

**Elizabeth Canal, LLC v Structure Tone Global Servs.,
Inc.**

2024 NY Slip Op 32736(U)

August 5, 2024

Supreme Court, New York County

Docket Number: Index No. 153543/2017

Judge: Arlene P. Bluth

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This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. ARLENE P. BLUTH PART 14

Justice

-----X

ELIZABETH CANAL, LLC, HH159 CANAL DEL
LLC, JEMCOMCANAL DEL, LLC, ELIZABETH BRONX,
LLC, JEMCOM CANAL REVERSE LLC,

Plaintiff,

INDEX NO. 153543/2017

MOTION DATE 08/02/2024

MOTION SEQ. NO. 003

- v -

STRUCTURE TONE GLOBAL SERVICES, INC., CIROCCO
& OZZIMO, INC., d/b/a CIROCCO &
OZZIMO CONTRACTING, INC. FIRST REPUBLIC BANK,

Defendant.

**DECISION + ORDER ON
MOTION**

-----X

CIROCCO & OZZIMO, INC.

Plaintiff,

Third-Party
Index No. 595785/2019

-against-

RITE-WAY DEMOLITION INC., ALL-SAFE LLC

Defendant.

-----X

STRUCTURE TONE GLOBAL SERVICES, INC.

Plaintiff,

Second Third-Party
Index No. 595857/2019

-against-

RITE-WAY DEMOLITION INC., ALL-SAFE LLC

Defendant.

-----X

The following e-filed documents, listed by NYSCEF document number (Motion 003) 120, 121, 122, 123,
124, 125, 126, 132, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148

were read on this motion to/for STRIKE PLEADINGS.

Plaintiffs' motion to strike the answer of defendant Cirocco & Ozzimo Inc. ("Cirocco") is denied.

Background

In this property damage case, plaintiffs (the owners of a building located on Canal Street) seek to strike the answer of defendant Cirocco on the ground that this defendant failed to produce requested discovery. They emphasize that Cirocco never objected to the subject requests but did not timely produce the demanded materials despite the fact that they agreed to do so in a conference order from June 2023.

Plaintiffs insist that Cirocco waited until March 2024 (after another conference order) to finally produce their responses but plaintiffs complain the belated responses were inadequate. They claim that at an April 18, 2024 conference, Cirocco was directed to produce a *Jackson* affidavit. Plaintiffs argue that the production of nearly every email without the metadata or attachments suggests a failure to properly preserve evidence.

In opposition, Cirocco contends that it has worked with plaintiffs to address any discovery issues and that it produced emails in their original format so that the metadata was accessible. It acknowledges that it took time to get a *Jackson* affidavit but it belatedly produced one on July 9, 2024 (after the instant motion was filed) and that it has produced all the documents in its possession. Cirocco points out that the property damage at issue occurred in 2014 and that this case was not commenced until 2017. It also emphasizes that it was only on site for a few days and so, taken together, it should not be surprising that Cirocco only possesses a limited number of documents.

In reply, plaintiffs complain that Cirocco ignored deadlines, including a Court-ordered deadline set in an April 2024 conference order. They emphasize that there was a deadline of May 17, 2024 to submit a *Jackson* affidavit and the belated submission in connection with this motion is not sufficient. Plaintiffs observe that Cirocco did not give a reasonable excuse for this failure. They also take issue with the *Jackson* affidavit itself and argue that the affiant does not explain his relationship to the search process.

Discussion

“Striking the answer of a party is an extreme and drastic penalty, warranted where the conduct is clearly deliberate or contumacious” (*Hunter Mech. Corp. v Salkind*, 237 AD2d 180, 180, 654 NYS2d 381 [1st Dept 1997] [internal quotations and citations omitted]). There is no basis to strike Cirocco’s answer on these papers. The fact is that Cirocco has disclosed all of the documents it claims is in its possession and, belatedly, turned over a *Jackson* affidavit.

Of course, plaintiffs are right to complain about the fact that this affidavit was delayed and that the proffered excuse—that Cirocco’s representative was “out of town” (NYSCEF Doc. No. 137, ¶ 20)—is underwhelming, to say the least. But the *Jackson* affidavit makes clear that a detailed search for the discovery was conducted, it explains where this search was performed and that all relevant documents were produced. Cirocco’s affiant also observes that no documents were destroyed or disposed. This affidavit satisfies Cirocco’s burden. And to the extent that plaintiffs have questions for the affiant, they can raise it at a deposition.

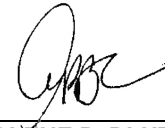
Although Cirocco’s conduct has been less than stellar with respect to discovery, it is not contumacious and this Court must follow the long standing “public policy [that] strongly favors the resolution of actions on the merits whenever possible” (*Henry v Datson*, 140 AD3d 1120, 1122, 35 NYS3d 383 [2d Dept 2016]). Nothing on this record suggests that Cirocco engaged in

misconduct or did anything that could justify striking its answer and thereby foreclosing their opportunity to litigate this case on the merits. Moreover, plaintiffs did not suffer any substantial prejudice from Cirocco’s delays.

Accordingly, it is hereby

ORDERED that plaintiffs’ motion to strike is denied.

See NYSCEF Doc. No. 129 concerning the next conference.

8/5/2024 DATE		 ARLENE P. BLUTH, J.S.C.
CHECK ONE:	<input type="checkbox"/> CASE DISPOSED	<input checked="" type="checkbox"/> NON-FINAL DISPOSITION
	<input type="checkbox"/> GRANTED <input checked="" type="checkbox"/> DENIED	<input type="checkbox"/> GRANTED IN PART <input type="checkbox"/> OTHER
APPLICATION:	<input type="checkbox"/> SETTLE ORDER	<input type="checkbox"/> SUBMIT ORDER
CHECK IF APPROPRIATE:	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/> FIDUCIARY APPOINTMENT <input type="checkbox"/> REFERENCE