

**Philadelphia Indem. Ins. Co. v Par Plumbing, Co.,  
Inc.**

2018 NY Slip Op 32508(U)

October 5, 2018

Supreme Court, New York County

Docket Number: 153337/2017

Judge: Gerald Lebovits

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This opinion is uncorrected and not selected for official publication.

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

<p><b>PRESENT:</b> <u>HON. GERALD LEBOVITS</u> <i>Justice</i></p> <p>-----X</p> <p>PHILADELPHIA INDEMNITY INSURANCE COMPANY</p> <p>Plaintiff,</p> <p>- v -</p> <p>PAR PLUMBING, CO, INC.,</p> <p>Defendant.</p> <p>-----X</p>	<p><b>PART</b></p>	<p><b>IAS MOTION 7EFM</b></p> <p><b>INDEX NO.</b> <u>153337/2017</u></p> <p><b>MOTION DATE</b> <u>06/21/2018</u></p> <p><b>MOTION SEQ. NO.</b> <u>001</u></p>
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**DECISION AND ORDER**

The following e-filed documents, listed by NYSCEF document number (Motion 001) 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23

were read on this motion to/for PRECLUDE

*Rosner, Nocera & Ragone LLP*, New York (Hilary E. Wright of counsel), for plaintiff.  
*London Fisher LLP*, New York (Arthur T. Tergesen of counsel), for defendants.

Defendant, Par Plumbing, Co., Inc., moves under CPLR 3126 to strike plaintiff’s complaint or preclude plaintiff from offering any evidence at trial for plaintiff’s supposed failure to provide outstanding written discovery. Alternatively, defendant moves under CPLR 3124 to compel plaintiff to provide outstanding written discovery.

Defendant served plaintiff with its first demand for discovery on June 21, 2017. (*See NY St Cts Electronic Filing [NYSCEF] Doc No. 15, Kramer aff, exhibit B.*) Plaintiff responded on July 10, 2018. (*See NY St Cts Electronic Filing [NYSCEF] Doc No. 15, Kramer aff, exhibit C.*) However, the response was deficient, and defendant renewed its demands in a Supplemental Notice for Discovery and three further letters on September 27, 2017, November 6, 2017 and December 29, 2017. (*See NY St Cts Electronic Filing [NYSCEF] Doc No. 15, Kramer aff, exhibits D, E, F, G.*) Plaintiff did not answer these letters and on March 7, 2018, a Preliminary Conference Order was entered in which plaintiff was ordered to respond to defendant’s Supplemental Notice for Discovery and Inspection by April 5, 2018 and to appear for a deposition on May 23, 2018. (*See NY St Cts Electronic Filing [NYSCEF] Doc No. 15, Kramer*

aff. exhibit H.) On April 18, plaintiff served its response (*See* NY St Cts Electronic Filing [NYSCEF] Doc No. 15, Kramer aff, exhibit I.)

Defendant claims that plaintiff's April 18, 2018, response is deficient and is "merely . . . a stack of irrelevant and unresponsive documents." (*See* NY St Cts Electronic Filing [NYSCEF] Doc No. 14, Kramer aff, ¶ 11.) Therefore, the scheduled deposition did not go forward due to the lack of pertinent discovery. (*See* NY St Cts Electronic Filing [NYSCEF] Doc No. 13, Kramer aff, ¶ 10.) On May 18, 2018, defendant filed this instant motion. (*See* NY St Cts Electronic Filing [NYSCEF] Doc No. 12, Kramer aff.)

#### *CPLR 3126*

CPLR 3126 provides penalties that can be implemented against parties for "refus[ing] to obey an order for disclosure or willfully fail[ing] to disclose information which the court finds ought to be have been disclosed. . . ." Here the parties attended a preliminary conference on March 7, 2018, to discuss discovery issues, and a court order directs plaintiff to comply with defendant's discovery and disclosure requests. Plaintiff's response of April 18, 2018, was deficient and caused defendant to file this motion. However, plaintiff attempted to comply with the court's order, and defendant made no conclusive showing that plaintiff's failure to comply was willful, contumacious, or due to bad faith. Therefore, defendant's motion seeking relief under CPLR 3126 is denied.

#### *CPLR 3124*

Defendant alternatively moves under CPLR 3124 to compel plaintiff to comply with discovery demands. Specifically, defendant demands plaintiff to produce the initial communications between plaintiff and Maxons' Restorations; the identity of any persons that performed work at the location after the accident; communications between plaintiff and persons who performed work following the accident; documents and records related to any damage that happened to the property five years prior to the accident; communications, documents and records of the pipe repair identifying who made the repair; records of restorations performed to unit 3J since 2006; and an accounting of payments made to plaintiff's insured for the alleged damages.

Plaintiff represents in its opposition papers that the discovery response of April 18, 2018, responded to all defendant's discovery demands and letters of September 27, 2017, November 6, 2017, and December 29, 2017. It also claims that the production of more than 700 pages is self-evidently exhaustive with respect to those demands.

Defendant represents that the production of documents cannot be considered by itself as adequate discovery if the entirety of the records demanded is not provided. In particular, plaintiff failed to disclose the records regarding the repairs to the pipe, including the identity of who

repaired it. Lacking the information, defendant was unable to prepare its defense and had to postpone the deposition scheduled for May 23, 2018.

CPLR 3101(a) provides that “[t]here shall be full disclosure of all matter material and necessary in the prosecution or defense of an action, regardless of the burden of proof.” “The phrase ‘material and necessary’ should be ‘interpreted liberally to require disclosure, upon request, of any facts bearing on the controversy which will assist preparation for trial by sharpening the issues and reducing delay and prolixity. The test is one of usefulness and reason.’” (*Friel v Papa*, 869 NYS2d 117 [2008], quoting *Allen v Crowell-Collier Publ. Co.*, 21 NY2d 403, 406, [1968]).

The court is not satisfied from the affidavit of Hilary E. Wright purporting to explain that plaintiff has turned over all necessary responsive records that defendant requested. Although the courts agree that striking plaintiff’s complaint would be a drastic remedy given the circumstances, evidence shows that plaintiff has not obtained all relevant documents. Further documents can be provided by plaintiff and such documents are material with respect to defense preparation.

Specifically, as photographs included in April 18, 2018 discovery response were labeled “repaired piping,” plaintiff must disclose the records related to these repairs. This is an action seeking damages for defendant’s negligence in maintaining or installing the plumbing of the piping system within a property insured by plaintiff. Defendant’s discovery demands require pertinent documents that are necessary to assist defendant in preparing for trial.

In light of the above, defendant’s motion to compel plaintiff to comply with discovery demands is granted.

Continued failure by either party in their discovery obligations, such as responsive documents being produced after either party has represented that no further responsive documents exist, might result in a CPLR 3126 sanction.

Accordingly, it is hereby

ORDERED that plaintiff’s motion to compel is granted only to the extent that plaintiff must produce all responsive non-privileged documents within 30 days; the parties must schedule depositions within 60 days; and the motion is otherwise denied; and it is further

ORDERED that the parties must appear for a compliance conference on January 23,

NYSCEF DOC. NO. 24

RECEIVED NYSCEF: 10/05/2018

2019, at 10:00 a.m., in Part 7, at 60 Centre Street, room 345.

10/5/2018  
DATE



GERALD LEBOVITS, J.S.C.

CHECK ONE:

CASE DISPOSED  
GRANTED

DENIED

NON-FINAL DISPOSITION  
GRANTED IN PART  
SUBMIT ORDER

OTHER

APPLICATION:

SETTLE ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE