

**One Bryant Park LLC v AXA Ins. Co.**

2021 NY Slip Op 30068(U)

January 8, 2021

Supreme Court, New York County

Docket Number: 655640/2017

Judge: Frank P. Nervo

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This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY**

**PRESENT:** HON. FRANK P. NERVO **PART** **IAS MOTION 4**

*Justice*

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ONE BRYANT PARK LLC, DURST DEVELOPMENT, L.L.C.,  
TISHMAN CONSTRUCTION CORPORATION OF NEW  
YORK,

Plaintiff,

- v -

AXA INSURANCE COMPANY, AXA CORPORATE  
SOLUTIONS ASSURANCE, AXA CORPORATE  
SOLUTIONS ASSURANCE (US REINSURANCE TRUST),  
PERMASTEELISA NORTH AMERICA CORP., TRAVELERS  
PROPERTY AND CASUALTY COMPANY OF AMERICA,  
COMPONENT ASSEMBLY SYSTEMS, INC., ROBERT  
MCCULLOUGH, ALLIED WORLD ASSURANCE COMPANY  
(US) INC.

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 006) 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 265

were read on this motion to/for

STRIKE PLEADINGS

This is the second motion by defendant Travelers Property Casualty Co. of America (hereinafter “Travelers”) seeking to sanction or strike the pleadings of plaintiffs One Bryant Park LLC (hereinafter “One Bryant”), Durst Development LLC, (hereinafter “Durst”), and Tishman Construction Corp. of New York (hereinafter “Tishman”). This Court, by decision and order on motion sequence 004, ordered One Bryant, Durst, and Tishman to provide a privilege log and respond to outstanding discovery requests within 30 days (*see* Decision and Order – December 11, 2019). One Bryant, Durst, and Tishman failed to comply with this Court’s order. Thereinafter, in motion sequence 005, Travelers sought to enforce the Court’s December 11, 2019 decision and order and strike

the pleadings of One Bryant, Durst, and Tishman. The Court found its December 11, 2019 order had not been complied with and such failure was willful and contumacious (see Decision and Order – June 12, 2020). However, given the preference for adjudicating matters on the merits, the Court conditionally struck the pleadings, and provided the noncomplying parties with 90 days to cure their failure and comply (*id.*). Despite this second order conditionally striking their pleadings, One Bryant, Durst, and Tishman failed to comply.

CPLR § 3126 subsection three provides that the Court may strike a pleading when it finds, inter alia, that a party has refused to obey an order for disclosure or willfully fails to disclose information that ought to have been disclosed. This remedy is drastic and should only be imposed when the movant has “clearly shown that its opponent’s nondisclosure was willful, contumacious or due to bad faith” (*Commerce & Indus. Ins. Co. v. Lib-Com Ltd.*, 266 AD2d 142 [1st Dept 1999]). A pattern of default, lateness, and failure to comply with court orders can give rise to an inference of willful and contumacious conduct (see *Merchants T & F, Inc. v. Kase & Druker*, 19 AD3d 134 [1st Dept 2005]); see also *Shah v. Oral Cancer Prevention Intl., Inc.*, 138 AD3d 722 [2d Dept 2016]). “[U]pon learning that a party has repeatedly failed to comply with discovery order, [trial courts] have an affirmative obligation to take such additional steps as are necessary to ensure future compliance” (*Figdor v. City of New York*, 33 AD3d 560, 561 [1st Dept 2006]).

Travelers now seeks, for a second time, to strike the pleadings of One Bryant, Durst, and Tishman for failure to provide the discovery this Court has twice ordered.

The Court's June 12, 2020 order was unequivocal, One Bryant, Durst, and Tishman "shall comply with this Court's [prior order] within 90 days from notice of entry of this order, or their complaints will be stricken and sanctions imposed" (*see* Decision and Order – June 12, 2020). Notwithstanding this Court taking action "necessary to ensure future compliance," One Byrant, Durst, and Tishman have failed to comply (*Figdor v. City of New York*, 33 AD3d at 561).

One Bryant, Durst, and Tishman have submitted a letter to the Court advising that this motion is moot due to settlement and discontinuance of the matter (NYSCEF Doc. No. 264). The Court record reflects no stipulation of discontinuance has been filed, no stipulation has been provided in opposition, and the matter's status remains active. To the extent that this letter may be deemed opposition to the instant motion, the Court finds One Bryant, Durst, and Tishman have willfully and contumaciously failed to comply with two orders of this Court and presented no valid excuse for their failure. The Court further finds that these parties were on notice that their pleadings would be stricken if their repeated noncompliance was not cured. Having failed to cure their non-compliance, and in accordance with this Court's June 12, 2020 decision and order, it is

ORDERED that movant has established One Bryant Park LLC, Durst Development LLC, and Tishman Construction Corporation of New York willfully and contumaciously failed to provide discovery as directed in the Court's December 11, 2019 and June 12, 2020 decisions and orders in that One Bryant Park LLC, Durst Development LLC, and Tishman Construction Corporation of New York have failed and refused, despite specific directives in said orders, and without good cause, to produce documents; and it is further

ORDERED that the motion of defendant to strike the pleadings of One Bryant Park LLC, Durst Development LLC, and Tishman Construction Corporation of New York and dismiss this case is granted; and it is further

ORDERED that the complaint is stricken and the action is dismissed; and it is further

ORDERED that the Clerk is directed to enter judgment of dismissal in favor of defendants, with costs and disbursements to defendant as taxed by the Clerk.

THIS CONSTITUTES THE DECISION AND ORDER OF THE COURT

1/8/2021  
DATE

  
FRANK P. NERVO, J.S.C.

CHECK ONE:

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