

Fisher Essex, LLC v New York Mar. & Gen. Ins. Co.

2024 NY Slip Op 33102(U)

September 3, 2024

Supreme Court, New York County

Docket Number: Index No. 651615/2019

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

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FISHER ESSEX, LLC,

Plaintiff,

- v -

NEW YORK MARINE AND GENERAL INSURANCE
COMPANY, TECHNOLOGY INSURANCE COMPANY, INC.,
NATIONAL GRID USA SERVICE COMPANY, INC.,
NATIONAL GRID USA, and THE HALLEN
CONSTRUCTION CO., INC.,

Defendants.

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NEW YORK MARINE AND GENERAL INSURANCE
COMPANY,

Plaintiff,

-against-

NATIONAL GRID USA SERVICE COMPANY, INC.,
NATIONAL GRID USA, THE HALLEN CONSTRUCTION CO.,
INC., NEW YORK PLUMBING HEATING COOLING CORP.,
NEW YORK PLUMBING HEATING COOLING CORP. DBA
NEW YORK PLUMBING, and HEATING & COOLING CORP.,

Defendants.

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INDEX NO. 651615/2019

MOTION DATE N/A,
08/26/2024

MOTION SEQ. NO. 005 006

**DECISION + ORDER ON
MOTION**

Third-Party
Index No. 596170/2019

The following e-filed documents, listed by NYSCEF document number (Motion 005) 191, 192, 193, 194, 195, 196, 197, 199, 200, 201, 202, 203, 204, 205, 206, 207, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, and 239

were read on this motion to STRIKE PLEADINGS.

The following e-filed documents, listed by NYSCEF document numbers (Motion 006) 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, and 305

were read on this motion to STRIKE PLEADINGS.

Plaintiff’s motion to strike the answer of defendant/third-party-defendant Brooklyn

Union Gas Company d/b/a National Grid NY (“BUG”) or compel discovery (Mot. Seq. No.

005); plaintiff's motion to strike the answer of BUG and for sanctions and damages (Mot. Seq. No. 006); and BUG's cross-motion for costs and sanctions (within Mot. Seq. No. 006) are consolidated herein for disposition.

Plaintiff's motion to strike (Mot. Seq. No. 005) and BUG's cross-motion (Mot. Seq. No. 006) are denied, for the reasons set forth in the respective opposition papers (NYSCEF Doc. Nos. 199, 209, 286), as supplemented by oral argument held on the record on August 29, 2024, in which the court concurs. After plaintiff filed its initial motion to strike for noncompliance with a court order (Mot. Seq. No. 005), the deposition on June 10, 2024, of a BUG witness, Mr. James Walsh, led to disclosure of new evidence, which plaintiff alleges BUG intentionally concealed. On this ground, plaintiff again moved to strike and for sanctions and damages against BUG (Mot. Seq. No. 006), which is granted in part, to the following extent.

Where a party "refuses to obey an order for disclosure or willfully fails to disclose information which the court finds ought to have been disclosed pursuant to this article, the court may make such orders with regard to the failure or refusal as are just" (CPLR 3126). "A complete failure to disclose is not a prerequisite to the imposition of sanctions pursuant to CPLR 3126, the relevant factor being whether the failure to disclose relevant documents at issue was willful and contumacious" (*Waltzer v Tradescape & Co., L.L.C.*, 31 AD3d 302, 303 [1st Dept 2006]). Willful and contumacious behavior may be inferred from repeated disregard of the Court's discovery orders without reasonable excuse (*Rosengarten v Born*, 161 AD3d 515, 515 [1st Dept 2018]). "A determination of sanctions pursuant to CPLR 3126 lies in the trial court's discretion" (*Board of Mgrs. v Leardon Boiler Works, Inc.*, 178 AD3d 462, 462 [1st Dept 2019]).

Here, the court declines to apply the "drastic sanction" of striking the answer of BUG, as the record indicates that BUG complied with the court's directives to produce documents and a

witness for deposition (*CEMD El. Corp. v Metrotech LLC I*, 141 AD3d 451, 453 [1st Dept 2016] [“Striking a party’s pleadings is a drastic sanction, and will generally be made only upon a clear showing that the party’s conduct was willful and contumacious”]). The court finds as excusable error BUG’s disclosure of evidence later found to be unrelated to the claimed incident, due to confusion between two separate incidents, which upon discovery BUG attempted to communicate to plaintiff. In light of BUG’s counsel’s good faith efforts to correct whatever misunderstanding it had in connection to the relevant body of evidence, the court is loathe to find BUG to have committed the type of discovery abuse that could possibly warrant the sanction of a stricken pleading.

Nonetheless, plaintiff should not have to bear the cost of BUG’s error. Therefore, the court grants so much of the plaintiff’s motion as seeks to reimburse plaintiff for its reasonable attorneys’ fees incurred in discovery motion practice related solely and directly to its efforts to obtain the relevant discovery to which it was entitled from BUG, and which it ultimately obtained.

Accordingly, it is hereby

ORDERED that plaintiff’s motion to strike pleadings or compel defendant/third-party defendant Brooklyn Union Gas Company d/b/a National Grid NY (Mot. Seq. No. 005) is denied; and it is further

ORDERED that defendant/third-party defendant Brooklyn Union Gas Company d/b/a National Grid NY’s cross-motion for costs and sanctions against plaintiff (Mot. Seq. No. 006) is denied; and it is further

ORDERED that plaintiff’s motion to strike pleadings and for sanctions and damages (Mot. Seq. No. 006) is granted in part and to the extent that said defendant/third-party defendant

Brooklyn Union Gas Company d/b/a National Grid NY shall reimburse plaintiff Fisher Essex, LLC its reasonable attorneys' fees incurred in discovery motion practice related solely and directly to its efforts to obtain the relevant discovery to which it was entitled from BUG, and which it ultimately obtained; and it is further

ORDERED that a fee hearing, as necessitated by the foregoing disposition, be conducted before the undersigned on October 1, 2024, at 10:00 AM, at the Courthouse, 111 Centre Street, Room 1166, New York, New York; and it is further

ORDERED that the time to file the note of issue is extended to December 31, 2024; and it is further

ORDERED that any dispositive motions shall be made on or before March 1, 2025; and it is further

ORDERED that counsel are directed to appear for a status conference in Room 1166, 111 Centre Street, on September 25, 2024, at 2:15 PM.

This constitutes the decision and order of the court.



<u>9/3/2024</u> DATE			<u>LOUIS L. NOCK, J.S.C.</u>
CHECK ONE:	<input type="checkbox"/> CASE DISPOSED	<input type="checkbox"/> DENIED	<input checked="" type="checkbox"/> NON-FINAL DISPOSITION
APPLICATION:	<input type="checkbox"/> GRANTED	<input type="checkbox"/> DENIED	<input checked="" type="checkbox"/> GRANTED IN PART
CHECK IF APPROPRIATE:	<input type="checkbox"/> SETTLE ORDER		<input type="checkbox"/> OTHER
	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN		<input type="checkbox"/> FIDUCIARY APPOINTMENT
			<input type="checkbox"/> REFERENCE