SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. ADAM SILVERA** **PART** **13**

Justice

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INDEX NO. 190091/2023

MOTION DATE 08/04/2023

MOTION SEQ. NO. 001

RICHARD A WALKER,

Plaintiff,

- v -

CARLISLE INDUSTRIAL BRAKE & FRICTION, INC.,FORMERLY KNOWN AS MOTION CONTROL INDUSTRIES, INC.,EATON CORPORATION, AS SUCCESSOR -IN-INTEREST TO CUTLER-HAMMER, INC.,GOSS INTERNATIONAL CORPORATION, INDIVIDUALLY AND AS SUCCESSOR TO GOSS GRAPHIC SYSTEMS, INC. AND MIEHLE-GOSS-DEXTER, INC.,AND MIEHLE PRINTING PRESS AND MANUFACTURING COMPANY AND ROCKWELL GRAPHIC SYSTEMS. INC.,GOSS GRAPHIC SYSTEMS, INC.,INDIVIDUALLY AND AS SUCCESSOR TO MIEHLE-GOSS-DEXTER, INC.,AND MIEHLE PRINTING PRESS AND MANUFACTURING COMPANY, AND ROCKWELL GRAPHIC SYSTEMS, INC.,HARRIS CORPORATION, N/K/A L3 HARRIS TECHNOLOGIES, INC.,INDIVIDUALLY AND AS SUCCESSOR TO HARRIS-INTERTYPE CORPORATION, HEIDELBERG USA, INC.,AS SUCCESSOR IN INTEREST TO MERGENTHALER LINOTYPE COMPANY AND LINOTYPE-HELL COMPANY, HOLLINGSWORTH & VOSE COMPANY, KOMORI AMERICA CORPORATION, LIPE AUTOMATION CORPORATION, A DISSOLVED CORPORATION, MANROLAND GOSS WEB SYSTEMS INTERNATIONAL LLC,LORILLARD TOBACCO COMPANY, INDIVIDUALLY, AND AS SUCCESSOR TO P. LORILLARD COMPANY AND AS SUCCESSOR TO LORILLARD, INC.,MERGENTHALER LINOTYPE COMPANY, ROCKWELL AUTOMATION, INC.,INDIVIDUALLY AND AS SUCCESSOR TO MIEHLE-GOSS-DEXTER, INC.,R.J. REYNOLDS TOBACCO COMPANY, AS SUCCESSOR BY MERGER TO LORRILARD TOBACCO COMPANY, MANROLAND GOSS WEB SYSTEMS INTERNATIONAL LLC,BORG-WARNER MORSE TEC LLC,A SUCCESSOR BY MERGER TO BORG-WARNER CORPORATION, DCO LLC,F/K/A DANA COMPANIES LLC,THE MONTALVO CORPORATION, MORSE TEC LLC,F/K/A BORGWARNER MORSE TEC LLC,BY SUCCESSOR BY MERGER WITH BORG-WARNER CORPORATION

Defendant.

DECISION + ORDER ON MOTION

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64

were read on this motion to/for DISCOVERY.

In this action, plaintiff Richard A. Walker ("Mr. Walker) moves pursuant to CPLR § 3124 to compel documents regarding asbestos testing performed on cigarettes manufactured by defendant R.J. Reynolds Tobacco Company ("R.J."), the successor-by-merger of Lorillard Tobacco Company ("Lorillard"). Mr. Walker also moves to dismiss R.J.'s answer with counterclaims pursuant to CPLR § 3126(3), or in the alternative, to preclude R.J. from introducing evidence at trial regarding any testing results. R.J. opposes the motion and Mr. Walker replies.

Mr. Walker filed an asbestos-related lawsuit against R.J. on March 30, 2023. *See* Attorney Affirmation and Brief in Support of Plaintiff's Motion to Dismiss Defendant's Answer, ¶ 3. On July 6, 2023, Mr. Walker served R.J. with a Notice to Admit pursuant to CPLR § 3123 requesting admissions and the production of certain documents. *Id.*, Ex. D, Notice to Admit Directed to Lorillard Tobacco Company. The requested documents are official reports of two electron microscopists, Dr. Fullam and Althea Revere, hired by Lorillard in the 1950s to conduct testing on whether the filters on its Kent Micronite ("Kent") cigarettes released asbestos fibers. *See* Attorney Affirmation in Support, *supra*, ¶¶ 7,12,25. Specifically, they were hired to "confirm the absence of any harmful fibers in Kent smoke." *Id.*, Ex. F, p. 2. Mr. Walker alleges that both Dr. Fullam's and Mrs. Revere's testing showed the presence of asbestos fibers in the smoke. *See id.*, Ex. K, p. 1. In a letter dated April 26, 1954, Lorillard's Director of Research, Dr. Parmele, wrote to William Halley, the President of Lorillard, stating

> As you know, Dr. Fullam of Schenectady, New York recently examined Kent smoke and confirmed Mrs. Revere's earlier observations, namely that such smoke contained traces of mineral fiber. We are embarked upon a program of attempting to work out a method for the elimination of the presence of such fibers in the smoke. (*id.*)

He further alleges that reports of Dr. Fullam and Mrs. Revere have not been produced, nor have the results been formally acknowledged by R.J.

In addition, Mr. Walker alleges that R.J.'s response to various questions in the Notice to Admit, that "testing in the 1950s of Kent cigarettes with the asbestos-containing filter, which were manufactured and sold from approximately March 1952 to May 1956, demonstrated that the act of smoking did not release asbestos into the smoke, or none beyond a trace amount that was insufficient to cause disease", is fraudulent based on internal correspondences from 1954 between Dr. Parmele, Mr. Halley, Dr. Fullam, and Althea Revere. Attorney Affirmation in Support, *supra*, ¶30.

Defendant R.J. maintains that the reports of Dr. Fullam and Mrs. Revere are not in their possession and thus cannot be produced. *See* Affirmation of Robb. W. Patryk in Opposition to Plaintiff's Motion to Dismiss Defendant's Answer, p. 2. R.J. further alleges that they were under no obligation to preserve the documents, as Mr. Walker failed to identify a retention policy for Lorillard in the 1950s and the first litigation from alleged exposure to asbestos from Kent cigarettes did not occur until 35 years later. *See id.* at p.7-8. Finally, R.J. contends that Mr. Walker cannot show that R.J.'s failure to produce the documents was willful or contumacious, as R.J. complied with Mr. Walker's Standard Interrogatories, Requests for Production, and Notices to Admit. *See id.* at 6.

As a preliminary matter, the Court notes that the 2017 NYCAL Case Management Order provides that all discovery disputes shall be brought to the attention of the Special Master and

request intervention. 2017 NYCAL CMO Index No. 782000/2017, ¶ III.B. Mr. Walker failed to do so in the present instance.

To the extent that Mr. Walker agues that R.J.'s answer be stricken, CPLR § 3126 provides that the Court may impose penalties upon any party who "willfully fails to disclose information which the Court determines ought to have been disclosed." CPLR § 3126(3) provides the drastic sanction of dismissing a party's pleadings for failure "to comply with outstanding discovery requests or court-ordered discovery obligations." "[W]hen a party fails to comply with a court order and frustrates the disclosure scheme set forth in the CPLR, it is well within the Trial Judge's discretion to dismiss [its pleading]". *Kihl v Pfeffer*, 94 NY2d 118, 122 [1999]. "The striking of a party's pleadings should not, however, be imposed except in instances where the party seeking disclosure demonstrates conclusively that the failure to disclose was wilful, contumacious or due to bad faith". *Hassan v Mahattan and Bronx Surface Transit Operating Authority*, 286 AD2d 303, 304 (1st Dept 2001). The failure to comply with court-ordered discovery or failure "to proffer any excuse for [the] failure to comply…, indicates willful, contumacious and evasive conduct". *Austin v Coin Devices Corp.*, 234 AD2d 155, 156 (1st Dept 1996).

Here, although Mr. Walker argues that R.J. should be compelled to produce the reports of Dr. Fullam and Mrs. Revere, he acknowledges that Alexander W. Spears, III, Ph.D., former Vice President of Research for Lorillard, has testified that the reports from Dr. Fullam and Mrs. Revere are missing from the company's files. *See* Attorney Affirmation in Support, *supra*, Ex. L, p. 86. The Court also notes that R.J. produced 3,896 company documents consisting of over 18,494 pages, as well as documents referencing the testing in question. *See* Affirmation in Opposition, *supra*, p. 6. The Court is unpersuaded by Mr. Walker's argument that pursuant to

CPLR § 3126, R.J.'s pleadings should be stricken for willful failure to provide discovery. There are no Court orders directing R.J. to provide disclosure, and despite R.J.'s failure to respond to Mr. Walker's discovery request, the Court does not find that such failure to respond was willful. Further, although Mr. Walker "requests preclusion in the alternative, [plaintiff] has not demonstrated a basis for preclusion (*see De Leo v State-Whitehall Co.*, 126 AD3d 750, 752 … [2d Dept 2015] [preclusion was unwarranted where movants failed to demonstrate a 'pattern of willful failure to respond to discovery demands or comply with disclosure orders']])." *McKee v Ford Motor Co.*, 110 NYS 3d 78 (Sup Ct, NY Cty, 2018).

With respect to Mr. Walker's argument that the Court should order R.J. to amend responses to the Notice to Admit, CPLR § 3124 provides that "[i]f a person fails to respond to or comply with any request, notice, interrogatory, demand, question or order under this article, except a notice to admit under section 3123, the party seeking disclosure may move to compel compliance or a response." The moving party must demonstrate 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 AD2d 552, 552 (1st Dep't 1998). Contrary to Mr. Walker's contention, notices to admit are expressly excluded from the ambit of CPLR § 3124, which provides a vehicle to compel a party to respond to discovery demands, as that section relates only to depositions, interrogatories, and matters arising out of various CPLR article 31 provisions other than CPLR § 3123. *See Glasser v City of NY*, 265 AD2d 526, 526 (2d Dept 1999) (holding that the penalties of CPLR § 3126 do not apply to CPLR § 3123, since the latter is self-executing).

Further, "[a] notice to admit pursuant to CPLR 3213 (a) is to be used only for disposing of uncontroverted questions of fact or those that are easily provable, not for the purpose of compelling admission of fundamental and material issues or ultimate facts that can only be

resolved after a full trial". *Meadowbrook-Richman, Inc. v Cicchiello*, 273 AD2d 6 (1st Dept. 2000). The First Department has "consistently held that the purpose of a notice to admit is 'to eliminate from the litigation factual matters which will not be in dispute at trial, not to obtain information in lieu of other disclosure devices' " such as depositions. *Taylor v. Blair*, 116 AD2d 204, 205-206 (1st Dept. 1986) *citing Berg v Flower Fifth Ave. Hosp.*, 102 AD2d 760 (1st Dept. 1984). R.J. also "correctly argues [in opposition] that the remedy for an inadequate response to a notice to admit is recovery of the expense of proving the fact at trial [pursuant to] CPLR 3123[c]..., not a striking order". *Rojas v City of New York*, 27 AD3d 323, 324 (1st Dept 2006). As such, Mr. Walker's argument that R.J. should amend their response to the Notice to Admit is without merit.

Accordingly, it is hereby

ORDERED that the motion of plaintiff Richard A. Walker pursuant to CPLR §§ 3124 and 3126 is denied in its entirety; and it is further

ORDERED that within 30 days of entry defendant R.J. shall serve all parties with a copy of this Decision/Order with notice of entry.

This constitutes the Decision and Order of the Court.

2/6/2024
DATE

ADAM SILVERA, J.S.C.

CHECK ONE:		CASE DISPOSED		X	NON-FINAL DISPOSITION		
		GRANTED	X DENIED		GRANTED IN PART		OTHER
APPLICATION:		SETTLE ORDER			SUBMIT ORDER		
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN			FIDUCIARY APPOINTMENT		REFERENCE