

**Michael Anthony Contr. Corp. v Queens N.Y. Realty
LLC**

2019 NY Slip Op 35272(U)

December 3, 2019

Supreme Court, Nassau County

Docket Number: Index No. 604986/2014

Judge: Jerome C. Murphy

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publication.

**SUPREME COURT : STATE OF NEW YORK
COUNTY OF NASSAU**

PRESENT:

**HON. JEROME C. MURPHY,
Justice.**

MICHAEL ANTHONY CONTRACTING CORP.,

Plaintiff,

- against -

**QUEENS N.Y. REALTY LLC, MIDRE CONTRACTING
CORP., ACTION STORE FRONTS INC., ROMAN IRON
WORKS INC., MAX HOROWITZ & SON INC.,
PRIME LIGHT ELECTRICAL CONSTRUCTION
MAINTENANCE INC., and SURETEC INSURANCE
COMPANY,**

Defendants

**QUEENS N.Y. REALTY LLC, on behalf of itself and as
subrogee of all other persons similarly situated as trust
fund beneficiaries of Lien Law Trusts of third-party
defendant Michael Anthony Contracting Corp., and
Benjamin Mason, M.D.,**

Third-Party Plaintiffs,

- against -

**MICHAEL ANTHONY CONTRACTING CORP.,
MICHAEL PERNA, HYMAN HAYES ASSOCIATES,
LLC, MYLES HYMAN, M/E ENGINEERING, P.C.,
F. JOSEPH STRAUB, P.E., HIG SERVICES, INC.,
LONG ISLAND CONCRETE INC., HART ROOFING
& WATERPROOFING, INC., ACTION STORE
FRONTS INC, ROMAN IRON WORKS, INC.,
MAX HOROWITZ & SON INC., and
JOHN DOES #1-10, inclusive, as those persons
and entities having an interest in the trust funds received,**

TRIAL/IAS PART 13

Index No.: 604986-14

Motion Date: 10/4/19

Sequence Nos.: 010

**MOD
DECISION AND ORDER**

or to be received by Michael Anthony Contracting Corp.,
for the improvement of the property located at 105-12
101st Avenue, Queens County, New York (a/k/a Block
9423, Lot 6 on the Land and Tax Map of Queens County,
New York),

Third-Party Defendants.

The following papers were read on this motion:

Sequence No. 010:

Notice of Motion, Affirmation and Exhibits.....	1
Affidavit in Opposition and Exhibits.....	2
Affirmation in Reply and Exhibits.....	3

PRELIMINARY STATEMENT

In Sequence No. 010, Defendant, Queens N.Y. Realty LLC and third-party plaintiff, Benjamin Mason, M.D. bring this application for an Order; a) pursuant to CPLR §3216, striking complaint, reply to counterclaims, and third party answer of Michael Anthony Contracting Corp. and Michael Perna; b) pursuant to CPLR §3216, dismissing the complaint; and c) for such other and further relief as to this Court deems just and proper. Opposition and reply to this application has been submitted.

BACKGROUND

Plaintiff commenced this action by filing a Summons and Complaint on September 23, 2014, for monies claimed to be owed for the construction of a medical center at 105-12 101st Street, Jamaica, New York (Exh. "B"). Queens N.Y. Realty LLC filed its Answer on September 23, 2014 (Exh. "C"). A Third Amended Third-Party Complaint was filed against plaintiff, the project architect, and the subcontractors on the project (Exh. "D").

Michael Perna, the principal of Michael Anthony Contracting Corp. ("Michael Anthony") testified at a deposition on February 6, 2018, February 15, 2018, and March 6, 2018. On November 20, 2018, defendant/third-party plaintiff Queens N.Y. Realty, LLC ("Queens N.Y.") and third-party plaintiff Benjamin Mason, M.D. ("Dr. Mason") served post-deposition discovery demands (Exh. "E"). Movant claims that, in response, Michael Anthony and Michael Perna sent a CD containing

the marked exhibits from Dr. Mason's deposition. On March 8, 2019, counsel sent an email to plaintiff's counsel requesting responses to the demands made at Mr. Perna's deposition. Counsel for plaintiff responded that some of the documents were sent or don't exist (Exh. "G").

After further efforts to obtain the documents, counsel for Queens N.Y. and Dr. Mason corresponded to the Court on August 15, 2019, advising of the difficulty with discovery, which resulted in a letter from the Court dated August 27, 2019, authorizing this discovery motion (Exh. "A").

By this motion Queens N.Y. and Dr. Mason seek the strike the Complaint and Reply to Counterclaim.

Counsel for plaintiffs submits in opposition a copy of their correspondence dated August 18, 2019, in response to the August 15, 2019 letter from Queens N.Y. and Dr. Mason (Exh. "B"). It states that "the vast majority of documents requested . . . were already provided." The post-deposition demand was for 40 items. The letter states that ". . . as I recall, items 6, 8, 12, 14, 19, 20, 22, 29, 37 and 38 were previously provided. Number 1 has been provided. Number 5 documents are e-filed and readily available to counsel. Numbers 39 and 40 are irrelevant to this matter. . . [i]tems Nos. 18, 29 and 30 would appear not to exist and are only subject to testimony."

In reply, counsel for Queens N.Y. and Dr. Mason asserts that plaintiff's counsel is referring to a November 10, 2015 Notice of Discovery and Inspection, which he acknowledges that plaintiff has responded to. The demands made at the deposition of Mr. Perna were made by counsel's predecessor, Jeffrey Benjamin, Esq. Mr. Benjamin submitted an affidavit attesting to the fact that he never received a response to the post-deposition demands, and counsel for movant also asserts that he is the party who served the post-deposition Demands, and has not had a response.

Counsel claims that plaintiff's counsel's claim that he provided a response to the post-deposition demands on September 19, 2019, after the filing of this motion (Exh. "D"). The flash drive referred to in the correspondence does not contain a formal response to the post-deposition demands, and it is therefore impossible to know if Michael Anthony or Michael Perna are in possession of documents which do not appear on the flash drive. He further claims that there are approximately twenty-seven demands are without response.

Queens N.Y. and Dr. Mason contend that the actions of plaintiff and Mr. Perna in failing to respond to the post-deposition demands are willful and contumacious, thereby warranting dismissal of the Complaint. Of course, striking a pleading is a drastic remedy, which is contrary to the generally accepted principle, that matters are best resolved on the merits.

“The willful and contumacious character of a party's conduct may be inferred from the party's repeated failure to comply with court-ordered discovery, and the absence of any reasonable excuse for those failures, or a failure to comply with court-ordered discovery over an extended period of time” (*New York Timber, LLC v. Seneca Cos.*, 133 A.D.3d 576, 577[2d Dept.2015]).

The primary action appears to be for the recovery of an unpaid balance \$168,245.60, and \$498,800.00 for change orders. Among the items sought is proof of service of a bid by plaintiff to Queens N.Y. for the performance of this work. It is impossible to know what is contained on the flash drive. Queens N.Y. and Dr. Mason are to specifically identify which of the 40 items on the post-deposition notice that they do not have, within 10 days of receipt of this Decision and Order. Plaintiff is directed to provide formal responses to those open demands within 20 days of receipt of the identified items.

Plaintiff will be automatically precluded from offering at time of trial any documentation demanded and not provided, by Queens N.Y. and Dr. Mason without the need for further motion. In the event that they are not in possession of any such documentation, they are directed to provide an affidavit to that effect, also within those 20 days. This 2014 matter is scheduled for trial on February 24, 2020.

To the extent that requested relief has not been granted, it is specifically denied.

This constitutes the Decision and Order of the Court.

Dated: Mineola, New York
December 3, 2019

ENTER:


JEROME C. MURPHY
J.S.C.

ENTERED

DEC 04 2019

NASSAU COUNTY
COUNTY CLERK'S OFFICE

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