

<b>Vargas v ESRT Empire State Bldg., LLC</b>
2021 NY Slip Op 31148(U)
April 8, 2021
Supreme Court, New York County
Docket Number: 155627/2016
Judge: W. Franc Perry
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**SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY**

**PRESENT: HON. W. FRANC PERRY**

**PART IAS MOTION 23EFM**

*Justice*

-----X

**INDEX NO. 155627/2016**

RODNEY VARGAS,

Plaintiff,

**MOTION DATE 05/07/2020,  
08/17/2020**

- v -

**MOTION SEQ. NO. 005 006**

ESRT EMPIRE STATE BUILDING, LLC, EMPIRE STATE  
REALTY TRUST, INC., LINKEDIN CORPORATION,

Defendant.

**DECISION + ORDER ON  
MOTION**

-----X

LINKEDIN CORPORATION

Plaintiff,

Third-Party  
Index No. 595430/2017

-against-

YAKAMEINSHOP CATERING LLC D/B/A CSAVOR, I.S.S.  
FACILITY SERVICES INC.

Defendant.

-----X

ESRT EMPIRE STATE BUILDING, LLC, EMPIRE STATE  
REALTY TRUST, INC.

Plaintiff,

Second Third-Party  
Index No. 595296/2020

-against-

ISS FACILITY SERVICES INC., YAKAMEINSHOP CATERING  
LLC D/B/A CSAVOR D/B/A GOURMET STREET MAGAZINE

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 005) 115, 116, 117, 118, 119, 120

were read on this motion to/for DISMISS

The following e-filed documents, listed by NYSCEF document number (Motion 006) 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142

were read on this motion to/for DISCOVERY

Motion Sequence Nos.: 005 and 006 have been consolidated for decision.

**Motion Sequence 005 is denied.**

In Motion Sequence 005, defendants ESRT EMPIRE STATE BUILDING LLC, EMPIRE STATE REALTY TRUST INC., and LINKEDIN CORPORATION, seek an Order, pursuant to CPLR 3126 (1) striking the answer of the third party defendant, YAKANEINSHIP CATERING LLC d/b/a CSAVOR d/b/a GOURMET STREET MAGAZINE and; (2) awarding a default judgment against it and in favor of LINKEDIN CORPORATION/

Movants state that since CSAVOR filed its answer to the third- party complaint, it has failed to appear at any court conference or any deposition and has not participated in any other aspects of the litigation. In addition, it is argued that CSAVOR has failed to provide responses or otherwise acknowledge the movant's discovery demands or its correspondence.

The nature and degree of the penalty to be imposed on a motion pursuant to CPLR 3126 is a matter of discretion with the court, striking an answer is inappropriate absent a clear showing that the failure to comply is willful, contumacious or in bad faith (*Herrera v City of New York*, 238 A.D.2d 475; *Harris v City of New York*, 211 A.D.2d 663), which must be affirmatively established by the moving party (*Pimental v City of New York*, 246 A.D.2d 467), whereupon the burden shifts to the nonmoving party to establish a reasonable excuse, with appropriate findings to be made by the court (*Corner Realty 30/7 v Bernstein Mgt. Corp.*, 249 A.D.2d 191, 193).

In this case, movants have failed show that CSAVOR's failure to participate in this litigation is willful, contumacious or in bad faith. While CSAVOR's conduct is not condoned by this Court, its lack of participation, at this time, does not warrant the sanction of dismissal.

**Motion Sequence 006 is denied in part and granted in part.**

In Motion Sequence 006, plaintiff moves for an order pursuant to CPLR 3126 striking the answer of defendants, I.S.S.FACILITY SERVICES INC., and YAKAMEINSHIP CATERING LLC d/b/a CSAVOR d/b/a GOURMET STREET MAGAZINE, for their failure to appear for a court ordered deposition, and/or requests that the Court preclude the defendants from giving any testimony at the time of trial, unless they appear for a deposition on or before a date certain. Plaintiff also moves for an Order consolidating this matter with plaintiff's separately filed complaint against ISS Facility Services, Inc., under Index No.: 157664/2018.

That portion of the motion requesting that defendants' answer be stricken due to their failure to appear for a deposition is denied as plaintiff has failed to demonstrate that defendants' conduct, in not appearing; is willful, contumacious or in bad faith. See, *Herrera, supra*.

The branch of the plaintiffs' motion seeking consolidation is granted. "When actions involving a common question of law or fact are pending before a court, the court, upon motion, may order a joint trial of any or all the matters in issue, may order the actions consolidated, and may make such other orders concerning proceedings therein as may tend to avoid unnecessary costs or delay" (CPLR 602 [a]). "A motion to consolidate two or more actions rests within the sound discretion of the trial court" (*American Home Mtge. Servicing, Inc. v Sharrocks*, 92 A.D.3d 620, 622 [2d Dep't 2012]). "Where common questions of law or fact exist, consolidation is warranted unless the opposing party demonstrates prejudice to a substantial right" (*id.*).

Here, there are common questions of law and fact in the two cases. Both matters arise out of the same incident and involve the same parties. In addition, no party has opposed the motion or demonstrated any prejudice to a substantial right. The consolidation of these two matters would also avoid unnecessary costs, delay, and promote judicial economy.

Therefore, Motion Sequence 005 is denied. That portion of Motion Sequence 006 requesting that defendant's answer be stricken is denied. The portion of Motion Sequence 006 seeking consolidation is granted

ORDERED that the motion is granted, as to consolidation only and the above-captioned action is consolidated in this Court with LinkedIn Corporation v. I.S.S.Facility Services Inc, et al , Index No. 157664/2018, pending in this Court; and it is further

ORDERED that the consolidation shall take place under Index No. 155627/2016 and the consolidated action shall bear the following caption:

RODNEY VARGAS,

Plaintiff,

Index No.155627/2016

Against

ESR EMPIRE STATE BUILDING, LLC  
EMOIRE STATE REALTY TRUST, INC  
LINKEDIN CORPORATION, and I.S.S.  
FACILITY SERVICES INC.,

Defendants.

-----  
LINKEDIN CORPORATION,

Third-Party Plaintiff,

Against

I.S.S. FACILITY SERVICES INC, and  
YAKAMEINSHOP CATERING d/b/a  
CSSAVOR d/b/a GOURMET STREET  
MAGAZINE,

Third-Party Defendants.

And it is further

ORDERED that the pleadings in the actions hereby consolidated shall stand as the pleadings in the consolidated action; and it is further

ORDERED that, within 30 days from entry of this order, movant shall serve a copy of this order with notice of entry on the Clerk of the Court (60 Centre Street, Room 141 B), who shall consolidate the documents in the actions hereby consolidated and shall mark his records to reflect the consolidation; and it is further

ORDERED that counsel for the movant shall contact the staff of the Clerk of the Court to arrange for the effectuation of the consolidation hereby directed; and it is further

ORDERED that service of this order upon the Clerk of the Court shall be made in hard-copy format if this action is a hard-copy matter or, if it is an e-filed case, shall be made in accordance with the procedures set forth in the *Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases* (accessible at the "E-Filing" page on the court's website at the address [www.nycourts.gov/supctmanh](http://www.nycourts.gov/supctmanh)); and it is further

ORDERED that, as applicable and insofar as is practical, the Clerk of this Court shall file the documents being consolidated in the consolidated case file under the index number of the consolidated action in the New York State Courts Electronic Filing System or make appropriate notations of such documents in the e-filing records of the court so as to ensure access to the documents in the consolidated action; and it is further

ORDERED that, within 30 days from entry of this order, movant shall serve a copy of this order with notice of entry on the Clerk of the General Clerk's Office (60 Centre Street, Room 119), who is hereby directed to reflect the consolidation by appropriately marking the court's records; and it is further

ORDERED that such service upon the Clerk of the General Clerk's Office shall be made in hard-copy format if this action is a hard-copy matter or, if it is an e-filed case, shall be made in accordance with the procedures set forth in the aforesaid *Protocol*.

This constitutes the Decision and Order of the Court.

<u>4/8/2021</u> DATE	<u>W. FRANC PERRY, J.S.C.</u>			
CHECK ONE:	<input type="checkbox"/> CASE DISPOSED	<input checked="" type="checkbox"/> NON-FINAL DISPOSITION		
APPLICATION:	<input type="checkbox"/> GRANTED	<input type="checkbox"/> DENIED	<input type="checkbox"/> GRANTED IN PART	<input checked="" type="checkbox"/> OTHER
CHECK IF APPROPRIATE:	<input type="checkbox"/> SETTLE ORDER	<input type="checkbox"/> SUBMIT ORDER		
	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/> FIDUCIARY APPOINTMENT	<input type="checkbox"/> REFERENCE	