

Union Mut. Fire Ins. Co. v Ben Frank LLC
2022 NY Slip Op 33871(U)
November 16, 2022
Supreme Court, New York County
Docket Number: Index No. 158281/2018
Judge: Sabrina Kraus
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. SABRINA KRAUS

PART 57TR

Justice

-----X

UNION MUTUAL FIRE INSURANCE COMPANY A/S/O
MARLENE MUNGUIA,

Plaintiff,

INDEX NO. 158281/2018

MOTION DATE 01/13/2023

MOTION SEQ. NO. 003

- v -

BEN FRANK LLC, NS BUILDERS LLC,

Defendant.

**DECISION + ORDER ON
MOTION**

-----X

NS BUILDERS LLC

Plaintiff,

Third-Party
Index No. 595895/2020

-against-

XOLLE, LLC, QUAD CONSTRUCTION SERVICES, LLC.

Defendant.

-----X

NS BUILDERS LLC

Plaintiff,

Second Third-Party
Index No. 595356/2021

-against-

QUAD CONSTRUCTION OF NEW YORK, LLC, QUAD
CONSTRUCTION CONTRACTORS, LLC.

Defendant.

-----X

NS BUILDERS LLC

Plaintiff,

Third Third-Party
Index No. 595571/2021

-against-

XOLLE DEMO LLC

Defendant.

-----X

The following e-filed documents, listed by NYSCEF document number (Motion 003) 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123

were read on this motion to/for

STRIKE PLEADINGS

Defendant/Third-Party Plaintiff/Second Third-Party Plaintiff/Third Third-Party Plaintiff, NS Builders LLC, moves pursuant to CPLR §3126 to strike Plaintiff's complaint for failure to comply with this court's June 8, 2022 order, in failing to produce the adjuster and insured to appear for depositions.

Plaintiff filed opposition on November 7, 2022 and NS Builders LLC filed reply on November 11, 2022. The motion was submitted for disposition on November 14, 2022.

The June 8, 2022 status conference order issued by this court provided plaintiff would produce the adjuster and the insured for deposition on or before September 30, 2022.

On September 19, 2022, plaintiff notified all parties by email that they would be producing Harry Beltrani, an independent adjuster hired by Plaintiff to handle this claim, and Francisco Picado, son of the insured Marlene Munguia and a resident of the building that is the subject of this litigation, as its deposition witnesses. There was no objection by any of the defendants at that time.

Mr. Beltrani was deposed on September 22, 2022 and Mr. Picardo was deposed on September 23, 2022.

NS Builders LLC now argue the complaint should be stricken and the action dismissed for Plaintiff's failure to comply with the June 8, 2022 order in failing to produce an employee of plaintiff and the insured.

In opposition, plaintiff argues they produced the most knowledgeable witnesses on behalf of its insured. Plaintiff is a Vermont based insurance company authorized to write insurance in the State of New York and Roundhill Express, LLC (Roundhill) is the Authorized Agent, Third-

Party Claims Administrator and Underwriter for all commercial insurance policies issued by plaintiff in the State of New York. Roundhill handles all aspects of claims management for plaintiff in connection with said insurance policies.

Plaintiff maintains and has offered in support the affidavit of James Lambert, President of Roundtree, who affirms that there is no person employed by plaintiff or Roundhill that has any personal knowledge of this claim. Mr. Beltrani is the only personally knowledgeable adjuster that handled this claim on behalf of plaintiff. Plaintiff asserts that they wholly accepted and adopted the report of Mr. Beltrani and paid in accordance with the same.

Plaintiff further maintains the insured, Marlene Munguia, does not speak English and authorized her son, Mr. Picado, to handle the instant claim on her behalf. Mr. Picado has lived in the building with his mother since 1999 and testified at his deposition to the damage sustained to building as a result of construction to an adjacent building.

It is plaintiff's position that every aspect of claim, including the repair of the building, was handled on the insured's behalf by her son, Mr. Picado. Producing Marlene Munguia would not have been productive and most likely would have resulted in the nonparty deposition of Mr. Picado.

All other defendants are satisfied with plaintiff's deposition witnesses and are ready to move forward with the remaining depositions in the discovery order.


"The remedy of striking a complaint pursuant to CPLR_3126 for failure to comply with a discovery order is appropriate only where the moving party demonstrates that the non-disclosure was willful, contumacious or due to bad faith (*Weissman v 20 East 9th Street Corp*, 48 AD3d 242 [1st Dept 2008] citing *Cespedes v. Mike & Jac Trucking Corp.*, 305 A.D.2d 222, 758 N.Y.S.2d 489 [2003]; *Christian v. City of New York*, 269 A.D.2d 135, 703 N.Y.S.2d 5

[2000]; *McGilvery v. New York City Trans. Auth.*, 213 A.D.2d 322, 324, 624 N.Y.S.2d 158 [1995]).

Here, moving defendant fails to establish that plaintiff has acted willfully or contumaciously in connection with its obligations pursuant to the discovery order. Rather, plaintiff provided the two witnesses with the most personal knowledge of the situation.

Based on the forgoing, the motion is denied.

This constitutes the decision and order of the court.

11/16/2022			
DATE			SABRINA KRAUS, J.S.C.
CHECK ONE:	<input type="checkbox"/> CASE DISPOSED	<input checked="" type="checkbox"/> DENIED	<input checked="" type="checkbox"/> NON-FINAL DISPOSITION
APPLICATION:	<input type="checkbox"/> GRANTED		<input type="checkbox"/> GRANTED IN PART
CHECK IF APPROPRIATE:	<input type="checkbox"/> SETTLE ORDER		<input type="checkbox"/> OTHER
	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN		<input type="checkbox"/> FIDUCIARY APPOINTMENT
			<input type="checkbox"/> REFERENCE