

**New York Bus Operators Compensation Trust v
Arthur J. Gallagher & Co.**

2024 NY Slip Op 34830(U)

July 29, 2024

Supreme Court, Suffolk County

Docket Number: Index No. 615531/2017

Judge: Jerry Garguilo

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This opinion is uncorrected and not selected for official publication.

SHORT FORM ORDER

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**SUPREME COURT - STATE OF NEW YORK
COMMERCIAL DIVISION IAS PART 48 - SUFFOLK COUNTY**

PRESENT:

**HON. JERRY GARGUILO
SUPREME COURT JUSTICE**

**MOTION RETURN DATE: 6/6/24
MOTION SEQ# 017 and #018
MOTION: MOTNDEC**

NEW YORK BUS OPERATORS
COMPENSATION TRUST,

Plaintiff,

**ALL PARTIES VIA NYSCEF
(FULL PARTICIPATION RECORDED)**

-against-

ARTHUR J. GALLAGHER & CO. et al.,

Defendants.

RISK MANAGEMENT PLANNING GROUP,
INC. n/k/a YORK RISK SERVICES GROUP,
INC.,

Third-Party Plaintiffs,

-against-

NETWORK ADJUSTERS, INC.,

Third-Party Defendant.

In rendering its decision, the Court has considered the following:

Motion Sequence #017

1. Plaintiff, New York Bus Operators Compensation Trust's Notice of Motion to Strike the Answers of AJG and GBS, Affirmation of Anthony F. Barbiero in Support of Motion to Strike inclusive of Exhibits 1-35 and Memorandum of Law.

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Motion Sequence #018

1. The Counterclaim Defendant, New York Bus Operators Compensation Trust's Notice of Motion to Strike the Answer and counterclaims of AJG and GBS, Affirmation of Amy M. Monahan in Support of Motion to Strike, inclusive of Exhibit A and the Memorandum of Law in Support; and Affirmation in Further Support of Amy M. Monahan in Further Support of Motion.

Opposition

1. Gallagher Defendants' Memorandum of Law in Opposition to both motion sequences by Thomas Kadian filed under motion sequence #015 at Document No. 712, and a letter by Thomas Kadian filed at Doc. No. 726, requesting the submission of his motion response papers on motion seq. #015 as his response to both motion sequences which the Court accepts.

ORDERED that the Motions of Plaintiff and Counterclaim Defendant, New York Bus Operators Compensation Trust ("MOVANT") are **DENIED** subject to the Court's directive as set forth herein.

MOVANT, New York Bus Operators Compensation Trust as a Plaintiff and as a counterclaim Defendant responding to counterclaims seeks various relief pursuant to CPLR 3126. The relief sought by MOVANT pursuant to CPLR is: (1) Pursuant to CPLR §3126 striking the answer and counterclaims of Arthur J. Gallagher & Co., Arthur J. Gallagher & Co. of New York, Inc., and Arthur J. Gallagher Risk Management Services Inc. (collectively "the AJG") and Gallagher Basset Services, Inc. ("GBS") based on their repeated failure to respond to NYBOCT's discovery demands and for defying "this Court's"¹ Orders; (2) Pursuant to CPLR §3126 striking the answer and counterclaims of AJG and GBS based upon their willful and contumacious conduct of intentionally failing to provide Court ordered affidavits from AJG and GBS for searches undertaken during the course of this litigation for the "Service Instructions" utilized by the defendants in their handling of the NYBOCT account between January 1, 2011 and January 1, 2013; and (3)

¹ Perhaps "this Court" refers to the prior presiding Court.

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scheduling a hearing to impose costs incurred by NYBOCT due to the false and intentionally misleading discovery responses served by AJG/GBS and their counsel.²

Section 3126 of the Civil Practice Law and Rules (CPLR) requires litigants to obey Court's disclosure orders and produce material or relevant information. It also provides the Court with broad discretion to impose sanctions and penalties on those who fail to comply with discovery demands and engage in obstructive or dilatory tactics. *See Cobo v Pennwalt Corp. Stokes Div.*, 185 A.D.3d 650, 652 (Second Department 2020); *see also Pfeiffer v Shouela*, 206 A.D.3d 941, 942 (Second Department 2022). The Court rejects MOVANT's claims that the "Gallagher" Defendants have engaged in obstructive or dilatory tactics.

In assessing whether to impose sanctions, courts consider a party's refusal to obey a disclosure order or any "willful or contumacious" failure to disclose requisite information. *Pezzino v Wedgewood Health Care Ctr., LLC*, 175 A.D.3d 840, 841 (Fourth Department 2019). The Court rejects any assertions the Gallagher Defendants are guilty of any willful or contumacious behavior.

"In determining the appropriate sanction, courts should consider the facts on a case-by-case basis, balancing the strong public policy favoring resolution of cases on the merits with the court's interest in ensuring efficient litigation through court orders, deadlines and sanctions." *See also Aldo v City of New York*, 210 A.D.3d 83, 834 (Second Department 2022). "Actions should be resolved on their merits whenever possible, and the drastic remedy of striking a pleading or the alternative remedy of precluding evidence should not be employed without a clear showing that the failure to comply with court-ordered discovery was willful and contumacious."

As noted in a memorandum of law in support of counterclaim Defendant NYBOCT to strike the AJG/GBS Defendants counterclaims:

Specifically, on May 18, 2023, after a hearing on the issue of the open discovery related to NYBOCT's repeated requests for Service Instructions which were used by GBS to administer NYBOCT's account, the Court ordered AJG/GBS and their attorneys to produce an affirmation from counsel, an affidavit from every entity implicated by the issue, and a compiled, consolidated, coordinated presentation delineating the searches

² The Court's review of the historical path of this litigation can only be described as a cacophony of confusion which now must end and head to trial.

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that were performed.

Despite counsel initially stating during the May 18, 2023 conference that he was happy to do the affirmation and would circulate the affidavit within a week, the following week AJG/GBS's counsel began to question whether "this Court's" May 18, 2023 Order was valid and whether AJG/GBS had to comply in an e-mail to the discovery Special Master David Rosenberg. NYBOCT's counsel responded on May 23, 2023 and outlined what had been set forth in the Court's order.

There are exchanges in which counsel for AJG/GBS again questioned the "legal authority" by which his affirmation and his clients' affidavits would be judged. Thereafter, defense counsel wrote to the Court on May 25, 2023, and asked for "an order with clear articulation of the legal standard and corresponding authority" that would apply to the directives given by the Court at the May 18, 2023, conference.

Thereafter, the Court (Justice Emerson) issued an Order dated May 31, 2023, which stated:

The Court gave clear directions on the record at the May 18, 2023 appearance and the Court reaffirms those directions regarding:

1. Affidavits to be provided by parties,
2. Affirmations to be provided by counsel

The Court is persuaded that the five (5) assertions of compliance set forth within Samuel J. Thomas's November 10, 2023, Memorandum of Law in Opposition to Plaintiff's motion to strike the Gallagher Defendants' answer display substantial, if not absolute, compliance with discovery directives.

The Court has reviewed the Affirmation of Samuel J. Thomas, Esq., pursuant to the Court's order entered May 31, 2023. At paragraphs 6 of Counsels Affirmation, he notes:

The Court's May 31, 2023, order relates to discovery dispute that has been argued and reargued several times since 2021. However, neither the Court nor Special Discovery Master have

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articulated the legal standard being applied or confirmed that the standard is being applied evenly.

The Court has reviewed the prior determinations of Justice Emerson. The Court has also pondered the meaning of “legal standard” as suggested by Defendants’ counsel. It appears to this Court that Justice Emerson was suggesting the so-called Jackson Affidavit as an avenue of resolution. If not, that is the path chosen by this Court. To that extent the legal standard for sufficiency of a Jackson Affidavit can be found at the following cases: (1) *Jackson v City of New York*, 185 A.D.2d 768; (2) *Henderson-Jones v City of New York*, 87 A.D.3d 498; (3) *Dedushaj v 3175-77 Villa Ave. Hous. Dev. Fund Corp.*, 135 A.D.3d 421; (4) *Vazquez v Lambert Houses Redevelopment Co.*, 110 A.D.3d 450; (5) *Trade Expo Inc. v Sterling Bancorp.*, 171 A.D.3d 634; and (6) *WMC Mortgage Corp., v. Vandermulen*, 32 Misc.3d 1206(A).

The Defendants will produce, pursuant to Justice Emerson's directive, the appropriate Jackson Affidavit and/or affidavits and submit the same to Special Master Rosenberg and the Court thirty (30) days after this Short Form Order is filed. All inquiries and/or questions regarding sufficiency of the Jackson Affidavit or affidavits shall be submitted to Mr. Rosenberg for comment and determination.

As concerns the applicable “legal standard,” all parties are directed to the “New York Commercial Division Practice Guide,” 2023 Edition. Whenever inquiry or doubt, the preparation of the Jackson Affidavit must comply with the ESI guidelines as set forth in the handbook. Additionally, any issues brought by the Defendants sounding in attorney work product and/or attorney-client privilege shall be submitted via a letter application addressed to Mr. Rosenberg. Thereafter, Mr. Rosenberg will determine such issues.

Expert disclosure and exchange shall close within thirty (30) days from the filing of this Short Form Order. Application for sanctions and/or dismissal of claims is **DENIED**. All other relief sought by the parties is **DENIED**.

The foregoing constitutes the decision and **ORDER** of this Court.

Dated: July 29, 2024


HON. JERRY GARGUILO, JSC