

**Domino v West St. Equities Corp.**

2021 NY Slip Op 32240(U)

November 9, 2021

Supreme Court, New York County

Docket Number: Index No. 159250/2017

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 NERVO PART 04

*Justice*

-----X

CHRISTOPHER DOMINO,

Plaintiff,

- v -

WEST STREET EQUITIES CORP., 50 WEST  
DEVELOPMENT LLC, HUNTER ROBERTS  
CONSTRUCTION GROUP, L.L.C.,

Defendant.

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INDEX NO. 159250/2017

MOTION DATE 09/09/2021

MOTION SEQ. NO. 002

**AMENDED DECISION +  
ORDER ON MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 002) 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99 were read on this motion to/for DISCOVERY.

Plaintiff seeks an order, inter alia, extending the deadline by which to file a note of issue, amending the complaint to add Tractel and PI management as direct defendants, and discovery relief.

The Court's prior order regarding the parties' dilatory approach to discovery obligations was unequivocal: depositions were to occur on the dates ordered and various discovery was to be completed following those depositions. Likewise, the Court's order advised that the failure to appear for a deposition would result in sanctions and the failure to timely notice plaintiff's independent medical exam (IME) constitute waiver of the exam. It is beyond cavil that the

parties were not free to extend or excuse compliance with the Court's prior order.

As this court noted in its prior order, “[t]he failure to comply with deadlines not only impairs the efficient functioning of the courts and adjudication of claims, but it places jurists unnecessarily in the position of having to order enforcement remedies to respond to the delinquent conducts of members of the bar, often to the 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” (*Gibbs v. St. Barnabas Hosp.*, 16 NY3d 74 [2010]).

“A party that permits discovery to ‘trickl[e] in [with a] cavalier attitude should not escape adverse consequence’” (*Henderson-Jones v. City of New York*, 87 AD3d 498, 504 [1st Dept 2011] quoting *Figdor v. City of New York*, 33 AD3d 560, 561 [1st Dept 2006]).

Here, the parties did not adhere to the Court's prior order and instead proceeded with depositions at their own leisure without regard to the deadlines imposed by this Court. The Court further notes that the witness produced by

defendant Hunter Roberts was indefensibly inappropriate. Hunter Roberts' witness left its employ approximately two years before plaintiff's alleged accident, was unaware of the accident, and could not identify those supervisors at the job site at the time of plaintiff's accident. Moreover, plaintiff waited three months after defendants' initial failure to appear for deposition, and shortly before the note of issue deadline, to bring the instant discovery application. Rule 202.20(e) requires such motions be brought promptly. The Court notes that no application was received following the initial failure to adhere to the Court's discovery order.

Put simply, the parties, by failing to comply with discovery deadlines and producing "know nothing" witnesses, have painted themselves into the proverbial corner and now turn, for a second time, to this Court to fix their problem.

Accordingly, it is

ORDERED that defendants have waived their right to conduct an independent medical exam, pursuant to the Court's May 2021 order; and it is further

ORDERED that given the substantial outstanding discovery, plaintiff's motion to amend the complaint to add third-parties Tractel and PI Management is denied without prejudice to renewal upon the completion of depositions below; and it is further

ORDERED that the below depositions shall occur either in-person or via electronic means; and it is further

ORDERED that all post-deposition demands shall be served within 20 days of completion of deposition or shall be deemed waived. All responses to post-deposition demands shall be served within 20 days of receipt of demand. Failure to timely respond to a timely post-deposition demand shall result in sanctions, in the Court's discretion, including but not limited to striking of pleadings; and it is further

ORDERED that third-party PI Management shall appear for a deposition on December 9<sup>th</sup>, 2021 at 10:00am, continuing day-to day until its completion, in accordance with the Uniform Rules; and it is further

ORDERED that third-party Tractel shall appear for a deposition on December 16<sup>th</sup>, 2021 at 10:00am, continuing day-to day until its completion, in accordance with the Uniform Rules, to the extent that such deposition has not been previously held; and it is further

ORDERED that failure to produce a witness with knowledge or to appear for deposition shall result in sanctions, including but not limited to striking of pleadings, as appropriate in the Court's discretion, upon further application; and it is further

ORDERED that defendant Hunter Roberts shall produce a witness with knowledge of the alleged accident who was employed at the accident site at the time of the alleged accident for further deposition on December 2<sup>nd</sup>, 2021 beginning at 10:00am and continuing day-to-day until its completion in accordance with the Uniform Rules. Defendant Hunter Roberts shall bear the entire costs of such further deposition; and it is further

ORDERED that should defendant Hunter Roberts fail to produce a proper witness, as above, for further deposition, its answer shall be stricken, absent further order of this Court; and it is further

ORDERED that the parties' dispute regarding plaintiff's July 17, 2018, August 17, 2021 and September 7, 2021 demands are referred to a discovery referee of the parties' choosing with costs to be borne equally by plaintiff and defendants, and such referee shall hear and report to this Court on said issue by April 1, 2022; and it is further

ORDERED that should the parties fail to agree upon a discovery referee within 14 days of this order, they shall file a letter to judge, in accordance with the Part Rules including courtesy copy via first-class mail, advising of same and this Court shall appoint a discovery referee of its own choosing with costs for same to be borne by the parties, as above; and it is further

ORDERED that counsel for plaintiff and defendant have engaged in frivolous conduct, as defined under section 130-1.1 (c) of the Rules of the Chief Administrator, by failing to adhere to the Court's prior final discovery order necessitating the instant entirely avoidable motion practice; and it is further

ORDERED that counsel for plaintiff, Saks and Saks, and defendants, Lewis Brisbois Bisgaard & Smith, are each sanctioned in the amount of \$250.00,

without any charge to their client, payable to the Lawyer's Fund for Client Protection, 119 Washington Avenue, Albany, New York 12210; and it is further

ORDERED that written proof of the payment of this sanction be provided to the Clerk of Part IV and opposing counsel within 30 days after service of a copy of this order with notice of entry; and it is further

ORDERED that, in the event that such proof of payment is not provided in a timely manner, the Clerk of the Court, upon service upon him of a copy of this order with notice of entry and an affirmation or affidavit reciting the fact of such non-payment, shall enter a judgment in favor of the Lawyer's Fund and against said counsel in the aforesaid sum; and it is further

ORDERED that such service upon the Clerk of the Court and the Clerk of the Part 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, in accordance with Section 130-1.3, a copy of this order will be sent by the Part to the Lawyer’s Fund for Client Protection; and it is further

ORDERED that the end date for all discovery shall be March 4, 2022; and it is further

ORDERED that the note of issue deadline is extended to March 18, 2022.

THIS CONSTITUTES THE DECISION AND ORDER OF THE COURT.

11/09/2021  
DATE

  
FRANK NERVO, J.S.C.

CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION
	<input type="checkbox"/>	GRANTED	<input type="checkbox"/>	GRANTED IN PART
	<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"/>	DENIED	<input checked="" type="checkbox"/>	OTHER
			<input type="checkbox"/>	REFERENCE