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| Cawley v Balloon Museum USA LLC |
| 2026 NY Slip Op 30991(U) |
| March 13, 2026 |
| Supreme Court, New York County |
| Docket Number: Index No. 158865/2024 |
| Judge: Matthew V. Grieco |
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. MATTHEW V. GRIECO PART 30M

Justice

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KYRSTEN CAWLEY

Plaintiff,

- v -

BALLOON MUSEUM USA LLC,

Defendant.

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INDEX NO. 158865/2024

MOTION DATE 09/16/2025

MOTION SEQ. NO. 002

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 002) 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 36, 37, 38, 39, 40, 41

were read on this motion to/for STRIKE PLEADINGS

Upon the foregoing documents, and for the reasons stated infra, plaintiff's motion pursuant to CPLR 3124 and 3126 for discovery sanctions (NYSCEF Doc. No. 24-26) is granted to the extent of directing defendant to provide or re-send the requested discovery.

Plaintiff, Krysten Cawley, commenced this action on September 25, 2024, alleging that she suffered personal injuries resulting from a slip and fall on December 26, 2023 at premises owned and operated by defendant, Balloon Museum USA LLC (NYSCEF Doc. No. 1 [summons and complaint]). Defendant timely answered (NYSCEF Doc. No. 4), and the parties exchanged discovery demands (NYSCEF Doc. Nos. 6-8, 13-14).

On May 28, 2025, plaintiff moved for a preliminary conference to be held (NYSCEF Doc. Nos. 15-16), which the parties stipulated be withdrawn, upon the court's scheduling a preliminary conference for September 24, 2025 (NYSCEF Doc. No. 22).

By letter dated July 14, 2025, plaintiff notified defendant that she was still awaiting “responses to Plaintiff’s Discovery Demands previously served on your office on December 30, 2024” (NYSCEF Doc. Nos. 23). Those demands included: records of maintenance, repair, and other building related documents; plaintiff statements; a verified bill of particulars on affirmative defenses; surveillance material; witness information; expert witness information; accident reports; and insurance information (NYSCEF Doc. No. 13, 31).

On September 16, 2025, about one week before the scheduled preliminary conference, plaintiff filed the current motion, seeking to strike the answer, or alternative relief, pursuant to CPLR 3124 and 3126, based on defendant’s failure to provide the requested discovery (NYSCEF Doc. No. 24-26). Defendant points to an email sent to plaintiff on September 22, 2025 that stated that the discovery was attached, although the actual attachments are not in the record (NYSCEF Doc. No. 37); plaintiff denies receipt of the email on that date (NYSCEF Doc. No. 40 ¶ 21 [reply aff.]).

According to defendant, a per diem attorney appeared for plaintiff at the September 24, 2025 preliminary conference, professing no knowledge of the September 22 email or the discovery responses. The parties agree that, during the conference, defendant resent the email directly to plaintiff’s counsel of record, but diverge on whether there were any attachments (NYSCEF Doc. No. 36 ¶ 4 [aff. in opp.]; Doc. No. 40 ¶22 [reply aff.]).

The preliminary conference order of September 24, 2025 (Leticia M. Ramirez, J.) set dates for: defendant to provide insurance coverage information and a bill of particulars; depositions of both parties; physical examination of plaintiff; and both parties to exchange the names and addresses of all eye witnesses and notice witnesses,

statements of opposing parties, and photographs (NYSCEF Doc. No. 35). No other discovery owing from defendant was recorded in the preliminary conference order.

Under CPLR 3124, “[i]f a person fails to respond to or comply with any request, notice, interrogatory, demand, question or order under this article, except a notice to admit under section 3123, the party seeking disclosure may move to compel compliance or a response.”

Relatedly, CPLR 3126 states that: “If any party ... refuses to obey an order for disclosure or wilfully fails to disclose information which the court finds ought to have been disclosed pursuant to this article, the court may make such orders with regard to the failure or refusal as are just,” and then provides a non-exclusive list of penalties, including preclusion or dismissal of the offending party’s pleading.

The operative language here is that defendant must have willfully failed to provide the requested discovery. Where the extreme sanction of striking a pleading is sought, the movant must make a clear showing that the failure to comply was willful, contumacious, or in bad faith, whereupon the burden shifts to the nonmoving party to establish a reasonable excuse (*see Palmenta v Columbia Univ.*, 266 AD2d 90 [1st Dept 1999]).


Willfulness has not been established here. Defendant does not refuse to provide the discovery, and maintains that it was sent prior to the preliminary conference. The order ensuing from that preliminary conference does not indicate wide swathes of missing discovery or obstructionist or dilatory conduct on the part of defendant. In fact, nothing in that order suggests that defendant had not been generally cooperating with discovery. It thus appears that the controversy has arisen from plaintiff’s inability to

access the discovery, perhaps because of the manner in which the material was attached to defendant's emails.

It is therefore

ORDERED that plaintiff's motion to compel or for discovery sanctions is granted to the extent that defendant is directed to resend to plaintiff all of the requested discovery pertaining to this motion, and to confirm by direct communication plaintiff's receipt and ability to access, by the next scheduled compliance conference, March 24, 2026; if necessary, defendant is to send hard copy of the material to plaintiff; and it is further

ORDERED that counsel are directed to appear for the previously scheduled status conference in Room 623, 111 Centre Street, New York, New York, on March 24, 2026, at 10:00 AM.

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| <u>3/13/2026</u> DATE | | | | |  MATTHEW V. GRIECO, J.S.C. |
| CHECK ONE: | <input type="checkbox"/> | CASE DISPOSED | <input checked="" type="checkbox"/> | NON-FINAL DISPOSITION | |
| | <input type="checkbox"/> | GRANTED | <input type="checkbox"/> | GRANTED IN PART | <input type="checkbox"/> |
| APPLICATION: | <input type="checkbox"/> | SETTLE ORDER | <input type="checkbox"/> | SUBMIT ORDER | <input type="checkbox"/> |
| CHECK IF APPROPRIATE: | <input type="checkbox"/> | INCLUDES TRANSFER/REASSIGN | <input type="checkbox"/> | FIDUCIARY APPOINTMENT | <input type="checkbox"/> |
| | | | | | <input type="checkbox"/> |
| | | | | | REFERENCE |