

<b>Travelers Indem. Co. v AMX Cooling &amp; Heating, LLC</b>
2013 NY Slip Op 32716(U)
October 21, 2013
Supreme Court, Westchester County
Docket Number: 535539/2011
Judge: Joan B. Lefkowitz
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This opinion is uncorrected and not selected for official publication.

To commence the statutory time period for appeals as of right [CPLR 5513(a)], you are advised to serve a copy of this order, with notice of entry upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF WESTCHESTER-COMPLIANCE PART

-----X  
TRAVELERS INDEMNITY COMPANY aso  
THE RESIDENCES AT THE RITZ-CARLTON WESTCHESTER,  
RESIDENCES CONDOMINIUM II,  
RENAISSANCE RENTAL PARTNERS, LLC, and  
THE RESIDENCES AT THE RITZ CARLTON WESTCHESTER II

Plaintiffs

**DECISION and ORDER**

Index No. 53539/2011  
Motion Date: Oct 21, 2013  
Seq. No. 1

-against-

AMX COOLING & HEATING, LLC,  
AMX CONTRACTING CORP.,  
NORTHEAST MECHANICAL SERVICES, INC.,  
and GEORGE A. FULLER COMPANY, INC.,

Defendants

-----X  
NORTHEAST MECHANICAL SERVICES, INC.,  
and GEORGE A. FULLER COMPANY, INC.,

Third-Party Plaintiffs

-against-

THE RITZ-CARLTON HOTEL COMPANY, LLC,

Third-Party Defendant

-----X  
LEFKOWITZ, J.

The following papers were read on this motion by plaintiffs for an order striking the answer of defendants AMX Cooling & Heating LLC and AMX Contracting Corp., or an

order precluding these defendants from offering evidence at trial, due to their failure to respond to plaintiffs' combined discovery demands, and for such other and further relief as this Court deems just and proper.

Order to Show Cause dated September 16, 2013  
Affirmation in Support  
Exhibits A-I  
Affirmation in Opposition  
Exhibits A-C

Upon the foregoing papers and upon oral argument heard on October 21, 2013, this motion is determined as follows:

This action arises out of a water damage incident that occurred on December 10, 2012, when a water pipe failed on the 25<sup>th</sup> floor at premises located at One Renaissance Square, White Plains, New York. Plaintiff, Travelers Indemnity Company (hereinafter to be referred to as Travelers) was the first-party property insurance carrier for the other plaintiffs who owned, sponsored and operated condominium units located at the subject premises. Pursuant to the subject insurance policy, Travelers reimbursed its insureds for the property damage sustained at the premises and is now subrogated for the total amount against liable third parties. Travelers contends that insofar as this action arises from the improper installation and/or inadequate inspection of a fan coil unit that was installed by defendants, during the construction of the premises, defendants are obligated to provide basic documentation (for example, service tickets, invoices for repair, installation contracts, etc.).

This action was commenced on or about February 16, 2011. Issue was joined on or about July 29, 2011. On or about October 31, 2011, Travelers served upon defendants its Combined Demands, its Notice for Discovery and Inspection and its Demand for a Bill of Particulars as to Affirmative Defenses.

After the parties appeared for a preliminary conference, they executed a so-ordered preliminary conference stipulation (Lefkowitz, J.), which provided, among other things, that all responses to demands for discovery and inspection would be served no later than May 17, 2013. Plaintiffs state that defendants, AMX Cooling & Heating, LLC, and AMX Contracting Corp. (hereinafter to be referred to jointly as AMX), did not comply with the dates set in the preliminary conference stipulation regarding discovery. By letter dated June 6, 2013, Travelers asked AMX to respond to its discovery demands and offered to provide a courtesy copy of those demands. A follow-up request for compliance with its discovery demands was sent by Travelers to AMX by letter dated July 15, 2013. The parties appeared for a conference in the compliance part on July 23, 2013. The compliance conference order directed AMX to serve outstanding responses to Traveler's discovery demands on or before August 16, 2013. According to Travelers, AMX failed to provide discovery by the date set by that order and it sent another letter to AMX, dated August 27, 2013, seeking discovery.

Presently, Travelers is moving for an order striking the answer of AMX or precluding AMX from offering evidence at trial, due to AMX's failure to respond to Travelers' discovery demands. Travelers asserts that the non compliance of AMX in the discovery process supports an inference of wilful and contumacious conduct. Travelers claims that AMX has ignored the discovery directives set by this Court in the preliminary conference stipulation and the compliance conference order dated July 23, 2013, and that AMX ignored several of its letters requesting discovery. Travelers claims that not only has AMX not responded to its discovery demands but it has failed to proffer a reasonable excuse for its continued refusal to comply with discovery orders. Travelers further contends that the non compliance by AMX in responding to its demands for discovery has posed substantial prejudice to its ability to identify additional installation and inspection related issues and has affected its ability to prosecute its claims. Travelers states that the statute of limitations is about to expire and not one piece of evidence has been provided to it to potentially identify other parties. Travelers also contends that depositions and the overall prosecution of this case is lingering on indefinitely and notes that the standards and goals for this matter expires in January. Travelers also states that all its demands are material and relevant to the prosecution of its claims.

This motion is opposed by AMX. It states that it has not intentionally delayed discovery. AMX notes that the parties to this action have been involved with the drafting of a complex and comprehensive "protective order". AMX now states that it told plaintiff's counsel at the compliance conference that it could not provide discovery while the terms and conditions of the protective order were being decided upon. AMX states that Travelers signed the protective order in September, 2013, and that AMX did not agree to its terms and conditions until only recently. AMX asserts that, therefore, its delay in discovery was excusable. Moreover, AMX notes that it now has responded to all of Travelers' discovery demands and that by letter dated October 6, 2013, it advised Travelers that its entire project file was available for review. AMX further notes that Travelers is not prejudiced by any delay insofar as discovery is still ongoing and Travelers has been ordered to respond to discovery demands in the third-party action. Additionally, AMX claims that Travelers, itself, did not respond to, nor provide, any discovery responses for over 15 months after the lawsuit was commenced.

At the oral argument of this motion, before this Court, Travelers asserted that no substantive discovery had been provided to it by AMX. AMX again offered to have Travelers review its entire file and tag what it wanted produced.

CPLR 3126 provides that if any party refuses to obey an order of disclosure or willfully fails to disclose information which the court finds ought to have been disclosed, the court may impose a penalty upon that party. "The nature and degree of the penalty to be imposed on a motion pursuant to CPLR 3126 is a matter generally left to the discretion of the Supreme Court" (*Carbajal v Bobo Robo*, 38 AD3d 820 [2d Dept 2007]). To invoke the drastic remedy of striking a pleading a court must determine that the party's failure to disclose is willful and contumacious (*Greene v Mullen*, 70 AD3d 996 [2d Dept 2010]; *Maiorino v City of New York*, 39 AD3d 601 [2d Dept 2007]). "Willful and contumacious conduct can be inferred from repeated

noncompliance with court orders coupled with no excuses or inadequate excuses” (*Russo v Tolchin*, 35 AD3d 431, 434 [2d Dept 2006] [cites omitted]; *see also Prappas v Papadatos*, 38 AD3d 871, 872 [2d Dept 2007]).

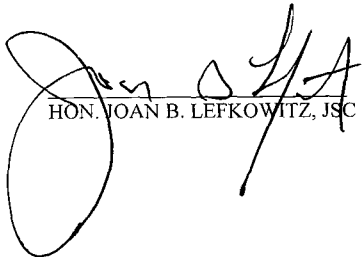
In the present case, AMX failed to comply with two court orders regarding discovery. Although the Court is not convinced that the reason for the delay propounded by AMX is adequate, its failure does not rise to the level of wilful or contumacious. The Court notes that although AMX states in its opposition papers that it now has submitted responses to Travelers as to its combined demands and to its notice for discovery and inspection, at the oral argument of this motion, held before the Court on this date, this statement was denied by Travelers. Accordingly, it is:

ORDERED that plaintiffs’ motion for an order pursuant to CPLR 3126 is granted to the extent that AMX is directed to provide to plaintiffs, on or before October 28, 2013, responses to all of its outstanding discovery demands including but not limited to a complete response to plaintiffs’ Combined Demands, its Notice for Discovery and Inspection and its Demand for a Bill of Particulars as to Affirmative Defenses. In the event that AMX does not comply fully with all outstanding discovery demands as herein discussed, plaintiffs shall, on or before November 8, 2013, file with the Court an affidavit of noncompliance and a Proposed Order striking the answer of AMX, upon notice to all parties; and it is further,

ORDERED that the parties are directed to appear for a conference in the Compliance Part, Room 800 on November 13, 2013, at 9:30 A.M.; and it is further,

ORDERED that plaintiffs are directed to serve all parties with a copy of this order with notice of entry within ten (10) days of entry.

Dated: White Plains, New York  
October 21, 2013

  
HON. JOAN B. LEFKOWITZ, JSC

To:  
  
Robert C. Sheps  
Sheps Law Group, P.C.  
Attorneys for Plaintiffs