

Liberty Mut. Ins. Co. v Trystate Mech., Inc.

2005 NY Slip Op 30496(U)

August 10, 2005

Supreme Court, New York County

Docket Number: 106489/03

Judge: William A. Wetzel

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

PRESENT:

HON. WILLIAM A. WETZEL

PART _____

0106489/2003

LIBERTY MUTUAL INS. CO.

VS

TRYPSTATE MECHANICAL, INC.

INDEX NO. _____

MOTION DATE _____

SEQ 2

MOTION SEQ. NO. _____

STRIKE A PLEADING

MOTION CAL. NO. _____

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

PAPERS NUMBERED

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

Answering Affidavits -- Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

is granted

to the extent indicated

in decision/order of 8/10/05

So ordered

FILED

AUG 23 2005

NEW YORK
COUNTY CLERKS OFFICE

Dated: 8/11/05

[Signature]
J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 50E

<hr/>		x
TRYSTATE MECHANICAL, INC., THE OHIO	:	
CASUALTY GROUP, THE OHIO CASUALTY	:	
INSURANCE COMPANY, JAMES O'DONNELL,	:	<u>DECISION AND ORDER</u>
PREMIERE INSULATION and PREMIERE	:	Index No. 106489/03
INSULATION & FIRE STOPPING SYSTEMS, INC.,	:	
	:	
Petitioners,	:	
	:	
-against-	:	
	:	
LIBERTY MUTUAL INSURANCE COMPANY,	:	
MONTEFIORE MEDICAL CENTER, and KEYSpan	:	
ENERGY MANAGEMENT, INC.	:	
	:	
Respondents.	:	
<hr/>		x

WILLIAM A. WETZEL, J.:

Petitioners move for an Order pursuant to CPLR §3126 to strike respondent’s complaint, to prohibit respondents from supporting certain claims and from introducing certain evidence, and to resolve certain issues in favor of the moving petitioners, along with the costs and disbursements of this application and such other and further relief as this Court may deem just and proper. Respondents oppose petitioner’s motion pursuant to CPLR §3126 and requests this Court to stay any further proceedings in the declaratory judgment action pending the outcome of the underlying case and determination of respondent’s negligence as required by the Appellate Division’s decision.

BACKGROUND

Respondents Liberty Mutual Insurance Company, Montefiore Medical Center (“Montefiore”), and Keyspan Energy Management, Inc. (“Keyspan”) had brought a declaratory judgment action against petitioner, The Ohio Casualty Insurance Company (“Ohio Casualty”) on

April 1, 2003. In this action, respondents had requested the court to declare the following: (1) Montefiore and Keyspan are additional insureds under the Ohio Casualty policy; (2) the Ohio Casualty policy is primary to all other available coverage; (3) Ohio Casualty has an absolute duty to indemnify Montefiore and Keyspan; (4) Ohio Casualty has an obligation to defend Montefiore and Keyspan without reservation in the underlying suit; and (5) Ohio Casualty must reimburse Montefiore and Keyspan for all costs and attorney fees incurred in defense of the underlying action up until Ohio Casualty takes over that defense.

Petitioners sent respondents a Notice for Discovery on May 3, 2003. Respondents responded to these requests on June 20, 2003. However, petitioners had deemed this response inadequate. In this response, respondents failed to supply Montefiore's primary policy and Montefiore and Keyspan's excess policies. Respondents had also objected to petitioner's discovery demands 5, 6, 7, 21 and 22 as palpably improper, and stated that they do not possess the documents requested in discovery demands 18, 19, 20 and 23. On July 15, 2003, respondents moved for summary judgment. On August 5, 2003, petitioners made a motion in opposition, as well as a cross motion seeking an order compelling an adequate response to petitioner's Notice of Discovery. On December 3, 2003, after ruling in favor of respondent's motion for summary judgment, this Court declared petitioner's discovery requests as moot. On February 10, 2005, the Appellate Division, First Department entered a Decision and Order modifying this Court's decision as to petitioner's discovery requests and directed respondents to comply with petitioner's outstanding discovery demands. The Appellate Division had stated, "any declaration as to the ultimate duty to indemnify, as well as whether coverage will be primary, must await adjudication of the underlying lawsuit." The underlying lawsuit concerns issues of fact as the

respondent's negligence. On April 12, 2005, petitioner's counsel mailed a letter to respondent's counsel requesting compliance with the Appellate Division's Order and noting that two months had already passed since the Order had been issued.

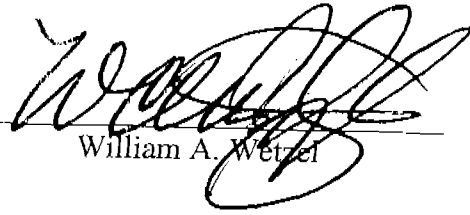
CPLR §3126

This Court may in its discretion impose penalties under CPLR §3126 upon a party that refuses to comply with or willfully fails to respond to a court-ordered discovery. See Conch Assoc., Inc. v. PMCC Mortg. Corp., 303 AD2d 538, 538-539 (2nd Dept. 2002). Under Frye v. City of New York, 228 AD2d 182, 182-183 (1st Dept. 1995), the imposition of the penalties under CPLR §3126 will only be warranted when the respondent's failure to comply with petitioner's discovery demands was willful or contumacious. However, this Court must keep in mind that the striking of a pleading against the party who has failed to comply with a court ordered discovery in an extreme sanction and requires a clear showing of willfulness or bad faith. Byrne v. City of New York, 301 AD2d 489, 490 (2nd Dept. 2002). This Court finds respondent's failure to comply with the petitioner's discovery demands not willful. Although the respondents have not responded to petitioner's request for the outstanding documents, the Appellate Division did not specify a time frame for the production of these policies. Respondents have also indicated their willingness to comply by asking this Court for thirty days to supply petitioners with Montefiore's primary policy and any of Montefiore's and Keyspan's excess policies. In light of this request, and with regards to Montefiore's primary policy and Montefiore and Keyspan's excess policies, this Court denies petitioner's motion pursuant to CPLR §3126 with the condition the respondent supply Montefiore's primary policy and Montefiore and Keyspan's excess policies within 30 days of service of a copy of this decision with notice of entry and also

comply with the outstanding discovery within the same time period to the extent such information/documentation exists.

This constitutes the Decision and Order of this court.

Dated: August 10, 2005
New York, New York


William A. Wetzel

FILED
AUG 23 2005
NEW YORK
COUNTY CLERK'S OFFICE