SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. SABRINA KRAUS** **PART** **57TR**

Justice

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1591 SECOND AVENUE LLC,1593 SECOND AVENUE LLC,1595-1597 SECOND AVENUE LLC,246 EAST 83 STREET LLC,248 EAST 83 STREET LLC

Plaintiff,

- v -

METROPOLITAN TRANSPORTATION AUTHORITY, MTA CAPITAL CONSTRUCTION COMPANY,

Defendant.

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INDEX NO. 161539/2015

MOTION DATE 02/04/2021

MOTION SEQ. NO. 008

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 008) 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 237, 238, 239, 240, 244, 274, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287

were read on this motion to/for STRIKE AFFIRMATIVE DEFENSE.

BACKGROUND

On February 4, 2021, plaintiff moved for an order striking defendants answer based on defendants' failure to comply with outstanding discovery demands. Pursuant to a decision and order dated June 23, 2021, the court (Kelly, J) denied the motion. The court held that plaintiff had failed to establish that defendants had willfully failed to provide discovery and that defendants had substantially complied with plaintiff's demands. Plaintiff appealed the decision and on February 22, 2022 the Appellate Division, First Department reversed Judge Kelly.

The Appellate Division held in pertinent part:

We find that Supreme Court improvidently exercised its discretion in denying plaintiffs' motion and concluding that defendants both had not willfully failed to comply, and had substantially complied, with Demand #6 without reviewing defendants' Jackson affidavits. Despite six court orders directing defendants to supply a Jackson affidavit, defendants still did not do so until sometime after plaintiffs moved for the third time to strike defendants' answer,

almost two years after first being ordered to do so. Under these circumstances, and given plaintiffs' well-founded allegations as to the insufficiency of defendants' *Jackson* affidavits, sanctions may very well be warranted, as we found them to be in *Jackson* (see 185 AD2d at 770). However, because the affidavits were never submitted to Supreme Court, either in connection with the motion underlying this appeal or otherwise, the affidavits are outside the record, and we cannot take judicial notice of them (*see Samuels v Montefiore Med. Ctr*., 49 AD3d 268 [lst Dept 2008]; *Gintell v Coleman*, 136 AD2d 515,517 [lst Dept 1988]). Moreover, the parties' letters to Supreme Court describing the contents of those affidavits were hearsay (*see HSBC Bank USA, N.A v Greene*, 190 AD3d 417,418 [1st Dept 2021]). Accordingly, the proper course under these circumstances is to vacate the order and remit this case to Supreme Court to assess the sufficiency of defendants' *Jackson* affidavits in the first instance and determine whether sanctions are appropriate. Should Supreme Court find that the affidavits did not satisfy the requirements of a bona fide *Jackson* affidavit (*see Jackson v City of New York*,185 AD2d at 770), the court has the ability to provide an appropriate remedy under CPLR 3126 (*see Merrill Lynch, Pierce, Fenner & Smith, Inc. v Global Strat. Inc*., 22 NY3d 877, 880 [2013].

Upon remittal, the court afforded each party an opportunity to make additional submissions to address the Appellate Division decision. Once those submissions were made the court reserved decision.

For the reasons stated below, the court finds that the *Jackson* affidavits were insufficient and grants plaintiff's motion to strike defendant's answer pursuant to CPLR §3126.

DISCUSSION

Following joinder of issue in this property damage action arising out of defendants' construction of the Second Avenue subway line, plaintiffs demanded, by notice dated February 11, 2016, that defendants produce, among other things, documents and reports concerning electronic survey equipment and related raw data (Demand #6). Over the following three years, defendants responded that they were conducting "a diligent search" for documents responsive to that demand; that they had no documents responsive to that demand; and, that documents responsive to other of plaintiffs' document demands were responsive to Demand #6. In those same three years, defendants were ordered by the court to serve documents responsive to Demand #6 at least four times, and defendants missed several deadlines by which to do so. That

culminated in an order entered on or about April 18, 2019, in which the court (Robert R. Reed, J.) granted plaintiffs' motion to strike defendants' answer solely to the extent of directing defendants to provide plaintiffs with an affidavit pursuant to *Jackson v City of New York* (185 AD2d 268 [1st Dept 1992]) on or before a date certain. Defendants did not supply the *Jackson* affidavit by the deadline set in the court's April 18, 2019 order. Defendants were again directed to do so by five subsequent court orders, the last of which granted plaintiffs leave to move for appropriate relief.

Per the Remand Order, the issues before this Court are: (i) whether the Affidavit of Nitin Patel, a senior engineering manager for the MTA, sworn to on April 5, 2021 ("Patel Affidavit") and the Affidavit of Juan Viruet, who is not an MTA employee, sworn to on June 11, 2021 ("Viruet Affidavit"), are sufficient under the rule of *Jackson v. City of New York*, 185 A.D.2d 768, 770 (1st Dep't 1992); (ii) and if not whether sanctions are appropriate in light of defendants' failure to comply with six separate court orders to provide plaintiffs with a *Jackson* Affidavit, then providing the aforementioned affidavits sometime after plaintiffs moved to strike the MTA's Answer for the third time.

Plaintiffs deposed Nitin Patel on, May 13, 2021, after he swore to the statements in the Patel Affidavit. Mr. Patel testified that he did not personally participate in the search described in the affidavit nor did he know how the search was conducted. The search was conducted by WSP Staff (a vendor of MTA). Mr. Patel further testified at his deposition as follows:

Q.: And how was that search done?

A.: I'm not 100 percent sure, but they use a similar terminology for longer area, 12 wider area.

Q.: Who would know, would anybody at the MTA, MTACC know?

A.: I'm not sure, no

Therefore, he has no personal knowledge regarding the search described in his affidavit, rendering it entirely devoid of evidentiary value.

Thereafter, the Viruet Affidavit was submitted. As noted from the Viruet Affidavit, Mr. Viruet is an employee of LKG-CMC Inc. He stated in general terms what would be done when a request is received. He makes no mention of the search at issue, the location of the documents and/or how the documents were maintained, nor does he make any reference to the actual search in connection with Demand 6.

In the seminal case of *Jackson v. City of New York*, 185 A.D.2d 768, 770 (1st Dep't 1992), the First Department specified that an affidavit regarding the unavailability of documents must make a showing "as to where the subject records were likely to be kept, what efforts, if any, were made to preserve them, whether such records were routinely destroyed, or whether a search had been conducted in every location where the records were likely to be found." The Patel and Viruet Affidavits fail to meet the standard set forth in *Jackson*. In his affidavit, Mr. Patel claims to have conducted a search for a number of documents and avers that the documents located through his search were produced to Plaintiffs. Mr. Patel does not describe any aspect of how the purported search was conducted. He does not identify where the requested documents were likely to be kept, what efforts, if any, were made to preserve them, whether such documents were likely to have been destroyed, or whether a search had been conducted in every location where the records were likely to be found, as required under *Jackson*. Any question as to the sufficiency of the Patel Affidavit was answered by Mr. Patel himself at his deposition on May 13, 2021, where he testified that he was not personally involved in the MTA's purported search for responsive documents nor did he know how the search was conducted. Because he was not

involved in the MTA's purported search for responsive documents and he admittedly did not have personal knowledge as to how the search was conducted, or even if a search was conducted at all, the Patel Affidavit is of no probative value and is not in compliance with the requirements of *Jackson*. In fact, submission of this affidavit is evidence of the MTA's bad faith and willful and contumacious conduct.

After the insufficiency of the Patel Affidavit was confirmed by Mr. Patel's deposition testimony, the MTA was given yet another opportunity to provide a proper *Jackson* Affidavit. The MTA provided the Viruet Affidavit. In his affidavit, Mr. Viruet, who is not an MTA employee and does not claim to have ever been one, does nothing other than describe his general practice in searching for documents requested by the MTA, and not any specific search for documents responsive to Demand. Mr. Viruet states: "When a request was made for damage to a building, a search would be made for the address of the building, documents relating to survey reports for the address, a search by block and lot number." He continues: "When the request was made for correspondence regarding a certain building, a search would be made using the landlord or owner's name." Again, nowhere in his six-paragraph affidavit does Mr. Viruet discuss a specific search for documents responsive to Plaintiffs' Demand 6 or in response to any of Plaintiffs' other document demands. As with the Patel Affidavit, the Viruet Affidavit fails to identify where the requested documents were likely to be kept, what efforts, if any, were made to preserve them, whether such documents were routinely destroyed, or whether a search had been conducted in every location where the records were likely to be found. The Viruet Affidavit, which generally states what would be done upon receipt of a request from the MTA with no mention of the actual search, if any, conducted regarding Demand 6, is clearly insufficient and does not meet the requirements of *Jackson*. In addition, the Viruet Affidavit does not and cannot

satisfy a party's obligation to conduct a meaningful, good-faith search when responding to discovery demands since it does not make any reference to the to the alleged search, if any, that was conducted. *See, e.g., Shchukin House OU v. Iseev*, 2019 Slip Op 33192(U), 2019 WL 5547021 (Sup Ct N.Y. County 2019), *aff'd sub nom Shchukin OU v. Iseev*, 195 A.D.3d 431 (1st Dep't 2021).

In *Shchukin House OU, supra*, the Court struck the pleading where the party's willful and contumacious behavior included the submission of an alleged *Jackson* Affidavit which only stated "in the most general terms possible" that the affiant searched the records and there were no additional responsive documents. *Id.* In the case at bar, the affiant, does not even state that he did the particular search that was required to be conducted in connection with Demand 6 nor that it was even conducted. The Viruet Affidavit does not comply with requirements of *Jackson*.

Based on this assessment, defendants' answer and affirmative defenses should be stricken. In *Henderson-Jones v. City of New York*, 87 A.D.3d 498, 505 (1st Dep't 2011), the defendants failed to provide information pertaining to the plaintiff's arrest and processing as a prisoner. According to the defendants' *Jackson* affidavits, searches for responsive documents were limited to "old desks and lockers" and they knew of no other places where responsive documents might be kept. *Id*. at 503-504. This was even though the plaintiff's expert identified several different locations that should have been searched. *Id*. The First Department described the defendants' *Jackson* affidavits as "so unimaginative and lacking in diligence that it is hard to characterize them as anything other than willfully designed to thwart plaintiff." *Id*. at 505. Likewise, here, the MTA's *Jackson* Affidavits, one of which was provided by a person with no personal knowledge of the search and the other couched in the most general terms possible with no reference to the search conducted, if any, in response to Demand 6, can only be described as

willfully designed to thwart Plaintiffs. Since Demand 6 was served on Defendants in February 2016, the MTA has never identified the individual or individuals who conducted any search for documents responsive to Demand 6, let alone provide a *Jackson* Affidavit from that individual or individuals. The MTA cannot establish the sufficiency of its search without an affidavit from the persons who actually conducted the search. *Donovan v. City of New York*, 239 A.D.2d 461, 461 (1st Dep't 1997). That the MTA has never provided an affidavit from anyone who conducted a search for documents responsive to Demand 6 suggests that the MTA cannot represent that a complete search was ever conducted. The MTA has produced no ESI in this litigation pending since 2015, this failure is further exacerbated by the MTA's belated provision of not one, but two patently defective affidavits that come nowhere near complying with the requirements of *Jackson*.

Nothing submitted by defendants warrants a different result. This court attempted to have defendants produce ESI responsive to outstanding demands. To date not a single ESI document has been produced by defendants who assert that the search terms offered by plaintiff and the court will not work because they produce too many results, but who refuse to provide their proposed search terms to accomplish the task.

Based on the foregoing, the motion is granted, and defendants' answer and affirmative defenses are stricken.

CONCLUSION

The plaintiff having established that defendant has willfully failed to provide discovery as directed in this court's prior orders as detailed above; it is hereby

ORDERED that plaintiff's motion is granted and the answer of defendants METROPOLITAN TRANSPORTATION AUTHORITY and MTA CAPITAL CONSTRUCTION COMPANY is stricken; and it is further

ORDERED that, on or before June 1, 2022, plaintiff shall serve a copy of this order with notice of entry upon, and file a note of issue and statement of readiness with, the Clerk of the General Clerk's Office (60 Centre Street, Room 119), and pay the fee therefor; and it is further

ORDERED that such service upon the Clerk of the General Clerk's Office 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)]; and it is further

ORDERED that, upon said filing and the payment of the appropriate fee, the Clerk shall place this matter upon the trial calendar for an inquest as to damages.

4/26/2022					**SABRINA KRAUS, J.S.C.**		
DATE							
CHECK ONE:		**CASE DISPOSED**			X	**NON-FINAL DISPOSITION**	
	X	**GRANTED**		**DENIED**		**GRANTED IN PART**	**OTHER**
APPLICATION:		**SETTLE ORDER**				**SUBMIT ORDER**	
CHECK IF APPROPRIATE:		**INCLUDES TRANSFER/REASSIGN**				**FIDUCIARY APPOINTMENT**	**REFERENCE**