SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. EMILY MORALES-MINERVA **PART** 42M

Justice

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INTERSTATE INDEMNITY COMPANY,

Plaintiff,

- v -

EAST 77 OWNERS CO., LLC,

Defendant.

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INDEX NO. 650794/2022

MOTION DATE 02/20/2024

MOTION SEQ. NO. 003

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 003) 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 108, 121, 122, 123, 124, 125, 126, 127, 128, 129, 135

were read on this motion to/for STRIKE PLEADINGS.

APPEARANCES:

Bruno, Gerbino, Soriano & Aitken, LLP, Hasbrouck Heights, New Jersey (Alfred C. Polidore, Esq., of counsel) for Plaintiff.

Segal McCambridge Singer & Mahoney, Ltd, New York, New York (Jeffrey Michael Marchese, Esq., of counsel) for Defendant.

HON. EMILY MORALES-MINERVA:

In this action for, among other things, breach of a settlement agreement and release involving damage to real property, plaintiff INTERSTATE INDEMNITY COMPANY ("INDEMNITY COMPANY"), moves, pursuant to CPLR § 3126 (1) – governing penalties for refusal to comply with an order or to disclose – for an order deeming certain issues resolved. Pursuant to the same statute, INDEMNITY COMPANY also moves for an order striking out the answer and rendering a

default judgment against defendant EAST 77 OWNERS CO., LLC's ("OWNER") (CPLR § 3126 [3]).

Defendant OWNER filed opposition and cross-moves, pursuant to CPLR § 3103, governing protective orders to prevent abuse of discovery, for (1) an order limiting and/or regulating plaintiff INDEMNITY COMPANY's Notice for Discovery and Inspection ("D & I"), dated November 16, 2024, and (2) for an order precluding disclosure of certain settlement agreements subject to the Court's in-camera inspection.

For the reasons set forth below, INDEMINTY COMPANY's motion is denied entirely, and defendant OWNER's cross-motion is granted, in part, to the limited extent that the Court shall order an in-camera inspection to review the settlement agreements in controversy for purposes of determining if terms therein are material and necessary in this action. OWNER's cross-motion is otherwise denied in its entirety.

BACKGROUND

In or around 2009, an incident occurred which caused damage the real property of OWNER. Consequently, Plaintiff INDEMNITY COMPANY, OWNER's insurance company and subrogee, and OWNER commenced four actions to recover damages. These actions were against, among others, non-party S.T.A. Parking Corporation

("S.T.A. Parking Corp.") and non-party Golden Vale Construction Corp. ("G.V.C. Corp.") (see generally Interstate Indem. Co. v E. 77 Owners Co., LLC, 224 AD3d 456 [1st Dept 2024] [setting forth some of the factual background in this action]).[1]

Thereafter, in or around April 2011, INDEMNITY COMPANY and OWNER entered into a settlement agreement and release whereby INDEMNITY COMPANY acquired the right to recover from proceeds of "any settlement of or judgments that [OWNER] actually recovered from the defendants or" insurers of the defendants in the actions from damages to OWNER's property (id.; see NY St Cts Elec Filing [NYSCEF] Doc. No. 12, Settlement Agreement and Release at ¶ 9). The agreement identified these actions as including "the Litigation."

About a year later, on April 19, 2012, defendant OWNER entered a partial settlement agreement with defendants in "the Litigation": non-parties S.T.A. Parking Corp., King Shah Group, Inc. ("King Shah"), Certified Testing Laboratories, Inc. ("CTL"), and Richard J. Zaloum ("Zaloum"). This settlement resolved "the Litigation" only against non-party King Shah, CTL, and Zaloum for a sum of $1,400,000.00 (NYSCEF Doc. No. 14, Litigation Settlement

[1] The actions are as follows: (1) East 77 Owners Co., LLC v King Shah Group, Inc. et al., Index No. 603340/07, (2) East 77 Owners Co., LLC v Richard J. Zaloum, P.C., Index No. 114895/07, (3) East 77 Owners Co., LLC v Richard J. Zaloum, Index No. 600105/08, and (4) Interstate Indemnity Company, as subrogee of East 77 Owners Co., LLC v King Shah Group, Inc. et al., Index No. 114015/07 (collectively "the Litigation").

Agreement at ¶ 2[a]). In exchange for said sum, OWNER formally released, and discontinued "the Litigation" against said non-parties.

However, the settlement agreement and payout did not resolve "the Litigation" between OWNER and S.T.A. Parking Corp. Instead, on May 25, 2012, OWNER and S.T.A. Parking Corp. negotiated a separate agreement, known as an assignment agreement. This agreement self describes as a "companion" to "the Settlement Agreement" to provide additional terms "solely as between [OWNERS] and [S.T.A. Parking Corp.] (see NYSCEF Doc. No. 15, Assignment Agreement, p 1).[2]

In this exclusive assignment arrangement, the OWNER and S.T.A. Parking Corp. agreed for the Court to determine liability of S.T.A. Parking Corp., and to hold an inquest on damages against S.T.A. Parking Corp. Therein, OWNER and S.T.A. Parking Corp. also agreed on an indirect method for OWNER to recover for the damages to its real property. Namely, OWNER acquired a right to a portion of any monies S.T.A. Parking Corp. recovers from the proceeds of (1) any of S.T.A. Parking Corp.'s settlements, (2) any judgments obtained against S.T.A. Parking Corp., (3) any settlements or judgments of S.T.A.'s insurer, and (4) any settlements or judgments

[2] The assignment agreement states: "This Agreement, entered into on this 24th day of May 2012, is a companion to the Settlement Agreement entered into in the Underlying Actions . . ., and is meant to provide additional terms solely as between OWNER and S.T.A. Parking Corp. that supplement the terms of the Settlement Agreement" (NYSCEF Doc. No. 15, Assignment Agreement).

against any non-settling party or any insurer to a non-settling party involved in "the Litigation." These parties included non-party Lancer Insurance Company (Lancer), non-parties Federal Insurance Company (Federal), Golden Vale Construction Corp. (Golden Vale), Axis Specialty Insurance Company (Axis), and General Star Indemnity Company (General Star).

Further, the assignment agreement allotted the portion of such recoveries between OWNER and non-party S.T.A. Parking Corp. as follows: 40% to OWNER, 20% to S.T.A. Parking Corp., 20% to OWNER's counsel as named therein, and 20% S.T.A. Parking Corp.'s counsel.

The assignment further provided that S.T.A. Parking Corp. continue pending claims against its insurers, any non-settling party to "the Litigation," and any insurer to such non-settling party. These claims included, but were not limited to, a pending inquest on damages against non-party Golden Vale, who defaulted in "the Litigation."

Following the assignment agreement, on November 7, 2013, OWNER obtained a judgment against S.T.A. Parking Lot in the sum of $3,417,051.19. Also, in November 2013, non-party S.T.A. Parking Corp. obtained a $3,848,596.62 judgment against Golden Vale on the indemnification claims it asserted as a third-party in "the Litigation."

Golden Vale's insurance company, non-party Axis Specialty Insurance Company ("Axis Insurance Company"), then paid S.T.A. Parking Corp. $1,000,000.00 on October 6, 2016. Later, in January 2021, S.T.A. Parking Corp. paid OWNER $1,376,842.96, pursuant to the assignment agreement.

Having surprisingly learned about both the OWNER's assignment agreement with S.T.A. Parking Corp. and OWNERS recoveries, on November 02, 2021, plaintiff INDEMNITY COMPANY sent OWNER a claim letter, seeking payment pursuant to their settlement agreement governing the method by which INDEMNITY COMPANY would collect from OWNER's recovery of damages to its property. However, OWNER did not issue any payment to INDEMNITY COMPANY.

Consequently, plaintiff INDEMNITY COMPANY filed the instant action, alleging that defendant OWNER breached their settlement agreement, as OWNER failed to pay plaintiff their agreed upon share of OWNER's recoveries. As to damages, INDEMNITY COMPANY seeks to recover: (1) 12% of the $1,000,000.00 Axis Insurance Company paid to S.T.A. Parking Corp., as such sum constituted proceeds of insurance for non-party Golden Vale in "the Litigation" (first cause of action), and (2) 12% of the $1,376,842.96 S.T.A. Parking Corp. paid to OWNER (second cause of action). Additionally, INDEMNITY COMPANY seeks an accounting from OWNER, setting forth each and every settlement or judgment OWNER collected in connection with "the Litigation" (third cause of action).

OWNER filed a pre-answer motion (sequence no. 001) to dismiss INDEMNITY COMPANY's complaint entirely or, in the alternative, to disqualify the entire law firm of Bruno, Gerbino, Soriano & Aitken, LLP, including counsel Alfred C. Polidore from representing INDEMNITY COMPANY in this action (NYSCEF Doc. No. 4).

The Court (N. Bannon, J.S.C.) granted the pre-motion, in part, to the extent of dismissing the third cause of action, and otherwise denied the motion entirely (see NYSCEF Doc. No. 24, Decision and Order, N. Bannon J.S.C.).

OWNER appealed said decision and order, only to the extent that the Court (N. Bannon, J.S.C.) denied OWNER's motion to dismiss the first and second causes of action.[3] Upon review, Appellate Division, First Department, affirmed the Court's decision in its entirety (see Indemnity Indem. Co. v E. 77 Owners Co., LLC, 224 AD3d 456 [1st Dept 2024]).

Thereafter, OWNER filed an answer, and INDEMNITY COMPANY served OWNER with various discovery demands. Among other things,

[3] Regarding OWNER's motion, in the alternative, the Court (N. Bannon, J.S.C.), expressly rejected OWNER's argument that the law firm Bruno Gerbino Soriano & Akin, LLP and counsel of record Alfred C. Polidore, Esq. should be disqualified. The Court reasoned OWNER presented no facts in support of the proposition that Bruno Gerbino Soriano & Akin, LLP and counsel of record Alfred C. Polidore, Esq.'s representation of INDEMNITY COMPANY, as OWNER's subrogee, created an attorney-client relationship between said counsel and OWNER. The Court further reasoned that OWNER, identified no authority for its proposition that an attorney-client relationship is automatically formed between counsel for a subrogee and a subrogor. Therefore, the Court denied OWNER's motion to disqualify the firm and counsel Alfred C. Polidore, Esq., from representing INDEMNITY COMPANY in this action.

the demands sought information concerning (1) amounts OWNER and/or S.T.A. Parking Corp. recovered from "the Litigation," (2) settlement agreements involving non-parties Axis Insurance Company and General Star, and (3) information related to the assignment agreement between OWNER and S.T.A. Parking Corp., including the specific amounts recovered, and lawsuits S.T.A. Parking Corp. commenced.

Following a preliminary conference with the parties, the Court (N. Bannon, J.S.C.) issued an order, directing OWNER to serve verified interrogatories by April 7, 2023 (see NYSCEF Doc. No. 33, Preliminary Conference Order).

At the compliance conference that followed, the same Court ordered OWNER to provide sworn responses to interrogatories and to supplement certain interrogatory requests (see NYSCEF Doc. No. 41, Compliance Conference Order). In addition, the court directed that the parties complete all depositions by September 29, 2023 (id.).

At the subsequent status conference with the parties, the Court (N. Bannon, J.S.C.) found that both parties failed to complete depositions and ordered that they complete depositions by November 27, 2023 (see NYSCEF Doc. No. 65, Status Conference Order).

Accordingly, on or before November 10, 2023, INDEMNITY COMPANY completed its deposition and OWNER completed its

deposition of Arlene Alter. Following the depositions, INDEMNITY COMPANY served OWNER with a notice for discovery and inspection, dated November 13, 2023.

In the notice, INDEMNITY COMPANY requested, among other things, (1) the settlement agreements with non-parties Axis Insurance Company and General Star, (2) documents by and between OWNER and S.T.A. Parking Corp., involving those settlements, and (3) copies of related documents and e-mails in non-party attorney Robert H. Friedman's possession relating to the settlements (see NYSCEF Doc. No. 67, notice for D & I). OWNER objected to each request, refusing to produce any documents.

Following the next status conference, the Court (N. Bannon, J.S.C.), issued an order directing: "[OWNER] shall serve and file supplemental responses to [INDEMNITY COMPANY's] post EBT demands . . . on or before 1-26-24 or be subject to sanctions per CPLR 3126 . . .." (See NYSCEF Doc. No. 74, Status Conference Order). The parties set forth varying interpretations of the direction based on alleged off-the-record discussions with the Court (see NYSCEF Doc. No. 123, OWNER's Affirmation in Support, ¶ 7; see also NYSCEF Doc. No. 127, INDEMNITY COMPANY's Reply Affirmation, ¶ 11).

Following the status-conference order, OWNER filed a supplemental response to the notice for discovery and inspection. While providing some responses, OWNER neither provided the settlement agreements involving nonparties Axis Insurance Company

and General Star, or any other documents INDEMNITY COMPANY demanded. However, OWNER provided clear objections to providing said agreements, which were not subject to a formal motion and were not apparently subject to a resolution on record (see NYSCEF Doc. No. 102, Exhibit M).

Given OWNER's objections, INDEMNITY COMPANY contacted the Court (N. Bannon, J.S.C.), by letter, for guidance as it considered filing a motion to compel and for sanctions against OWNER (see NYSCEF Doc. No. 77). OWNER responded, also that INDEMNITY COMPANY made no good faith attempt to resolve the issues raised, and that OWNER complied with the court's order (see NYSCEF Doc. No. 83). INDEMNITY COMPANY asserted that its letter seeking guidance constituted the requisite good faith to resolve their discovery issues (see NYSCEF Doc. No. 84).

On February 8, 2024, having no progress on discovery, INDEMINITY COMPANY filed note of issue, demanding $285,221.14 in damages. INDEMNITY COMPANY then filed the subject motion (seq. no. 003), pursuant to CPLR § 3126 (1) – governing penalties for refusal to comply with an order or to disclose – for an order deeming certain issues resolved for purposes of this action. INDEMNITY COMPANY further moves, pursuant to the same statute, for an order striking out pleadings of and rendering a default judgment against OWNER.

OWNER opposes the motion in its entirety. OWNER also cross-moves, pursuant to CPLR § 3103, governing protective orders to prevent abuse of discovery, for (1) an order limiting and/or regulating plaintiff INDEMNITY COMPANY's Notice for Discovery and Inspection ("D & I"), dated November 16, 2024, and (2) for an order precluding disclosure of certain settlement agreements subject to the Court's in-camera inspection.

ANALYSIS

Up first is INDEMNITY COMPANY's application, pursuant to CPLR § 3126 (1) and (3), for (a) an order deeming resolved "the issues to which the information is relevant" to the claims of INDEMNITY COMPANY and for (b) an order striking OWNER's answer and rendering a default judgment against OWNER.

The court has discretion to "determine the appropriate penalty" against a party that does not respond to discovery demands (e.g., Spira v Antoine, 191 AD2d 219, 219 [1st Dept 1993]; see also CDR Creances S.A.S. v Cohen, 104 AD3d 17, 26-27 [1st Dept 2012] [providing the court is "accorded wide latitude in determining appropriate sanctions for dilatory conduct"]). Indeed, when a party "refuses to obey an order for disclosure or willfully fails to disclose information which the court finds ought to have

been disclosed," the court may make any orders in response "as are just" (CPLR § 3126).

However, as preclusion or striking of the pleadings and default are an extreme punishment, the court should not impose such penalties unless a party's behavior has been "willful, deliberate and contumacious" (see generally Holliday v Jones, 36 AD3d 557, 557-58 [1st Dept 2007]). A party behaves willfully and contumaciously where it ignores court orders or delays complying with court orders for long periods of time and does not offer an excuse for doing so (e.g., Northern Leasing Sys., Inc. v Estate of Turner, 82 AD3d 490, 490 [1st Dept 2011]).

Applying these principles here, there appears to be no basis to impose the penalty of deeming certain issues resolved or of striking the answer and issuing a default judgment against OWNER. OWNER did not withheld information deliberately, contumaciously, or in bad faith (e.g., Michaluk v NYC Health & Hosps. Corp., 169 AD3d 496, 496 [1st Dept 2019]; W&W Glass, LLC v 1113 York Ave. Realty Co. LLC, 83 AD3d 438, 438 [1st Dept 2011]). Further, OWNER has not nefariously disregarded any court orders for discovery but has consistently expressed reasonable objections that have not been formally addressed (see generally Michaluk, 169 AD3d at 496; see also W&W Glass, LLC, 83 AD3d at 438).

Here, it appears the parties genuinely have confusion as to the off-the-record discussion regarding what OWNER must provide in

response to the subject demand. Further, it is undisputed that the parties have not yet met in good faith to resolve these issues (see 22 NYCRR § 202.07 [providing motions shall include "an affirmation of good faith effort to resolve the issues raised by the motion [including] the time, place and nature of the consultation and the issues discussed and any resolutions, or shall indicate good cause why no such conferral with counsel for opposing parties was held"]).

Moving next to OWNER's cross-motion, the Court finds therein a fairer alternative to resolving the subject discovery issues. Pursuant to CPLR § 3103 (a), "[t]he court may at any time . . . make a protective order denying, limiting, conditioning or regulating the use of any disclosure device." The key purpose of such order is to "prevent unreasonable annoyance, expense, embarrassment, disadvantage, or other prejudice to any person or court" (CPLR § 3103 [a]).

Here, OWNER seeks to prevent the disclosure of confidential information and requests permission to submit the subject settlement agreements to the court for an in-camera review to determine their materiality and necessity in this action (see Mahoney v Turner Const. Co., 61 AD3d 101, 104 [1st Dept 2009] [addressing disclosure of a settlement agreement to a non-settling party as appropriate where the terms of the agreement are "material and necessary" to the non-settling party's case]). As an in-

camera review would relieve "doubt as to the relevance" and protect unnecessary information from disclosure, this solution is most prudent (id. at 105).

Accordingly, it is hereby:

ORDERED that plaintiff INDEMNITY COMPANY's motion (seq. no. 003) is denied in its entirety; it is further

ORDERED that defendant OWNER's cross-motion is granted, in part, to the limited extent that OWNER shall provide the Court with the settlement agreements of non-party Axis Specialty Insurance Company and of non-party General Star Indemnity Company for an in-camera inspection; it is further

ORDERED that defendant OWNER shall provide such agreements to the Court within seven days from the date of this order with notice of entry; it is further

ORDERED that the remaining parts of OWNER's cross-motion is denied; and it is further

ORDERED that defendant OWNER shall serve plaintiff INDEMNITY COMPANY with this order and notice of entry within ten days of this date, July 31, 2024.

THIS CONSTITUTES THE DECISION AND ORDER OF THE COURT.

7/31/2024
DATE

Emily Morales-Minerva
EMILY MORALES-MINERVA, J.S.C.

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