

**Travelers Property Casualty Company of America v
Consolidated Edison**

2008 NY Slip Op 33458(U)

December 19, 2008

Supreme Court, New York County

Docket Number: 110462/07

Judge: Milton A. Tingling

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

PRESENT: HON. MILTON A. TINGLING
J.S.C. Justice

PART 44

TRAVELERS PROPERTY,

INDEX NO. 110462/07

MOTION DATE 10/8/08

- v -

MOTION SEQ. NO. 002

CON ED.,

MOTION CAL. NO. _____

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

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

PAPERS NUMBERED

Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion is decided in accordance with annexed decision.

FILED

DEC 30 2008

COUNTY CLERK'S OFFICE
NEW YORK

Dated: 12/19/08 mat
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):

HON. MILTON A. TRINGLING
J.S.C.

SUPREME COURT OF THE CITY OF NEW YORK
COUNTY OF NEW YORK: PART 44

-----x
TRAVELERS PROPERTY CASUALTY COMPANY
OF AMERICA a/s/o SHERLE WAGNER
INTERNATIONAL,

Plaintiff,

Index No.: 110462/07

-against-

CONSOLIDATED EDISON,

Defendant.

-----x
CONSOLIDATED EDISON COMPANY OF NEW
YORK, INC.,

Third Party Plaintiff

-against-

450 PARK LLC, TACONIC MANAGEMENT
COMPANY, LLC, TACONIC INVESTMENT
PARTNERS, LLC, BLACKACRE CAPITAL
GROUP, L.P. and SHERLE WAGNER
ACCESSORIES, INC.,

Third Party Defendants.

-----x
SHERLE WAGNER INTERNATIONAL, LLC

Plaintiff,

-against-

Index No.: 602851/07

CONSOLIDATED EDISON COMPANY OF
NEW YORK, INC.,

Defendant.

-----x

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DEC 30 2008
COUNTY CLERK'S OFFICE
NEW YORK

CONSOLIDATED EDISON COMPANY OF
NEW YORK, INC.,

Third Party Plaintiff,
-against-

450 PARK LLC, TACONIC INVESTMENT
PARTNERS, LLC, TACONIC MANAGEMENT
COMPANY, LLC, BLACKACRE CAPITAL
GROUP, L.P. and SHERLE WAGNER
ACCESSORIES, INC.,

Third Party Defendants.

-----x

SHERLE WAGNER,

Plaintiff,

-against-

Index No.: 600455/07

TRAVELERS PROPERTY CASUALTY,

DECISION AND ORDER

Defendant.

-----x

TINGLING, J.

FACTUAL BACKGROUND

Defendant Consolidated Edison Company of New York, Inc. (Con Ed) moves for leave to file opposition *nunc pro tunc* on three separate motions. The first motion was filed by Travelers Property Casualty Company of America (Travelers) to amend its pleadings to add a cause of action. The second motion was filed on behalf of Sherle Wagner International, LLC and Sherle Wagner Accessories, Inc. (collectively, Sherle Wagner) to strike Con Ed's answer for failing to meet discovery requests. The third motion was filed by Blackacre Capital Group, L.P. (Blackacre) for an order dismissing Con Ed's third-party claim against it.

The three motions were granted on default. The first two motions were on the calendar for the first time, and the third motion had been adjourned from the preceding week so that all the motions could be heard at the same time.

Con Ed states that its affirmation was served by regular mail on counsel on September 17, 2008, and not picked up by service for timely submission on the following day at the calendar call. Con Ed further states that when its law office attempted to serve the affirmation in opposition later that day, September 18, 2008, it was refused by the Clerk. The basis for the instant motion by Con Ed is law office failure.

DISCUSSION

"A party seeking relief from an order or judgment on the basis of excusable default pursuant to CPLR 5015 (a) (1) must provide a reasonable excuse for the failure to appear and demonstrate the merit of the cause of action or defense. The determination of the sufficiency of the proffered excuse and the statement of merits rests within the sound discretion of the court [citations omitted]."

Goldman v Cotter, 10 AD3d 289, 291 (1st Dept 2004).

Accepting as a reasonable excuse the failure of the law office to have service file the opposition in time for the calendar call, especially in light of the fact that Con Ed did attempt to file its opposition later that same day, the court must now address, individually, the merits of the opposition to each of the motions filed.

With respect to the first motion, Travelers, the moving

party, consents to granting Con Ed additional time to complete discovery, and further agrees to accept a reading of the court's order of October 1, 2008, in which the court granted its motion to amend the pleadings on default, so as to permit amendment of its pleadings if and when additional payments are made to Sherle Wagner. Based on this concession, Con Ed's motion is granted with leave for Travelers to renew its motion to amend if and when payments are made to Sherle Wagner.

With respect to the second motion to strike Con Ed's answer for failing to complete discovery pursuant to a discovery order, Con Ed states that the overdue responses consist of documents and photographs, both of which are in the process of being scanned and burned to disks.

"In order to invoke the drastic remedy of preclusion (CPLR 3126), the court must determine that the party's failure to comply with a disclosure order was wilful, deliberate and contumacious [internal citation omitted]." *Holliday v Jones*, 36 AD3d 557, 557-558 (1st Dept 2007). So too is the striking of a pleading so drastic a remedy that it should only be invoked when there is a clear refusal of a party to obey a discovery order. See *Villega v New York City Housing Authority*, 231 AD2d 404 (1st Dept 1996).

In the instant matter, the discovery orders did not contain any sanctions for non-compliance. Despite the fact that Con Ed

has not complied with all the discovery demands, there is no evidence to indicate that it has engaged in any action that is "so egregious as to outweigh the general policy that actions should be resolved on their merits." *Commerce & Industry Insurance Company v Lib-Com, Ltd.*, 266 AD2d 142, 145 (1st Dept 1999).

Under these circumstances, "[a] conditional order is an appropriate remedy when it affords the party who is refusing to comply with a disclosure order an additional opportunity to comply prior to the imposition of the final sanction." *Casas v Romanelli*, 232 AD2d 445, 445 (2d Dept 1996). This approach provides the parties with "a fresh start with a clean slate and a firm directive to move this case along and complete discovery [internal quotation marks omitted]." *Carpenter v Browning-Ferris Industries, Inc.*, 262 AD2d 999, 999 (4th Dept 1999).

However, as part of Con Ed's opposition to this motion, it asserts that it cannot allow access to its electrical facility for an inspection because OSHA regulations limit access only to properly qualified personnel. Con Ed refers to 29 CFR 1910.269 as support for this assertion.

Taconic opposes this portion of the motion specifically, asserting that Con Ed's assertions are conclusory and not supported by the OSHA regulations.

The court has reviewed the OSHA regulations in question, and

agrees with Taconic. The regulations specifying qualifications all refer to persons employed in the facility. No mention is made of any specific training requirement for a person making a facility inspection pursuant to discovery for an ongoing lawsuit.

The affirmation filed by Con Ed with respect to this inspection is self-serving and conclusory (*See Carroll v Nostra Realty Corp.*, 54 AD3d 623 [1st Dept 2008]), and fails to indicate any specific OSHA provision that would prevent the discovery inspection. However, despite Con Ed failing to indicate a meritorious defense (*Silverman & Weintraub v Gillon*, 1 AD3d 142 [1st Dept 2003]), it is the "strong public policy of this State that matters be decided on their merits." *Mediavilla v Gurman*, 272 AD2d 146, 148 (1st Dept 2000). Consequently, as part of this order, Con Ed must comply with all discovery demands still outstanding, including the inspection of its electrical facility.

Lastly, the Con Ed consents to the dismissal of Blackacre from the third-party complaint, rendering this portion of the motion moot.

CONCLUSION

Based on the foregoing, it is hereby

ORDERED that Consolidated Edison Company of New York, Inc.'s motion with respect to Travelers Property Casualty Company of America's motion to amend its pleadings, is granted, with leave for Travelers Property Casualty Company of America to renew its

motion to amend when Travelers Property Casualty Company of America actually makes a payment to Sherle Wagner International, LLC and/or Sherle Wagner Accessories, Inc.; and it is further

ORDERED that the motion to amend previously granted to Travelers Property Casualty Company of America on default is vacated; and it is further

ORDERED that Consolidated Edison Company of New York, Inc.'s motion to deny striking its answer is granted; and it is further

ORDERED that Consolidated Edison Company of New York, Inc. provide all discovery still outstanding, pursuant to notices to produce and the compliance discovery orders of March 19, 2008 and June 3, 2008, and consistent with this decision; and it is further

ORDERED that should Consolidated Edison Company of New York, Inc. fail to provide this discovery within 30 days of notice of entry of this order it will be precluded from offering any evidence or testimony on these issues at the time of trial; and it is further

ORDERED that Consolidated Edison of New York, Inc.'s motion with respect to dismissing the third-party claim against Blackacre Capital Group, L.P. is denied as moot.

Dated: 12/19/08

ENTER:

mat

MILTON A. ENGLING s.c.
HON. MILTON A. ENGLING
J.S.C.

FILED 1
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