

<b>Landusco v Open Loop NYC</b>
2019 NY Slip Op 31248(U)
May 2, 2019
Supreme Court, New York County
Docket Number: 154566/2017
Judge: Robert R. Reed
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**SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY**

**PRESENT: HON. ROBERT R. REED PART 43**

*Justice*

-----X	INDEX NO.	154566/2017
PETER LANDUSCO,		
Plaintiff,		03/18/2018, 06/01/2018, 09/18/2018,
- v -	MOTION DATE	06/17/2019
OPEN LOOP NYC, MICHAEL JOHNSON		
Defendant.	MOTION SEQ. NO.	002 003 004 005

**DECISION AND ORDER**

-----X

The following e-filed documents, listed by NYSCEF document number (Motion 002) 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42  
were read on this motion to STRIKE PLEADINGS.

The following e-filed documents, listed by NYSCEF document number (Motion 003) 44, 45, 46, 47, 48, 49, 60, 61, 62, 63, 64, 66, 67, 69, 70, 71  
were read on this motion for DISCOVERY.

The following e-filed documents, listed by NYSCEF document number (Motion 004) 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 97, 98, 99, 100, 101, 102, 103  
were read on this motion to VACATE/STRIKE - NOTE OF ISSUE/JURY DEMAND/FROM TRIAL CALENDAR.

The following e-filed documents, listed by NYSCEF document number (Motion 005) 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118  
were read on this motion to RELEASE RECORDS.

In this personal injury action, motion sequences 002, 003, 004, and 005 are consolidated for disposition and are granted in part and denied in part for the reasons stated below.

In motion sequence 002, defendants move, pursuant to CPLR 3126 (3) and CPLR 3215, to strike plaintiff's complaint and for default judgment on defendants' counterclaims. The motion to strike plaintiff's complaint is withdrawn as moot, because both parties in a status conference dated February 1, 2018 agreed that defendants would withdraw the branch of its motion seeking to strike plaintiff's complaint. (See NYSCEF document number 43). In order to

successfully oppose a motion for leave to enter a default judgment based upon a plaintiff's failure to serve a reply to a counterclaim, a plaintiff must establish a reasonable excuse for the delay and demonstrate a meritorious defense (*see, e.g., Twersky v. Kasaks*, 24 A.D.3d 657). In the matter at bar, plaintiff has failed to proffer any excuse for his failure to serve a reply to defendants' counterclaims. Accordingly, the portion of the motion for leave to enter a default judgment upon plaintiff's default in replying to the counterclaims is granted with regard to liability only, and without prejudice to plaintiff's prosecution of the complaint.

In motion sequence 003, plaintiff seeks an order (1) to compel the deposition of the witness "Vincent Johnson," or (2) in the alternative, to preclude defendants from testifying at the time of trial; and (3) awarding costs and fees to plaintiff's attorney for making the application. Defendants cross-move, pursuant to CPLR 3124 and 22 NYCRR 130-1.1, (1) to compel production of documents and information responsive to document requests 1, 2, 4, 5, 6, 9, and 12-16, as set forth in their first request for the production of documents, dated October 3, 2017, and required to have been produced no later than March 1, 2018, pursuant to this court's conference order dated February 1, 2018, and, if plaintiff fails to do so, to preclude plaintiff from introducing at trial or on summary judgment, or in connection with any other matter in this case, any document, photograph, recording or any piece of information not produced by plaintiff to defendants as of the date provided in the order deciding this cross-motion; and (2) awarding defendants' costs and other monetary sanctions. With regard to plaintiff's motion to compel, defendants explain that the witness identified in plaintiff's motion as Vincent Johnson is likely in fact "Vinnie Curtin," a former manager at Open Loop. Additionally, defendants state that Mr. Curtin is no longer an employee of Open Loop and Open Loop is now out of business. A party cannot be compelled to produce a witness over which it has no control (*see Schneider v.*

*Melmarkets, Inc.*, 289 A.D.2d 470). Plaintiff has confirmed in its reply to defendants' cross-motion that Mr. Curtin's last known address was provided. Defendant has successfully shown that the witness identified by plaintiff is no longer under defendants' current control making him a non-party witness. As a last known address has been provided, defendants have met their obligation with respect to Mr. Curtin. Accordingly, plaintiff's motion is denied in its entirety.

Regarding defendants' cross-motion, for this court to impose the drastic remedy of preclusion, the court must determine that the offending party's failure to comply with discovery demands was willful, deliberate and contumacious (*see* CPLR 3126[2]). In the matter at bar, plaintiff's lack of diligence in furnishing some of the requested materials cannot be said to rise to this level. Thus, the court exercises its discretion not to preclude testimony. Instead, the alternative relief requested -- to compel discovery responses -- is granted. Additionally, the branch of defendants' motion seeking costs and sanctions, is denied. Costs upon a motion may be awarded to any party in the discretion of the court. (*See* CPLR 8106). The court exercises its discretion not to sanction plaintiff's counsel. It cannot be said that plaintiff's counsel's conduct was "undertaken primarily to delay or prolong the resolution of this litigation, or to harass or maliciously injure another" (22 NYCRR 130-1.1[c] [2]). Accordingly, defendants' motion to compel is granted to the extent that, within 20 days, plaintiff is directed to file complete responses to the requested items, to provide an affidavit attesting that the items requested are not in plaintiff's custody or control, or to provide valid reasons why defendants would not be entitled to such items (with a detailed privilege log, if any privilege is asserted). Defendants' request for costs and sanctions is denied.

In motion sequence 004, defendants move, pursuant to 22 NYCRR 202.21(e) and 22 NYCRR 130-1.1, (1) to grant defendant Open Loop NYC and defendant/counterclaim plaintiff

Michael Johnson's motion to vacate the note of issue, and (2) to award reasonable attorneys' fees and costs incurred in connection with the filing of this motion. Plaintiff opposes, arguing that they have complied with defendants' discovery demands, and that in the event additional discovery is required, it can be provided without striking the action from the trial calendar.

A court may vacate a note of issue where it appears that a material fact set forth therein is incorrect – and this is particularly true when the representation regards whether discovery has been completed (*see* 22 NYCRR 202.21(e); *Rivers v Bimbaum*, 102 A.D.3d 26; *Gomes v Valentine Realty LLC*, 32 A.D.3d 699; *Herbert v Sivaco Wire Corp.*, 1 A.D.3d 144). Defendants allege that plaintiff has made several material misrepresentations to the court in its note of issue, including statements that all pleadings have been served and that there are no outstanding discovery requests. Contrary to what plaintiff attested to in his note of issue, defendants note that plaintiff has failed to respond to defendants' counterclaims and defendants' motion for default judgment. Additionally, defendants stated that plaintiff served a subpoena for production of documents and for defendants to appear at a deposition for a date six weeks after the note of issue was filed. Defendants have also served a subpoena on plaintiff's employer to appear for a deposition, and for production of documents. In the court's assessment, it is clear that discovery remains outstanding. As such, the note of issue is vacated, as this case is manifestly not ready for trial. Accordingly, defendants' motion to vacate the note of issue is granted. Additionally, the branch of defendants' motion seeking costs and sanctions is granted, inasmuch as defendant should have never been required to make this motion to vacate the note of issue with both parties aware of the outstanding discovery requests. The court, exercising its discretion, awards to defendants \$200 to defray the fees and costs incurred in having been required to make this motion (*see* CPLR 8106; *see also Greenspan v Rockefeller Ctr. Mgt. Corp.*, 268 A.D.2d 236, 237

[holding that the motion court's award of costs on the motion was within its discretion under CPLR 8106, which does not require any finding of frivolous conduct]).

In motion sequence 005, defendants move for an order to unseal the record from the criminal matter involving plaintiff, Peter Landusco, captioned *The People of the State of New York v Peter Landusco*, 2016NY055285 (Criminal Court of the City of New York, County of New York). Defendants have made no showing as to the necessity of such extraordinary intervention by this court. Accordingly, defendants' motion to unseal the record from the criminal matter involving plaintiff is denied.

Accordingly, it is

ORDERED that, with regard to motion sequence 002, the portion of defendant's motion seeking to strike the complaint is withdrawn pursuant to the status conference order dated February 1, 2018; and it is further

ORDERED that the portion of defendants' motion sequence 002 seeking a default on the counterclaims is granted as to liability only and without prejudice to plaintiff's prosecution of the complaint; and it is further

ORDERED that motion sequence 003 is denied in its entirety; and it is further

ORDERED that defendants' cross-motion with respect to motion sequence 003 is granted to the extent that, within 20 days, plaintiff is directed to file complete responses to requested items (1, 2, 4, 5, 6, 9, and 12-16), to provide an affidavit attesting that the items requested are not in plaintiff's custody or control, or to provide a valid reason as to why defendant would not be entitled to such items (with a detailed privilege log, if any privilege is asserted); and it is further

ORDERED that the portion of defendants' cross-motion with respect to motion sequence 003 seeking costs and sanctions is denied; and it is further

ORDERED that motion sequence 004 to vacate the note of issue is granted, and the note of issue is vacated and the case is stricken from the trial calendar; and it is further

ORDERED that all further discovery in this matter shall be completed within 60 days from service of a copy of this order with notice of entry; and it is further

ORDERED that, within 20 days from the entry of this order, movant shall serve a copy of this order with notice of entry on all parties and upon the Clerk of the General Clerk's Office (60 Centre Street, Room 119), who is hereby directed to strike the case from the trial calendar and make all required notations thereof in the records of the court; and it is further

ORDERED that, upon completion of discovery as hereinabove directed, the plaintiff shall cause the action to be placed upon the trial calendar by the filing of a new note of issue and certificate of readiness (for which a fee shall be imposed), to which shall be attached a copy of this order [the plaintiff shall move to reinstate the note of issue as provided in Uniform Rule 202.21 (f)]; and it is further

ORDERED that the portion of defendants' motion, in motion sequence 004, seeking costs and sanctions is granted and that plaintiff is directed to pay to defendant \$200 forthwith; and it is further

ORDERED that motion sequence 005 is denied in its entirety; and it is further

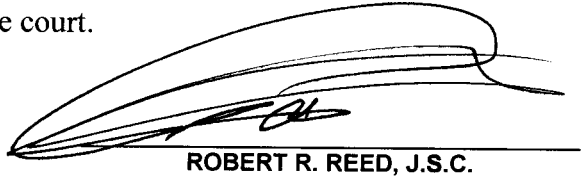
ORDERED that the new note of issue date is August 5, 2019; and it is further

ORDERED that counsel are directed to appear for a conference in Part 43, located at 60 Centre Street, Room 412, on June 13, 2019 at 11:00 a.m.; and it is further

ORDERED that the Clerk is directed to mark his files accordingly.

This constitutes the decision and order of the court.

5/2/2019  
DATE

  
ROBERT R. REED, J.S.C.

CHECK ONE:

CASE DISPOSED

GRANTED

SETTLE ORDER

INCLUDES TRANSFER/REASSIGN

DENIED

NON-FINAL DISPOSITION

GRANTED IN PART

SUBMIT ORDER

FIDUCIARY APPOINTMENT

OTHER

REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: