below sets a dangerous precedent that should be explicitly overturned.

The attitude toward domestic violence expressed by the decision below reflects a shameful history, in which much of society and sadly many government officials – including police, prosecutors, and judges – did not treat domestic violence seriously, often minimizing the significance of the crime or blaming the women who are its victims. Indeed, the trial court's dismissive characterization of Ms. Martinez's claim to have fled from an abusive husband as a mere "excuse" suggests that it should be accorded no more respect than that which a slight inconvenience or annoyance might merit. Domestic violence, however, is a serious crime. "In the United States, battering is the major cause of injury to women aged 14-45, causing more injuries than auto accidents, muggings and

rapes combined.” New York State Office for the Prevention of Domestic Violence, *Some Facts about Domestic Violence*, in *Domestic Violence: Finding Safety & Support* (2d ed. 2000), at http://www.opdv.state.ny.us/about_dv/fss/factsdv.html; see also, e.g., Centers for Disease Control and Prevention, *Costs of Intimate Partner Violence Against Women in the United States* (2003) (finding that each year there are 5,300,000 non-fatal violent victimizations committed by intimate partners against women).

In recent years, this State has taken many measures to promote the health, physical safety, and economic self-sufficiency of individuals victimized by domestic violence. This public policy is demonstrated in statutes enacted by the New York State Legislature, orders issued by the Executive Branch, and decisions issued by the courts. For example, in 1992, the State created the New York State Office for Prevention of Domestic Violence (“OPDV”), an executive level state agency charged with improving the response of the State and local communities to domestic violence. N.Y. Lab. L. § 10-b, as explained in N.Y. Exec. L. § 575 (establishing OPDV and delineating its responsibilities). OPDV seeks to carry out its mission through technical assistance, training, public education, and policy development. *About OPDV*, at <http://www.opdv.state.ny.us/aboutopdv.html#welcome>.

Significantly, in addition to creating mechanisms to protect victims’ physical safety, New York State lawmakers have sought to reduce the fallout that violence creates in other aspects of victims’ lives, particularly by enacting legislation to help victims maintain economic independence. Thus, for example, although generally individuals who voluntarily leave jobs are not eligible for unemployment benefits, the Legislature has provided that victims of domestic violence who choose to leave a job because of

domestic violence *can* receive benefits. N.Y. Lab. L. § 593(1)(a) (providing “a voluntary separation [from work] may be deemed for good cause if it occurred as a consequence of circumstances directly resulting from the claimant being a victim of domestic violence”). The Legislature has also recognized that domestic violence may make compliance with administrative requirements difficult – or dangerous – and has acted to place victims’ safety first. The State’s public assistance program therefore provides that requirements that public benefits recipients cooperate with efforts to collect child support obligations or to establish paternity of children, as well as requirements regarding work, may be waived for victims of domestic violence if enforcement of such requirements would place victims at risk or make it more difficult for them to escape from violence. N.Y. Soc. Serv. L. § 349-a; 18 N.Y.C.R.R. § 351.2.

By refusing to even consider the significance of Ms. Martinez’s claim that she was unable to produce the relevant records because she had fled from her husband, the decision below, by contrast, establishes a rule that punishes a victim of domestic violence for the consequences of securing her own safety. Victims of domestic violence are often forced to flee their homes with little or no notice. *See, e.g., OPDV, Safety Planning and Risk Assessment, in Domestic Violence: Finding Safety & Support, at* http://www.opdv.state.ny.us/about_dv/fss/safety.html (discussing need for safety planning and emergency escape plans). Ideally, every time a victim fled her home, she would manage to bring all relevant documents for all aspects of her life with her. The unfortunate truth, however, is that frequently victims leave important documents behind and returning to retrieve such documents – or taking any steps that can reveal their location to abusers – can place a victim at great risk. *Cf.* N.Y. Dom. Rel. L. § 254; N.Y.

Family Court Act § 154(b) (both permitting the court in any of a variety of proceedings to authorize any party or the child involved to keep his or her address confidential where revealing the address would put a party at risk); United States Social Security Admin. Pub. No. 05-10093 (Jan. 2004), *available at* <http://www.ssa.gov/pubs/10093.pdf> (recognizing that domestic violence victims frequently need to change their social security numbers to escape their abusers and outlining procedures under which such applications will be processed). Accordingly, the circumstances surrounding a failure to produce documentation in a case such as this, and the consequences of such a failure, should be assessed with the recognition that victims often must take drastic steps to leave their abusers.

The trial court's absolute refusal in this case to assess the significance and credibility of Ms. Martinez's claims that she could not produce records to support her claim because she had fled from her abusive husband was an abuse of discretion, and the dismissal of her claim on this basis should be reversed. An inflexible rule stating that such a situation cannot, as a matter of law, excuse a failure to produce records in compliance with a discovery order is a dangerous precedent that should be overturned.

CONCLUSION

For the foregoing reasons, proposed *amicus curiae* NOW Legal Defense respectfully requests that this Court reverse the court below with respect to its holding that Ms. Martinez's claims of domestic violence could not excuse her failure to produce records and remand for further proceedings as appropriate.

DATED: January ___, 2004

Respectfully submitted,

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