SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. KATHLEEN WATERMAN-MARSHALL** **PART** **31**

Justice

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MARC BARADEL,

Plaintiff,

- v -

EDELMAN ARTS, INC.,THOSE UNDERWRITERS AT LLOYD'S LONDON WHO SUBSCRIBE TO THE POLICY OF INSURANCE/CERTIFICATE NUMBERED

Defendant.

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INDEX NO. 653717/2019

MOTION DATE 12/04/2023

MOTION SEQ. NO. 011

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 011) 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 558, 559, 561, 562, 563

were read on this motion to/for STRIKE PLEADINGS.

This matter was administratively transferred to Part 31 in late January 2025. Following the transfer, this Court held a conference to discuss and resolve the instant discovery motions given the length of time they have been pending. Counsel informed the Court that the motions could not be resolved and that a decision would be required.

Upon the foregoing documents, defendant Those Underwriters at Llyod's London who Subscribe to the Policy of Insurance/Certificate Numbered ("Llyod's of London") moves, pursuant to CPLR § 3126, to strike the complaint and dismiss the matter for failure to produce discovery. Upon the same record, plaintiff Marc Baradel ("Baradel") cross-moves to: strike defendants' answers; preclude defendants from defending based upon filing two allegedly false non-party affidavits; seal an affidavit by non-party Manea as perjurious; declare defendants' attorney-client confidentiality waived; and direct Llyod's of London to produce demanded discovery. Each party also seeks sanctions for alleged discovery violations. For the reasons that follow, the motion and cross-motion are denied.

Background

This action arises out of damage to a sculpture, "*Le Poisson.*" Baradel is the owner of *Le Poisson* and other art sculptures, which he alleges were created by the artist Constantin Brancusi. Baradel consigned *Le Poisson* to defendant Edelman Arts Inc ("Edelman Arts"), and Llyod's of London insured the artwork under a $20 million policy issued to Edelman Arts; Lloyd's also issued a separate $5 million certificate of insurance for the consignment of *Le Poisson.*

Baradel alleges that he purchased "*Le Poisson*" in 1990 as part of a group of approximately 20 other sculptures from a farmer in Romania – who allegedly discovered the artwork buried under a chicken coop. *Le Poisson* remained in Baradel's possession and was variously transported and stored across Europe before arriving at Edelman Arts in New York on July 3, 2018 under the consignment agreement between Baradel and Edelman.

Le Poisson visually comprises four components stacked on top of one another. The bottom two components are generally cube-shaped, the third component is generally sphere shaped and partially imbedded in the second cube, and the top component (referred to as the main component) is an oblong elliptical football shaped stone seemingly balanced on top of the spherical component. The same day Baradel consigned *Le Poisson* to Edelman, the main component fell and broke while the statue was being assembled. *Le Poisson* was repaired, and Baradel filed a claim under the Llyod's of London policy issued to Edelman Arts.

Llyod's of London sought to investigate Baradel's insurance claim. In response, Baradel filed this action for: breach of the consignee agreement; negligence by the consignee; breach of the covenant of good faith and fair dealing against the insurers; and bad faith against the insurers.

Defendants collectively take issue with Baradel's transportation and storage of the sculptures from 1990 through 2018 – contending that the sculptures were not transported, stored, declared at customs, or insured as would be expected presuming the veracity of Baradel's valuation of the artworks. As such, defendants generally question *Le Poisson's* authenticity and provenance. Baradel contends that *Le Poisson* is authentic and that Llyod's waived any right it had to challenge the authenticity by issuing the insurance certificate without inspection.

By motion filed December 4, 2023, defendants seek to strike the complaint and dismiss the action for Baradel's failure to comply with discovery deadlines. Baradel cross-moves to strike defendants' answers, and for other various relief.

Discussion

I. The Parties' Requests to Strike Pleadings and/or For Preclusion, Are Denied

CPLR § 3101(a) directs that there "shall be full disclosure of all matter material and necessary to the prosecution or defense of an action, regardless of the burden of proof" (*Forman v Henkin*, 30 NY3d 656, 661 [2018]). The test utilized is "one of usefulness and reason" (*id.*). When a party has refused to obey an order for disclosure or willfully fails to disclose information that ought to have been disclosed, CPLR § 3126 (3) provides that the Court may strike a pleading. This remedy is drastic and should only be imposed when the movant has "clearly shown that its opponent's nondisclosure was willful, contumacious or due to bad faith" (*Commerce & Indus. Ins. Co. v Lib-Com Ltd.*, 266 AD2d 142 [1st Dept 1999]). A pattern of default, lateness, and failure to comply with court orders can give rise to an inference of willful and contumacious conduct (*see Merchants T & F, Inc. v Kase & Druker*, 19 AD3d 134 [1st Dept 2005]; *see also Shah v Oral Cancer Prevention Intl., Inc.*, 138 AD3d 722 [2d Dept 2016]). "A party that permits discovery to 'trickl[e] in [with a] cavalier attitude should not escape adverse consequence'" (*Henderson-Jones v City of New York*, 87 AD3d 498, 504 [1st Dept 2011] quoting *Figdor v City of New York*, 33 AD3d 560, 561 [1st Dept 2006]).

As the Court of Appeals has repeatedly underscored

> . . . our court system is dependent on all parties engaged in litigation abiding by the rules of proper practice. The failure to comply with deadlines not only impairs the efficient functioning of the courts and adjudication of claims, but it places jurists unnecessarily in the position of having to order enforcement remedies to respond to the delinquent conducts of members of the bar, often to the detriment of the litigants they represent. Chronic noncompliance with deadlines breeds disrespect for the dictates of the Civil Practice law and Rules and a culture in which cases can linger for years without resolution.

(*Gibbs v St. Barnabas Hosp.*, 16 NY3d 74 [2010]). Compliance requires a timely response and good faith effort to provide a meaningful response (*Kihl v Pfeffer*, 94 NY2d 118, 123 [1999]). Disregard of discovery deadlines will not be tolerated (*Andrea v Arnone, Hedin, Casker, Kennedy & Drake, Architects & Landscape Architects, P.C*, 5 NY3d 514, 521 [2005]; *see also Arpino v F.J.F. & Sons Elec. Co., Inc.*, 102 AD3d 201, 208 [2d Dept 2012]). "[U]pon learning that a party has repeatedly failed to comply with discovery orders, [trial courts] have an affirmative obligation to take such additional steps as are necessary to ensure future compliance" (*Figdor v City of New York*, 33 AD3d 560, 561 [1st Dept 2006]).

This motion and cross-motion have been pending for nearly a year and a half, during which time the discovery landscape has greatly shifted. Indeed, the record reflects that various court conferences have occurred in the past 18-month period. The parties also represent that certain discovery issues were addressed and resolved off-record, resulting in various directives, although these off-record conferences did not result in any written orders.

In support of their CPLR § 3126 motion to dismiss for failure to comply with discovery, defendants identify 14 alleged instances of noncompliance by Baradel. However, it appears that certain of these allegations were addressed by the piecemeal orders and off-the-record conferences referred to above. As some of these piecemeal orders and conferences were never reduced to a written order or otherwise placed on the record, it is impossible to determine whether the discovery at issue is still outstanding. Similarly, without a written order or an on-the-record direction, this Court cannot determine whether a party has failed to comply with a discovery order sufficient to strike any party's pleading. Under these circumstances, it is impossible to determine whether any pleadings should be stricken for noncompliance with discovery orders. For the same reasons, an order of preclusion is not warranted on this record.

Llyod's of London's request to supplement this motion with additional allegations and briefing, in an attempt to clarify the record, would serve only to make this voluminous motion more unwieldly and further confuse the state of discovery. Therefore, the request is declined.

In support of his cross-motion to dismiss defendants' answers, Baradel alleges that they perpetrated a fraud on the Court by submitting perjurious non-party affidavits. Although brought as a motion to strike under CPLR § 3126, Baradel's perjury claims are the same as those he raised during a conference before the prior jurist in 2021, which resulted in a May 27, 2021

Order that, *inter alia*, struck Baradel's discovery demands addressed to these non-parties. Thus, Baradel's perjury claims amount to a motion to reargue/reconsider and are addressed separately below. To the extent that Baradel's cross-motion may be read to seek dismissal based upon alleged discovery noncompliance, it is denied for the same reasons that Llyod's of London's motion to strike for discovery noncompliance is denied – there can be no violation of a written discovery order or direction that simply does not exist (*supra*).

Nevertheless, it is clear that discovery has not proceeded at an appropriate pace in this matter. Despite pending for at least five years, with over 570 documents spread across 8 pages of the NYSCEF record, the record reveals that a preliminary conference has never been held. Instead, the parties have engaged in significant motion practice, including six prior dismissal motions and two discovery motions. The lack of a comprehensive discovery schedule has likely contributed to the confused state of current discovery. Continuing to address discovery in a piecemeal fashion is neither appropriate nor an efficient method to shepherd this matter towards resolution.

Accordingly, a **Preliminary Conference** has been scheduled for **July 1, 2025 at 3:30 p.m.,** during which the court will issue an order setting forth a comprehensive discovery schedule. Counsel are directed to follow the Part Rules, specifically those relating to conferences and conference orders.

In crafting conferring with each other on discovery matters prior to the Preliminary Counsel, and crafting supplemental discovery demands, counsel are reminded of the court's prior orders regarding non-discoverability of attorney work product and attorney-client privileged material, which remain in effect (May 26, 2021 decision and order as non-substantively amended May 27, 2021; March 23, 2023 decision and order in pre-action disclosure proceeding under Index No. 159863/2022). Demands seeking material which the court has repeatedly found to be privileged are frivolous, and may result in sanctions against parties and counsel, pursuant to 22 NYCRR § 130-1.1. Counsel should be guided accordingly.

II. Reconsideration & Sealing

Baradel's request that this Court "*sua sponte*" reverse the May 27, 2021 Order, which struck plaintiff's demand addressed to non-parties and for privileged information from defendants, is without merit. Baradel fails to identify a misapprehension of law or fact required for reargument of the May 27, 2021 Order (*Foley v Roche*, 68 AD2d 558, 567 [1st Dept 1979]; *see* CPLR § 2221[d][2]). He alleges, without any evidence, that the affidavits of non-party Manea, who allegedly sold *Le Poisson*, are perjurious/fraudulent and that defense counsel intentionally procured these improper affidavits. Baradel also alleges that defense counsel submitted false attorney affidavits on this motion. These claims are simply a rehash of the arguments rejected by the prior jurist on May 27, 2021. In any event, if non-party witness Manea's conflicting affidavits are perjurious, as Baradel contends, the veracity of the statements will presumably be measured via Manea's testimony at deposition and, ultimately, trial.

To the extent that Baradel's request may be deemed a motion for renewal based upon a third affidavit purportedly by Manea (dated August 2, 2023), the affidavit is unsworn and does

not constitute newly discovered evidence for renewal (*see e.g. Rose v Horton Medical Center*, 29 AD3d 977 [2d Dept 2006] [unsigned affidavit not competent proof]).

For the same reasons, there is no basis to seal these affidavits. Court records are presumed to be in the public sphere, accessible for the public's review and inspection absent good cause (*Mosallem v Berenson*, 76 AD3d 345 [1st Dept 2010]; 22 NYCRR § 216.1[a]). Baradel has not identified any good cause to seal any affidavits in this matter.

III. Sanctions

To the extent that any party seeks sanctions for frivolous conduct under 22 NYCRR § 130-1.1, such relief is denied. The Court is afforded discretion to impose sanctions and costs for frivolous conduct (22 NYCRR § 130-1.1[a]). The statute defines frivolous conduct at as that which "is completely without merit in law and cannot be supported by a reasonable argument for an extension, modification or reversal of existing law" (22 NYCRR § 130-1.1[c]; *Newman v Berkowitz*, 50 AD3d 479 [1st Dept 2008] [internal quotations omitted]; *E. New York Sav. Bank v Sun Beam Enterprises, Inc.*, 256 AD2d 78, 79 [1st Dept 1998] ["patently meritless motions" are frivolous]; *Sanders v Copley*, 194 AD2d 85, 88 [1st Dept 1993] [knowingly false affidavit is "completely without merit … in fact"]), or "asserts materially factual statements that are false" (22 NYCRR § 130-1.1[c]).

In determining the appropriateness of sanctions for frivolous conduct, the Court considers the totality of the circumstances, as well as the dual purposes of sanctions: (1) retributive, in punishing past conduct and (2) deterrent, preventing future frivolous conduct by the parties and the greater bar at large (22 NYCRR § 130.1-1[c]; *Levy v Carol Mgmt. Corp.*, 260 AD2d 27, 34 [1st Dept 1999]; *Tribeca Equity Partners*, 44 Misc3d 1201[A] [Civil Ct. NY County 2014]). The deterrent purpose of imposing sanctions includes consideration of the waste of judicial resources (*id.*). "There is no requirement that the dictates of [22 NYCRR] § 130-1.2 be followed in any rigid fashion, the court's decision was sufficient to set forth the conduct on which the [sanctions] award was based, the reasons why it found this conduct to be frivolous and the amount to be appropriate" (*Benefield v New York City Hous. Auth.*, 260 AD2d 167, 168 [1st Dept 1999]).

As discussed, the discovery landscape has changed significantly in the year-and-a-half that this motion has been pending. These changes, taken together with various discovery directives by the prior jurist – which were apparently not reduced to a written order or otherwise placed on-the-record – do not support sanctions under § 130-1.1 for frivolousness. The Court declines the parties' invitation to impose discovery sanctions where it is unclear whether any party has violated a discovery order.

Accordingly, it is

ORDERED that the motion and cross-motion for discovery sanctions are denied; and it is further

ORDERED that Baradel's cross-motion for reargument/renewal/reconsideration and to seal certain documents is denied; and it is further

ORDERED that the parties shall appear for a Preliminary Conference on July 1, 2025 at 3:30 p.m. Prior to the conference, the parties to meet, confer and identify, with specificity, any outstanding discovery demands and/or deficiency letters to previously served responses, and arrive at a Joint Preliminary Conference Order; and it is further

ORDERED that any specific claims for relief not expressly addressed herein have been considered, found to be without merit, and denied.

THIS CONSTITUTES THE DECISION AND ORDER OF THE COURT

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6/23/2025
DATE

KATHLEEN WATERMAN-MARSHALL, J.S.C.

CHECK ONE:	[ ]	**CASE DISPOSED**		[X]	**NON-FINAL DISPOSITION**	
	[ ]	**GRANTED**	[ ] **DENIED**	[X]	**GRANTED IN PART**	[ ] **OTHER**
APPLICATION:	[ ]	**SETTLE ORDER**		[ ]	**SUBMIT ORDER**	
CHECK IF APPROPRIATE:	[ ]	**INCLUDES TRANSFER/REASSIGN**		[ ]	**FIDUCIARY APPOINTMENT**	[ ] **REFERENCE**