

Sefina Indus. Ltd. v Tishman Constr. Corp. of N.Y.
2020 NY Slip Op 32329(U)
July 16, 2020
Supreme Court, New York County
Docket Number: 160375/2018
Judge: Andrea Masley
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: <u>HON. ANDREA MASLEY</u>	PART	IAS MOTION 48EFM
	<i>Justice</i>	
-----X	INDEX NO.	<u>160375/2018</u>
SEFINA INDUSTRIES LIMITED,	MOTION DATE	_____
Plaintiffs,	MOTION SEQ. NO.	<u>002, 003, 004, 005, 006, 007</u>
- v -		
TISHMAN CONSTRUCTION CORPORATION OF NEW YORK et al,	DECISION + ORDER ON MOTION	
Defendant.		
-----X		

MASLEY, J.:

These six motions concern the obstructionist behavior of defendant Tishman Construction Corporation of New York (Tishman) during discovery. Tishman has repeatedly failed to honor its discovery obligations at the expense of the other parties in this action in violation of four court orders; a failure of such variety and scope that this court has rarely if ever seen before. Accordingly, Tishman's failure to comply with this order will result in the most serious consequences.

I. Background

Defendant Tishman entered into a Construction Management Agreement (CMA) with nonparty Riverside Center Site Owner, LLC (Owner). (NYSCEF Doc. No. [NYSCEF] 42, Amended Complaint ¶¶ 12.) Pursuant to the CMA, Tishman agreed to perform services resulting in the construction of a 43-story residential tower located at 1 West End Avenue, New York, N.Y. (Project). (*Id.* ¶¶ 12.) Tishman allegedly was entitled to receive payment from a separate fund created by the Owner in excess of \$7 million for increases in the cost of work on the Project. (*Id.* ¶¶ 18.) These increases, as contemplated by the parties, accounted for nonperformance of subcontractors and the

costs of curing subcontractors' defects. (*Id.* ¶ 18.) If the fund remained intact by the completion of the Project, a certain amount would be paid to Tishman. (*Id.* ¶ 19.)

Tishman contracted with plaintiff Sefina Industries Limited (Sefina) to complete the Project (the Subcontract). (*Id.* ¶ 22.) Sefina allegedly performed the terms and conditions of the Subcontract. (*Id.* ¶ 24.) Nevertheless, the Project experienced so many delays and cost increases that the Owner commenced an action against Tishman on October 13, 2017 (Index Number 65634/2017) (Owner Action). (*Id.* ¶¶ 29-30.) The Owner sued Tishman for breach of contract and Tishman counterclaimed for breach of contract. (*Id.* ¶¶ 33-34.) On May 10, 2018, the Owner and Tishman executed and filed a stipulation of discontinuance in the Owner Action. (*Id.* ¶ 34.) As a result, Tishman allegedly abandoned its obligations to exhaust its remedies with the Owner on behalf of Sefina and the other subcontractors. (*Id.* ¶ 35.) Tishman also allegedly failed to pay Sefina approximately \$3.8 million in breach of the Subcontract. (*Id.* ¶ 40.)

Sefina filed a "Notice under Mechanic's Lien Law" with respect to the premises of the Project. (*Id.* ¶ 47.) Subsequently, on November 7, 2018, Sefina commenced this action for breach of the Subcontract against Tishman, foreclosure of the mechanics lien, and certain other claims against the other subcontractors including Almar Plumbing and Heating Corp. (Almar), Five Start Electric Corp. (Five Star), R & S United Services, Inc. (R&S), and W&W Glass, LLC (W&W). Tishman counterclaimed against Sefina and cross-claimed against the other subcontractors; the other subcontractors filed cross claims against Tishman. (NYSCEF 334, McDermott aff ¶¶ 2-7.)

On June 10, 2019, this court held a preliminary conference with the parties and set a schedule for discovery. (NYSCEF 90, Preliminary Conference Order.) The court directed the parties to serve demands for discovery and inspection within 30 days from

the conference. (*Id.*) Responses were to be served within 45 days of the demand's receipt. (*Id.*) The court further directed that the parties serve interrogatories within 30 days of the conference and their responses within 45 days of receipt. (*Id.*) Tishman failed to comply with this order by failing to respond to interrogatories and demands for discovery and inspection, and, by failing to serve its own demands for discovery and inspection within that time period.

Accordingly, the court held a second conference on August 28, 2019. Again, Tishman was ordered to respond to plaintiff and the other defendants' discovery demands and interrogatories. (NYSCEF 114, August 28, 2019 Status Conference Order.) Tishman was directed to start its rolling production by September 30, 2019. (*Id.*)

On December 11, 2019, the parties appeared before the court to resolve outstanding discovery issues. (NYSCEF 140, December 11, 2019 Status Conference Order.) The court specifically documented that "[a]ll parties, but most significantly defendant Tishman (which has failed to respond to numerous demands, many dating back nearly an entire year), shall serve all outstanding responses to previously-served demands by 12/24/19, final or else waived and subject to penalties as may be appropriate." (*Id.* ¶ 4.) To remedy Tishman's noncompliance, the court directed that Tishman "produce the Builders Risk Policies and submitted claims relating to those policies, the subcontractor default insurance policy and related submitted claims, or advise that those documents are not in its custody or reasonable control by 1/10/20." (*Id.* ¶ 9.) Tishman was further directed to produce documents identified in a deficiency letter sent by W&W on December 10, 2019 because Tishman had previously failed to produce this discovery. (*Id.* ¶ 10.)

To remedy and deter further noncompliance on Tishman's part, the court implemented comprehensive protocols. For instance, this court directed that

"[a]ll outstanding production to previously served demands shall be completed on a rolling basis (meaning that the parties will produce documents in batches as the review of those documents are completed and the court will entertain motions for sanctions, costs, or other penalties if a party 'document dumps' on or near the end-date for production after the following status conference) not later than 2/10/20, FINAL with all privilege logs and CD Rule 11-b certifications as well as *Jackson* affidavits of person(s) with actual knowledge stating the following:

- (a) where the responsive documents/records/files were kept and/or were likely to be kept;
- (b) what efforts, if any, were made to preserve such documents/records/files;
- (c) the person(s) or entities which had control over those files at all relevant times and, if not ... when, and who/what had control over those documents at each given time;
- (d) whether the documents/files were lost or destroyed and, if so, the manner(s) and date(s) of any loss or destruction;
- (e) whether a search was conducted in every location where these files were or are likely to be found; who or what entity conducted those search(es); all dates on which all searches were conducted; and
- (f) any other information pertinent to the party's inability to provide the responsive documents (*see Jackson v City of New York*, 185 AD2d 768 [1st Dept 1992]); ...

The parties shall further execute, not later than 45 days before the end-date for fact discovery, its CD Rules 11-e affidavits and affirmation of compliance with continuing discovery obligations pursuant to the Part Rules for each individual discovery request" (*Id.* ¶¶ 7-8.)

Nevertheless, Tishman failed to comply with this order. Accordingly, the court held another conference on March 10, 2020 to address Tishman's noncompliance.

(NYSCEF 322, March 20, 2020 Conference Order.) The court noted that “any responses/productions untimely made pursuant to the court’s 12/12/19 dated order are waived” because Tishman had not served demands pursuant to the preliminary conference order. (*Id.*) Because the other parties raised various issues concerning Tishman’s compliance with prior court orders, the court directed that “Parties may move by OSC with regard to perceived deficiencies or noncompliance with 12/12/19 order.” (*Id.* ¶ 2.)

II. The Motions to Compel Discovery from Tishman

Motion Sequence Numbers 002 and 004 are to compel discovery from Tishman and they are consolidated here for disposition.

A. Motion Sequence Number 002

In motion sequence number 002, Sefina, Almar and Five Star move, pursuant to CPLR 3214, to compel defendant Tishman to (1) comply with all prior court orders; (2) identify each listed back charge for Five Star identified in Tishman’s First Amended Answers to Interrogatories dated January 22, 2020 by the respective back charge number assigned by Tishman; (3) identify each listed back charge for Sefina identified in Tishman’s First Amended Answers to Interrogatories dated January 22, 2020 by the respective back charge number assigned by Tishman; (4) identify all additional damages and additional costs due to delays alleged to have been caused by Sefina, Almar and Five Star; (5) respond to the Demands for Electronically Stored Information (ESI) served by Sefina, Almar and Five Star on September 23, 2019; (6) produce all documents constituting claim records, claims, correspondence, schedule analyses and related documents, as well as internal documents and communications regarding such claims that Tishman submitted under the Builder’s Risk Policy for the Project; (7)

produce all documents constituting claim records, claims, correspondence, schedule analyses and related documents, as well as internal documents and communications regarding such claims that Tishman submitted under the Subcontractor Default Insurance Policy for the Project; (8) produce all documents supporting a \$42 million Notice of Mechanic's Lien filed by Tishman against the Project's real property, including the documents which formed the basis for "Tishman's Request for Additional General Conditions Due to Excusable Delays One West End Avenue Riverside Center Site 5"; (9) produce all documents supporting the allegations asserted by Tishman in the Verified Answer with Counterclaim filed in the Owner Action; and (10) pay costs of this motion.

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 words, 'material and necessary', are . . . to 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. (*Forman v Henkin*, 30 NY3d 656, 661 [2018] [internal quotation marks and citations omitted].)

The following discovery is relevant to this action.

1. Prior Orders

Tishman is directed to comply with all prior orders including the directive to supply privilege logs with CD Rule 11-b certifications and *Jackson* affidavits of person(s) with actual knowledge if Tishman cannot comply with any of the document demands. Tishman has 30 days from the date of court's entry of this order on NYSCEF to comply with all prior orders of this court.

2. Back Charges for Five Star

Tishman argues that it provided a list of back charges concerning Five Star albeit “[t]he ... 11 [back charges] which are at the beginning of the list are actually Almar back charges and were mistakenly included.” (NYSCEF 291, Rosen aff ¶ 4.) The movants contend that all these back charges concern Almar, not Five Star. (NYSCEF 309, McDermott reply aff ¶ 6.) Tishman’s argument is unacceptable and Tishman is directed to *correctly* identify each listed back charge for defendant Five Star identified in Tishman’s First Amended Answers to Interrogatories dated January 22, 2020 by the respective back charge number assigned by Tishman. Tishman has 30 days from the date of court’s entry of this order on NYSCEF to comply.

3. Back Charges for Sefina

Tishman is directed to identify each listed back charge for Sefina identified in Tishman’s First Amended Answers to Interrogatories dated January 22, 2020 by the respective back charge number assigned by Tishman. Tishman has 30 days from the date of court’s entry of this order on NYSCEF to comply.

4. Damages Allegedly Caused by Sefina, Almar and Five Star

With respect to this request, Tishman asserts that it “will supplement its discovery responses when it has completed its analysis of delay on the project.” (NYSCEF 291, Rosen aff ¶ 6.) Again, this assertion is unacceptable. Tishman is directed to identify all additional damages and additional costs due to delays alleged caused by Sefina, Almar and Five Star. Tishman has 30 days from the date of court’s entry of this order on NYSCEF to comply.

5. Demands for ESI

Tishman asserts that its responses to the ESI demands are the subject of a different motion where Tishman seeks an extension of time to respond. (NYSCEF 291, Rosen aff ¶ 7.) Because these demands allegedly require Tishman to review and produce 134,000 documents, Tishman asked to produce them by March 30, 2020 instead of the initial deadline of February 10, 2020. (*Id.*) Nevertheless, Tishman states its “intent to produce the documents responsive to each parties’ demands on a rolling basis as the review is complete.” (*Id.* ¶ 14.) As of the date of this decision and order, Tishman has received even more time than it requested to review these documents. Accordingly, Tishman is directed to respond to the Demands for ESI served by Sefina, Almar and Five Star on September 23, 2019. Tishman has 30 days from the date of court’s entry of this order on NYSCEF to comply.

6. Documents Related to Builder’s Risk Policy Claims

Although Tishman asserts that it provided documents related to the Builder’s Risk Policy claims, movants contend that Tishman did not even provide the correct Builder’s Risk Policy. (NYSCEF 291, Rosen aff ¶¶ 16-17; NYSCEF 309, McDermott reply aff ¶ 33.) Failing to provide the correct policy in accordance with this court’s prior order is unacceptable. Tishman is directed to produce all documents constituting claim records, claims, correspondence, schedule analyses and related documents, as well as internal documents and communications regarding such claims that Tishman submitted under the Builder’s Risk Policy for the Project. Tishman has 30 days from the date of court’s entry of this order on NYSCEF to comply.

7. Documents Related to Subcontractor Default Insurance

Tishman asserts that it provided documents related to the Subcontractor Default Insurance (SDI); however, movants contend that Tishman failed to produce the SDI Policy, Tishman's claim to the SDI Carrier and other documents. (NYSCEF 291, Rosen aff ¶ 18; NYSCEF 309, McDermott reply aff ¶¶ 46-47.) Again, Tishman's conduct here is unacceptable. Tishman is directed to produce all documents constituting claim records, claims, correspondence, schedule analyses and related documents, as well as internal documents and communications regarding such claims that Tishman submitted under the SDI Policy for the Project. Tishman has 30 days from the date of court's entry of this order on NYSCEF to comply with all prior orders of this court.

8. Notice of Mechanic's Lien

Tishman is directed to produce all documents supporting the \$42 million Notice of Mechanic's Lien filed by Tishman against the Project real property including the documents which formed the basis for Tishman's Request for Additional General Conditions Due to Excusable Delays One West End Avenue Riverside Center Site 5. Tishman has 30 days from the date of court's entry of this order on NYSCEF to comply.

9. Documents Relating to The Owner Action

Tishman is directed to produce all documents, to the extent not produced, supporting the allegations asserted by Tishman in the Verified Answer with Counterclaim filed in the Owner Action. Tishman has 30 days from the date of court's entry of this order on NYSCEF to comply.

10. Costs

Movant's request that Tishman pay costs for this motion is granted. Tishman has demonstrated a repeated failure to comply with court-issued disclosure warranting

payment of the parties' costs in making this motion. It is only fair that Tishman pay for the problems it has created.

B. Motion Sequence Number 004

In motion sequence number 004, defendant W&W moves pursuant to CPLR 3124 to compel Tishman to (1) comply with all prior orders (2) produce all documents responsive to W&W document demands Nos. 1-4, 7, 8, 10-18, 20, 22-25, and 27-45, (3) produce additional documents in support of Tishman's damages claim against W&W including delay damages, (4) produce all documents referenced in email attachments and hyperlinks that were identified in Tishman's prior document production but not produced, (5) identify each listed back charge for W&W identified in Tishman's response to W&W Interrogatory No. 21, by the respective back charge/change order number assigned by Tishman; (6) identify in response to W&W Interrogatory No. 10. each person that was engaged or retained to review, evaluate, or test W&W's work; and (7) pay the costs of W&W incurred in connection with this Order to Show Cause and for such other, further and different relief as this Court deems just, reasonable and proper, including but not limited to the striking of Tishman's pleading pursuant to CPLR 3126.

W&W contends that Tishman has failed to comply with the court's December 12, 2019 order insofar as Tishman has not produced the documents identified in W&W's deficiency letter. (NYSCEF 268, McDonough aff ¶ 18.) W&W also contends that the documents produced reference hyperlinked documents and attachments that were not produced. (*Id.* ¶ 26.) Ultimately, W&W contends that Tishman has failed to produce all responsive documents and the prior productions were incomplete. (NYSCEF 311, McDonough reply aff ¶ 3.)

Tishman submits an affirmation in opposition stating that it has “produced most of the documents in prior productions.” (NYSCEF 301, Rozen aff ¶ 2.) Nevertheless, Tishman’s counsel acknowledges that some of the documents at issue in this motion “were inadvertently missed” but produced as of the filing of his affirmation. (*Id.*)

Producing “most” of the documents that a party is entitled to is not good enough. It is unacceptable and unprofessional. Tishman is directed to review its production to ensure that all responsive documents have been produced. Any responsive documents not produced shall be turned over to W&W within 30 days of the date of the court’s entry of this order on NYSCEF.

III. The Motions to Strike Tishman’s Pleadings

Motion Sequence Numbers 003, 006 and 007 are to strike Tishman’s pleadings and they are consolidated here for disposition.

A. Motion Sequence Number 003

In motion sequence number 003, R&S moves, pursuant to CPLR 3126, to strike the answer and counterclaims of Tishman to the extent the answer and counterclaims concern R&S.

R&S argues that Tishman (1) failed to respond to discovery demands within the time required by the CPLR; (2) failed to comply with the disclosure obligations set out in the Preliminary Conference; (3) failed to comply with the conference order dated December 12, 2019 by serving responses to interrogatories one month after the court ordered date of December 24, 2019; and (4) failed to fully respond to a demand for discovery and inspection, the Statements Demand or the Expert Demand. (NYSCEF 207, Hellman aff ¶¶ 9, 10, 19-20, 21 n 6.)

Tishman argues that it has produced in excess of 43,000 pages of documents in this complex litigation. (NYSCEF 289, Rosen aff ¶¶ 4, 13.) Tishman asserts that part of the reason for the delay in serving interrogatory answers is that the closeout process on the Project was still ongoing.

“If the credibility of court orders and the integrity of our judicial system are to be maintained, a litigant cannot ignore court orders with impunity. Although actions should be resolved on the merits whenever possible, the efficient disposition of cases is not advanced by hindering the ability of the trial court to supervise the parties who appear before it and to ensure they comply with the court's directives.” (*Fish & Richardson, P.C. v. Schindler*, 75 AD3d 219, 220 [1st Dept 2010] [internal quotation marks and citation omitted].) Accordingly, “CPLR 3126 provides various sanctions for violations of discovery orders, the most serious of which are striking a party's pleadings or outright dismissal of the action. However, ... the extreme sanction of dismissal is warranted only where a clear showing has been made that the noncompliance with a discovery order was willful, contumacious or due to bad faith.” (*Corner Realty 30/7, Inc. v Bernstein Management Corp.*, 249 AD2d 191, 193 [1st Dept 1998] [citations omitted].) A party's “pattern of noncompliance with discovery demands and a court-ordered stipulation supports an inference of willful and contumacious conduct” (*Jackson v OpenCommunications Omnimedia, LLC*, 147 AD3d 709, 709 [1st Dept 2017] [citations omitted].) Although, that party may “tender a reasonable excuse to overcome defendants' showing of willfulness” (*Menkes v Delikat*, 148 AD3d 442, 442 [1st Dept 2017] [citation omitted]), “failure to offer a reasonable excuse for . . . noncompliance with discovery requests gives rise to an inference of willful and contumacious conduct that

warrant[s] the striking of the [pleading].” (*Turk Eximbank-Export Credit Bank of Turkey v Bicakcioglu*, 81 AD3d 494, 494 [1st Dept 2011] [citations omitted].)

R&S has shown that Tishman engaged in a pattern of noncompliance with this court's orders. Although Tishman focuses on that portion of R&S's application that discusses the late responses to interrogatories, Tishman utterly fails to address the other portions of R&S's applications concerning the outstanding responses to a demand for discovery and inspection, the Statements Demand or the Expert Demand. (NYSCEF 207, Hellman affirmation ¶ 21 n 6.) Moreover, Tishman's assertions that this litigation is complex and that the closeout process was still ongoing are not reasonable considering the repeated court orders that Tishman failed to comply with and the fact that these assertions do not explain away the other outstanding discovery demands.

Nevertheless, the court will grant Tishman one final opportunity to comply with these discovery obligations. Tishman is directed to remedy the deficiencies at issue in this motion within 30 days of the order's filing on NYSCEF. Should Tishman fail to remedy these deficiencies, R&S may file an affirmation delineating Tishman's failure and requesting renewal of this motion.

B. Motion Sequence Number 006

In motion sequence number 006, Sefina, Almar and Five Star move pursuant to CPLR 3126 to strike Tishman's answer and dismiss its cross claims against Almar and Five Star. Alternatively, they move for an adverse inference concerning back charges that Tishman asserted against Sefina, Almar or Five Star. Alternatively, they seek an adverse inference concerning Tishman's defenses. The movants request sanctions on the grounds that Tishman has engaged in frivolous conduct and for repeated extensions of discovery deadlines with little or no compliance thereafter.

The movants contend that Tishman has failed to provide documentation for thirty specific back charges and documentation to substantiate the allocation of forty specific back charges among other things. (NYSCEF 484, McDermott aff ¶ 3.) They argue that Tishman has failed to provide contractually required prior written notices, project documents demonstrating how the movants are responsible for deductions, contract documents including drawings and specification that demonstrate responsibility for the deductions and evidence of payments (checks) for the costs claimed by Tishman as back charges. (*Id.* ¶ 4.)

In opposition, Tishman asserts that “its delays with respect to discovery responses and the omissions of certain material were excusable.” (NYSCEF 468, Rozen aff ¶ 18.) Tishman admits that the movants “identify several back charges for which the backup was not captured in Tishman’s prior productions or its ESI production.” (*Id.* ¶ 13.) According to Tishman, “possible reasons that these documents were not captured is that ... the person at Tishman that coordinated the records regarding the back charges and typically forwarded them to the trades had a major computer issue and had to have her computer replaced.” (*Id.*) Still, Tishman does not address several of the requests at issue in the moving papers.

Here the movants demonstrate that relevant documents have not been produced, and Tishman either admits that documents have not been produced or fails to address them. Tishman’s repeated noncompliance raises an inference of willful and contumacious conduct. (*Jackson v OpenCommunications Omnimedia, LLC*, 147 AD3d 709, 709 [1st Dept 2017].)

Nevertheless, the court will grant Tishman one final opportunity to comply with these discovery obligations. Tishman is directed to remedy the deficiencies at issue in

this motion within 30 days of the order's filing on NYSCEF. Should Tishman fail to remedy these deficiencies, Sefina, Almar and Five Star may file an affirmation delineating Tishman's failure and requesting a renewal of this motion.

C. Motion Sequence Number 007

In motion sequence number 007, W&W moves to strike Tishman's answer to W&W's crossclaims. Alternatively, W&W moves to preclude Tishman from introducing evidence that relates to back charges or for an adverse inference concerning these back charges. Alternatively, W&W moves to preclude Tishman from introducing evidence regarding any defenses against W&W. Lastly, W&W moves to impose sanctions on Tishman and extend discovery deadlines.

W&W argues that as of the date of its moving papers, Tishman has refused to produce documents that W&W requires to defend itself against Tishman's multi-million back charge claim. (NYSCEF 487, McDonough aff ¶ 3.) W&W argues that these documents have not been produced despite numerous court orders directing Tishman to comply. (*Id.*) These documents include support for Tishman's \$1 million delay claim and back charges in the amount of \$2,312,559. (*Id.* ¶¶ 3-4.)

In opposition, Tishman disputes W&W contentions but admits that certain discovery was outstanding at the time the motion was made. Nevertheless, Tishman asserts that the "remaining missing back charges have been transmitted to W&W by email today." (NYSCEF 474, Rozen aff ¶ 7.)

By its own admission, Tishman acknowledges that discovery has not been complied with despite the numerous conference orders that this court issued. As discussed above, Tishman's repeated noncompliance with discovery orders raises an

inference of willful and contumacious conduct. (*Jackson v OpenCommunications Omnimedia, LLC*, 147 AD3d 709, 709 [1st Dept 2017].)

Nevertheless, the court will grant Tishman one final opportunity to comply with these discovery obligations. Tishman is directed to remedy the deficiencies at issue in this motion within 30 days of the order's filing on NYSCEF. Should Tishman fail to remedy these deficiencies, W&W may file an affirmation delineating Tishman's failure and requesting renewal of this motion.

IV. Tishman's Motion for Leave to Serve Untimely Demands and For an Extension

In motion sequence number 005, Tishman moves for an extension of time to respond to ESI demands and seeks leave to serve written discovery demands. As of the date of this decision, Tishman has effectively received even more time than it requested to review and respond to the ESI demands. Accordingly, the motion is granted albeit Tishman will have 30 days from the date of this decision's filing to produce these responses.

The motion, however, is denied with respect to Tishman's request to serve demands. Tishman acknowledges that, pursuant to the preliminary conference order, written discovery demands should have been served within 30 days of July 10, 2019. (NYSCEF 282, Rozen aff ¶ 22.) Nevertheless, "Tishman did not serve its written discovery demands ... until December 23, 2109." (*Id.* ¶ 23.) "Tishman submits that the reason it did not serve the demands in accordance with the Preliminary Conference Order is that it was focused on its efforts to produce documents in this case and respond to the extensive discovery requests." (*Id.* ¶ 24.) Tishman's demands were rejected by each claimant as untimely. (*Id.* ¶ 23.)

Tishman's excuse that it was too busy focusing on document production is unpersuasive and undermined by Tishman's admission that its prior productions were insufficient or incorrect. The excuse is also unreasonable especially because these motions were brought based on Tishman's repeated failures to comply with this court's discovery orders. (*See Newkirk v City of New York*, 154 AD2d 661 [2d Dept 1989].)

Lastly, it is unacceptable to suggest that Tishman, and in turn its counsel, could not serve demands because it had to focus on producing documents. An attorney has an ethical duty to provide diligent representation to the client. (*See Rules of Professional Conduct* [22 NYCRR 1200] 1.3.) Attorneys must accomplish many tasks at once, and diligently and promptly handle their workloads. Thus, a suggestion that Tishman's attorney could not serve demands and produce documents at the same time, a common task in litigation, is outrageous. Tishman was ordered twice to serve its demands prior to December 23, 2019 and failed to do so (NYSCEF 90, Preliminary Conference Order; NYSCEF 114, August 28, 2019 Status Conference Order.) Tishman's demands are waived.

The motion is granted, in part, and denied, in part.

Accordingly, it is

ORDERED that the motion sequence number 002 and 004 are granted as set forth above; and it is further

ORDERED that Tishman is directed to make the productions set out in this decision within 30 days of this decision's filing on NYSCEF by the court; and it is further

ORDERED that motion sequence number 003 is denied without prejudice as set forth above, and Tishman shall remedy the deficiencies at issue in this motion within 30

days of this order's filing on NYSCEF. Should Tishman fail to comply, R&S may file an affirmation with the court to renew this motion; and it is further

ORDERED that motion sequence number 006 is granted, in part, as set forth above and Tishman shall remedy the deficiencies at issue in this motion within 30 days of this order's filing on NYSCEF. Should Tishman fail to comply, Sefina, Almar and Five Star may file an affirmation with the court to renew this motion; and it is further

ORDERED that motion sequence number 007 is granted, in part, as set forth above and Tishman shall remedy the deficiencies at issue in this motion within 30 days of this order's filing on NYSCEF. Should Tishman fail to comply, W&W may file an affirmation with the court to renew this motion; and it is further

ORDERED that motion sequence number 005 is granted, in part, to the extent that Tishman has 30 days from the filing of this order to produce ESI responses.

Motion Sequence Number 002

7/16/2020
DATE

CHECK ONE:

CASE DISPOSED

GRANTED

DENIED

NON-FINAL DISPOSITION

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

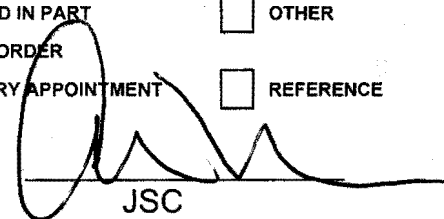
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CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE


JSC

Motion Sequence Number 003

7/14/2020
DATE

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CASE DISPOSED

GRANTED

DENIED

NON-FINAL DISPOSITION

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

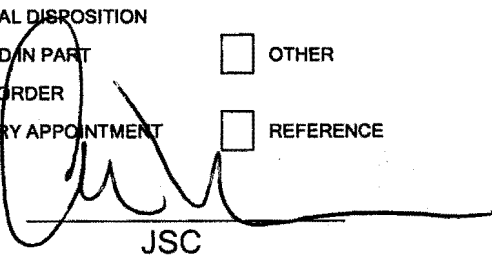
SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE


JSC

Motion Sequence Number 004

7/16/20
DATE

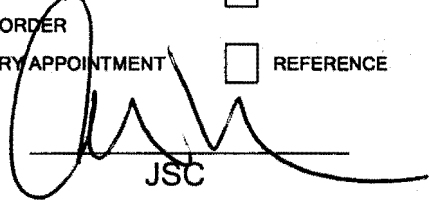
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<input type="checkbox"/>	GRANTED IN PART		
<input type="checkbox"/>	SUBMIT ORDER		
<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/>	REFERENCE

APPLICATION:

CHECK IF APPROPRIATE:


JSC

Motion Sequence Number 005

7/16/20
DATE

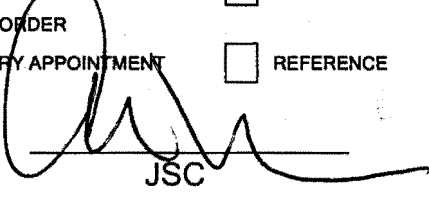
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<input type="checkbox"/>	GRANTED		
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<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN		

<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	<input type="checkbox"/>	OTHER
<input checked="" type="checkbox"/>	GRANTED IN PART		
<input type="checkbox"/>	SUBMIT ORDER		
<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/>	REFERENCE

APPLICATION:

CHECK IF APPROPRIATE:


JSC

Motion Sequence Number 006

7/16/20
DATE

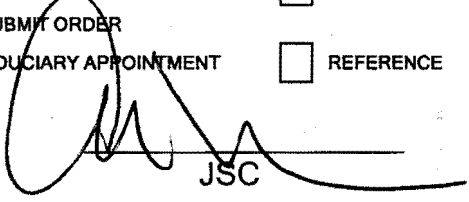
CHECK ONE:

<input type="checkbox"/>	CASE DISPOSED	<input type="checkbox"/>	DENIED
<input type="checkbox"/>	GRANTED		
<input type="checkbox"/>	SETTLE ORDER		
<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN		

<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	<input type="checkbox"/>	OTHER
<input checked="" type="checkbox"/>	GRANTED IN PART		
<input type="checkbox"/>	SUBMIT ORDER		
<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/>	REFERENCE

APPLICATION:

CHECK IF APPROPRIATE:


JSC

Motion Sequence Number 007

7/16/20
DATE

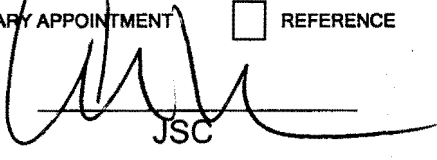
CHECK ONE:

<input type="checkbox"/>	CASE DISPOSED	<input type="checkbox"/>	DENIED
<input type="checkbox"/>	GRANTED		
<input type="checkbox"/>	SETTLE ORDER		
<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN		

<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	<input type="checkbox"/>	OTHER
<input checked="" type="checkbox"/>	GRANTED IN PART		
<input type="checkbox"/>	SUBMIT ORDER		
<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/>	REFERENCE

APPLICATION:

CHECK IF APPROPRIATE:


JSC