

Reyes v 6-10 E. First St. Group, LLC
2010 NY Slip Op 30393(U)
March 1, 2010
Supreme Court, New York County
Docket Number: 118245/06
Judge: Martin Shulman
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: MARTIN SHULMAN

PART 1

Index Number : 118245/2006

REYES, MARCELINO

vs

6-10 EAST FIRST STREET

Sequence Number : 002

COMPEL

INDEX NO. 118245/06

MOTION DATE _____

MOTION SEQ. NO. 002

MOTION CAL. NO. _____

his motion to/for _____

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ... <u>A-J</u>	<u>1</u>
Answering Affidavits — Exhibits <u>A-B</u>	<u>2</u>
Replying Affidavits <u>- Exh. K</u>	<u>3</u>

Cross-Motion: Yes No

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

FILED
MAR 02 2010
NEW YORK
COUNTY CLERK'S OFFICE

Dated: MAR 1 2010

MARTIN SHULMAN 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: IAS PART 1

-----X
MARCELINO REYES,

Plaintiff,

Index No: 118245/06

-against-

Decision and Order

6-10 EAST FIRST STREET GROUP, LLC,

Defendant.

-----X
6-10 EAST FIRST STREET GROUP, LLC,

Third Party Index No.
591163/07

Third-Party Plaintiff,

-against-

DINO'S GENERAL CONTRACTOR CORP., and DINO'S
GENERAL CONTRACTING & SHEET METAL CORP.,

Third-Party Defendants.

-----X
HON. MARTIN SHULMAN, J.S.C.:

In this action alleging causes of action for common law negligence and violations of Labor Law §§ 200, 240 and 241, defendant-third-party plaintiff 6-10 East First Street Group, LLC ("6-10" or "movant") moves to compel third-party defendants Dino's General Contractor Corp. and Dino's General Contracting & Sheet Metal Corp. (collectively "Dino's") to respond fully to its discovery demand and to comply with several discovery orders. Alternatively, 6-10 requests an order of preclusion. Dino's submits an affirmation in opposition, stating that it has provided the outstanding discovery and the motion is now moot. Movant disputes that Dino's has properly responded to its demand.

This motion concerns only a single outstanding discovery demand. Specifically, testimony from plaintiff's October 24, 2008 deposition (Exh. J to motion) indicates the existence of an eye witness to plaintiff's accident. However, plaintiff was only able to identify this witness as "Dino's nephew". On November 7, 2008, movant served a written demand (Exh. E to motion) to produce seeking the full name and last known address of "Dino's nephew". Dino's never responded to this demand and at subsequent court conferences the court issued no less than three (3) orders directing that this information be provided.¹ Over a year after its written demand, 6-10 was compelled to bring this motion.

After being served with this motion, Dino's finally served a response on January 12, 2010, stating that "John" (first name unknown) Radoveschi, resides at 14 Windom Avenue, Staten Island, New York." Marino Aff. in Opp. at Exh. A. Counsel for Dino's alleges that this information was obtained after retaining an investigator. No reason is given as to why the witness' first name could not be ascertained. Among the reasons cited for the delay, counsel alleges that it was only recently substituted as counsel of record for Dino's and that prior counsel had been unsuccessful in contacting Dino's, which is no longer in business.²

¹ See so-ordered stipulations dated February 24, 2009, June 9, 2009 and September 8, 2009 (Exhs. F, G and H to motion). After this motion was served, a subsequent so-ordered stipulation dated December 2, 2009 required Dino's to provide Dino's nephew's full last name and last known address. See Miller Reply Aff. at Exh. K.

² Prior counsel's certified mail to Dino's post-marked June 4, 2009 was returned with the markings "attempted not known" and "return to sender". Marino Aff. in Opp. at Exh. B.

Regarding the penalties for refusal to comply with orders to disclose, CPLR

§3126 states, in pertinent part:

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, among them:

- . . . 2. an order prohibiting the disobedient party from supporting or opposing designated claims or defenses . . .

Here, the court agrees with movant's position that Dino's response is virtually worthless. From this record, it appears that Dino's principal and his nephew reside at the address provided in the response. Even if the two do not reside at the same address, it is unlikely that Dino's principal does not know his nephew's name or could not ascertain it. Movant further notes that an internet search revealed that 5 to 7 people reside at the address provided. Without a full and correct name, it would be impossible for 6-10 to serve a subpoena on this non-party witness.

Despite all of the foregoing, counsel for Dino's argues that its clients' conduct is not wilful, wanton or contumacious. The court does not agree. While counsel may have made efforts to comply with its discovery obligations, it appears that Dino's has simply chosen to bury its head in the sand and not participate in this litigation.³ The contact information for an eye witness to plaintiff's accident is clearly relevant, is not onerous and should not take over a year to provide. Dino's has had ample opportunity to comply with one simple request and its disobedience of multiple court orders

³ In its reply, 6-10 advises that after this motion was served Dino's refused to appear for its scheduled deposition as required by court order.

[* 5]
frustrates the CPLR's disclosure scheme. *See, e.g., Zletz v. Wetanson*, 67 NY2d 711 (1986); *Berman v. Szpilzinger*, 180 AD2d 612 (1st Dept. 1992).


Notwithstanding the court's broad discretion under CPLR §3126, movant first requests an order compelling compliance and/or alternatively, an order of preclusion. While the circumstances arguably warrant striking of Dino's answer, such relief was not specifically requested. Accordingly, 6-10's motion is granted to the extent that it is

ORDERED that within twenty (20) days of service of a copy of this decision and order with notice of entry, Dino's shall provide the full name and last known address of "Dino's nephew", as testified to at plaintiff's deposition; and it is further

ORDERED that in the event that Dino's fails to comply with the foregoing, movant 6-10 shall submit an affirmation detailing the default and shall submit an order of preclusion on notice.

This constitutes this court's Decision and Order. Courtesy copies of same have been provided to counsel for movant and Dino's.

Dated: New York, New York
March 1, 2010



HON. MARTIN SHULMAN, J.S.C.

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