

Briones v QB Dev. Owner LLC.

2025 NY Slip Op 31162(U)

April 3, 2025

Supreme Court, New York County

Docket Number: Index No. 153387/2022

Judge: Lynn R. Kotler

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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. LYNN R. KOTLER PART 08

Justice

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WASHINGTON BRIONES,

Plaintiff,

- v -

QB DEVELOPMENT OWNER LLC., OMNIBUILD
CONSTRUCTION, INC., MARATHON BUILDERS GROUP
INC., PRIME STRUCTURE INC.,

Defendant.

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INDEX NO. 153387/2022

MOTION DATE 02/05/2025

MOTION SEQ. NO. 004

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 004) 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 195

were read on this motion to/for STRIKE PLEADINGS.

Upon the foregoing documents, this motion is decided as follows. Defendants/Third-Party Plaintiffs/Fourth Third-Party Plaintiffs, QB DEVELOPMENT OWNER LLC and OMNIBUILD CONSTRUCTION INC. (collectively, "Movants") move for an order pursuant to CPLR 3124 and 3126(2), (3) striking the answer of Third-Party Defendant/Third Third-Party Defendant, MARATHON BUILDERS GROUP INC. ("Marathon"), for failure to produce a relevant witness for deposition, precluding Marathon from offering testimony or evidence at trial as to the documents or things demanded, or compelling Marathon to produce a relevant witness for deposition. Marathon opposes the motion and argues that they do not have a witness with the knowledge the Movants seek and were not willful, deliberate, or contumacious in their failure to produce a witness with knowledge for the deposition. For the reasons that follow, the motion is granted to the extent that Marathon is precluded from introducing testimony or evidence at trial from any employee who has not been deposed.

Facts

On May 28, 2024, plaintiff filed a motion seeking an order to compel Marathon to produce a witness for deposition or, in the alternative, preclude Marathon from offering evidence at the time of trial. Plaintiff alleged that he had made many attempts to schedule Marathon's deposition and Marathon failed to respond. Movants cross-moved against Marathon on June 3, 2024, seeking the same relief as plaintiffs.

On October 23, 2024, this court issued a decision, which ordered in part Marathon to produce a witness on December 16, 2024, or be precluded from offering evidence and/or testimony at trial absent good cause shown in writing.

On December 16, 2024, Marathon produced Anthony Scibelli ("Scibelli") for deposition over Zoom, beginning at 10:00 am. At his deposition Scibelli testified that he had worked partly for Marathon in 2022 but not in 2023 and that he was not familiar with the project at issue. Scibelli also testified he had no title at Marathon, did not know who owned Marathon, and did not know who hired him. He testified that his job capacity at Marathon involved payroll and submitting drawings. When questioned about Marathon's contracts, Scibelli stated that he might have reviewed the contracts for work but did not recognize the contracts presented to him at the deposition. Scibelli also testified that he did not know who the plaintiff was and could not recall a single person who worked at Marathon (NY St Cts Elec Filing [NYSCEF] Doc No. 187).

Based on the transcript provided, Scibelli did not provide any relevant information regarding the litigation and often responded that he did not remember or had no knowledge of the questions asked of him. Scibelli abruptly left the deposition, after being asked questions about his criminal record:

Q. Have you ever been convicted of a crime?

A. Yes.

Q. What crime were you convicted of?

A. I don't remember the extent, it was economic harm.

Mr. Daly: I have no further questions.

Mr. Gokce: I have some follow-ups.

Q. What county were you convicted of this crime?

A. Listen, I'm not going to sit here and speak about something from 17 years ago. So you know what, if my attorney is not going to answer that question for me, I'm going to make this very simple, I am not answering any personal information regarding me. If you can't deal with it, let me know and I'll hang up off this meeting. It's up to you.

Scibelli left the Zoom deposition at approximately 10:40-10:45 am and failed to return.

Movants acquired the Article of Dissolution filed May 4, 2023 for Marathon which is signed by Scibelli in his capacity as president of Marathon (NYSCEF Doc No. 190).

On March 19, 2025, the parties appeared before the court for a conference on the motion, but were unable to come to an agreement to resolve the instant motion.

Discussion

Striking a pleading for failure to provide discovery is a drastic remedy and should not be granted absent a showing that the non-disclosure was willful, contumacious or due to bad faith (*McGilvery v. New York City Transit Authority*, 213 AD2d 322 [1st Dept 1995]). Here, the court finds that Marathon produced a witness, Anthony Scibelli, despite the fact that he was hostile, and uncooperative. Marathon's actions do not rise to the level of willful, contumacious or in bad faith that would result in the court striking its answer. Marathon claims they are unable to find any other witness because the entity is dissolved, and that they have no knowledge of other employees whom they could produce for a deposition.

Marathon claims they have no knowledge of any other witness they could produce for deposition and therefore the court cannot compel them to produce an additional witness. Movants argue that Marathon provided a witness named Thomas Frangipane (“Frangipane”) in another matter concerning the project at issue. At the March 19, 2025 conference, Marathon acknowledged the existence of Frangipane, but that the other litigation was being handled by another law firm and that Frangipane is not under Marathon’s controls. Should Movants wish to depose Frangipane, they should subpoena him rather than ask this court to order a non-party witness to appear.

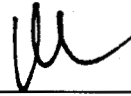
Pursuant to CPLR 3126(2), the court may prohibit a party who’s witness “refuses to obey an order for disclosure or willfully fails to disclose information” from producing additional evidence or witnesses. Here, not only did Scibelli willfully fail to disclose information during his deposition, but he walked out of the deposition after only 40 – 45 minutes and failed to return. Scibelli testified that he had little to no knowledge of Marathon despite signing the articles of dissolution in his capacity as president of the corporation. Moreover, Scibelli’s deposition testimony is incredible testifying that he had no job title at Marathon, had limited involvement with the company and the project that is the subject of the lawsuit, and provided no substantive testimony at his deposition. Based on the foregoing, Marathon is precluded from introducing testimony or evidence from any former employee who has not been deposed at the time of trial.

Conclusion

Based on the foregoing, it is hereby

ORDERED that Marathon is precluded from introducing additional evidence or testimony at the time of trial as to any documents or things demanded from any former employee other than Anthony Scibelli.

Any requested relief not expressly addressed herein has nonetheless been considered and is hereby denied and this constitutes the decision and order of the court.

<u>4/3/2025</u> DATE	 LYNN R. KOTLER, J.S.C.			
CHECK ONE:	<input type="checkbox"/> CASE DISPOSED	<input type="checkbox"/> DENIED	<input checked="" type="checkbox"/> NON-FINAL DISPOSITION	<input type="checkbox"/> OTHER
APPLICATION:	<input type="checkbox"/> GRANTED		<input checked="" type="checkbox"/> GRANTED IN PART	
CHECK IF APPROPRIATE:	<input type="checkbox"/> SETTLE ORDER		<input type="checkbox"/> SUBMIT ORDER	
	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN		<input type="checkbox"/> FIDUCIARY APPOINTMENT	<input type="checkbox"/> REFERENCE