[* 1]

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: SCARPULLA Justice

PART 19

WENCEWICZ, JAROSLAW, ET AL.

-v-

SHAWMUT DESIGN AND CONSTRUCTION, ET AL.

INDEX NO. 109791/08

MOTION DATE

MOTION SEQ. NO. 03

MOTION CAL. NO.

The following papers, numbered 1 to _____ were read on this motion to/for _____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☐ Yes ☒ No

Upon the foregoing papers, it is ordered that this motion

is decided in accordance with the accompanying decision and order.

Dated: 3/16/12

Saliann Scarpulla J.S.C.

SALIANN SCARPULLA

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

☐ SUBMIT ORDER/ JUDG. ☐ SETTLE ORDER/ JUDG.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

[* 2]

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: CIVIL TERM: PART 19

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JAROSLAW WENCEWICZ and
MALGORZATA WENCEWICZ,

Plaintiffs,

Index No.:109791/2008
Submission Date: 1/11/12

- against-

SHAWMUT DESIGN AND CONSTRUCTION, LIZ CLAIBORNE, INC., VORNADO 640 FIFTH AVENUE, L.L.C, LCI HOLDINGS, INC., THE MOSTAZAFAN FOUNDATION OF NEW YORK, ALAVI FOUNDATION, 650 FIFTH AVENUE COMPANY, and DRYWALL & ACOUSTICS CONSTRUCTION CORPORATION,

Defendants.

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FILED
MAR 21 2012
NEW YORK
COUNTY CLERK'S OFFICE

SHAWMUT DESIGN AND CONSTRUCTION,

Third-Party Plaintiff,

-against-

ROCKMOR ELECTRIC ENTERPRISES, INC.,

Third-Party Defendant.

---------- X

For Plaintiffs:
The Feld Law Firm P.C.
150 Broadway, Suite 1703
New York, NY 10038

For Defendants Shawmut Design & Construction and Drywall & Acoustics Construction Corporation:
Baxter Smith & Shapiro, P.C.
200 Mamaroneck Avenue, Suite 601
White Plains, NY 10601

Papers considered in review of this motion to strike, and preclude:

Order to Show Cause. 1
Aff in Support 2
Aff in Opp 3

HON. SALIANN SCARPULLA, J.:

In this action to recover damages for personal injuries, plaintiffs Jaroslaw Wencewicz ("Jaroslaw") and Malgorzata Wencewicz ("plaintiffs") move to: (1) strike the answer of defendants Shawmut Design and Construction ("Shawmut"), 650 Fifth Avenue Company ("650 Fifth"), and Drywall & Acoustic Construction Corporation ("Drywall") (collectively the "defendants") for failure to comply with court orders, withholding discovery, and ambushing opposing counsel with purported accident reports and photographs of the broken ladder prepared and taken over three years ago; (2) preclude defendants from using any accident reports, documents, photographs and other materials withheld until the date of the depositions of their first two witnesses; (3) strike the testimony of defendants' deposition witnesses, except for their admissions; and (4) grant plaintiffs and their attorneys costs and sanctions.

As alleged in the attorney affirmation in support of the motion, this action arises from injuries allegedly sustained by Jaroslaw on June 6, 2008 while working as a construction electrician on a construction project at the Juicy Couture store at 650 Fifth Avenue, New York, New York. Jaroslaw alleges that he was severely injured when the "wooden job made constructed ladder" he was on broke, which caused him to fall and injure his left hand. Shawmut was the general contractor for the project, 650 Fifth was an owner of the building.

Plaintiffs assert that Drywall built the "job made ladder" which broke, causing Jaroslaw to fall.

On or around April 30, 2009, plaintiffs served a demand for discovery and inspection on the defendants, demanding, among other things, all photographs showing the location of the accident, all accident reports prepared by the defendant, the names of witnesses to the accident, all pertinent contracts, all work logs and reports, and all job and safety meeting minutes and reports (the "requested discovery"). These items were also the subject of a number of discovery conference orders. The defendants failed to produce the requested discovery, and failed to identify any witnesses.

On October 18, 2011, defendants produced two witnesses for deposition who saw the broken ladder immediately after the accident. At the deposition, defendants' counsel produced accident reports allegedly prepared on June 6, 2008 and June 9, 2008, with photographs purportedly taken the day of the accident annexed. Plaintiffs now assert that "[t]he only plausible inference from this ambush is that the defendants purposely withheld this disclosure to prevent opposing counsel from being able to prepare for their witnesses' testimony."

Plaintiffs also assert that during the deposition of defendants' witnesses, defendants' counsel consulted with the witnesses without plaintiffs' counsel's consent.

In opposition, defendants assert that on December 20, 2011, they served on all parties color photographs of the location of the accident, as well as a response to the December 7,

2011 Compliance Conference Order. This response stated that all accident reports were disclosed and marked at the defendants' deposition, that defendants know of no additional witnesses, that all contracts have been produced, that all work logs and reports have been produced, and that all job and safety meeting minutes and reports have been produced.

Defendants further assert that the photographs and accident reports requested by plaintiffs were not produce by Shawmut and Drywall to counsel until October 17, 2011, the night before their scheduled depositions. Counsel affirms that these documents were produced immediately, at the depositions on October 18, 2011.

In addition, defendants maintain that there was no improper consultation between defendants' witnesses and counsel at the deposition. They claim that the witness requested a break, when there was no question pending.

Discussion

"The law strongly prefers that matters be decided on the merits. Accordingly, the drastic sanction of striking a pleading is inappropriate without a clear showing that the failure to comply with disclosure obligations was willful, contumacious, or the result of bad faith." *Gibbs v. St. Barnabas Hosp.*, 61A.D.3d 599 (1st Dep't 2009) (citations omitted). "Morever, even where the proffered excuse is less than compelling there is a strong preference in our law that matters be decided on their merits." *Catarine v. Beth Israel Med. Ctr.*, 290 A.D.2d 213 215 (1st Dep't 2002) (internal citations omitted). *See also* CPLR 3126; *Iskowitz v. Forkosh Constr. Co.*, 269 A.D.2d 131, 133 (1st Dep't 2000) ("In light of this State's policy

preference for deciding actions on their merits, such a drastic sanction should only be imposed when the party's conduct is willful, contumacious or in bad faith"). "The moving party bears the initial burden of coming forward with a sufficient showing of willfulness." *Read v. Dickson*, 150 A.D.2d 543, 544 (2d Dep't 1989).

Plaintiffs have not made a sufficient showing of willfulness here to warrant the severe sanction of striking the defendants' pleadings. To the contrary, the papers submitted establish that, although belatedly, the defendants have substantially complied with their discovery obligations. Delay, without a showing that the delay was willful or contumacious, is not an appropriate basis for the severe sanction of striking an answer. See *Hanson v. City of New York*, 227 A.D.2d 217 (1st Dep't 1996) (finding court abused its discretion by striking City's answer even though City delayed in complying with discovery demands); *Nieves v. City of New York*, 25 A.D.3d 557, 558 (2d Dep't 2006) ("the Supreme Court providently exercised its discretion in denying those branches of the plaintiff's motions which were to strike the answer of the defendant City of New York since there was no clear showing that the City's conduct, including its late disclosure of certain [] records, was willful and contumacious").

Here, plaintiffs claim they were ambushed by the production of these documents at the deposition of defendants witnesses, but do not allege they suffered any harm or prejudice as a result. Plaintiffs' assertion that "[t]he only plausible inference from this ambush is that the defendants purposely withheld this disclosure to prevent opposing counsel from being

able to prepare for their witnesses' testimony" is insufficient to support a motion to strike the answer, or to preclude defendants from using these accident reports and photographs.

I have reviewed plaintiffs other arguments in support of their motion, and find them without merit.[1]

In accordance with the foregoing, it is

ORDERED that the motion by plaintiff plaintiffs Jaroslaw Wencewicz ("Jaroslaw") and Malgorzata Wencewicz to : (1) strike the answer of defendants Shawmut Design and Construction, 650 Fifth Avenue Company, and Drywall & Acoustic Construction Corporation(2) preclude defendants from using any accident reports, documents, photographs and other materials withheld until the date of the depositions of their first two witnesses; (3) strike the testimony of defendants' deposition witnesses, except for their admissions; and (4) grant plaintiffs and their attorneys costs and sanctions is denied.

This constitutes the Decision and Order of the Court.

Dated: New York, New York
March 16, 2012

ENTER:

Saliann Scarpulla, J.S.C.

[1] As to plaintiffs claim that defendants' counsel inappropriately consulted with witnesses during depositions, I note that the proper time to raise this was during the deposition. As plaintiffs failed to bring this to my attention at the time of the deposition, they now have no basis on which I may grant relief.