

<b>Turco v Novita LLC</b>
2021 NY Slip Op 32023(U)
July 16, 2021
Civil Court of the City of New York, New York County
Docket Number: L&T 962/20
Judge: Frances A. Ortiz
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CIVIL COURT OF THE CITY OF NEW YORK  
COUNTY OF NEW YORK, HOUSING PART B

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MICHELE TURCO, ELENA NUNEZ,  
PHYLIS HILLIARD, and SALEH HEGAZY

Petitioner, Tenant,

**-against-**

**Index No. L&T 962/20  
DECISION AND ORDER**

NOVITA LLC, TEAMS MANAGEMENT LLC,  
and FRANK PECORA

Respondent(s)-Owner(s)

DEPARTMENT OF HOUSING PRESERVATION  
AND DEVELOPMENT,

Co-Respondent, and

NEW YORK CITY DEPARTMENT OF BUILDINGS,

Co-Respondent.  
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CIVIL COURT OF THE  
CITY OF NEW YORK  
JUL 16 2021  
ENTERED  
NEW YORK COUNTY

**FRANCES A. ORTIZ, JUDGE**

Recitation as required by CPLR 2219(a), of the papers considered in the review of the petitioner's motion to strike the pleadings and/or preclude respondent from entering evidence at trial and respondent's cross motion to extend time to produce documents.

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<b>Papers</b>	<b>Numbered</b>
Notice of Motion, Affirmation & Exhibits.....	1/NYSCEF 51-58
Affirmation in Opposition & Exhibit.....	2/NYSCEF 59-71
Reply Affirmation.....	3/NYSCEF 72

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Upon the foregoing cited papers, the Decision/Order of this Court on these consolidated motions is as follows:

This Court in a decision dated April 6, 2021 granted petitioners' motion for discovery in this HP Action to the extent that the respondent/owner was to reply to items 1 through 15 in the

“Notice of Discovery and Inspection” in Exhibit J to the motion within 45 days of the date of the decision.

Now, petitioners move pursuant to *CPLR §3126* to strike respondent’s pleadings and to preclude the respondent from entering into evidence or testimony any documents not produced in response to their document requests. According to counsel for petitioners, respondent on May 20, 2021 provided certain documents to the request but they were woefully deficient. The documents provided were relevant to only four (4) out of the fifteen (15) items demanded, and respondent failed to provide any affidavits indicating why the documents could not be produced. (*Amor Affirm. ¶s 14 & 15*). Additionally, petitioners contend that respondent failed to provide any documents toward their sole defense of economic infeasibility. (*Id. ¶16*). On June 15, 2021, petitioners’ counsel wrote a letter to counsel for respondent documenting the insufficiencies of their responses and requested further responses by June 18, 2021. (*Id. ¶19*).

Additionally, at the July 13, 2021 oral argument of the instant motions on the record<sup>1</sup>, this Court requested an update from petitioners’ counsel as to what documents remained unproduced.

According to Maria Amor, Esq.,

document request 3 relating to any and all insurance policies for the subject premises had not been produced,

document request 4 relating to any and all correspondence with insurance carriers related to policies for the subject premises held on November 3, 2020 did not contain an affidavit confirming that what had been provided contained all documents in respondent’s possession,

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<sup>1</sup> FTR Room 583/Part B, 7/13/21, 9:30 am – 10:10 am

document request 5 relating to any and all insurance claims made for the subject premises on or since November 3, 2020 to the present did not contain an affidavit confirming that what had been provided contained all documents in respondent's possession,

document request 6 relating to any and all correspondence with insurance carriers related to claims made for the subject premises on or since November 3, 2020 to the present did not contain an affidavit confirming that what had been provided contained all documents in respondent's possession,

document request 7 relating to any and all insurance reports, adjustments, and/or estimates for the subject premises made on or since November 3, 2020 to the present did not contain an affidavit confirming that the one estimate provided indicating "work in progress" was the only one available in respondent's possession,

document request 8 to relating any and all correspondence with insurance carriers related to insurance reports, adjustments, and/or estimates for the subject premises made on or since November 3, 2020 to the present did not contain an affidavit confirming unavailability of these documents,

document request 11 relating to any and all offers received or solicited by respondents for the sale of the subject premises on or since November 3, 2020 to the present did not contain an affidavit explaining why there was no response to this,

document request 12 relating to any and all appraisals for the subject premises from November 3, 2020 to the present did not contain an affidavit explaining why there was no response to this,

document request 13 relating to any and all correspondence with or reports made by architects or engineers detailing the condition of the subject premises including but not limited to scope of

work required and or feasibility of work required to lift the vacate order did not provide the scope of work but merely provided the name of the engineer, document request 14 relating to any and all appraisals and or reports on the value of the subject premises if the necessary work to lift the vacate order on the subject premises is performed did not contain an affidavit explaining why there is no response to this and document request 15 relating to any and all itemized reports, or itemized estimates detailing the cost to complete repairs necessary to lift the vacate order on the subject premises did not contain an affidavit explaining why there is no response to this but merely a work in progress.

Under *CPLR §3126*, courts have the discretion to impose penalties, upon parties who fail to disclose information which the court orders to be disclosed. The penalties can be:

....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,....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.

*CPLR §3126 (2) and (3).*

As such, a court may issue an order to strike the pleadings or prohibit the disobedient party from producing evidence or testimony at trial related to the defenses and the undisclosed information. However, “..before a court invokes the drastic remedy of striking a pleading, or even of precluding all evidence, there must be a clear showing that the failure to comply with court-ordered discovery was willful and contumacious.” *Crupi v. Rashid, 157 A.D.3d 858, 859 (2<sup>nd</sup> Dept’ 2018).*

Here, the record does not demonstrate that respondent has willfully and contumaciously failed to provide all the responses to the Notice of Discovery and Inspection. It appears that there has been partial compliance with this Court’s Discovery Order dated April 6, 2021. As such, this Court will not at this juncture issue an Order to strike the respondent’s pleadings and/or preclude respondent from entering any documents in evidence which fall within the scope of the Notice of Discovery and Inspection. Accordingly, petitioners’ motion is denied.

However, the denial of petitioners’ motion is not in vain. This Court is very perturbed by subsequent events that occurred after the April 6, 2021 Order. Respondent submitted a “Responses and Objections to Petitioners’ Notice of Discover [sic] and Inspection” dated May 20, 2021.<sup>2</sup> The April 6, 2021 Order addressed any opposition to the motion for discovery and the motion was fully submitted, reviewed and decided by the Court. The appropriate remedy at this procedural posture is an appeal of the discovery order and request for a stay not an objection due to vagueness or privilege.

Additionally, this Court is frustrated by the absence of an excusable explanation for respondent’s failure in producing what would be considered readily available documents to the respondent such as insurance policies, insurance claims or engineer’s scope of work for the subject premises, after the fire in November 2020. The Court of Appeals has repeatedly emphasized the following:

...our court system is dependent on all parties engaged in litigation abiding by the rules of proper practice (*see e.g. Brill v. City of New York*, 2 N.Y.3d 648, 781 N.Y.S.2d 261, 814 N.E.2d 431 [2004]; *Kihl v. Pfeffer*, 94 N.Y.2d 118, 700 N.Y.S.2d 87, 722 N.E.2d 55 [1999] ). The failure to comply with deadlines not only impairs the efficient functioning of the courts and the adjudication of claims, but it places jurists unnecessarily in the position of having to order enforcement remedies to respond to the delinquent conduct of members of the bar, often to the

<sup>2</sup> On the 44th day of the April 6, 2021 Order.

detriment of the litigants they represent. Chronic noncompliance with deadlines breeds disrespect for the dictates of the Civil Practice Law and Rules and a culture in which cases can linger for years without resolution. Furthermore, those lawyers who engage their best efforts to comply with practice rules are also effectively penalized because they must somehow explain to their clients why they cannot secure timely responses from recalcitrant adversaries, which leads to the erosion of their attorney-client relationships as well. For these reasons, it is important to adhere to the position we declared a decade ago 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” (*Kihl*, 94 N.Y.2d at 123, 700 N.Y.S.2d 87, 722 N.E.2d 55).

*Gibbs v. St. Barnabas Hosp.*, 16 N.Y.3d 74, 81, (2010).

As such, the Court urges respondent to not ignore this Court’s April 6, 2021 discovery order and within 30 days of the date of this Order with Notice of Entry to fully respond to document request items 3, 4, 5, 6, 7, 8, 11, 12, 13, 14, and 15; otherwise, petitioners may have to file a second motion to strike and preclude and compel this Court to re-consider the request. Additionally, respondent is reminded that if does not possess any of the documents in items 3, 4, 5, 6, 7, 8, 11, 12, 13, 14, and 15, then it should submit affidavit(s) explaining why the document is incomplete and/or affirmatively confirming that such documents already submitted are the only ones in their possession. Such compliance and transparency will promote respect, credibility and efficiency of this Court’s Order, the attorneys, the parties and effectuate the proper housing maintenance standards needed to promote the public interest in HP actions or proceedings like this one which involve the enforcement of state and local laws for the establishment and maintenance of housing standards.

In light of the above, respondent’s cross motion for an extension of time to respond to the document requests is granted to 30 days of the date of this Order with Notice of Entry to fully respond to document request items 3, 4, 5, 6, 7, 8, 11, 12, 13, 14, and 15.

ORDERED: Petitioner’s motion to strike the pleadings and/or preclude respondent from entering evidence at trial is denied.

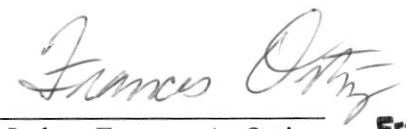
ORDERED: Respondent’s cross motion to extend the time to produce documents is granted to the limited extent that respondent has an additional 30 days of the date of this Order with Notice of Entry to fully respond to document request items 3, 4, 5, 6, 7, 8, 11, 12, 13, 14, and 15.

ORDERED: The matter remains off calendar pending the completion of discovery.

This is the decision and order of the Court, copies of which are being emailed to those indicated below.

Date: July 16, 2021

CIVIL COURT OF THE CITY OF NEW YORK  
JUL 16 2021  
ENTERED NEW YORK COUNTY



Judge, Frances A. Ortiz

**Frances A. Ortiz**  
Judge, Housing Court

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