

**Liberty El. Corp. v Broadway 280 Park Fee LLC**

2021 NY Slip Op 31389(U)

April 22, 2021

Supreme Court, New York County

Docket Number: 652002/2019

Judge: Louis L. Nock

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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. LOUIS L. NOCK **PART** **IAS MOTION 38EFM**

*Justice*

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LIBERTY ELEVATOR CORPORATION,

Plaintiff,

- v -

BROADWAY 280 PARK FEE LLC, PLAZA  
CONSTRUCTION LLC, JAME LEGACY LLC,  
CLASSIC RESTAURANTS, CORP, d/b/a THE  
FOUR SEASONS RESTAURANT and ATLANTIC  
SPECIALTY INSURANCE COMPANY,

Defendants.

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48

were read on this motion to/for

STRIKE PLEADINGS

Upon the foregoing documents, the motion of plaintiff Liberty Elevator Corporation (“Plaintiff”) to strike the answers of defendant Plaza Construction LLC, 280 Park Fee LLC, Jame Legacy LLC, Classic Restaurants, Corp. d/b/a The Four Seasons Restaurant and Atlantic Specialty Insurance Company or preclude defendants from offering evidence at trial is granted in part, in accord with the following memorandum decision.

In this action to foreclose a mechanic’s lien, Plaintiff moves pursuant to CPLR 3126 to strike the Verified Answer with Cross-Claims of Defendant Plaza Construction LLC (“Plaza Construction”) (NYSCEF Doc 14) and the joint Verified Answer and Counterclaims of Defendants 280 Park Fee LLC, Jame Legacy LLC, Classic Restaurants, Corp. d/b/a the Four Seasons Restaurant and Atlantic Specialty Insurance Company (the “280 Park Defendants”) (NYSCEF Doc 12) and enter a default judgment in favor of Plaintiff or, in the alternative, to

preclude defendants from offering evidence at trial, for failure to produce documents responsive to Plaintiff's discovery demands. On February 28, 2020, Plaintiff served a Notice of Discovery and Inspection on Plaza Construction and the 280 Park Defendants (Andalkar affirmation ¶ 10). On April 15, 2020, counsel for the 280 Park Defendants was substituted as counsel for Plaza Construction (all together, "Defendants") (NYSCEF Doc 26). On June 5, 2020, Defendants served responses to Plaintiff's Notice of Discovery and Inspection (Andalkar affirmation ¶ 13), but did not produce responsive documents. On June 8, 2021, Plaintiff served a First Set of Interrogatories (the "Interrogatories") on all Defendants (*id.* ¶ 14).

On August 28, 2020, Defendant made a partial production of documents (*id.* ¶ 15). Thereafter, the court conducted two discovery conferences and issued orders, dated September 31, 2020 and November 18, 2020, in which it directed Defendants to respond to all outstanding discovery requests and produce relevant documents (NYSCEF Docs 28-29). A third compliance conference was held on December 21, 2020, wherein Plaintiff was given leave to file the instant motion upon a showing that Defendants had again failed to produce responsive documents in violation of the September 31, 2020 and November 18, 2020 orders. Defendants made an additional document production to Plaintiff on January 6, 2021 and Plaintiff thereafter filed this motion on February 10, 2021.

In opposition to this motion, Defendants contend that all responsive documents in their possession were produced in the January 6, 2021 document production and in subsequent productions made during the pendency of the motion (Dee affirmation ¶¶ 4-5). Nevertheless, on reply, Plaintiff identifies several categories of items demanded that Defendants have yet to produce, including, *inter alia*, documents and correspondence related to payment of the underlying claims, documents related to alleged damages of defendants Jame Legacy LLC and

Classic Restaurants Corp., d/b/a The Four Seasons Restaurant, and documents referencing and referring to change orders in connection with the underlying claims (Andalkar reply affirmation ¶¶ 9-18). Notably, Defendants also have not responded to the Interrogatories served on June 8, 2020. An additional compliance conference was held with the court on April 21, 2021, wherein Defendants' counsel confirmed that no additional document production of the items identified by Plaintiff in the reply has been made.

Plaintiff's instant motion seeks to strike the answers of Defendants or, in the alternative, to preclude Defendants from offering any evidence at trial regarding the issues for which it has failed to produce responsive documents. Plaintiff also seeks an award of attorneys' fees in connection with discovery. CPLR 3126 authorizes the court to sanction a party who "refuses to obey an order for disclosure or wilfully fails to disclose information which the court finds ought to have been disclosed" (*see also, Kutner v Feiden, Dweck & Sladkus*, 223 AD2d 488, 489 [1st Dept 1998]). "The nature and degree of the penalty to be imposed pursuant to CPLR 3126 lies within the sound discretion of the Supreme Court" (*Lazar, Sanders, Thaler & Assoc, LLP v Lazar*, 131 AD3d 1133, 1133 [2d Dept 2015]; *see Maxim, Inc. v Feifer*, 161 AD3d 551, 554 [1st Dept 2018]). A party's failure to satisfy his or her discovery obligations, particularly after a court order has been issued, "may constitute the dilatory and obstructive, and thus contumacious, conduct" (*Kutner v Feiden, Dweck & Sladkus*, 223 AD2d at 489; *see CDR Creances S.A. v Cohen*, 104 AD3d 17 [1st Dept 2012]; *Reidel v Ryder TRS, Inc.*, 13 AD3d 170 [1st Dept 2004]). A party may "tender a reasonable excuse to overcome [a] showing of willfulness" (*Menkes v Delikat*, 50 NYS3d 318, 319 [1st Dept 2017]), but "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 answer” (*Turk Eximbank-Export Credit Bank of Turkey v. Bicakcioglu*, 81 AD3d 494, 494 [1st Dept 2011]).

Upon the evidence offered on the motion, the court finds that by failing, for a period of over one year and without a reasonable explanation, to fully comply with this court’s orders, produce all responsive documents in discovery, and respond to the Interrogatories, Defendants have exhibited a “willful and contumacious pattern of disobeying court orders and failing to comply with disclosure obligations” (*Amini v Arena Constr. Co., Inc.*, 110 AD3d 414, 415 [1st Dept 2013]). Accordingly, the motion is granted to the extent that Defendants are directed to respond to the Interrogatories and produce all documents in their possession that are responsive to Plaintiff’s outstanding discovery demands no later than June 7, 2021, and will be precluded from offering any items not produced by that date, as evidence at trial. Failure to respond to the Interrogatories by June 7, 2021, in conformity with CPLR 3133, will result in the striking of the Defendants’ answers.

Accordingly, it is

ORDERED that the motion to strike is granted in part and to the extent that Defendants are directed to respond to the Interrogatories and produce all documents in their possession that are responsive to Plaintiff’s outstanding discovery demands no later than June 7, 2021, and will be precluded from offering any items not produced by that date as evidence at trial; and it is further

ORDERED that Defendants’ failure to respond to the Interrogatories by June 7, 2021, in compliance with CPLR 3133, will result in the striking of the Verified Answer with Cross-Claims of Defendant Plaza Construction LLC (NYSCEF Doc 14) and the joint Verified Answer and Counterclaims of Defendants 280 Park Fee LLC, Jame Legacy LLC, Classic Restaurants,

Corp. d/b/a the Four Seasons Restaurant and Atlantic Specialty Insurance Company (NYSCEF Doc 12); and it is further

ORDEED that the portion of Plaintiff’s motion that seeks an award of attorneys’ fees is denied; and it is further

ORDERED that a further compliance conference will be held on June 9, 2021 at 12:00 p.m., to be conducted via a Microsoft Teams appearance to be arranged by the court.

ENTER:



<u>4/22/2021</u> DATE					<u>LOUIS L. NOCK, J.S.C.</u>		
CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED		<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION		
	<input type="checkbox"/>	GRANTED	<input type="checkbox"/>	<input checked="" type="checkbox"/>	GRANTED IN PART	<input type="checkbox"/>	OTHER
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER		<input type="checkbox"/>	SUBMIT ORDER		
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN		<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/>	REFERENCE