SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK

PRESENT: HON. DENISE L. SHER
Acting Supreme Court Justice

KASSA Y. PORTER,

Plaintiff,

- against -

MERRICK PLAZA LLC and JFB CONSTRUCTION & DEVELOPMENT INC.,

Defendants.

TRIAL/IAS PART 33
NASSAU COUNTY

Index No.: 611394/17
Motion Seq. Nos.: 02, 03, 04
Motion Dates: 11/26/19
11/26/19
12/17/19
XXX

JFB CONSTRUCTION & DEVELOPMENT INC,

Third-Party Plaintiff,

- against -

PEOPLE READY, INC. formerly known as LABOR READY INC. and CLP RESOURCES, INC.,

Third-Party Defendants.

The following papers have been read on these motions:

	Papers Numbered
Notice of Motion (Seq. No. 02), Affirmation and Exhibits	**1**
Notice of Motion (Seq. No. 03), Affirmation and Exhibits	**2**
Notice of Motion (Seq. No. 04), Affirmations and Exhibits	**3**
Pro Se Affidavit in Opposition to Motions (Seq. Nos. 02, 03 and 04) and Exhibits	**4**
Reply Affirmation to Motion (Seq. No. 02)	**5**

Upon the foregoing papers, it is ordered that the motions are decided as follows:

Defendant/third-party plaintiff JFB Construction & Development Inc. ("JFB") moves (Seq. No. 02), pursuant to CPLR § 3212, for an order granting summary judgment dismissing plaintiff's Verified Complaint as against it, as well as any and all cross-claims and counterclaims as against it; and moves, pursuant to CPLR § 3126, for an order dismissing plaintiff's Verified Complaint due to plaintiff's failure to provide discovery.

Third-part defendants move (Seq. No. 03), pursuant to CPLR § 3212, for an order granting summary judgment dismissing defendant/third-party plaintiff's Third-Party Complaint.

Defendant Merrick Plaza LLC ("Merrick") moves (Seq. No. 04), pursuant to CPLR § 3126(3) and 22 NYCRR 202.27(b), for an order dismissing plaintiff's Verified Complaint due to plaintiff's failure to provide discovery.

Pro se plaintiff opposes the motions (Seq. Nos. 02, 03 and 04).

Plaintiff commenced the instant action with the filing of a Summons and Verified Complaint on or about October 24, 2017. *See* Defendant/Third-Party Plaintiff JFB's Affirmation in Support Exhibit A. Issue was joined by defendant/third-party plaintiff JFB on or about December 21, 2017. *See id.* Issue was joined by defendant Merrick on or about January 5, 2018. *See id.* Defendant/third-party plaintiff JFB filed a Third-Party Summons and Third-Party Complaint on or about January 18, 2018. *See* Defendant/Third-Party Plaintiff JFB's Affirmation in Support Exhibit B. Issue was joined by third-party defendants on or about March 5, 2019. *See id.*

In support of defendant/third-party plaintiff JFB's motion (Seq. No. 02), its counsel submits, in pertinent part, "[p]laintiff, Kassa Porter, has filed the present action seeking redress to recover for injuries allegedly sustained while working on a renovation project for Defendant JFB

Construction & Development Inc. (hereinafter referred to as 'JFB'). Plaintiff alleges that, on the date of the alleged incident, he was an employee of Labor Ready Inc., which had a contract with JFB to provide them with temporary workers. As will be discussed herein, the undisputed facts unequivocally demonstrate that Plaintiff was a special employee of JFB and is therefore barred from bringing this action. Plaintiff alleges that while in the employ of Labor Ready, pursuant to its contract with JFB, Plaintiff reported to Steve Arant, who he understood to be a site manager affiliated with JFB. He did not report to anyone from Labor Ready or to any other supervisor. He did not receive instruction or direction from any other individual other than the JFB site manager. The exclusive remedy provision of the Workers' Compensation Law limits a plaintiff's recovery for these type of workplace accident (*sic*) to the receipt of workers' compensation benefits, and is an absolute bar to negligence actions against his or her employer. As will be made unquestionably clear, Plaintiff was a special employee of JFB within the meaning of the law, and is therefore precluded from bringing the instant action against JFB.... Notwithstanding the foregoing, Plaintiff's Complaint should also be dismissed for Plaintiff's continued refusal to provide discovery that is material and necessary to JFB's defense in this action. Plaintiff has disregarded, and continues to disregard, his statutory obligation to provide relevant court-ordered discovery, which has prejudiced JFB. Notably, Plaintiff testified at his deposition that he underwent surgery on his right knee and received spinal injections as a result of the subject incident. This was the first time JFB was made aware that Plaintiff underwent any such procedure. Despite numerous demands for treatment records as well as a supplemental Bill of Particulars, Plaintiff has failed to provide the necessary discovery. Plaintiff further testified that he was involved in an automobile accident in 1995, for which he received treatment, but has failed to provide these records."

Counsel for defendant/third-party plaintiff JFB further asserts, in pertinent part, that, "JFB entered into an Agreement to Supply Temporary Staffing with Labor Ready on or about July 21, 2015.... Pursuant to this Agreement, Labor Ready was to provide Workers to 'work under [JFB's] supervision' pursuant to the terms of the contract.... On June 22, 2016, Plaintiff alleges that he was employed by Labor Ready as a laborer in the field of construction.... Plaintiff alleges that on that date, he was engaged to work at (*sic*) construction site located at 2095 Merrick Road, Merrick, New York, for JFB, pursuant to the Agreement between JFB and Labor Ready.... Plaintiff further alleges that on June 22, 2016, while, 'acting within the course of his employment and in the performance of his duties at the aforesaid location,' Plaintiff was caused to trip and fall and sustain injuries while carrying sheet rock.... While on the jobsite, Plaintiff was not supervised by anyone other than JFB's site manager.... Upon information and belief, Plaintiff received, and continues to receive, workers' compensation benefits in connection with the alleged accident." *See* Defendant/Third-Party Plaintiff JFB's Affirmation in Support Exhibits C-E.

Counsel for defendant/third-party plaintiff JFB contends, in pertinent part, that, "[t]he documentary evidence, along with the testimony given by Plaintiff, clearly demonstrates that Plaintiff was a special employee of JFB, within the meaning of the law, and any recovery for the alleged injuries claimed herein is limited to Workers' Compensation pursuant to the exclusive remedy provisions of Workers' Compensation Law § 29(6). Workers (*sic*) Compensation Law §29(6) provides that '[t]he right to compensation or benefits under this chapter, shall be the exclusive remedy to an employee.' 'A person may be deemed to have more than one employer for purposes of the Workers' Compensation Law, a general employer and a special employer.' [citation omitted]. Court (*sic*) have consistently held that 'a general employee of one employer may also be in the special employ of another, notwithstanding the general employer's

responsibility for payment of wages and for maintaining workers' compensation and other employee benefits.' [citations omitted]. A special employee is describes (*sic*) as one who is 'transferred for a limited time of whatever duration to the service of another.' [citations omitted].... The determination of special employment status may be made as a matter of law where, as here, 'the particular, undisputed critical facts compel that conclusion and present no triable issue of fact.' [citations omitted]. A key consideration is the employer's right to 'direct the work and the degree of control exercised over the employee.' [citations omitted].... Both the contract language and Plaintiff's testimony demonstrate that JFB had complete and exclusive control over Plaintiff's work duties. There exist no triable issues of fact, as Plaintiff has not, and cannot dispute the facts which bar him from bringing this action. The Contract between Labor Ready and JFB provides that '[JFB] understand that [Labor Ready] **will not supervise its Workers** and that **[JFB] shall be responsible for supervising and directing the activities of Workers.'** ... The Contract explicitly states that JFB was to '**assign the Workers duties** consistent with their skills and abilities.'... The Contract further provided that JFB had the power to dismiss Plaintiff and request a replacement if it was 'dissatisfied ... for any reason.'... Plaintiff himself admits that he only received instruction from Steve, who he understood to be the 'site manager.'... He further testified that he did not take any instruction with regard to how to do his job from anyone other than Steve.... The only information that he received from Labor Ready relative to that job was that he'd be doing 'construction work' for 'maybe six hours.'... In the case at bar, Labor Ready was responsible for Plaintiff's paychecks and employee benefits as his general employer. However, JFB has exclusive control over Plaintiff's work. Per the unambiguous contract language as well as Plaintiff's testimony, it is undisputed that only JFB assigned, directed, and supervised Plaintiff's work duties, which created a special employment relationship between Plaintiff and JFB. Plaintiff has filed for and received, and continues to

receive, workers' compensation benefits for the injuries he allegedly sustained while working for JFB. It must follow, then, that the exclusive remedy provision of the Workers' Compensation Law applies, and Plaintiff is therefore barred from brining the instant action against JFB." *See* Defendant/Third-Party Plaintiff JFB's Affirmation in Support Exhibits D and H.

Counsel for defendant/third-party plaintiff JFB further asserts, in pertinent part, that, "[a]t the April 9, 2019 Compliance Conference, Plaintiff advised the Court that he intended to claim further injuries in connection with the subject accident.... JFB wrote to Plaintiff requesting that he supplement his Bill of Particulars and provide authorizations to receive records for any newly disclosed treatment, to the extent that he intended to claim injuries not previously identified in his Verified Bill of Particulars.... This letter went ignored and JFB did not receive the requested discovery. Plaintiff Kassa Porter is representing himself at this time. At the commencement of the action, he was represented by counsel. Counsel was relieved by Order of this Court filed March 12, 2019.... Thereafter, *Pro Se* Plaintiff Mr. Porter, along with all counsel, appeared in Court on the following dates: April 9, 2019; May 21, 2019; June 25, 2019; August 6, 2019; September 3, 2019; and September 25, 2019. Though there have been numerous appearances, important discovery remains outstanding. During the June 25, 2019 appearance, all defense counsel supplied Mr. Porter with a list of items needed in this matter. We should note here, parenthetically, that, while we have deposed Mr. Porter on the liability of his claim, the damages deposition remains outstanding. We have been prevented from completing the deposition due to Plaintiff's failure to comply with discovery demands and Orders.... During the June 25, 2019 appearance before this Court, defense counsel supplied Plaintiff, Mr. Porter, with a list of outstanding items,... At this time, Plaintiff Mr. Porter has supplied some authorizations, but many remain outstanding,... There have been numerous opportunities afforded to Plaintiff to provide outstanding discovery.... Plaintiff has shown persistent disregard of its (*sic*) statutory obligations

to provide discovery that is undeniably owed to Defendants, in direct contravention of this Court's Orders and the CPLR.... Plaintiff's willful and blatant disregard has greatly prejudiced JFB and has resulted in the inability of JFB to obtain discovery that is material and necessary for the Defendant's defense of this case. *See* Defendant/Third-Party Plaintiff JFB's Affirmation in Support Exhibits F and G.

In support of third-part defendants' motion (Seq. No. 03), its counsel submits, in pertinent part, that, "Defendant/Third-Party Plaintiff JFB Construction & Development Inc. ('JFB') alleges two causes of action against Moving Defendants: contractual indemnification and common law indemnification, but they are owed neither. The Agreement between Moving Defendants and JFB only requires Moving Defendants to indemnify and hold harmless JFB for Moving Defendants' negligence, gross negligence or if Moving Defendants engaged in willful misconduct in connection with the performance of plaintiff's work, and the evidence has not and cannot establish none (*sic*) of the above. Plaintiff testified that: Moving Defendants' instruction to him was limited to telling him the location of the worksite, who to report to when he arrived at the site and that the assignment is at a construction site. JFB solely supervised, directed and controlled Plaintiff the entire time he was at the site - not Moving Defendants. JFB has the authority to stop work at the site and controlled whether any breaks were taken - not Moving Defendants. Plaintiff was working pursuant to directives he received from JFB at the time of his accident - not Moving Defendants. In fact, the Agreement states that Moving Defendants' sole warranty to JFB is the replacement of unsatisfactory workers like Plaintiff and JFB never made such request. Thus, the Court should deny JFB's contractual indemnification claim. The Court should similarly dismiss the common law indemnification claim because to grant such claim would contradict the plain meaning of the New York's (*sic*) Workers' Compensation statute and run afoul of legislative intent. New York Workers' Compensation Law § 11 states that an

employer shall not be liable to any third-party for indemnification or contribution unless (a) an agreement provides for same; (b) a plaintiff sustains a narrowly tailored and strictly interpreted 'grave injury' itemized therein; or (c) an employer fails to procure workers' compensation insurance for a plaintiff.... Plaintiff's alleged injuries fail to meet the 'grave injury' requirement because he sustained soft tissue injuries to his cervical and lumbar spines, and sprains to the right elbow and right knee. Lastly, Matthew Parman, Director of Litigation and Assistant General Counsel for Moving Defendants affirmed that Moving Defendants procured a workers' compensation insurance policy for plaintiff and currently pays plaintiff's workers' compensation benefits." *See* Third-Party Defendants' Affirmation in Support Exhibits E-H.

In further support of the motion (Seq. No. 03), third-party defendants submit the transcript from plaintiff's Examination Before Trial ("EBT") testimony. *See* Third-Party Defendants' Affirmation in Support Exhibit E. They also submit the Affidavit of Matthew Parman, Director of Litigation and Assistant General Counsel at PeopleReady, Inc. i/s/h/a People Ready, Inc. *See* Third-Party Defendants' Affirmation in Support Exhibits H and I.

In support of defendant Merrick's motion (Seq. No. 04), its counsel details the numerous court dates at which the parties appeared and, at which, *pro se* plaintiff failed to provide demanded discovery. *See* Defendant Merrick's Affirmation in Support Exhibit H.

Counsel for defendant Merrick argues, in pertinent part, that, "[t]hat plaintiff is prosecuting this action *pro se* is of no consequence, especially in light of this Court's repeated warnings that plaintiff is proceeding at his own peril and in that '[a] litigant appearing *pro se* acquires no greater right than any other litigant and such appearance may not be used to deprive defendants of the same rights enjoyed by other defendants.' [citation omitted]. Plaintiff has shown persistent, wilful disregard of his statutory obligations to provide discovery he acknowledged is owed to defendants, in direct contravention of this Court's multiple orders and

the mandates of the CPLR. Plaintiff's obstinance has prevented MERRICK from obtaining material discovery necessary to MERRICK's ability to properly, effectively and zealously defend this action. In that plaintiff has forever failed to provide the large majority of the court-ordered discovery, for the reasons detailed above, and pursuant to the statutory and case law authority cited in the support thereof, plaintiff's complaint should be dismissed in its entirety."

In opposition to the motions (Seq. Nos. 02, 03 and 04), *pro se* plaintiff submits, in pertinent part, that, "[i]n response, the Defendant should REMAIN MANDATORY throughout the rest of the proceedings herein due to false reports, false filing, and evading the rights of Plaintiff, Kassa Porter. As when they raised their right hand and vowed to tell nothing but the truth in front of GOD, to do their job from Start to Finish, as the Plaintiff, there are a lot of missing testimonies and evidence that would say that there is any foul play during the ON-SITE accident. Attorneys' (*sic*) of the Defendant have a line that should've never, ever been ignored. That line as per the studies of their practice have been blatantly ignored ever since the defense agreed that I, the Plaintiff, was going *Pro-Se*, which means, on the record, that I am the client of myself. When Plaintiff, Kassa Porter, went to seek counseling about the Lawsuit there was reasonable doubt that the Attorneys of Defense was coercing and miscuing information.... The list of Authorizations that was put together had to do with a conversation that wasn't On-Record and never was recorded. The rest of the information is privileged information that I do not wish to disclose since it isn't within the rights that I, as Plaintiff Pro-Se, have available. An example of and irrelevant authorization is the Order of Protection and index number. Since I am moving forward Pro-Se, I don't want to have been taken advantage of due to all of the Constitutional Rights that protect me as an citizen of the United States of America. As stated before, all needed Authorizations have been filled out that signed in the offices of the Defendant's Attorney, Supreme Court House waiting area, and inside the court room (Orders of the Judge, Denise L.

Sher), so that the Lawsuit could move on.... As in Response to the request of Bill of Particulars from Plaintiff, Kassa Porter, an answering Pro-Se, I Motion a Subpoena. In light of the client of his self, what was consulted and explained that a Bill of Particulars was is an overall document of all injuries and what happened at the accident On-Site. During off-record, face-to-face, conversation with the defense attorneys I was purposely misinformed as to the nature of where I was to get the Bill of Particulars. The defendant's attorneys said as quoted 'To get the Bill of Particulars from the Orthopedist, and there is paperwork that needs to get filled out by them.' As I waited for this paperwork form the defense for the request of a Bill of Particulars, which they specifically said I had to sign, I went and consulted with the Orthopedist and he brought to light to the point that the document is drawn-up by the plaintiff's attorney nor the Orthopedist and asked why are the misrepresenting how to attain the needed information since I, the Plaintiff, is Pro-Se. Defense attorneys for JFB Construction & Development Inc. never requested a Bill of Particulars between the dates they requested a response from former Attorney, David Horowitz, P.C. and when the defense attorneys asked for second Bill of Particulars with all of the injuries from the accident that occurred. As in Response to the summons that occurred during employment by Plaintiff, Kassa Porter, all conversations that were held were solely between the defendants and former Attorney Firm David Horowitz, P.C. Previous to the removal of the former attorneys' firm, for Malpractice reasons, there wasn't any summons or need for the Plaintiff, Kassa Porter, to appear at any court dates, as was told by the former Attorney. Plaintiff, Kassa Porter, is clinically deemed Permanently Disabled as deemed in the Workers Compensation Courts as well as the Supreme Court."

Pro se plaintiff goes on to provide a purported "Response to the request of Bill of Particulars. *See Pro Se* Plaintiff's Affidavit in Opposition Exhibits A-E.

It is well settled that the proponent of a motion for summary judgment must make a *prima facie* showing of entitlement to judgment as a matter of law by providing sufficient evidence to demonstrate the absence of material issues of fact. *See Sillman v. Twentieth Century-Fox Film Corp.*, 3 N.Y.2d 395, 165 N.Y.S.2d 498 (1957); *Alvarez v. Prospect Hospital*, 68 N.Y.2d 320, 508 N.Y.S.2d 923 (1986); *Zuckerman v. City of New York*, 49 N.Y.2d 557, 427 N.Y.S.2d 595 (1980); *Bhatti v. Roche*, 140 A.D.2d 660, 528 N.Y.S.2d 1020 (2d Dept. 1988). To obtain summary judgment, the moving party must establish its claim or defense by tendering sufficient evidentiary proof, in admissible form, sufficient to warrant the court, as a matter of law, to direct judgment in the movant's favor. *See Friends of Animals, Inc. v. Associated Fur Mfrs., Inc.*, 46 N.Y.2d 1065, 416 N.Y.S.2d 790 (1979). Such evidence may include deposition transcripts, as well as other proof annexed to an attorney's affirmation. *See* CPLR § 3212 (b); *Olan v. Farrell Lines Inc.*, 64 N.Y.2d 1092, 489 N.Y.S.2d 884 (1985).

If a sufficient *prima facie* showing is demonstrated, the burden then shifts to the non-moving party to come forward with competent evidence to demonstrate the existence of a material issue of fact, the existence of which necessarily precludes the granting of summary judgment and necessitates a trial. *See Zuckerman v. City of New York*, *supra*. When considering a motion for summary judgment, the function of the court is not to resolve issues but rather to determine if any such material issues of fact exist. *See Sillman v. Twentieth Century-Fox Film Corp.*, *supra*. Mere conclusions or unsubstantiated allegations are insufficient to raise a triable issue. *See Gilbert Frank Corp. v. Federal Ins. Co.*, 70 N.Y.2d 966, 525 N.Y.S.2d 793 (1988).

Further, to grant summary judgment, it must clearly appear that no material triable issue of fact is presented. The burden on the court in deciding this type of motion is not to resolve issues of fact or determine matters of credibility, but merely to determine whether such issues exist. *See Barr v. Albany County*, 50 N.Y.2d 247, 428 N.Y.S.2d 665 (1980); *Daliendo v.*

Johnson, 147 A.D.2d 312, 543 N.Y.S.2d 987 (2d Dept. 1989).

Summary judgment is a drastic remedy which should not be granted when there is any doubt about the existence of a triable issue of fact. *See Sillman v. Twentieth Century-Fox Film Corp.*, *supra*. It is nevertheless an appropriate tool to weed out meritless claims. *See Lewis v. Desmond*, 187 A.D.2d 797, 589 N.Y.S.2d 678 (3d Dept. 1992); *Gray v. Bankers Trust Co. of Albany, N.A.*, 82 A.D.2d 168, 442 N.Y.S.2d 610 (3d Dept. 1981).

A 'special employee' is an individual who, while working as a general employee of one employer, is transferred for some period of time to the service of another employer. *See Fung v. Japan Airlines Co., Ltd.*, 9 N.Y.3d 351, 850 N.Y.S.2d 359 (2007). The exclusivity of the workers' compensation remedy applies in the case of a "special employee," *See Pena v. Automatic Data Processing, Inc.*, 105 A.D.3d 924, 963 N.Y.S.2d 357 (2d Dept. 2013); *Thompson v. Grumman Aerospace Corp.*, 78 N.Y.2d 553, 578 N.Y.S.2d 106 (1991). One who is a general employee of one party may be a special employee of another, subject to workers' compensation exclusivity with respect to the latter, even where the general employer is responsible for the employee's salary and other employee benefits, and has the power to hire and fire him or her. *See Thompson v. Grumman Aerospace Corp.*, *supra*; *Cameli v. Pace University*, 131 A.D.2d 419, 516 N.Y.S.2d 228 (2d Dept. 1987). The key to the determination of a worker's status as a special employee, for the purpose of applying the exclusive remedy provision of the Workers' Compensation Law, is who controls and directs the manner, details, and ultimate result of the worker's labor. *See Gubitosi v. National Realty Co.*, 247 A.D.2d 512, 669 N.Y.S.2d 321 (2d Dept. 1998).

In the instant matter before the Court, the determination that defendant/third-party plaintiff JFB was a special employer of *pro se* plaintiff can be made as a mater of law based upon the particular, undisputed facts, detailed in defendant/third-party plaintiff JFB's motion

(Seq. No. 02), that compel this conclusion. *Pro se* plaintiff has raised no triable issues of fact in his opposition.

Therefore, the branch of defendant/third-party plaintiff JFB's motion (Seq. No. 02), pursuant to CPLR § 3212, for an order granting summary judgment dismissing plaintiff's Verified Complaint as against it, as well as any and all cross-claims and counterclaims as against it, hereby **GRANTED**.

CPLR § 3126 provides the "[p]enalties for refusal to comply with order or to disclose." It reads, "[i]f any party, or a person who at the time a deposition is taken or an examination or inspection is made is an officer, director, member, employee or agent of a party or otherwise under a party's control, refuses to obey an order for disclosure or wilfully fails to disclose information which the court finds ought to have been disclosed pursuant to this article, the court may make such orders with regard to the failure or refusal as are just, among them: 1. An order that the issues to which the information is relevant shall be deemed resolved for purposes of the action in accordance with the claims of the party obtaining the order; or 2. an order prohibiting the disobedient party from supporting or opposing designated claims or defenses, from producing in evidence designated things or items of testimony, or from introducing any evidence of the physical, mental or blood condition sought to be determined, or from using certain witnesses; or 3. an order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or any part thereof, or rendering a judgment by default against the disobedient party."

The nature and degree of the sanction to be imposed on a motion pursuant to CPLR § 3126 is a matter reserved to the sound discretion of the trial court. *See Dokaj v. Ruxton Tower Ltd. Partnership*, 91 A.D.3d 812, 938 N.Y.S.2d 101 (2d Dept. 2012). The drastic remedy of striking a pleading for failure to comply with court ordered disclosure will be granted only where

the conduct of the resisting party is shown to be willful and contumacious. *See Pirro Group, LLC v. One Point St., Inc.*, 71 A.D.3d 654, 896 N.Y.S.2d 152 (2d Dept. 2010). To invoke the drastic remedy of preclusion, the Court must determine that the party's failure to comply with a disclosure order was the result of willful, deliberate and contumacious conduct or its equivalent. *See Arpino v. F.J.F. & Sons Elec. Co., Inc.*, 102 A.D.3d 201, 959 N.Y.S.2d 74 (2d Dept. 2012); *Assael v. Metropolitan Tr. Auth.*, 4 A.D.3d 443, 772 N.Y.S.2d 364 (2d Dept. 2004). Willful and contumacious conduct can be inferred from repeated non-compliance with court orders, *inter alia*, directing depositions, coupled with either no excuses, or inadequate excuses; or a failure to comply with court ordered discovery over an extended period of time. *See Prappas v. Papadatos*, 38 A.D.3d 871, 833 N.Y.S.2d 156 (2d Dept. 2007).

As the Court of Appeals stated in *Andrea v. Arnone, Hedin, Casker, Kennedy & Drake, Architects & Landscape Architects, P.C.* (*Habiterra Assoc.*), 5 N.Y.3d 514, 806 N.Y.S.2d 453 (2005), "[l]itigation cannot be conducted efficiently if deadlines are not taken seriously" and "disregard of deadlines should not and will not be tolerated." Compliance requires not only a timely response, but a good faith effort *to provide a meaningful response* (emphasis added). *See Arpino v F.J.F. & Sons Elec. Co., Inc.*, *supra*. The failure to comply with deadlines and provide good-faith responses to discovery demands "impairs the efficient functioning of the courts and adjudication of claims." *See id. citing Gibbs v. St. Barnabus Hosp.*, 16 N.Y.3d 74, 917 N.Y.S.2d 68 (2012). The Court of Appeals has pointed out that "[c]hronic non-compliance with deadlines breeds disrespect for the dictates of the Civil Practice Law and Rules" (*see Gibbs v. St. Barnabus Hosp.*, *supra* at 81) and has declared that "[i]f the credibility of court orders and the integrity of our judicial system are to be maintained, a litigant cannot ignore court orders with impunity." *See Arpino v. F.J.F. & Sons Electric Co., Inc.*, *supra citing Kihl v. Pfeffer*, 94 N.Y.2d 118, 700 N.Y.S.2d 87 (1999). Although perhaps an undesirable outcome, parties, where necessary, *will be*

held responsible for the failure to provide meaningful responses to discovery demands and preliminary conference orders (emphasis added). *See Arpino v. F.J.F. & Sons Electric Co., Inc.*, *supra*. "The willful and contumacious character of a party's conduct can be inferred from the party's repeated failure to comply with discovery demands or orders without a reasonable excuse." *Id. citing Commisso v. Orshan*, 85 A.D.3d 845, 925 N.Y.S.2d 612 (2d Dept. 2011).

Pursuant to CPLR § 3126 when a party refuses "to obey an order for disclosure or willfully fails to disclose information which the court finds ought to have been disclosed pursuant to this article, the court may make such orders with regard to the failure or refusal as are just..." CPLR § 3126(3) authorizes the court to strike pleadings or grant a default judgment against the disobedient party. The court may certainly impose sanctions or strike pleadings where a party fails to provide disclosure pursuant to an order. *See* SIEGEL, PRACTICE COMMENTARIES, 3126:5. It is only proper to strike a pleading, however, where it appears that the failure to obey the court's order is "deliberate and contumacious." *See Sindeband v. McCleod*, 226 A.D.2d 623, 641 N.Y.S.2d 127 (2d Dept. 1996); *Ortiz v. Weaver*, 188 A.D.2d 290, 590 N.Y.S.2d 474 (1st Dept. 1992). "[W]here a party disobeys a court order and by his conduct frustrates the disclosure scheme provided by the CPLR, dismissal of the [pleading] is within the broad discretion of the court." *See Eagle Insurance Company of America v. Behar,* 207 A.D.2d 326 (2d Dept. 1994).

As plaintiff is appearing in the instant matter *pro se*, the Court has repeatedly advised him of the responsibilities he has in acting as his own counsel. Nevertheless, despite the latitude that has been given to *pro se* plaintiff, the Court finds his purported "response to the Demand for a Bill of Particulars" in his opposition papers fails to provide a meaningful response to the demand issued by defendants and is wholly inadequate. *See Arpino v. F.J.F. & Sons Electric Co., Inc.*, *supra*. In the Court's opinion, *pro se* plaintiff has failed to provide defendants with a responsive

Supplemental Bill of Particulars and has failed to provide defendants with proper authorizations.

Therefore, based upon the above, the branch of defendant/third-party plaintiff JFB's motion (Seq. No. 02), pursuant to CPLR § 3126, for an order dismissing plaintiff's Verified Complaint due to plaintiff's failure to provide discovery, is hereby **GRANTED**.

Defendant Merrick's motion (Seq. No. 04), pursuant to CPLR § 3126(3) and 22 NYCRR 202.27(b), for an order dismissing plaintiff's Verified Complaint due to plaintiff's failure to provide discovery, is also hereby **GRANTED**.

Furthermore, based upon the Court's above rulings, as well as the arguments presented in the moving papers, third-part defendants' motion (Seq. No. 03), pursuant to CPLR § 3212, for an order granting summary judgment dismissing defendant/third-party plaintiff's Third-Party Complaint, is hereby **GRANTED**.

This constitutes the Decision and Order of this Court.

ENTER:

DENISE L. SHER, A.J.S.C.
XXX

Dated: Mineola, New York
February 28, 2020

ENTERED
MAR 0 2 2020
NASSAU COUNTY
COUNTY CLERK'S OFFICE