

Campos v LAM Group

2026 NY Slip Op 30076(U)

January 6, 2026

Supreme Court, New York County

Docket Number: Index No. 160924/2018

Judge: James G. Clynes

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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. JAMES G. CLYNES PART 39M
Justice
INDEX NO. 160924/2018
EDVALDO CAMPOS, MOTION DATE 09/09/2024
Plaintiff, MOTION SEQ. NO. 004
- against -

LAM GROUP, HARLEM COMMUNITY DEVELOPMENT CORPORATION and FLINTLOCK CONSTRUCTION SERVICES, LLC,

DECISION + ORDER ON MOTION

Defendants.

LAM GROUP, HARLEM COMMUNITY DEVELOPMENT CORPORATION and FLINTLOCK CONSTRUCTION SERVICES, LLC,

Third-Party Index No. 595444/2019

Third-Party Plaintiffs,

-against-

SKY MATERIALS CORP.,

Third-Party Defendant.

The following e-filed documents, listed by NYSCEF document number (Motion 004) 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 198, 199, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211

were read on this motion to/for JUDGMENT - SUMMARY

In this motion, sequence 004, Defendants/Third-Party Plaintiffs Lam Group, Harlem Community Development Corporation and Flintlock Construction Services, LLC (hereinafter referred to as Lam Group, Harlem Corp, Flintlock, and collectively as plaintiffs), move pursuant to CPLR § 3212, for summary judgment on its claims of contractual indemnification and defense against third-party defendant Sky Materials Corp. (Sky Corp). Plaintiffs also move pursuant to CPLR § 3126 to strike Sky Corp's answer and or to preclude Sky Corp from presenting evidence at trial. Additionally, plaintiffs seek dismissal of Sky Corp's counterclaim in the event it has not previously been dismissed.

BACKGROUND

In the underlying action, plaintiff, Edvaldo Campos (Campos), seeks to recover damages for personal injuries allegedly sustained while performing construction work during his employment with Sky Corp, at the premises located at 233 West 125th Street, New York, New York (NYSCEF 176, complaint). The construction work was part of a larger project that included the restoration of a theatre lobby as well as the new construction of a hotel located above the theatre. Flintlock, in its capacity as construction manager for the project, hired and retained Sky Corp, a concrete structure company, as a subcontractor to build the superstructure of the building. As such, Flintlock and Sky Corp entered into a contract outlining such services (NYSCEF 187, contract).

Shortly after Campos filed the underlying action seeking to recover damages as against Lam Group, Harlem Corp, and Flintlock, plaintiffs filed a third-party action, naming Sky Corp as a third-party defendant. Plaintiffs allege, among other things, that Sky Corp must provide Lam Group, Harlem Corp, and Flintlock with indemnification and defense pursuant to the contract between Flintlock and Sky Corp (NYSCEF 178, third-party complaint). Specifically, in the instant motion, plaintiffs argue that section 4.6.1 of the contract requires Sky Corp to indemnify, defend, and hold harmless Flintlock and those entities identified as additional insureds on Exhibit A to the contract, such as Harlem Corp, against liability and claims, like those brought by Campos in the underlying action.

Plaintiffs further argue that Sky Corp should be sanctioned pursuant to CPLR § 3126 for its failure to comply with four consecutive court orders directing its appearance at a deposition (NYSCEF 189-92). Plaintiffs contend that this lack of compliance with the court's discovery orders demonstrates Sky Corp's willful and contumacious conduct and warrants the striking of Sky Corp's answer.

In opposition, Sky Corp argues that plaintiffs' claims for contractual indemnity are moot. Specifically, Sky Corp notes that Campos' claims as against Lam Group were dismissed by the

Decision and Order dated June 20, 2024 (*see*, NYSCEF 181) (Order), and that nothing in the record or in the contract required Lam Group to be indemnified for anything or that it be added as an additional insured. Therefore, Lam Group is not entitled to additional insured coverage or a defense in this case. Sky Corp further argues that plaintiffs' submission of the contract does not include a copy of the Exhibit A referenced in plaintiffs' moving papers. However, Sky Corp notes that Accredited Surety & Casualty Company accepted the tender demand of Flintlock and Harlem Corp based on an insurance policy issued to Sky Corp and are providing a full defense and indemnity in connection to the underlying case to Flintlock and Harlem (*see*, NYSCEF 188, 208).

Sky Corp further argues that its failure to produce a witness for a deposition as required, was not due to willful and contumacious conduct warranting the severe sanction of striking its answer. Rather, Sky Corp contends that it made attempts to track down a possible witness to appear for a deposition, including retaining the services of an investigator. However, despite its extensive investigative efforts, Sky Corp was unable to locate a possible person who worked for Sky Corp at the time of Compos' accident. Therefore, Sky Corp asserts the more appropriate remedy would be an order of preclusion of any testimony by a witness for Sky Corp at the time of trial, unless a witness is produced for a deposition within thirty days of trial.

DISCUSSION

On a motion for summary judgment "the movant must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact" (*Madeline D'Anthony Enters., Inc. v Sokolowsky*, 101 AD3d 606, 607 [1st Dept 2012] [internal quotation marks and citation omitted]). "Once this showing has been made, the burden shifts to the party opposing the motion for summary judgement to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action" (*Bazdaric v Almah Partners LLC*, 41 NY3d 310, 316 [2024] [internal citation and quotation marks omitted]). Where the moving party

fails to make such a showing, the motion must be denied without regard to the sufficiency of the opposing papers (*see Voss v Netherlands Ins. Co.*, 22 NY3d 728, 734 [2014]). “Since [summary judgment] deprives the litigant of [its] day in court it is considered a drastic remedy which should only be employed when there is no doubt as to the absence of triable issues” (*Andre v Pomeroy*, 35 NY2d 361, 364 [1974]).

Among its many submissions, plaintiffs rely on the contract between Flintlock and Sky Corp in support of its summary judgment motion. A contract is unambiguous if on its face it is reasonably susceptible of only one meaning (*see, Greenfield v Philles Records*, 98 NY2d 562, 570 [2002]). Further, “[t]he intent of the parties must be found within the four corners of the contract, giving a practical interpretation to the language employed and the parties’ reasonable expectations” (*Triax Capital Advisors, LLC v Rutter*, 83 AD3d 490, 493 [1st Dept 2011] [internal quotations and citations omitted]). Written agreements that are clear, complete and subject to only one reasonable interpretation must be enforced according to the plain meaning of the language chosen by the contracting parties. Therefore, courts cannot make a new contract for the parties under the guise of interpreting the writing (*see, Bailey v Fish & Neave*, 8 NY3d 523, 528 [2007]).

Here, plaintiffs have submitted a contract that is insufficient to support an award of summary judgment, as there are parts of the submission that are missing or are entirely illegible. While plaintiffs assert that Harlem Corp was listed as an additional insured on Exhibit A to the contract, the same assertion is not made regarding Lam Group. However, there is no Exhibit A included with plaintiffs’ submission of the contract, even though plaintiffs cite to the same. Furthermore, plaintiffs never set forth what the relationship is between Lam Group and Flintlock, and how Lam Group would be entitled to any benefit under the contract between Flintlock and Sky Corp. As such, plaintiffs have failed to establish its prima facie burden. Therefore, summary judgment on plaintiffs’ claims of contractual indemnification and defense are hereby denied.

In considering a moving party's request for sanctions, a court, in its discretion, may strike a pleading as a sanction against a party who refuses to obey an order for disclosure (*see*, CPLR § 3126 [3]). However, actions should be resolved on the merits whenever possible (*see*, *Catarine v Beth Israel Medical Center*, 290 AD2d 213 [1st Dept 2002]). Therefore, "a court may strike an answer only when the moving party establishes a clear showing that the failure to comply is willful, contumacious or in bad faith" (*Rodriguez v United Bronx Parents, Inc.*, 70 AD3d 492, 492 [1st Dept 2010] [internal quotations and citation omitted]).

Here, there is no dispute that Sky Corp repeatedly and persistently failed to comply with four successive court orders to produce a witness for a deposition. Furthermore, Sky Corp's contention that it employed reasonable good faith efforts to locate its witness are seemingly without merit. While Sky Corp claims it hired an investigator to assist in the search for its witness, Sky Corp has not submitted an affidavit from any such investigator detailing what efforts were made to locate the witness. Nor did Sky Corp specify any other efforts made to ascertain a possible witness location (*see*, *Reidel v Ryder TRS, Inc.*, 13 AD3d 170 [1st Dept 2004]). Sky Corp's description of its efforts to locate its witness, or lack thereof, is devoid of necessary detail and inadequate.

However, plaintiffs have not met their burden of establishing a clear showing that Sky Corp's failure to comply was willful, contumacious or in bad faith, thereby warranting the striking of its answer (*see*, *Palmenta v Columbia University*, 266 AD2d 90 [1st Dept 1999]). Accordingly, Sky Corp is to appear for a deposition within 30 days from the date of entry of this decision and order. Failure to appear as directed, shall result in the preclusion of any testimony by a witness for Sky Corp at the time of trial.

Lastly, plaintiffs contend it withdrew the portion of its prior motion seeking to dismiss Sky Corp's counterclaim against it as moot, pursuant to the Decision and Order dated June 20, 2024, which determined that there were no cross claims or counterclaims asserted against plaintiffs (*see*, NYSCEF 181). However, Sky Corp's answer asserts a counterclaim as against plaintiffs (NYSCEF 179, Sky Corp's Answer). Therefore, in the event the Order, did not

judicially determine that Sky Corp’s counterclaim was dismissed or withdrawn, plaintiffs now request to revive its prior arguments (NYSCEF 91, 93, 94, 133) which it asserts were mistakenly withdrawn. This branch of plaintiff’s motion is granted as unopposed. Accordingly, Sky Corp’s counterclaim is hereby dismissed.

CONCLUSION

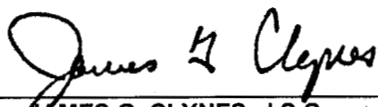
ORDERED, that defendants/third-party plaintiffs’ motion is granted to the extent as follows and otherwise denied:

- a) ORDERED, that third-party defendant Sky Materials Corp. shall appear for a deposition within 30 days of the date of entry of this Decision and Order; and it is further
- b) ORDERED, that the failure of third-party defendant Sky Materials Corp. to appear for a deposition as directed above shall result in the striking of its answer; and it is further
- c) ORDERED, that third-party defendant Sky Materials Corp. counterclaim is hereby dismissed as against all defendants/third-party plaintiffs; and it is further

ORDERED, that the remainder of the instant action shall continue.

This constitutes the Decision and Order of the court.

1/6/2026
DATE


JAMES G. CLYNES, J.S.C.

CHECK ONE:	<input type="checkbox"/> CASE DISPOSED	<input checked="" type="checkbox"/> NON-FINAL DISPOSITION
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"/> DENIED	<input type="checkbox"/> OTHER
		<input type="checkbox"/> REFERENCE