

<b>McGlone v Port Auth. of N.Y. &amp; N.J.</b>
2010 NY Slip Op 31204(U)
May 13, 2010
Supreme Court, New York County
Docket Number: 111625/2006
Judge: Eileen A. Rakower
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

**HON. EILEEN A. RAKOWER**

PRESENT: \_\_\_\_\_

PART 15

*Justice*

Index Number : 111625/2006

**MCGLONE, MICHAEL**

vs.

**PORT AUTHORITY OF NEW YORK**

SEQUENCE NUMBER : 002

STRIKE ANSWER

INDEX NO. \_\_\_\_\_

MOTION DATE \_\_\_\_\_

MOTION SEQ. NO. \_\_\_\_\_

MOTION CAL. NO. \_\_\_\_\_

this motion to/for \_\_\_\_\_

PAPERS NUMBERED

1-5

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

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

**DECIDED IN ACCORDANCE WITH  
ACCOMPANYING DECISION / ORDER**

**FILED**

MAY 19 2010

NEW YORK  
COUNTY CLERK'S OFFICE

Dated: 5/13/10



**HON. EILEEN A. RAKOWER**

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST  REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 15

-----X  
MICHAEL MCGLONE and PATRICIA MCGLONE,

Plaintiffs,

Index No.  
111625/06

- against -

**DECISION  
and ORDER**

THE PORT AUTHORITY OF NEW YORK AND  
NEW JERSEY, SPEARIN, PRESTON & BURROWS,  
INC., SEMCOR EQUIPMENT AND MANUFACTURING  
CORPORATION, ENGINEERED CONCRETE REMOVAL,  
INC., MODERN CONTINENTAL CONSTRUCTION CO.,  
INC., MODERN CONTINENTAL CONSTRUCTION CO.  
OF NEW YORK, INC.,

Mot. Seq.  
002

**FILED**

MAY 19 2010

Defendants.

NEW YORK  
COUNTY CLERK'S OFFICE

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HON. EILEEN A. RAKOWER

Michael McGlone ("Plaintiff") and Patricia McGlone bring this action for personal injuries sustained on August 25, 2005. Plaintiff alleges that while working on the Bayonne Bridge, he was caused to slip and fall as a result of oil leaking on the work surface from a compressor or power pack used on the work site. Presently before the Court is Plaintiff's motion for an order (1) striking the answer of Defendant Semcor Equipment and Manufacturing Corporation ("Semcor"); (2) precluding all other defendants (collectively referred to herein as "Port Authority") from offering any testimony or evidence at trial on the issue of liability for which particulars and discovery have not been provided; (3) alternatively, compelling Defendants to comply with their discovery obligations; (4) extending the time to conduct discovery and for Plaintiff to file a Note of Issue; and (5) directing that Defendants pay Plaintiff's attorney \$10,000 in attorney's fees as a sanction for their failure to comply with their discovery obligations.

On or around January 22, 2007, Plaintiff served both a Demand for Verified Bill of Particulars ("BP") and Combined Demands for Discovery ("Combined

Demands”) on the Port Authority. Another set of Combined Demands was served by Plaintiff on or around March 21, 2007.

On or around March 21, 2007, Plaintiff served a BP Demand and Combined Demands upon Semcor.

On or around January 6, 2009, Plaintiff served a Notice for Discovery (“post-EBT Demand”) upon Defendants following the deposition of Defendant Spearin, Preston & Burrows, Inc. (one of the Port Authority defendants).

On or around March 17, 2009, Defendants were served with a post-EBT Demand following the deposition of the Port Authority.

On May 11, 2009, Defendants were served with a post-EBT Demand following the depositions of Engineered Concrete Removal, Inc. (another Port Authority defendant) and Semcor.

With respect to Semcor, Plaintiff states that, despite a Preliminary Conference Order (“PC Order”) dated October 2, 2008, and three separate Compliance Conference Orders (“CC Orders”), the last of which dated September 17, 2009, Semcor has yet to provide a BP. Plaintiff also states that Semcor has failed to provide any response to his May 11, 2009 post-EBT Demand, despite three CC Orders in 2009 directing same.

With respect to Plaintiff’s BP Demand upon the Port Authority, the Port Authority provided Plaintiff with a BP on October 15, 2009. Plaintiff states that the Port Authority’s BP is not responsive to Plaintiff’s demands, is unverified, and that it improperly asserts objections because, *inter alia*, they are untimely.

As for Plaintiff’s Combined Demands of January 22, 2007 and March 21, 2007, Plaintiff states that a PC Order dated October 11, 2007 directed the Port Authority to respond to the Combined Demands by November 27, 2007. Plaintiff states that, on March 12, 2008, Plaintiff moved to compel the sought-after discovery, as the Port Authority had yet to furnish a response. On April 16, 2008, the Port Authority responded to the Combined Demands. However, Plaintiff states that this discovery was incomplete. Plaintiff states that, while the Port Authority provided two supplemental discovery responses pursuant to two CC Orders, these responses were once again incomplete.

Plaintiff also states that, despite numerous CC Orders, the Port authority failed to respond to Plaintiff's post-EBT Demands of January 6, 2009, March 17, 2009, and May 11, 2009. Despite being ordered to respond to these requests within 15 days in the last CC Order (dated September 17, 2009), the Port Authority provided a further supplemental discovery response on October 16, 2009. Plaintiff states that this response does not identify the specific demand(s) being responded to and, in any event, Plaintiff states that the response is incomplete.

The Port Authority submits an Affirmation in Opposition, wherein the Port Authority contends that the sanction of preclusion is unwarranted because there is no evidence that its conduct was willful and contumacious. The Port Authority argues that its BP as to its affirmative defenses contains sufficient responses. As for Plaintiff's discovery demands, the Port Authority asserts that it has provided Plaintiff with all of the requested discovery in its possession, and that subsequent to the date of Plaintiff's motion, the Port Authority made the entire project file available for inspection by Plaintiffs' attorneys. The Port Authority states that the project file "contains all of the documents from the sub-contractors, including Engineered Concrete Removal, as well as documents that were transmitted to the Port Authority." In short, the Port Authority states that, to the extent it has not produced documents responsive to Plaintiff's requests, no such documents exist.

Semcor also submits an Affirmation in Opposition to Plaintiff's motion, wherein Semcor provides various items of discovery. In reply to Semcor's submissions, Plaintiff withdraws its motion as against Semcor to the extent that it seeks an order striking Semcor's Answer and/or preclusion. Instead, Plaintiff seeks only that the Court direct Semcor to provide the last known addresses of Chris Maynard and Doug Hover.

Plaintiff submits a Reply Affirmation in response to the Port Authority's opposition papers. Plaintiff states that the Port Authority has failed to provide fully respond to Plaintiff's discovery demands, and has failed to provide sufficient responses in its BP.

Pursuant to CPLR §3126, a court may impose sanctions when a party willfully fails to disclose information which the court finds ought to have been disclosed. The sanction of striking a party's answer is warranted when a party repeatedly and persistently fails to comply with several disclosure orders issued by the court. (*Yoon v. Costello*, 29 A.D.3d 407 [1st Dept. 2006]). The moving party

must show “conclusively that failure to disclose was willful, contumacious or due to bad faith.” (*Dauria v. City of New York*, 127 AD2d 416 [1st Dept. 1987]).

Although the Court finds that striking Defendants’ answer is unwarranted based upon the record before it, CPLR §3124 provides:

If a person fails to respond to or comply with any request, notice, interrogatory, demand, question or order under this article . . . the party seeking disclosure may move to compel compliance or a response.

Here, with respect to the discovery items listed in Plaintiff’s Affirmation in Support, the Port Authority does not deny that the items are discoverable, but rather states that all responsive documents in its possession have already been disclosed. Based on the foregoing, the Court directs the Port Authority to either produce all outstanding discovery sought by Plaintiff, as listed in paragraph #54 in Plaintiff’s Affirmation in Support, or provide affidavits attesting to the fact that the items specified therein either do not exist, or are not in the Port Authority’s possession, within 30 days of receipt of a copy of this Order with Notice of Entry thereof.

As for Plaintiff’s BP Demand, the Court directs the Port Authority to provide a verified Supplemental BP within 30 days of receipt of a copy of this Order with Notice of Entry thereof. This Supplemental BP shall provide answers which are responsive to questions numbered 11 through 16. Since the Port Authority failed to timely move for a protective order relieving it from its obligation to respond, the Port Authority is obligated to answer all questions that are not palpably improper (*see Helfant v. Rappaport*, 14 A.D.2d 764, 765 [1st Dept. 1961]). Here, the Court neither finds, nor does the Port Authority even argue, that such questions are palpably improper. In addition, the Court directs the Port Authority to supplement its BP with respect to question #8, inasmuch as the open-ended phrase “including but not limited to” fails to satisfy the requirements of a BP (*see Alvarado v. New York City Hous. Auth.*, 302 A.D.2d 264 [1st Dept. 2003]).

Wherefore it is hereby

ORDERED that Semcor is directed to provide the last known addresses of Chris Maynard and Doug Hover to Plaintiff within 30 days of receipt of a copy of this Order with Notice of Entry; and it is further

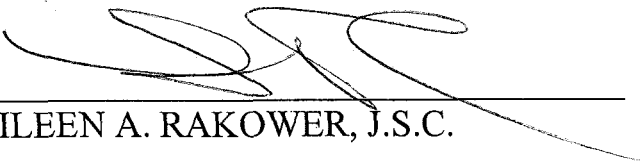
ORDERED that the Port Authority is directed to provide all outstanding discovery as enumerated in paragraph #54 of Plaintiff's Affirmation in Support, or provide affidavits attesting to the fact that the items specified therein either do not exist, or are not in the Port Authority's possession, within 30 days of receipt of a copy of this Order with Notice of Entry; and it is further

ORDERED that the Port Authority is directed to provide a verified Supplemental BP with respect to questions #8 and 11-16 within 30 days of receipt of a copy of this Order with Notice of Entry; and it is further

ORDERED that the parties are directed to appear for a compliance conference on Tuesday, July 6, 2010 at 9:30 a.m. in 80 Centre Street, Room 308 New York NY.

This constitutes the decision and order of the court. All other relief requested is denied.

DATED: May 13, 2010

  
EILEEN A. RAKOWER, J.S.C.

**FILED**  
MAY 19 2010  
NEW YORK  
COUNTY CLERK'S OFFICE