

**Perrone v Suez Water Westchester, Inc.**

2024 NY Slip Op 30207(U)

January 12, 2024

Supreme Court, New York County

Docket Number: Index No. 153276/2019

Judge: Leslie A. Stroth

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. LESLIE A. STROTH PART 12

Justice

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INDEX NO. 153276/2019

JOSEPH PERRONE,

MOTION DATE 10/31/2023

Plaintiff,

MOTION SEQ. NO. 002

- v -

SUEZ WATER WESTCHESTER, INC., J.FLETCHER
CREAMER & SON, INC.,

DECISION + ORDER ON MOTION

Defendant.

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SUEZ WATER WESTCHESTER, INC., J.FLETCHER
CREAMER & SON, INC.

Third-Party
Index No. 596043/2021

Plaintiff,

-against-

MICHAEL MILENO, DANIELLE MILENO

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 002) 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90

were read on this motion to/for DISMISS

The instant action arises out of personal injuries allegedly sustained by Joseph Perrone (plaintiff) when he tripped and fell while walking on the sidewalk adjacent to 64 Hillside Avenue, New Rochelle, New York 10801 (the subject premises) on December 1, 2017. Michael Mileno and Danielle Mileno (together, the Milenos), own the subject premises. On the date of the accident, defendant Suez Water Westchester Inc. (Suez), a water provider, contracted with co-defendant J. Fletcher Creamer & Sons, Inc. (J. Fletcher) (collectively, defendants) to perform excavation work at the subject premises.

On March 28, 2019, plaintiff filed his summons and complaint, alleging a cause of action against defendants for negligence. On November 11, 2021, defendants filed a third-party action against the

Milenos, pleading causes of action for contribution, indemnification, and attorneys' fees. Defendants now seek to compel disclosure of documentation from the Milenos regarding the purchase of the subject premises. The Milenos oppose, arguing that defendants' demands are overbroad, irrelevant, or the requested records do not exist.

### **I. Relevant Procedural History**

On September 8, 2022, defendants served a notice for discovery and inspection on the Milenos. Defendants sought copies of any pre-purchase inspection photographs and reports for the subject premises, copies of any contracts with lawn maintenance companies for the subject property, and copies of any permits regarding renovation or alterations for the subject property. On September 21, 2022, the Milenos served a discovery response in which they alleged that they were not in possession of any records responsive to the relevant demands.

Danielle Mileno subsequently appeared for deposition. At her deposition, she testified that she purchased the subject property in July 2017, five months prior to the subject incident. She also testified that she and her husband, Michael Mileno, hired a realtor named "Olivia" to assist in the purchase, but that she was unable to recall Olivia's last name. She testified that the closing documents for the subject premises would have Olivia's last name and company, and that Olivia provided the Milenos with a link to view the listing for the property, which included photographs of the subject premises. Ms. Mileno further testified that Olivia visited the premises with the Milenos on at least one occasion, as did plaintiff.<sup>1</sup>

Michael Mileno also appeared for deposition. He testified that the premises was purchase with a mortgage through the use of a realtor and that he had visited the property prior to purchase. Mr. Mileno also testified that the Milenos hired an attorney to represent them in closing. He could not recall the name of the attorney or firm, or if an appraisal or inspection had been conducted prior to the home's purchase.

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<sup>1</sup> Plaintiff is Danielle Mileno's father, who accompanied her on her visits to her home prior to purchase. *See* NYSCEF doc. no. 71 at 15, lines 13- 19.

In light of the Milenos' respective deposition testimony, defendants demanded the full name of the realtor, "Olivia," as well as the name of the realtor agency and law firm that assisted in the sale of the subject premises. In response, the Milenos state that they did not recall the name of the law firm, attorney, or realtor who assisted in the purchase. Defendants also seek the Milenos' homeowner's policy, which was not forthcoming.

As the Milenos were unable to locate the requested documentation, defendants demanded the name of the bank holding the mortgage of the subject premises, as well as a copy of the check from the mortgage documents. Defendants additionally requested an authorization for the mortgage lender for checks issued so that defendants may obtain the name of the realty company and the handling legal firm. In the alternative, if such documents are unavailable, defendants requested affidavits from the Milenos that adequately set forth their good faith efforts to comply with these discovery demands. *See Trade Expo Inc. v Sterling Bancorp*, 171 AD3d 634, 635 (1st Dept 2019); *see also Jackson v City of New York*, 185 AD2d 768 (1st Dept 1992).

In response, the Milenos objected to providing the bank documents, with their counsel writing that the case "involves a hole created by your clients near the sidewalk of third-party defendants' home. As such, bank records and closing documents are in no way relevant to this matter." NYSCEF doc. No. 74.

According to defendants, they filed a proposed "so-ordered discovery stipulation" via NYSCEF, with the Milenos' consent. *See* NYSCEF doc. no. 75. In the proposed discovery stipulation, the Milenos agreed to "provide a further response" concerning the records at issue, namely bank authorizations for the subject premises to obtain pre-purchase inspections, surveys, and photographs; authorizations for the attorney and firm that handled the closing for the subject premises; and a copy of the closing papers for the subject property. *See* NYSCEF doc. no. 75. The stipulation is dated January 30, 2023 and requires the

Milenos to provide their “further responses” on or before February 17, 2023. *Id.* Notably, the proposed discovery order was never so-ordered.

When defendants inquired as to when such further response should be expected from the Milenos, the Milenos’ counsel replied that his e-mail dated January 19, 2023 – predating the filing of the stipulation in which they agreed to provide additional responses – was his supplemental response. It is defendants’ position that the Milenos agreed to provide additional responses as to the records at issue but subsequently backed out of such agreement. Given the Milenos’ failure to provide the agreed-to supplemental responses, defendants bring the instant motion to strike the Milenos’ answer pursuant to CPLR 3216, or, in the alternative, to compel responses to all outstanding discovery.

## II. Analysis

CPLR 3101 (a) calls for the “full disclosure of all matter material and necessary in the prosecution or defense of an action.” Whether matter is “material and necessary”...[must] be interpreted liberally to require disclosure, upon request, of any facts bearing on the controversy which will assist preparation for trial by sharpening the issues and reducing delay and prolixity” *Allen v Crowell-Collier Publ. Co.*, 21 NY2d 403, 406 (1968). CPLR 3214 provides that “[i]f a person fails to respond to or comply with any request, notice, interrogatory, demand, question or order under this article ..., the party seeking disclosure may move to compel compliance or a response.” Additionally, under CPLR 3126, the Court may strike a party’s pleadings or dismiss an action if that party “refuses to obey an order for disclosure or wilfully fails to disclose information which the court finds ought to have been disclosed pursuant to this article.”

Defendants argue that the records and information sought is material and necessary as they will shed light on whether the alleged sidewalk defect pre-existed defendants’ excavation work around the subject premises and/or if it existed prior to the Milenos’ purchase of the premises. Specifically, defendants cite to the City Charter of New Rochelle, which requires a property owner “to keep the

sidewalks and curbs adjoining his or her lot or piece of land at all times in repair, free of defects, clean and free from snow, ice or other obstruction. Property owners are responsible for the replacement of deteriorated or defective curbs." City of New Rochelle Charter, Article XXII, §197(a). The Charter further indicates that "In the event that any owner . . . shall fail to maintain the sidewalks and curbs adjoining his or her lot or piece of land as required by Subsection (a) and (b) above . . . said owner shall be liable to any persons injured as a result of such failure and the City of New Rochelle shall not be liable." *Id.* at § 197(j). Therefore, defendants maintain that the records demanded would be able to establish whether the liability for the defect would shift from defendants to the Milenos. Further, defendants demand Jackson affidavits from the Milenos that outline what efforts they made to obtain the relevant documents.

In opposition, the Milenos argue that the documents sought by defendants are palpably irrelevant to the facts of the case. The Milenos maintain that plaintiff's fall took place months after the closing for the purchase of the property. Moreover, the defendants fail to articulate how bank records and closing documents are relevant to this action. Specifically, their demand for the name of the mortgage lender and copies of cancelled checks is speculative as to whether this information, if provided, would lead to relevant information in this matter, failing to meet the "threshold requirement" that the request be reasonably calculated to yield information that is "material and necessary." *Formean v Henkin*, 30 NY3d 656 (2018).

At the outset, the Court notes that the Milenos' decision not to produce the private, irrelevant documents as per the stipulation is not so willful or contumacious as to warrant the drastic remedy of striking their answer. *See* CPLR 3126. Most notably, the stipulation on which defendants rely to assert that the Milenos have refused to comply with an order has not been sanctioned or so-ordered by this Court. Moreover, the Milenos have continuously repeated their potentially viable objections to the discovery demanded. As such, the Court declines to strike the Milenos' answer pursuant to CPLR 3126.

Further, with respect to a further response for bank authorizations, attorney authorizations, or closing papers for the subject premises (*see* NYSCEF doc. no. 75, proposed so-ordered discovery stipulation, ¶¶ 6, 7, 8), such demands are overbroad and not reasonably calculated to yield information that is material and necessary. Defendants' argument that the information may lead to information as to the condition of the subject premises prior to the accident is speculative, and the Court declines to direct the production of these demands.

However, as to the pre-purchase inspection reports, pre-inspection photographs, and copies of listings of the subject property (*see* NYSCEF doc. no. 75, proposed so-ordered discovery stipulation, ¶¶ 65, *see also* NYSCEF doc. no. 69, ¶ 2- 10), these records are plainly relevant in that they may serve to establish whether the defect which caused plaintiff's injury existed prior to defendants' excavation work. As the Milenos have previously responded that they do not have possession of such records, they shall provide defendants with affidavits that adequately set forth their good faith efforts to comply with these discovery demands to date, and the name(s) of the entity(ies) that may have these records. *See Trade Expo Inc. v. Sterling Bancorp*, 171 AD3d 634, 635 (1st Dept 2019); *see also Jackson v City of New York*, 185 AD2d 768 (1st Dept 1992). Further, the Milenos shall make every attempt to obtain the name of the realty company, so that defendants may subpoena the relevant pre-purchase inspection reports, pre-inspection photographs, and copies of listings of the subject property.

### III. Conclusion

Accordingly, it is

ORDERED that the motion of defendant Suez Water Westchester Inc and defendant Suez Water Westchester Inc. is granted in part; and it is further

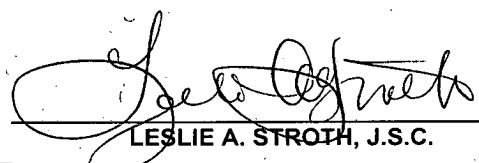
ORDERED that third-party defendants Danielle Mileno and Michael Melino shall, within 30 days from the date of this decision and order, produce and deliver to defendants a sufficient *Jackson* affidavit<sup>2</sup> with respect to their attempts to comply with defendants' demand for discovery and inspection dated September 8, 2017, ¶ 2- 10 (NYSCEF doc. no. 69); and it is further

ORDERED that third-party defendants Danielle Mileno and Michael Mileno shall, within 30 days of the date of this decision and order, conduct their own search of their records in an effort to obtain the name of their realtor, "Olivia," and her company, and provide either said information or an affidavit detailing their efforts; and it is further

ORDERED that the remainder of the motion is denied in all respects; and it is further

ORDERED that counsel are directed to appear for a status conference in Room 328, 80 Centre Street, on February 27, 2024, at 2:15 p.m.

The foregoing constitutes the decision and order of the Court.

  
LESLIE A. STROTH, J.S.C.

1/12/2024  
DATE

CHECK ONE:

<input type="checkbox"/>	CASE DISPOSED	<input type="checkbox"/>	DENIED
<input type="checkbox"/>	GRANTED		
<input type="checkbox"/>	SETTLE ORDER		
<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN		

<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	<input type="checkbox"/>	OTHER
<input checked="" type="checkbox"/>	GRANTED IN PART		
<input type="checkbox"/>	SUBMIT ORDER		
<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/>	REFERENCE

APPLICATION:

CHECK IF APPROPRIATE:

<sup>2</sup> See *Trade Expo Inc. v Sterling Bancorp*, 171 AD3d 634, 635 (1st Dept 2019); see also *Jackson v City of New York*, 185 AD2d 768 (1st Dept 1992).