

**Riverside Ctr. Site 5 Owner LLC v Lexington Ins. Co.**

2023 NY Slip Op 32429(U)

July 17, 2023

Supreme Court, New York County

Docket Number: Index No. 650043/2019

Judge: Nancy M. Bannon

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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. NANCY M. BANNON PART 42

Justice

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RIVERSIDE CENTER SITE 5 OWNER LLC, RIVERSIDE CENTER 5 MEZZ LLC, EL AD RIVERSIDE LLC, RIVERSIDE CENTER 5 HOLDCO LLC, SILVERSTEIN RIVERSIDE HOLDING COMPANY LLC, EL AD US HOLDING INC.,

Plaintiffs,

- v -

LEXINGTON INSURANCE COMPANY, STARR SURPLUS LINES INSURANCE COMPANY, HOUSTON CASUALTY COMPANY, ALLIANZ GLOBAL RISK US INSURANCE COMPANY, ILLINOIS UNION INSURANCE COMPANY,

Defendants.

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INDEX NO. 650043/2019
MOTION DATE 01/01/2023
MOTION SEQ. NO. 008

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 008) 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 221

were read on this motion to/for STRIKE PLEADINGS

In this action seeking, inter alia, indemnification in the sum of \$31,285,539.24 for water damage at a high-rise construction site, defendants move pursuant to CPLR 3126 to strike plaintiffs' complaint for failure to disclose requested communications during discovery and to comply with court-ordered disclosure. Plaintiffs oppose the motion. The motion is granted.

This case concerns plaintiffs' claim for coverage under an insurance policy issued by defendants for an alleged two-hundred-thirty-five (235) day delay in completion of a construction project that plaintiffs contend was caused solely by a March 5, 2017 sprinkler pipe burst that caused water damage to their construction project (the "Loss"). Recovery under the insurance policy is available only for delays attributable to the Loss. Non-Loss related delays are

not covered. Defendants contend that the claimed delay period is overstated and attributable to a myriad of other delays unrelated to the Loss. Thus, the crux of the parties' dispute is the extent and cause of the project delays.

Defendants served plaintiffs with their initial discovery demands on or about June 4, 2019. In the preliminary conference order dated June 6, 2019, the court set the Note of Issue deadline as January 10, 2020. By compliance conference order dated December 19, 2019, the court extended the deadline to August 30, 2020. The court did not extend the Note of Issue date in the status conference order dated March 5, 2020, but directed that all depositions be completed by May 29, 2020. By an order dated August 21, 2020, the court directed the parties to complete all outstanding discovery and set November 30, 2020, as the final Note of Issue deadline. A status conference order dated December 9, 2020, states that depositions had still not been completed, and that the parties cited the voluminous document discovery as the reason. The court directed that all depositions be completed on or before February 26, 2021, and extended the Note of Issue deadline to March 5, 2021, marking the date "Final - 2X." A status conference order dated April 23, 2021, states that one party deposition and all non-party depositions remained outstanding and that the delays were occasioned in part by the non-compliance of non-parties with subpoenas. The court again extended the Note of Issue deadline to June 25, 2021, noting that the new date was "FINAL 3X - see prior orders - no further extensions without motion practice."

Plaintiffs thereafter filed their Note of Issue and Certificate of Readiness on June 25, 2021, notwithstanding their acknowledgement that discovery was still not complete, as several scheduled depositions remained outstanding and plaintiffs were still serving defendants voluminous supplemental document productions, which were likely to necessitate even more

depositions. Defendants moved to vacate the Note of Issue, which the court granted by an order dated July 14, 2021. The July 14, 2021 order, which extended the Note of Issue deadline to August 23, 2021, stated that “any discovery not completed within the additional time provided herein may result in preclusion or be waived[,]” and cautioned plaintiffs that their actions bordered on sanctionable conduct, and that further failures to comply with court orders or to make necessary disclosures could result in sanctions. Thereafter, on August 19, 2021, plaintiffs filed their second Note of Issue and represented that all discovery was finally complete.

However, on January 14, 2022—five months after plaintiffs filed their second Note of Issue—defendants received non-party subpoena responses that included at least seventeen (17) previously undisclosed communications between plaintiffs and their Construction Manager, Tishman Construction Corporation of New York (“Tishman”) (the “Undisclosed Communications”). The Undisclosed Communications, which identify and discuss various sources of project delays unrelated to the Loss, are highly relevant, as they go directly to the crux of the parties’ dispute. Plaintiffs plainly should have produced these communications over three years ago in response to defendants’ initial document demands, or at any point thereafter in compliance with the court’s numerous discovery orders. Instead, they withheld these communications. Notably, plaintiffs *did* produce nearly nineteen thousand (19,000) other communications between themselves and Tishman, including some that generally concern the same or similar non-Loss delays as those addressed in the Undisclosed Communications. The Undisclosed Communications, though, appear to be far more specific in detailing the causes, and quantifying the extent, of the non-Loss delays, and are thus potentially far more damaging to plaintiffs’ case.

CPLR 3126 authorizes the court to sanction a party who “refuses to obey an order for disclosure or willfully fails to disclose information which the court finds ought to have been disclosed” and that a failure to comply with discovery, particularly after a court order has been issued, may constitute the “dilatatory and obstructive, and thus contumacious, conduct warranting the striking of [a pleading].” Kutner v Feiden, Dweck & Sladkus, 223 AD2d 488, 489 (1<sup>st</sup> Dept. 1998); see CDR Creances S.A. v Cohen, 104 AD3d 17 (1<sup>st</sup> Dept. 2012); Reidel v Ryder TRS, Inc., 13 AD3d 170 (1<sup>st</sup> Dept. 2004). The court may infer willfulness from repeated failures to comply with court orders or discovery demands without a reasonable excuse. See LaSalle Talman Bank, F.S.B. v Weisblum & Felice, 99 AD3d 543 (1<sup>st</sup> Dept. 2012); Perez v City of New York, 95 AD3d 675 (1<sup>st</sup> Dept. 2012); Figiel v Met Food, 48 AD3d 330 (1<sup>st</sup> Dept. 2008); Ciao Europa, Inc. v Silver Autumn Hotel Corp., Ltd., 270 AD2d 2 (1<sup>st</sup> Dept. 2000).

Plaintiffs offer no explanation, let alone a reasonable excuse, for their failure to disclose the Undisclosed Communications other than to vaguely assert that the non-disclosure was inadvertent. They do not, however, explain how such an inadvertent and, had it not been discovered, fortuitous omission of evidence particularly damaging to their claims could have occurred. Plaintiffs do not recount the steps taken to ensure the production of relevant documents, nor do they detail where the Undisclosed Communications were kept, what efforts were made to preserve them, whether such records were routinely destroyed, or whether a search was conducted in every location where the records were likely to be found. Plaintiffs have thus provided no basis upon which to conclude that their records search was thorough or conducted in good faith. Indeed, absent any explanation for their claim of inadvertent omission, and given plaintiffs’ repeated failures to comply with court orders and defendants’ discovery demands, as well as their production of nearly nineteen thousand (19,000) *other* communications between

themselves and Tishman—*i.e.*, the same category of documents as those that were not disclosed—there is a strong inference that plaintiffs willfully and intentionally withheld this small set of particularly damaging documents.

Moreover, defendants were plainly prejudiced by plaintiffs' non-disclosure in that they were prevented from utilizing the Undisclosed Communications during the litigation, including during the numerous depositions of plaintiffs' witnesses, or as a possible basis for a summary judgment motion, as the time to move for summary judgment has already passed.

Plaintiffs' conduct clearly warrants sanctions. Nevertheless, because actions should be resolved on the merits whenever possible, the court, in its discretion, declines to strike plaintiffs' complaint at this juncture. Therefore, defendants' motion is granted to the extent that the Note of Issue is stricken; defendants shall be given an opportunity to conduct additional depositions limited to the matters raised in the Undisclosed Communications; and plaintiffs shall pay defendants' discovery costs, including reasonable attorneys' fees, in their entirety, for all discovery conducted thus far in the litigation, as well as all future discovery.

Accordingly, it is

ORDERED that defendants' motion for sanctions pursuant to CPLR 3126 is granted to the extent that plaintiffs shall pay defendants' discovery costs, including reasonable attorneys' fees, in their entirety, for all discovery conducted thus far in the litigation, as well as all future discovery; and the motion is otherwise denied without prejudice, and it is further


ORDERED that the Note of Issue filed August 19, 2021 is hereby vacated and the action is stricken from the trial calendar; and it is further

ORDERED that defendants shall serve a copy of this order on the Trial Support Office within 20 days; and it is further

ORDERED that the parties shall appear for a status conference at 10:00 A.M. on August 10, 2023 to set a schedule for defendants' additional discovery; and it is further

ORDERED that the Clerk shall mark the file accordingly.

This constitutes the Decision and Order of the court.

  
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NANCY M. BANNON, J.S.C.  
**HON. NANCY M. BANNON**

7/17/2023  
DATE

CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION		
	<input type="checkbox"/>	GRANTED	<input type="checkbox"/>	DENIED	<input type="checkbox"/>	OTHER
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>	SUBMIT ORDER		
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/>	REFERENCE