

**DDG 532 W. 20th St. LLC v Herod's Stone Design of
Jersey City Inc.**

2024 NY Slip Op 32935(U)

August 16, 2024

Supreme Court, New York County

Docket Number: Index No. 656152/2021

Judge: Louis L. Nock

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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. LOUIS L. NOCK PART 38M

Justice

-----X

DDG 532 WEST 20TH STREET LLC,

Plaintiff,

- v -

HEROD'S STONE DESIGN OF JERSEY CITY
INC., HEROD'S STONE DESIGN OF JERSEY CITY .
CORPORATION, RAPHAEL PORCELAIN TILES &
QUARTZ LLC, HERODS STONE OF ENGLEWOOD
CORP., MICHAEL ZEITLIN,

Defendants.

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INDEX NO. 656152/2021

MOTION DATE 02/16/2024

MOTION SEQ. NO. 002

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 002) 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 135, 136, 137, 138

were read on this motion to/for STRIKE PLEADINGS.

LOUIS L. NOCK, J.S.C.

Upon the foregoing documents, the motion of plaintiff DDG 532 West 20th Street LLC ("Plaintiff") to strike the answers and counterclaims of defendants Herod's Stone Design of Jersey City Inc., Herod's Stone Design of Jersey City. Corporation, Raphael Porcelain Tiles & Quartz LLC, Herods Stone of Englewood Corp., and Michael Zeitlin a/k/a Mike Zeitlin ("Defendants") is granted in accord with the following memorandum decision.

Background

In this action to recover damages for breach of contract and willful exaggeration of mechanic's lien, plaintiff moves pursuant to CPLR 3126 to strike defendants' answer for failure to comply with discovery orders. Plaintiff commenced this action by filing a summons and complaint on October 26, 2021 (NYSCEF Doc No. 1). Defendants Herod's Stone Design of Jersey City Inc. and Herod's Stone Design of Jersey City Corporation appeared in the action by

filing an answer with counterclaims on January 14, 2022 (NYSCEF Doc No. 27). On March 10, 2022, defendants Raphael Porcelain Tiles & Quartz LLC, Herods Stone of Englewood Corp., and Michael Zeitlin a/k/a Mike Zeitlin filed a pre-answer motion for sanctions and to dismiss the complaint as against them, pursuant to CPLR 3211(a)(7), and Plaintiff opposed the motion (NYSCEF Doc No. 28 through 82). By Order dated December 8, 2022, the Court denied the motion (NYSCEF Doc No. 83). On December 29, 2022, defendants, Raphael Porcelain Tiles & Quartz LLC, Herods Stone of Englewood Corp., and Michael Zeitlin a/k/a Mike Zeitlin filed an answer (NYSCEF Doc No. 85).

Thereafter, defendants failed to comply with three Compliance Conference Orders dated January 27, 2023 (NYSCEF Doc No. 86), May 31, 2023 (NYSCEF Doc No. 96), and September 13, 2023 (NYSCEF Doc No. 97). Each of those Orders directed the parties that “[f]ailure to comply with these directives may result in the imposition of costs or sanctions including dismissal or default judgment.”

Plaintiff filed this motion on February 16, 2024 (NYSCEF Doc No. 106-137), seeking an Order striking defendants' answers and counterclaim for failure to comply with the above referenced Orders and failure to respond to discovery demands served by plaintiff. Plaintiff's counsel appeared for oral argument of this motion on August 8, 2024, but defendants' counsel failed to appear.

Discussion

CPLR 3126 authorizes the court to sanction a party who "refuses to obey an order for disclosure or wilfully fails to disclose information which the court finds ought to have been disclosed" (CPLR 3126; see, *Kutner v Feiden, Dweck & Sladkus*, 223 A.D.2d 488, 489 [1st Dept] [pleading properly stricken where party engaged in discovery conduct that was "dilatatory

and obstructive, and thus contumacious"], *lv denied* 88 N.Y.2d 802 [1996]). A party's failure to satisfy his or her discovery obligations, particularly after a court order has been issued, "may constitute dilatory and obstructive, and thus contumacious, conduct" (*id.*; *see also, Reidel v. Ryder TRS, Inc.*, 13 A.D.3d 170 [1st Dept 2004]). A party may tender a reasonable excuse to overcome a showing of willfulness (*Menkes v Delikat*, 148 A.D.3d 442 [1st Dept 2017]); but failure to offer a reasonable excuse for noncompliance with discovery requests gives rise to an inference of willful and contumacious conduct that warrants the striking of a pleading (*Turk Eximbank-Export Credit Bank v Bicakcioglu*, 81 A.D.3d 494 [1st Dept 2011]). "The nature and degree of the penalty to be imposed pursuant to CPLR 3126 lies within the sound discretion of the Supreme Court" (*Lazar, Sanders, Thaler & Assocs., LLP v Lazar*, 131 A.D.3d 1133, 1133 [2d Dept 2015]; *see Maxim, Inc. v Feifer*, 161 A.D.3d 551, 554 [1st Dept 2018]).

On this motion, defendants have displayed willful and contumacious conduct by failing to timely and fully respond to plaintiff's discovery demands (NYSCEF Doc No. 107, Lucas affirmation in support ¶¶ 8-18). Striking the defendants' answer pursuant to CPLR 3126 is therefore appropriate. Striking the answer is also warranted under 22 NYCRR 202.27, which provides that "[a]t any scheduled call of a calendar or at any conference, if all parties do not appear and proceed or announce their readiness to proceed immediately or subject to the engagement of counsel, the judge may note the default on the record and . . . [i]f the plaintiff appears but the defendant does not, the judge may grant judgment by default or order an inquest" (22 NYCRR 202.27 [a]). The motion is therefore granted.

Accordingly, it is

ORDERED that the motion to strike is granted, and the answers, affirmative defenses, and counterclaim of defendants Herod's Stone Design of Jersey City Inc., Herod's Stone Design

of Jersey City. Corporation, Raphael Porcelain Tiles & Quartz LLC, Herods Stone of Englewood Corp., and Michael Zeitlin a/k/a Mike Zeitlin filed on July 17, 2019 (NYSCEF Doc No. 27 and 85) are hereby stricken pursuant to CPLR 3126 and 22 NYCRR 202.27; and it is further

ORDERED that the notice of mechanic's lien in the sum of \$121,894 filed by defendant Herod's Stone Design of Jersey City Inc. on January 28, 2021 in the office of the Clerk of New York County, State of New York, against the interest of plaintiff DDG 532 West 20th Street LLC, as owner of the real property described as 532 West 20th Street LLC, New York, New York, Block 691, Lot 50 (NYSCEF Doc No. 125), be vacated and canceled, and the Clerk is directed to cancel said lien of record and to mark on the docket of said lien a statement of such cancellation, with a reference to this order and its date of entry; and it is further

ORDERED that the bond, dated March 26, 2021 (Atlantic Specialty Insurance Company Bond No. 800117008, Index No. 100342/21) (NYSCEF Doc No. 126) discharging said Mechanic's Lien in the sum of \$134,083.40 filed on April 9, 2021 with the Clerk of New York County by plaintiff and Atlantic Specialty Insurance Company, in order to discharge the aforementioned lien be vacated and canceled, and the Clerk is directed to cancel such bond of record and to mark on the docket of such bond a statement of such cancellation, with a reference to this order and its date of entry; and it is further

ORDERED that the parties shall appear for a damages inquest before the undersigned at the Courthouse, 111 Centre Street, Room 1166, New York, New York, on September 23, 2024 at 10:00 a.m., or any adjourned day fixed by the Court.

This constitutes the decision and order of the court.



<u>8/16/2024</u>			<u>LOUIS L. NOCK, J.S.C.</u>
DATE			
CHECK ONE:	<input type="checkbox"/> CASE DISPOSED	<input checked="" type="checkbox"/> NON-FINAL DISPOSITION	
	<input checked="" type="checkbox"/> GRANTED	<input type="checkbox"/> DENIED	<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