

**Marbilla, LLC v 143/145 Lexington LLC**

2014 NY Slip Op 30388(U)

February 7, 2014

Sup Ct, New York County

Docket Number: 117132/2006

Judge: Louis B. York

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

PRESENT: YORK  
Justice

PART 2

MARBILLA, LLC

INDEX NO. 117132/06

- v -  
143/145 LEXINGTON, LLC,  
ETAL.

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

MOTION SEQ. NO. 19

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 ...

Answering Affidavits — Exhibits \_\_\_\_\_

Replying Affidavits \_\_\_\_\_

PAPERS NUMBERED

Cross-Motion:  Yes  No

**FILED**

Upon the foregoing papers, it is ordered that this motion **FEB 13 2014**

**NEW YORK  
COUNTY CLERK'S OFFICE**

**MOTION IS DECIDED WITH  
ACCOMPANYING MEMORANDUM DECISION**

Dated: 2/7/14

LY  
**LOUIS B. YORK** 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 2

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MARBILLA, LLC,

Plaintiff,

-against-

INDEX NO. 117132/2006  
Motion Sequence 019  
**DECISION & ORDER**

143/145 LEXINGTON LLC, GREEN CIRCLE  
CONSTRUCTION LLC, JOHN LAYTON, M&R  
EUROPEAN CONSTRUCTION CORP.,  
HOWARD I. SHAPIRO & ASSOCIATES  
CONSULTING ENGINEERS, P.C., JAMES  
SCHELD and MANUAL GLAS,  
Defendants.

**FILED**

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143/145 LEXINGTON LLC, GREEN CIRCLE  
CONSTRUCTION LLC and JOHN LAYTON,  
Third-Party Plaintiffs,

-against-

Third-Party Index No. 590961/2007

M&R EUROPEAN CONSTRUCTION CORP.,  
Third-Party Defendant.

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HOWARD I. SHAPIRO & ASSOCIATES  
CONSULTING ENGINEERS, P.C. and JAMES  
SCHELD,

Second Third-Party Plaintiffs,

-against-

Second Third-Party Index No.  
591166/2007

M&R EUROPEAN CONSTRUCTION CORP.,  
Second Third-Party Defendant.

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M&R EUROPEAN CONSTRUCTION CORP.,  
Third Third-Party Defendant,

-against-

Third Third-Party Index No.  
590387/2008

VERSATILE CONSULTING & ENGINEERING SERVICES, INC., VERSATILE ENGINEERING PC and ROMAN SOROKKO, PE,  
Third Third-Party Defendants.

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M&R EUROPEAN CONSTRUCTION CORP.,  
Fourth Third-Party Plaintiff,

-against-

Fourth Third-Party Index No.  
590398/2008

DELTA TESTING LABORATORIES INC. and WARREN GEORGE INC.,  
Fourth Third-Party Defendants.

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M&R EUROPEAN CONSTRUCTION CORP.,  
Fifth Third-Party Plaintiff,

-against-

Fifth Third-Party Index No.

IRON HEAD ENTERPRISES LLC,  
Fifth Third-Party Defendant.

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M&R EUROPEAN CONSTRUCTION CORP.,  
Sixth Third-Party Plaintiff,

-against-

Sixth Third-Party Index No.

SKYSCRAPER STEEL CORP.,  
Sixth Third-Party Defendant.

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143/145 LEXINGTON LLC,  
Plaintiff,

-against-

INDEX NO. 603831/2008  
Motion Sequence 006

M&R EUROPEAN CONSTRUCTION CORP.,  
"JOHN DOE No. 1" through "JOHN DOE No. XX," and "XYZ CORP. No. 1" through XYZ

CORP. No. XX,” the last forth names being persons or entities intended to be contractors, subcontractors, or sub-subcontractors whose names are fictitious and unknown to Plaintiff, Defendants.

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M&R EUROPEAN CONSTRUCTION CORP.,  
Third-Party Defendant,

-against-

Third-Party Index No. 590571/2010

GREEN CIRCLE CONSTRUCTION LLC,  
HOWARD I. SHAPIRO & ASSOCIATES  
CONSULTING ENGINEERS, P.C., JAMES  
SCHELD, MANUAL GAS, VERSATILE  
CONSULTING & ENGINEERING SERVICES,  
INC., VERSATILE ENGINEERING PC, ROMAN  
SOROKKO, PE, DELTA TESTING  
LABORATORIES INC. and WARREN GEORGE  
INC.,

Third-Party Defendants.

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M&R EUROPEAN CONSTRUCTION CORP.,  
Second Third-Party Plaintiff,

-against-

Second Third-Party Index No.  
591144/2010

IRON HEAD ENTERPRISES LLC,  
Second Third-Party Defendant.

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M&R EUROPEAN CONSTRUCTION CORP.,  
Third Third-Party Plaintiff,

-against-

Third Third-Party Index No.

SKYSCRAPER STEEL CORP.  
Third Third-Party Defendant.

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**LOUIS B. YORK, J.:**

The two actions, *Marbilla, LLC v 143/145 Lexington LLC*, New York County Index No.

117132/2006 (Action 1) and *143/145 Lexington LLC v M&R European Construction Corp.*, New York County Index No. 603831/2008 (Action 2), and their associated third-party actions, arise from property damage on the same construction project. As explained below, motion sequence 019 in Action 1, and motion sequence 006 in Action 2, are essentially identical, as are the third-party actions addressed. Therefore, the decisions on the two motions are hereby consolidated. In Action 1, sixth third-party defendant Skyscraper Steel Corp. (Skyscraper) moves, by order to show cause, pursuant to CPLR 3126 (3), to dismiss the sixth third-party complaint and any cross claims as against it.<sup>1</sup> In Action 2, third third-party defendant Skyscraper moves, by order to show cause, pursuant to CPLR 3126 (3), to dismiss the third third-party complaint and any cross claims as against it.<sup>2</sup>

**Background**

143/145 Lexington LLC (the Landlord) owns the property at 143/145 Lexington Avenue, New York County (the Property). The Landlord engaged Green Circle Construction LLC (Green Circle) as its general contractor for the construction of a 13-story residential building. John Layton (Layton) is a principal of Green Circle. M&R European Construction Corp. (M&R) was hired to do the demolition and excavation work on the project. Skyscraper delivered and erected steel beams at the project. Others allegedly employed on the project were: Howard I. Shapiro & Associates Consulting Engineers, P.C. (Shapiro), a structural engineering firm; James Scheld (Scheld), a professional engineer; Manual Glas, a professional architect; Versatile Consulting & Engineering Services, Inc. and Versatile Engineering PC, engineering firms, owned by Roman

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<sup>1</sup> There are no co-defendants in either third-party action at issue, and Skyscraper is not joined in any of the other actions. Therefore, there are no cross claims against Skyscraper to be regarded.

<sup>2</sup> Each motion herein will be identified by the action that it pertains to.

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Sorokko, PE (Sorokko); Delta Testing Laboratories Inc., a company that performs tests on and monitors the pouring of concrete; Warren George Inc., a commercial drilling company; and Iron Head Enterprises, LLC (Iron Head), a wall and floor tile company. Marbilla, LLC (Marbilla) owns the premises at 141 Lexington Avenue, adjacent to the Property.

Skyscraper was brought into the construction project to install steel beams as temporary shoring between the Property and adjacent buildings. Sorokko recommended this approach to the Landlord and Green Cicle once settling and tipping of the adjacent buildings occurred. Skyscraper prepared the shop drawings and installed the steel beams, which were removed floor-by-floor as the new structure rose.

Marbilla commenced Action 1 on November 16, 2006, asserting causes of action for negligence and trespass, because of the alleged damage to Marbilla's property during the project's demolition and excavation phase. Action 1, exhibit A. The Landlord commenced Action 2 on December 26, 2008, asserting a cause of action for negligence, because of the alleged damage to the Property during the project's demolition and excavation phase. *Id.*

M&R commenced Action 1's sixth third-party action on May 1, 2012, asserting causes of action against Skyscraper for common-law indemnification or contribution, negligence, contractual indemnification, and breach of contract in connection with the temporary erection of steel beams on the project. Action 1, exhibit B. M&R commenced Action 2's third third-party action, also on May 1, 2012, asserting causes of action against Skyscraper for common-law indemnification or contribution, negligence, contractual indemnification, and breach of contract in connection with the temporary erection of steel beams on the project. *Id.*

M&R's two third-party complaints against Skyscraper are essentially identical, as are the two motions at issue, differing only by a word or two. Skyscraper offers a complete duplicate of

its motion papers for each motion. M&R submits the transcript of the extended deposition of Martin McKernan (McKernan), a founder and principal of M&R, with Action 1's motion only, and identical affirmations by counsel with references to McKernan's testimony with both motions. There is no need to further distinguish the two motions, and all ensuing discussion will be based on the complete set of papers for Action 1, Skyscraper's motion to dismiss the sixth third-party complaint (M&R's Complaint).

### **Discussion**

M&R's Complaint, paragraph 9, charges that Skyscraper's work on the project "was inadequate, not performed in a workmanlike manner and caused a portion of the damages being claimed by plaintiff [Marbilla or Landlord] herein." In its answer to M&R's Complaint, Skyscraper asserts a counterclaim for indemnification "on the basis of the apportionment of responsibility." Action 1, exhibit B, ¶ 22.

In its verified bill of particulars, M&R states that Skyscraper's negligence consisted of, among other things, "failing to follow various plans and specifications for steel supports at the property, . . . [and] making field modifications to remedial steel delivered and erected at the site so as to cause or contribute to movement of the neighboring buildings." *Id.*, exhibit E, ¶ 4. M&R continues that Skyscraper's changes to the original design and the ensuing installation led "the contractors, developers and neighboring property owners into a false sense of security that the support steel as designed and delivered would perform as intended." *Id.* At the time that this bill of particulars was served, on or about June 25, 2012, M&R claimed that it did not have a copy of Skyscraper's contract(s), because Skyscraper had not yet produced it. *Id.*, ¶ 6.

On August 3, 2012, Skyscraper moved, pursuant to CPLR 1010 and 603, to either dismiss M&R's Complaint, or sever it from the other pending actions, arguing that Skyscraper faced

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substantial prejudice in being brought into this complex litigation five-and-a-half years after it commenced. The court denied Skyscraper's motion, on January 17, 2013, because an expert hired by M&R, after examining photographs of the work site taken by Sorokko in January 2006, but only produced on April 5, 2012, opined that Skyscraper significantly departed from Sorokko's plans. Action 1, exhibit F.

At a conference on January 31, 2013, the court ordered a discovery schedule to accommodate Skyscraper. *Id.*, exhibit G. The order stated that "Skyscraper may depose all parties except Shapiro, Scheld & Warren George on the limited issues pertaining to Skyscraper. Iron Head is excluded, also." *Id.* Sorokko was deposed on July 15, 2013, in accordance with this order. Skyscraper wrote to M&R's counsel the next day, requesting the scheduling of a deposition of an M&R principal. *Id.*, exhibit J. Alternatively, it urged M&R to discontinue its action, because Skyscraper maintained that M&R was not in privity with Skyscraper, and that Skyscraper satisfied its agreement with the Landlord/Green Circle, as described in Sorokko's testimony. On August 30, 2013, Skyscraper wrote to the court, because M&R had not scheduled the deposition in spite of several purported conversations. *Id.*, exhibit K. This motion practice followed.

M&R, by counsel, claims that it "is a dissolved corporation, has no assets, no records, no employees, no officers and no principals." Levi affirmation, Action 1, ¶ 2. Previously, it "managed to convince a former principal of the company, Martin McKernan to come to New York City for a deposition . . . [lasting] three days." *Id.*, ¶ 4. Now, according to M&R, Skyscraper insists "that they have questions ten other lawyers somehow didn't ask and, further, that they would be prejudiced because Mr. McKernan presumably has knowledge that they need to explore." *Id.*, ¶ 6. Were McKernan to appear, he would only "express, once again, his

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ignorance and lack of recollection.” *Id.*, ¶ 13. While acknowledging that there is a court order in place, M&R’s counsel asserts that there “is also no question that this office cannot compel a former principal to appear for a deposition and this court has, unfortunately, no active jurisdiction over this former principal.” *Id.*, ¶ 8. Further, M&R’s counsel states that it has “minimal contact with this individual and he has not returned our messages to his last known cell phone or email address.” *Id.*, ¶ 9. It suggests that Skyscraper subpoena McKernan so that the action may proceed.

M&R also argues that Skyscraper has unclean hands, because Skyscraper refuses to produce a witness until McKernan appears, and its document production has been negligible. M&R does not offer any legal authority for its position.

CPLR 3126 provides that,

“[i]f 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: . . . an order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or any part thereof, or rendering a judgment by default against the disobedient party.”

Skyscraper contends that M&R’s failure to appear at a court-ordered deposition warrants harsh sanctions, specifically the dismissal of the M&R Complaint. *Kingsley v Kantor*, 265 AD2d 529, 530 (2d Dept 1999) (“The nature and degree of the penalty to be imposed pursuant to CPLR 3126 is generally a matter left to the discretion of the Supreme Court”). Since the “striking of an answer is an extreme and drastic penalty” (*Henry Rosenfeld, Inc. v Bower & Gardner*, 161 AD2d 374, 374 [1st Dept 1990]), the court believes that M&R should be given an adequate opportunity to comply with the court’s January 31, 2013 discovery order. M&R’s counsel, in stating his opposition to Skyscraper’s motions, mentions only McKernan as “a former principal.” Levi affirmation, ¶ 8. There is no indication anywhere, though, that he ran a one-man operation, or

that there is not another person with knowledge that M&R could produce.

Therefore, Skyscraper's motions are denied, and M&R is ordered to produce a witness with personal knowledge of the construction project at 143-145 Lexington Avenue, New York County, during 2006, within 45 days of the service of a copy of this order, with notice of entry, at a location of Skyscraper's choosing. If M&R is unable to produce such a witness, its counsel shall submit an affirmation of good faith describing the efforts made to comply with this order within that time. Skyscraper may then subpoena McKernan or any other witness associated with M&R who it believes has personal knowledge of the construction project at 143-145 Lexington Avenue, New York County, during 2006.

Accordingly, it is

ORDERED that the motion by Skyscraper Steel Corp., as sixth third-party defendant, pursuant to CPLR 3126 (3), to dismiss the sixth third-party complaint in Action 1 (motion sequence 019), is denied; and it is further

ORDERED that the motion by Skyscraper Steel Corp., as third third-party defendant, pursuant to CPLR 3126 (3), to dismiss the third third-party complaint in Action 2 (motion sequence 006), is denied; and it is further

ORDERED that M&R European Construction Corp. shall produce a witness with personal knowledge of the construction project at 143-145 Lexington Avenue, New York County, during 2006, at a location of Skyscraper's choosing, within 45 days of the service of a copy of this order, with notice of entry; and it is further

ORDERED that, in the event that M&R European Construction Corp. is unable produce a witness with personal knowledge of the construction project at 143-145 Lexington

