

<b>Colson v Riverside Ctr. Parcel 2 Bit Assoc., LLC</b>
2019 NY Slip Op 33467(U)
October 29, 2019
Supreme Court, Bronx County
Docket Number: 20626/2015
Judge: Laura G. Douglas
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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF BRONX, PART 11

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CORNELL COLSON,

**Index No. 20626/2015**

Plaintiff,

**DECISION/ORDER**

-against-

RIVERSIDE CENTER PARCEL 2 BIT ASSOCIATES, LLC  
and TISHMAN CONSTRUCTION CORPORATION,

**Present:**  
**Hon. Laura G. Douglas**  
**J.S.C.**

Defendants.

-----X  
RIVERSIDE CENTER PARCEL 2 BIT ASSOCIATES, LLC  
and TISHMAN CONSTRUCTION CORPORATION,

Third-Party Plaintiffs,

-against-

FIVE STAR ELECTRIC CORP.,

Third-Party Defendant.

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Recitation, as required by Rule 2219(a) of the C.P.L.R., of the papers considered in the  
review of these motions to dismiss complaint and/or preclude and related relief:

<u>Papers</u>	<u>Numbered</u>
Notice of Motion by Defendants/Third-Party Plaintiffs Riverside Center Parcel 2 Bit Associates, LLC and Tishman Construction Corporation, Good Faith Affirmation of Bolam Kim, Esq. dated June 10, 2019, Affirmation of Bolam Kim, Esq. dated June 10, 2019 in Support of Motion, and Exhibits (“A” through “V”).....	1
Affirmation of Mark Muccigrosso, Esq. dated August 9, 2019 in Opposition to Motions and Exhibits (“A” and “B”).....	2
Reply Affirmation of Bolam Kim, Esq. dated August 14, 2019.....	3
Third-Party Defendant’s Notice of Motion, Good Faith Affirmation of Deirdre Egan, Esq. dated June 20, 2019, Affirmation of Deirdre Egan, Esq. dated June 21, 2019 in Support of Motion, and Exhibits (“A” through “M”).....	4

*Upon the foregoing papers and after due deliberation, the Decision/Order on this motion is as follows:*

Defendants/Third-Party Plaintiffs Riverside Center Parcel 2 Bit Associates, LLC and Tishman Construction Corporation (collectively, "Riverside") seek an order pursuant to CPLR § 3126 and CPLR Rule 3124 dismissing the plaintiff's complaint as a penalty for his purported failure to provide certain disclosure or, alternatively, precluding the plaintiff from offering evidence at trial contained in said discovery demands or, alternatively, compelling the plaintiff to provide the requested items. Third-Party Defendant Five Star Electric Corp. ("Five Star") separately moves for similar relief on related grounds. The motions are granted as ordered below and are denied in all other respects.

The plaintiff seeks monetary damages for personal injuries allegedly sustained on June 4, 2014 at his work site when he "caught his foot on a piece of copper tubing or a piece of metal holding a pipe causing [him] to twist his right knee" (*see* Plaintiff's Verified Bill of Particulars, paragraph "42", attached as Exhibit "A" to Kim Affirmation in Support).

Riverside and Five Star seek authorizations permitting the release of the plaintiff's medical records and workers' compensation records for 14 prior accidents spanning the period of 2001-2014, as well as authorizations to obtain the non-privileged portion of the litigation file for the plaintiff's prior lawsuit bearing index number 303752/2008. These items were demanded in discovery notices dated December 1, 2015 and November 10, 2017 (which included records of another accident in 2014 and the plaintiff's employment records after the alleged accident of June 4, 2014). By discovery notice dated August 4, 2016, Riverside sought authorizations for the plaintiff's records from his primary care physician and medical records and films related to a subsequent bicycle accident. The plaintiff agreed to provide an affidavit "regarding the history note referenced in the Thermodynamics Physical Rehab records pertaining to a bike incident" and an authorization "if the plaintiff sought further medical treatment for a pipe incident" (*see* Kim Affirmation in Support, Exhibit "L"). Riverside served another discovery notice dated April 17, 2019 requesting that the plaintiff furnish authorizations to obtain his medical records from City MD and records related to the plaintiff's chronic kidney disease and arthritis.

This Court ordered the plaintiff to provide a response to these discovery notices on three occasions, first on December 10, 2018, then on January 17, 2019, and again on February 25, 2019. The plaintiff first responded to these court orders in a response dated April 30, 2019, which simply raised objections to the requested discovery and did not include an affidavit regarding a bicycle

accident. The plaintiff made the same objections in discovery responses dated May 7, 2019 and May 28, 2019. The plaintiff concedes that he first provided any of the items requested on July 26, 2019, some 1½ - 3½ years after several of the notices and some 7 months after this Court's initial order directing a response (*see* Muccigrosso Affirmation, paragraphs "4" and "5"). It is a proper exercise of discretion to penalize a party for its dilatory conduct in providing discovery responses, even to the extent of striking the offending party's pleading (*see* *Watson v. City of New York*, 157 AD3d 510 [1<sup>st</sup> Dept 2018]), especially when, as is the case here, the party ignored multiple court orders in failing to respond to the various demands (*see* *McHugh v. City of New York*, 150 AD3d 561 [1<sup>st</sup> Dept 2017]). Rather than penalizing the plaintiff in such manner, the Court will instead allow the plaintiff a final opportunity to provide the requested items. In any event, the plaintiff has already provided authorizations to obtain the workers' compensation records for a handful of the prior workers' compensation cases and medical records (*see* Muccigrosso Affirmation in Opposition, Exhibit "B").

Finally, a plaintiff waives the physician-patient privilege attached to prior injuries only for injuries affirmatively placed in controversy, including instances where the plaintiff has alleged an aggravation or exacerbation of prior injuries (*see* *McGlone v. Port Authority of New York & New Jersey*, 90 AD3d 479 [1<sup>st</sup> Dept 2011] and *Rega v. Avon Products, Inc.*, 49 AD3d 329 [1<sup>st</sup> Dept 2008]). Here, Riverside and Five Star correctly argue that the plaintiff has opened the door to such disclosure by making a claim for "exacerbation and aggravation of any and all degenerative conditions that were asymptomatic at the time of the accident" in his verified bill of particulars dated June 10, 2015. The plaintiff's contention that all exacerbations and aggravations are limited to the heading of "RIGHT KNEE" (*see* Muccigrosso Affirmation, paragraph "3") is unavailing, since the bill of particulars lists exacerbations and aggravations twice - first under the RIGHT KNEE heading as "Exacerbation and Aggravation of Anterior Cruciate Ligament" and again later as an all-encompassing "Exacerbation and Aggravation of any and all degenerative conditions that were asymptomatic at the time of the accident". In addition, the bill of particulars later states "Plaintiff's injuries were asymptomatic prior to the date of accident and/or symptomatic and said accident has aggravated or exacerbated either an asymptomatic condition or less symptomatic condition" and "Plaintiff will require future surgeries to include but not limited to right knee".

Accordingly, it is hereby

ORDERED that the plaintiff shall furnish fresh authorizations to obtain the records

previously objected to no later than 30 days following service of a copy of this Order with notice of entry.

This constitutes the Decision and Order of this Court.

Bronx, New York

October 29, 2019



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HON. LAURA G. DOUGLAS

J.S.C.