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| East 51st St. Dev. Co., LLC v HFZ E. 51, LLC |
| 2023 NY Slip Op 34246(U) |
| November 28, 2023 |
| Supreme Court, New York County |
| Docket Number: Index No. 652135/2016 |
| Judge: Debra A. James |
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. DEBRA A. JAMES PART 59

Justice

-----X

EAST 51ST STREET DEVELOPMENT COMPANY, LLC,
968 KINGSMEN, LLC, and JAMES KENNELLEY,

Plaintiffs,

INDEX NO. 652135/2016

MOTION DATE 07/14/2021

MOTION SEQ. NO. 007

- v -

HFZ EAST 51, LLC, HFZ CAPITAL GROUP, LLC, 51ST
STREET MAIN LOT OWNER, LLC, HFZ CORNER LOT
OWNER, LLC, 51ST STREET CORNER LOT OWNER, LLC,
ZIEL FELDMAN, JOHN DOES 1-10, and XYZ COMPANIES
1-10

**DECISION + ORDER ON
MOTION**

Defendants.

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The following e-filed documents, listed by NYSCEF document number (Motion 007) 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 115, 117, 118, 119, 120, 121, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142

were read on this motion to/for STRIKE PLEADINGS.

ORDER

Upon the foregoing documents, it is

ORDERED that the motion of the plaintiffs EAST 51ST STREET DEVELOPMENT COMPANY, LLC, 968 KINGSMEN, LLC, and JAMES KENNELLEY (collectively "East 51st"), to strike the answer of the defendants is DENIED; and it is further

ORDERED that counsel are directed to post on NYSCEF a proposed discovery compliance conference order or competing proposed discovery compliance conference order(s) at least two days before January 11, 2024, on which date counsel shall appear via Microsoft Teams, unless such appearance be waived by the court.

DECISION

The plaintiffs EAST 51ST STREET DEVELOPMENT COMPANY, LLC, 968 KINGSMEN, LLC, and JAMES KENNELLEY (collectively "East 51st") moved to strike the answer of the defendants HFZ EAST 51, LLC, HFZ CAPITAL GROUP, LLC, 51ST STREET MAIN LOT OWNER, LLC, HFZ CORNER LOT OWNER, LLC, 51ST STREET CORNER LOT OWNER, LLC, ZIEL FELDMAN, JOHN DOES 1-10, and XYZ COMPANIES 1-10 (collectively, "HFZ") for failure to respond to discovery demands. East 51st initially contends that HFZ's failure to respond to discovery demands and produce documents was willful because prior HFZ counsel obtained an extension of the discovery deadlines by stipulation, allegedly by deceit, subsequently withdrawing from the action. However, in his reply affirmation, East 51st counsel admits that he was indeed informed of prior defense counsel's intention to seek to be relieved as counsel before the filing of the discovery deadline extension stipulation but did not realize such application pursuant to CPLR 321(a) sought an interim stay of the discovery deadlines. Nonetheless, in his reply, East 51st counsel doubles down on his contention that prior defense counsel misrepresented that defendants would nevertheless adhere to the stipulated extended deadlines. The record establishes that HFZ provided responses to the East 51st's interrogatories on September 8, 2020, prior to the filing of the herein motion but did not produce responsive documents until after such filing.

In opposition, HFZ counters that it has been diligently producing responses to the demands of East 51st and that it is East 51st that has been dilatory with its discovery obligations.

As argued by HFZ,

[p]ublic policy strongly favors the resolution of actions on their merits so that the preclusion of evidence is not to be imposed absent a clear showing that a party's failure to provide discovery was willful and contumacious [, which] may be inferred from a party's conduct, such as by the repeated failure to comply with court-ordered discovery coupled with an inadequate explanation for the failure to comply, or a failure to comply with court-ordered discovery over an extended period of time

Pizzo v Lustig, 216 AD3d 38, 44-45 (2d Dept 2023) [citations and internal quotation marks omitted].

Based on the foregoing, the court finds that the HFZ's delay does not arise to the level of willfulness or contumaciousness that warrants the imposition of discovery sanctions. Cf Kutner v Feiden, Dweck & Sladkus, 223 AD2d 488 (1st Dept 1996) (defendants' disobedience of series of court orders that directed production of material and appearance of individual defendant for deposition constituted dilatory and obstructive, and thus contumacious

conduct.) Instead, counsel must appear for a discovery conference to resolve any disclosure issues and to have the court set an expedited discovery schedule.

Debra A. James

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11/28/2023

DATE

DEBRA A. JAMES, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE