

**Arguelles v Hunter Roberts Constr. Group, LLC**

2022 NY Slip Op 31971(U)

June 24, 2022

Supreme Court, New York County

Docket Number: Index No. 158479/2019

Judge: Lisa S. Headley

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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. LISA HEADLEY PART 28M**

*Justice*

-----X

ANTHONY ARGUELLES,

Plaintiff,

- v -

HUNTER ROBERTS CONSTRUCTION GROUP,  
LLC,SOUTH STREET SEAPORT LIMITED PARTNERSHIP,  
SEAPORT MANAGEMENT DEVELOPMENT COMPANY,  
LLC,THE HOWARD HUGHES CORPORATION, CROSS  
MANAGEMENT CORP., GTL CONSTRUCTION, LLC,

Defendant.

-----X

SOUTH STREET SEAPORT LIMITED PARTNERSHIP,  
SEAPORT MANAGEMENT DEVELOPMENT COMPANY, LLC,  
THE HOWARD HUGHES CORPORATION

Plaintiff,

-against-

NEP IMAGE GROUP, LLC, NATIONAL ACOUSTICS, LLC

Defendant.

-----X

NEP IMAGE GROUP, LLC

Plaintiff,

-against-

CROSS MANAGEMENT CORP., NATIONAL ACOUSTICS  
LLC

Defendant.

-----X

The following e-filed documents, listed by NYSCEF document number (Motion 005) 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 315

were read on this motion to/for STRIKE PLEADINGS.

**DECISION + ORDER ON  
MOTION**

Third-Party  
Index No. 595305/2020

Second Third-Party  
Index No. 595900/2020

The following e-filed documents, listed by NYSCEF document number (Motion 006) 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 318, 319, 320, 321, 323, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360

were read on this motion to/for

DISCOVERY

**After oral argument before the court and after a careful and thorough review of all the above documents, motion sequences 005 and 006 are granted in part.**

Third-party defendant/second third-party defendant National Acoustics LLC (hereinafter “National”) moves this court seeking an order pursuant to CPLR §3126 to strike the answers and cross-claims of Hunter Roberts Construction Group and Cross Management Corp for the willful and contumacious refusal to provide outstanding discovery, or, in the alternative; pursuant to CPLR §3126 precluding Hunter Roberts Construction Group and Cross Management Corp from introducing evidence and testifying at the time of trial and otherwise on each issue for which outstanding discovery remains; or, in the alternative; pursuant to CPLR §3124 compelling Hunter Roberts Construction Group and Cross Management Corp to serve full and complete responses National’s Combined Discovery Demands by a date certain or be automatically precluded. (Motion Seq 005).

In opposition, defendants Hunter Roberts and Cross Management argue, *inter alia*, that National’s motion must be denied because the discoverable and relevant records requested by National were already produced and in counsel’s possession thereby rendering the motion moot and borderline frivolous under the circumstances and to order other relief it deems just and proper under the circumstances here, including sanctions. Defendant Hunter Roberts and Cross Management also argue that National has failed to proffer which records it suggests the court require Hunter Roberts to produce and fails to set forth case law supporting such request, and, therefore, National has failed to meet its burden of showing the documents requested in the Combined Demands are material and necessary.

Defendant Hunter Roberts moves this court for an order pursuant to CPLR § 3126 striking the plaintiff’s complaint for failing to respond to outstanding discovery and to comply with the March 16, 2021 and August 12, 2021 Orders; and/or pursuant to CPLR § 3124 to compel the plaintiff to comply with all outstanding discovery by a date certain and appear for a supplemental deposition limited to that production; or in the alternative; pursuant to CPLR § 3126 precluding plaintiff from introducing the records that remain outstanding as evidence at the time of trial. (Motion Seq 006)

Defendant Hunter Robert also moves this court for an order pursuant to CPLR § 3124 compelling National to provide all material records and documents requested in Hunter Roberts’ February 12, 2021 Combined Demands, February 12, 2021 Notice for Discovery and Inspection, August 14, 2021 letter and August 26, 2021 Notice for Discovery and Inspection and/or a Jackson affidavit attesting to the search conducted for the records not located and that the Court stay the deposition of National pending resolution of this motion; or in the alternative, pursuant to CPLR § 3126 precluding National from introducing the outstanding records as evidence at the time of trial as to liability defenses and from introducing the records for prosecution of its cross-claims.

In partial opposition, National argues, *inter alia*, that it has responded to Hunter Roberts’ discovery demands on three separate occasions and even served supplemental discovery responses on two separate occasions.

Plaintiff cross-moves seeking an order pursuant to CPLR § 3103. Specifically, plaintiff seeks a protective order denying, limiting, conditioning or regulating the defendant's continued requests for discovery related relief, which are the subject of the underlying motion filed by the defendant and for an order pursuant to CPLR § 3124, compelling Hunter Roberts to provide responses to the plaintiff's January 21, 2022 Notice for Discovery and Inspection.

Defendant Hunter Robert opposes the motion, arguing, *inter alia*, that Plaintiff's counsel adamantly refuses to provide the defendant with an authorization to obtain the Blue Cross Blue Shield records despite counsel being given medical evidence demonstrating that the insurance was used and despite plaintiff's very own testimony which confirmed that his Blue Cross Blue Shield insurance was used for treatment relating to this instant accident. Defendant Hunter Robert claims that the related medical records which document that the Blue Cross Blue Shield Insurance was used for treatment relating to the injuries from this alleged accident, are attached as Exhibit "A", see also; Exhibit E, Page 27. Defendant Hunter Robert further argues that plaintiff testified at the deposition that he used his Blue Cross Blue Shield insurance for prior treatment regarding his prior back pain. As such, Hunter Roberts alleges that they are entitled to an unrestricted authorization for plaintiff's Blue Cross Blue Shield insurance records.

Pursuant to *CPLR §3126(3)*, the court may strike a pleading as a sanction against a party who refuses to obey an order for disclosure. *See, CPLR §3126(3)*. "Before a court invokes the drastic remedy of **striking** a pleading or the alternative remedy of precluding evidence, there must be a clear showing that the **failure** to comply with court-ordered discovery was willful and contumacious." *Harris v. City of New York*, 117 A.D.3d 790, 790 (2d Dep't 2014). (Emphasis added). Willfulness and contumaciousness can be inferred from "**repeated failures** to comply with the court's orders, as well as the absence of any explanation offered to excuse... **failures** to comply." *Sowerby v. Camarda*, 20 A.D.3d 411 (2d Dep't 2005). (Emphasis added).

The Court notes that "[i]t is well settled that a court should not resort to striking an answer for failure to comply with discovery directives unless noncompliance is clearly established to be both deliberate and contumacious. Moreover, even where the proffered excuse is less than compelling, there is a strong preference in our law that matters be decided on their merits." *Catarine v. Beth Israel Med. Ctr.*, 290 A.D.2d 213, 215 (1st Dep't 2002) [internal citations omitted]. Under *CPLR §3124*, "if a person fails to respond or comply with any request, notice, interrogatory, demand, or question ... the party seeking disclosure may move to compel compliance or a response." A party may move to compel further discovery pursuant to *CPLR §3124* when said party demonstrates that it has made a "good faith effort to bring about a nonjudicial resolution to any remaining discovery disputes." *Barber v. Ford Motor Co.*, 250 A.D.2d 552, 553 (1st Dep't 1998).

Pursuant to *CPLR §3124*, "if a person fails to respond or comply with any request, notice, interrogatory, demand, or question ... the party seeking disclosure may move to compel compliance or a response." *CPLR §3124*. A party may move to compel further discovery under this provision when the movant demonstrates that it has made a "good faith effort to bring about a non-judicial resolution to any remaining discovery disputes." *Barber v. Ford Motor Co.*, 250 A.D.2d 552, 553 (1st Dep't 1998). "While the disclosure provisions of the CPLR are ordinarily to be construed liberally, the scope of permissible discovery is not entirely unlimited and the trial court is invested with broad discretion to supervise discovery and to determine what is 'material and necessary' as

that phrase is used in *CPLR 3101(a)*." *Auerbach v. Klein*, 30 A.D.3d 451, 452 (2d Dep't 2006). . Moreover, there is a strong preference in our law that matters be decided on their merits." *Catarine v. Beth Israel Med. Ctr.*, 290 A.D.2d 213, 215 (1st Dep't 2002)(*internal citations omitted*).

As stated above, the court has reviewed the no less than 120 documents uploaded to NYSCEF relating to motion sequences 005 and 006, and the court has relied on the representations of counsel during oral argument. Therefore, within this Court's discretion, it is hereby

**ORDERED** that National Acoustics LLC's motion to strike the answers and cross-claims of Hunter Roberts Construction Group and Cross Management Corp. is denied; and it is further

**ORDERED** that National Acoustics LLC's motion to preclude Hunter Roberts Construction Group and Cross Management Corp from introducing evidence and testifying at the time of trial is denied; and it is further

**ORDERED** that Hunter Roberts Construction Group and Cross Management Corp. are hereby compelled to respond to any outstanding discovery requests by national Acoustics LLC, if not already responded to, no later than September 30, 2022 and to the extent that National Acoustics LLC needs to specify with more detail the outstanding discovery sought, they shall do so no later than July 29, 2022; and it is

**ORDERED** that Defendant Hunter Roberts Construction Group's motion to strike the plaintiff's complaint is denied; and it is further

**ORDERED** that defendant Hunter Roberts Construction Group's motion to preclude the plaintiff from introducing the records that remain outstanding as evidence at the time is denied; and it is further

**ORDERED** that plaintiff shall comply with all outstanding discovery including the supplemental deposition, if not already done so, by September 30, 2022. Specifically, plaintiff shall provide authorizations for the Blue Cross insurance as it pertains to the within incident on the date the insurance was used. Plaintiff shall also produce pictures limited to those that show plaintiff engaging in activities as they pertain to the alleged injuries. Plaintiff does not have to turn over any still photographs that don't depict plaintiff engaging in activities that go against the injuries alleged; and it is further

**ORDERED** that defendant Hunter Roberts Construction Group's motion to preclude National Acoustics LLC from introducing the outstanding records as evidence at the time of trial as to liability defenses and from introducing the records for prosecution of its cross-claims is denied; and it is further

**ORDERED** that the deposition of National Acoustics LLC shall go forward, if not already done so, and is to be completed on or before October 7, 2022; and it is further

**ORDERED** that Hunter Roberts shall produce all relevant documents as they pertain to the insurance policy, the excess, the demands for insurance policy number, etc.

**ORDERED** that plaintiff's motion for a protective order is denied; and it is further

**ORDERED** that to the extent that a party alleges that discovery is missing and the other party alleges it turned it over, if a party still says that they don't have the discoverable item, the party who claims that the item was previously submitted, shall produce a duplicate in furtherance of moving this case forward; and it is further

**ORDERED** that the parties shall submit a Jackson Affidavit for all discoverable items that they allege that they cannot produce; and it is further

**ORDERED** that the parties, as officers of the court, shall proceed with discovery expeditiously, diligently and in good faith so that this case can be resolved on the merits; and it is further

**ORDERED** that if the parties need additional time for discovery, they are encouraged to work it out amongst themselves and contact the Part 28 clerk before filing any other discovery motions; and it is further

**ORDERED** that due to the voluminous documents upon which the court had to rely, there may be the possibility that the court missed something. If this is the case, please contact the Part 28 clerk; and it is further

**ORDERED** that plaintiff shall file the Note of Issue on or before February 10, 2023; and it is further

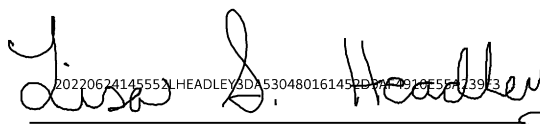
**ORDERED** that any requested relief sought not expressly addressed herein has nonetheless been considered; and it is further

**ORDERED** that within 30 days of entry, the movant on motion sequence 005 shall serve a copy of this Decision and Order upon all other parties with notice of entry

This constitutes the Decision/Order of the Court.

6/24/2022

DATE



LISA HEADLEY, J.S.C.

CHECK ONE:

CASE DISPOSED

GRANTED

SETTLE ORDER

INCLUDES TRANSFER/REASSIGN

DENIED

NON-FINAL DISPOSITION

GRANTED IN PART

SUBMIT ORDER

FIDUCIARY APPOINTMENT

OTHER

REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: