Banda v 1174 Ogden, LLC.
2025 NY Slip Op 35365(U)
February 6, 2025
Supreme Court, Bronx County
Docket Number: Index No. 816720/2021E
Judge: Naita A. Semaj
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NEW YORK SUPREME COURT – COUNTY OF BRONX

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX: PART 27

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Joel Llanos Banda

Petitioner,

-against-

1174 Ogden, LLC. et al., and
NY Preferred Development Group, LLC.,

Respondent.

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Index No.: 816720/2021E

Hon. Naita A. Semaj,
Justice of the Supreme Court

The following papers numbered NYSCEF Doc. #**43** to NYSCEF Doc. # **48** were read on **Petitioner's Motion** (Seq. No**. 2**) for an Order: (1) Compelling Defendant NY Preferred Development Group LLC to appear for a deposition on or before a date certain; (2) Compelling Defendants to produce witness Ilen Diaz for a deposition on or before a date certain; (3) Compelling Defendants to provide a response to Plaintiff's Post-Deposition Demands, dated June 14, 2024; and ,(4) Conditionally Striking Defendant's Answers, pursuant to CPLR § 3126, if Respondents fail to meet the aforementioned deadlines. Compelling Respondents appearance at depositions were noticed and duly submitted on **September 21, 2024**

Sequence No. 2	NYSCEF Doc. Nos.
Notice of Motion - Exhibits and Affidavits Annexed	43 - 48
Answering Affirmation/Affidavit and Exhibits	-
Replying Affirmation/Affidavit and Exhibits	-

See attached decision and order dated **February 6, 2025**

Dated: February 6, 2025

Hon. _____
Naita A. Semaj , J.S.C.

1. CHECK ONE..... ☐ CASE DISPOSED IN ITS ENTIRETY ☒ CASE STILL ACTIVE
2. MOTION IS..... ☐ GRANTED ☐ DENIED ☒ GRANTED IN PART ☐ OTHER
3. CHECK IF APPROPRIATE..... ☐ SETTLE ORDER ☐ SUBMIT ORDER

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Hon. Naita A. Semaj,
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HON. NAITA A. SEMAJ

On December 8, 2021, Petitioner filed this action to recover damages arising out of injuries purportedly sustained while Petitioner was present at 1174 Ogden Avenue, Bronx County. Petitioner claimed that on November 15, 2021, Respondents, *inter alia,* failed to properly maintain or repair hazardous conditions at the subject premises when Petitioner was struck by unsecured, falling wood. Respondents interposed an Answer on June 3, 2022.

Now, by Notice of Motion filed September 21, 2024, Petitioner seeks an Order : (1) Compelling Defendant NY Preferred Development Group LLC to appear for a deposition on or before a date certain; (2) Compelling Defendants to produce witness Ilen Diaz for a deposition on or before a date certain; (3) Compelling Defendants to provide a response to Plaintiff's Post-Deposition Demands, dated June 14, 2024; and ,(4) Conditionally Striking Defendant's Answers, pursuant to CPLR § 3126, if Respondents fail to meet the aforementioned deadlines.

In material part, Petitioner seeks deposition of witnesses on behalf of Respondent NPDG, the general contractor of the construction site and who was present at the site daily, and deposition of Ilen Diaz who Respondents identified as a witness to the subject incident. Respondents did not file written opposition.

After review of all papers, the Court decides as follows:

Regarding the aspect of Petitioner's motion to compel, pursuant to CPLR § 3124, the Court may compel compliance upon failure of a party, to provide discovery. It is within the Court's discretion to determine whether the materials sought are "material and necessary" (*see Roman Catholic Church of the Good Shepard v. Tempco Systems*, 202 A.D. 2d 257 [1st Dept., 1994]. The New York Court of Appeals wrote in *Forman v. Henkin*, 30 N.Y.3d 656 (2018), "that the words material and necessary are ... to be interpreted liberally to require disclosure, upon request, of any facts bearing on the

controversy which will assist in preparation for trial by sharpening the issues and reducing delay and prolixity. The test is one of usefulness and reason. "(*Henkin* at 656).

In addition, the New York Court of Appeals favors relief under CPLR § 3124 where the record supports the determination that Respondents, through delays and other strategies, engaged in a course of conduct designed to yield one-sided disclosure in Respondents' favor, culminating in Respondents' disregard of an order compelling Respondents to answer [questions] which were found to be relevant and appropriate (*see Richard Zletz v. Herbert Wetanson et al.,* 67 N.Y.2d 711 [Ct Ap 1999], *cf. Fellner v. Texas Mexican Ry. Co.,* 76 A.D.2d 820, 429 N.Y.S.2d 27; *Commissioners of State Ins. Fund v. News World Communications*, 74 A.D.2d 765, 425 N.Y.S.2d 595*).*

Moreover, the Court also requires that all motions relating to disclosure or to a bill of particulars must include "an affirmation that counsel has conferred with counsel for the opposing party in a good faith effort to resolve the issues raised by the motion." (22 NYCRR 202.7[a]; *Sanchez v St. John's University 224 AD3d 859*; *Behar v. Wiblishauser*, 219 A.D.3d 793, 794; *see Muchnik v. Mendez Trucking, Inc*., 212 A.D.3d 640, 641). Consequently, "failure to provide an affirmation of good faith which substantively complies with 22 NYCRR 202.7(c) warrants denial of the motion." (*see Wiblishauser*, quoting *Winter v. ESRT Empire State Bldg., LLC,* 201 A.D.3d 842, 844, 161 N.Y.S.3d 314).

Here, Petitioner's relief requested is based on Respondents' alleged failure to comply with post-deposition demands, produce witnesses, schedule depositions, failure to provide outstanding discovery, and failure to respond to emails requesting compliance. Respondents do not oppose Petitioner's application.

In support of motion, Petitioner claims that Respondents have not replied to correspondence for over six months. Allegedly, Respondents would not schedule depositions for Respondent 1174 Ogden, LLC., ["Ogden"]. Instead, Respondents insisted and twice confirmed that a witness for Respondent NY Preferred Development Group, LLC ["NPDG"] be produced on June 14, 2024.

Petitioner alleges that on June 14, 2024, Respondents produced a witness for Respondent Ogden - and not Respondent NPDG, as agreed. Further, citing to the transcript of deponent Dana Reilly, the witness testified that: (i) she is an employee of Blanco Drilling; (ii) that Capital Concrete New York worked on the premises on the date of the accident; and, (iii) that she does not recall if either her or any Respondents were present or witnessed the accident. Petitioner argues that Ms. Reilly had no personal knowledge of the accident.

As such, on June 14, 2024, after deposition of Ms. Reilly, Petitioner demanded additional discovery because new or additional information and witnesses – specifically, Ilen Diaz - were provided by Respondents at deposition. Petitioner asserts that deposition of Ilen Diaz is relevant and essential since she is an employee of Respondent Ogden who allegedly witnessed the accident.

Petitioner served Respondents with post-deposition demands which required responses within 20 days of service. Petitioner contends Respondents did not respond within 20 days.

Prior to filing a motion, Petitioner attempt to contact Respondent and resolve issues on:

i. June 13, 2024
ii. July 2, 2024
iii. July 9, 2024
iv. July 16, 2024
v. July 23, 2024
vi. July 25, 2024
vii. July 29, 2024

Petitioner's good faith affirmations demonstrate Petitioner's attempts to contact opposing counsel and proffer sufficient evidence that Petitioner's counsel attempted to confer with opposing counsel to schedule depositions and complete outstanding discovery.

Therefore, this Court is persuaded to find Petitioner made good faith attempts to resolve the alleged disclosure dispute and thus satisfies 22 NYCRR § 202.7(c). *(See 241 Fifth Ave. Hotel, LLC., v. GSY Corp.,* 110 AD3d 470, 472 [2nd Dept 2013], citing *Mironer v. City of New York*, 79 AD3d 1106, 1107–08 [2nd Dept 2010]; *Kelly v. New York City Tr. Auth.,* 162 A.D.3d 424 [2018]; Matter of City of Troy v. Assessor of the Town of Brunswick,145 A.D.3d 1241 [2016]; *Dennis v. City of New York*, 304 A.D.2d 611 [2003]). As such, this Court is persuaded by Respondents' argument in support of an order to compel.

Regarding as aspect of Petitioner's motion seeking to strike Respondents' answer, under CPLR § 3126, if a party refuses to "obey an order for disclosure or willfully fails to disclose information which the court finds ought to have been disclosed…" the Court may enter an order "prohibiting the disobedient party from supporting or opposing designated claims or defenses, from producing in evidence designated things or items of testimony …or from using certain witnesses" (CPLR § 3126[2]).

However, it is well settled that the drastic remedy of striking an answer is inappropriate absent a clear showing that the failure to comply with discovery demands is willful, contumacious, or in bad faith (*see Harris v City of New York*, 211 AD2d 633. , CPLR 3126; *Lestingi v. City of New York,* 209 A.D.2d 384,; *Cruzatti v. St. Mary's Hosp.,* 193 A.D.2d 579; *Ahroni v. City of New York,* 175 A.D.2d 789,).

In addition, the Appellate Division has long held that "the drastic remedy of striking a party's pleading pursuant to CPLR § 3126 for failure to comply with a discovery order…is appropriate only where the moving party conclusively demonstrates that the non-disclosure was willful, contumacious or due to bad faith" (*Watson v. City of New York*, 157 A.D.3d 510 [1st Dept 2018] citing (*Henderson-Jones v City of New York*, 87 AD3d 498, 504 [1st Dept 2011] [internal quotation marks omitted]).Willfulness and

contumacy may be established by the violation of multiple court orders without reasonable excuse (see *Watson v. City of New York*., 157 AD3d 520 [1st Dept 2018]).

Further, although it is well settled that "[t]he nature and degree of any penalty imposed on a motion pursuant to CPLR 3126 is a discretionary matter" (*see Gokey v Decicico* 24 AD3d 860, citing *Nabozny v. Cappelletti*, 267 A.D.2d 623, 625 [1999]; *see also Zletz v. Wetanson*, 67 N.Y.2d 711, 713 [1986]), such a determination must be balanced against the " 'general policy favoring the resolution of actions on their merits' " (*Osterhoudt v. Wal–Mart Stores*, 273 A.D.2d 673, 675, [2000], quoting *Mrs. London's Bake Shop v. City of Saratoga Springs*, 144 A.D.2d 749, [1988]; accord Kinge v. State of New York, 302 A.D.2d 667 [2003]).

Indeed, the ultimate sanction of preclusion should be reserved for cases where the failure to comply with discovery demands is the result of " 'a deliberately evasive, misleading and uncooperative course of conduct or a determined strategy of delay that would be deserving of the most vehement condemnation' " (*Altu v. Clark*, 20 A.D.3d 749 [2005], quoting *Forman v. Jamesway Corp.,* 175 A.D.2d 514, 515– 516, [1991]; *see Matter of Beauregard v. Millwood–Beauregard*, 207 A.D.2d 633 [1994]; *see e.g. Appler v. Riverview Obstetrics & Gynecology*, 9 A.D.3d 577, [2004]; *Osterhoudt , supra* at 673–674; *Lawrence H. Morse, Inc. v. Anson*, 251 A.D.2d 722 [1998]).

In United States Fire Insurance Co v JR Greene, Inc, et al (272 AD2d 148), Respondents delayed competition of discovery for several years. As such, the Appellate Division First Department held that striking Respondents' answer is appropriate when:

> "[D]efendant has adopted a 'pattern of partially complying' with demands for disclosure, 'only after being directed to do so by court order', resulting in a delay in the completion of discovery" over a period of several years, citing *LaValle v. City of New York Dept. of Sanitation,* 240 A.D.2d 639, 639–640, 659 N.Y.S.2d 299, quoting *Cauley v. Long Is. R.R. Co.,* 234 A.D.2d 252, 651 N.Y.S.2d 80)....[and], when '[d]efendant has had ample opportunity to furnish a list of end users, and numerous warnings that failure to comply with the directive could result in the striking of its answer.' Under circumstances that evince the willful frustration of plaintiffs' discovery efforts, we regard it as an improvident exercise of discretion to have denied so much of plaintiffs' motion as sought to strike defendant's answer (*id.; see also, Harris v. City of New York,* 211 A.D.2d 663, 664, 622 N.Y.S.2d 289).

Here, this Court notes that this is a case that gives rise to an inference that Respondents' conduct is willful and contumacious.

Petitioner emailed Respondents' counsel seven times, to request follow-up with post-deposition demands and scheduling of depositions or arrange for conference within 7 days to discuss outstanding discovery. Respondents did not respond to emails or comply with post-deposition demands or acknowledge any good faith letter or affirmation.

As a result, on July 29, 2024, Petitioner emailed Respondent that it will seek court intervention, to no avail.

To date, Respondents failed to produce Ilen Diaz and depositions have not been scheduled do to the actions or inactions of Respondents. Further, Respondents demonstrate unwillingness to respond to Petitioner's letters of good faith.
The record reflects that Petitioner made multiple good faith attempts to resolve outstanding discovery prior to the filing of Petitioner's motion.

Considering the facts presented, this Court finds that deposition of additional witnesses is necessary and material to allow the parties prepare for trial. Additionally, this Court is concerned over Respondents' failure to comply with post-deposition discovery demands. As such, the Court is persuaded to conditionally strike Respondents' answer.

Accordingly, it is hereby,

ORDERED, that the aspect of Petitioner's Motion to compel Respondents to respond to all outstanding post-deposition discovery demands is GRANTED, and further;

ORDERED, that Respondents produce Ilena Diaz at EBT within 45 days after service of a copy of this Order with Notice of Entry, and further:

ORDERED, that Respondents NY Preferred Development Group, LLC.,
at EBT within 45 days after service of a copy of this Order with Notice of Entry, and further:

ORDERED, that Respondents failure to comply with the aforementioned orders by March 28, 2025 shall result in Petitioners application to strike Respondents' answer being GRANTED in its entirety. As such, the application to strike Respondents' answer is held in abeyance until March 28, 2025.

This constitutes the Decision and Order of this Court.

Dated: February 6, 2025

Hon. _____
Naita A. Semaj , J.S.C.