

**Dewinkeleer v Portland Stoneware Packaging, Co.,  
Inc.**

2017 NY Slip Op 32978(U)

August 14, 2017

Supreme Court, Dutchess County

Docket Number: 51982/2016

Judge: Maria G. Rosa

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT - STATE OF NEW YORK  
DUTCHESS COUNTY

Present:

Hon. MARIA G. ROSA

Justice.

\_\_\_\_\_  
SALLY DEWINKELEER and NICHOLAS  
DEWINKELEER,

Plaintiff,

-against-

DECISION AND ORDER

Index No:51982/2016

PORTLAND STONEWARE PACKAGING, CO., INC.,  
CHRISTOPHER PELLETIER, DENNIS RICHMOND,  
BUILDING SYSTEMS INC., JESSICA STUART and  
SCHNEIDER NATIONAL CARRIERS, INC.,

Defendants.

\_\_\_\_\_  
The following papers were read and considered on defendant's motion for preclusion and/or sanctions:

NOTICE OF MOTION  
AFFIRMATION IN SUPPORT  
EXHIBITS A-K

AFFIRMATION IN FURTHER SUPPORT  
EXHIBITS L-P

AFFIRMATION IN SUPPORT

AFFIRMATION IN SUPPORT

AFFIRMATION IN OPPOSITION  
EXHIBITS A-J

REPLY AFFIRMATION

## EXHIBITS A&amp;B

Defendants Dennis Richmond and Natural Building Systems move for an order precluding defendants Portland Stoneware Packaging Co., Inc. (“Portland Stoneware”) and Christopher Pelletier from introducing evidence at trial or in the alternative striking their answer. Movants further seek an order awarding attorney’s fees incurred in filing the instant motion and costs.

This court has the discretion to impose sanctions pursuant to CPLR §3126 for a party’s failure to comply with a discovery order. However, the drastic remedy of striking a pleading for failure to comply with court-ordered disclosure should only be granted where the conduct of the resisting party is shown to be willful and contumacious. See Bonzer v Parke-Davis, 41 AD3d 522 (2<sup>nd</sup> Dep’t 2007). Willful and contumacious conduct can be inferred from the repeated failure over an extended period of time to comply with court orders directing disclosure and the absence of any reasonable excuse for such failures. Id.

Defendants Dennis Richmond and Natural Building Systems, Inc.’s (“moving defendants”) motion is premised upon claims that Portland Stoneware and Pelletier failed to produce evidence and information secured at an April 6, 2017 inspection of a Pontiac driven by defendant Dennis Richmond at the time of the July 11, 2016 motor vehicle accident underlying this litigation. Since the onset of this litigation, there has been significant discussion with the court about the exchange of information downloaded from components of the vehicles involved in the multi-car accident. It has been represented to the court that certain information can be obtained from the vehicles which experts can then use in an attempt to determine potential causes of the motor vehicle accident. On October 18, 2016, a preliminary conference was held before the court. In accordance with discussions at that conference, a preliminary conference order was issued in which the parties agreed to freely exchange all information downloaded from the motor vehicles involved in the subject accident. Various discussions ensued thereafter at court conferences about the type of data that could be downloaded and the method by which it could be exchanged. At a compliance conference held on April 13, 2017, the parties discussed at length the exchange of information downloaded at an inspection of the Pontiac held on April 6, 2017. The court ordered Portland Stoneware to provide the other parties with downloads of all information obtained by its expert at that inspection in a readable form. On May 2, 2016, Portland Stoneware submitted a response in accordance with the court’s order. Such response indicated that it contained all information obtained by its expert in accordance with the court’s April 13, 2017 directive. Thereafter, the moving defendants sent Portland Stoneware a letter indicating that the papers filed electronically on May 2, 2017 contained a copy of the moving defendants’ expert’s previously exchanged download and did not contain the downloaded information Portland Stoneware was required to exchange. Shortly thereafter, the moving defendants sent a letter to this court stating that Portland Stoneware had failed to comply with this court’s directive to provide all electronic and computer information obtained by its expert. The court granted the moving defendants’ leave to make a discovery motion. On May 18, 2017, Portland Stoneware sent the court a letter stating that it had provided copies of all information obtained from the second inspection of the Pontiac including raw data and screen captures from that inspection. The letter further stated that counsel’s office had provided the court all demanded and

ordered information in the formats in which that information exists.

Defendants Richmond and Natural Building Systems, Inc. filed the instant motion on May 31, 2017. Approximately one week later, Portland Stoneware filed an additional discovery response that included a print out of all crash data retrieval information obtained from the April inspection of the Pontiac.

At a June 15, 2017 deposition, Portland Stoneware's expert witness Peter Scalia testified that on April 28, 2017 he e-mailed counsel for Portland Stoneware all the data he had obtained during his examinations of the Pontiac. Based on this information the moving defendant supplemented their motion, emphasizing that counsel was in possession of the outstanding discovery yet failed to produce same while representing to this court that all outstanding discovery had been exchanged.

In opposition to the motion, Portland Stoneware cites law office failure as an excuse for not timely providing discovery responses. Based upon the procedural history of this case, this court's order at the April 13, 2017 conference directing Portland Stoneware to turn over all outstanding electronically downloaded information within three weeks and subsequent misrepresentations to this court that all outstanding discovery had been disclosed, the court finds that law office failure does not provide a reasonable excuse for the failure to abide by the court's discovery order. Notably, Portland Stoneware first complied with its discovery obligations after the moving defendants made the instant application seeking an order of preclusion and/or sanctions. Under the circumstances, the court finds an award of sanctions is appropriate. Accordingly, it is hereby

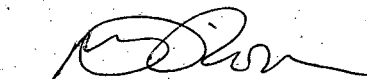
ORDERED that the motion of Defendants Richmond and Natural Building Systems, Inc. is granted to the extent that defendants Portland Stoneware and Christopher Pelletier shall pay defendant's costs and attorney's fees incurred in making the instant application. A party should not have to make a discovery motion to get discovery that is authorized pursuant to Article 31 of the CPLR and has been expressly ordered to be disclosed by the court. Within two weeks of the date of this decision and order, the movants shall submit an affirmation of attorney's fees to the court on notice to Portland Stoneware. Portland Stoneware shall then have two weeks from receipt of the affirmation to lodge any objections to the reasonableness of such fees. If no such objections are raised, movants are hereby granted to submit a proposed order awarding the requested costs and fees. It is further

ORDERED that the motion to strike the pleading or the answer of defendants Portland Stoneware and Christopher Pelletier is denied as the outstanding discovery has been provided and movants fail to establish prejudice from the untimely disclosure. Accordingly, the court finds that the drastic sanction of striking their pleadings is not warranted.

This constitutes the decision and order of the court. The parties are reminded that a compliance conference is scheduled for September 18, 2017 at 9:45 a.m.

Dated: August 14, 2017  
Poughkeepsie, New York

ENTER:



MARIA G. ROSA, J.S.C.

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Pursuant to CPLR §5513, an appeal as of right must be taken within thirty days after service by a party upon the appellant of a copy of the judgment or order appealed from and written notice of its entry, except that when the appellant has served a copy of the judgment or order and written notice of its entry, the appeal must be taken within thirty days thereof.