

Coico v 122-24 Lexington Ave. Corp.

2022 NY Slip Op 34301(U)

December 14, 2022

Supreme Court, New York County

Docket Number: Index No. 156284/2018

Judge: William Perry

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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. WILLIAM PERRY PART 23

Justice

-----X

JOSEPH COICO,

Plaintiff,

- v -

122-24 LEXINGTON AVE. CORP., 120 LEXINGTON AVE.
CORP., THE HOME DEPOT INC., PHOENIX BRIDGING
INC. D/B/A PHOENIX SCAFFOLDING, DOMAIN
PROPERTIES LLC, HAIM YAGEN, SKYLAND
MANAGEMENT INC., SKYLAND MANAGEMENT GROUP
LLC, ISAAC DABAKAROFF, DANIEL DABAKAROFF,

Defendant.

-----X

THE HOME DEPOT INC.

Plaintiff,

-against-

ALEXANDER HOLDINGS LLC

Defendant.

-----X

**DECISION + ORDER ON
MOTION**

Third-Party
Index No. 595048/2021

The following e-filed documents, listed by NYSCEF document number (Motion 003) 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88

were read on this motion to/for STRIKE PLEADINGS.

In this personal injury action, plaintiff seeks an order pursuant to CPLR 3126, motion sequence number 003, striking the answer of the defendants, 122-24 Lexington Ave. Corp., Skyland Management Inc., Skyland Management Inc., Skyland Management Group LLC, Isaac Dabakaroff and Daniel Dabakaroff, for the defendants repeated failure to provide responses to outstanding discovery since 2019. Defendant Home Depot U.S.A., Inc., submits an affidavit in support of plaintiff's motion and notes that said defendants have also failed to respond to Home

Depot's post deposition discovery demands dated January 14, 2022. The motion is submitted to the court without opposition.

CPLR 3126 provides a range of sanctions against 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." Sanctions include the dismissal of the offending party's complaint (see CPLR 3126 [3]), if the party seeking such a sanction establishes that the offending party's "repeated noncompliance has been 'dilatory, evasive, obstructive and ultimately contumacious'" (*Arts4all, Ltd. v Hancock*, 54 AD3d 286, 286, 863 N.Y.S.2d 193 [1st Dept 2008], *affd* 13 NY3d 812, 918 N.E.2d 945, 890 N.Y.S.2d 432 [2009] [internal citation omitted]). The "sanction should be commensurate with the particular disobedience it is designed to punish and go no further than that" (*Brigham v Jaffe*, 189 AD3d 475, 476 [1st Dept 2020] [internal citation omitted]). CPLR 3124 also provides that party may move to compel compliance or discovery. It is within the court's discretion to grant a motion brought under CPLR 3124 or 3126 (see *Ruiz v Selzer*, 187 AD3d 558, 558, 130 N.Y.S.3d 657 [1st Dept 2020]; *Valencia v City of New York*, 188 AD3d 549, 550 [1st Dept 2020]).

Here, plaintiff and defendant Home Depot have demonstrated that the outstanding discovery responses owed by defendants, 122-24 Lexington Ave. Corp., Skyland Management Inc., Skyland Management Inc., Skyland Management Group LLC, Isaac Dabakaroff and Daniel Dabakaroff, to plaintiff were directed to be provided on or before July 15, 2022, and further directed that the deposition of Daniel Dabakaroff be conducted on or before September 30, 2022. (NYSCEF Doc No. 71). Plaintiff and defendant Home Depot have demonstrated that they have attempted to resolve the outstanding discovery, however, the discovery responses have not been

served and the outstanding depositions have not been held. In addition, the note of issue date is approaching, and the parties have demonstrated that discovery remains outstanding.

“When a party fails to comply with a court order and frustrates the disclosure scheme, it is within the trial judge's discretion to dismiss the case. Furthermore, if the non-complying party fails to provide a reasonable excuse for its delay in responding to or opposing the disclosure demands, the court may infer that the failure to comply was willful.” (*Jones v Green*, 2005 WL 5959753 [Sup Ct, NY County 2005] [internal citations omitted], *affd* 34 AD3d 260 [1st Dept 2006]). However, “[p]ublic policy strongly favors the resolution of actions on the merits whenever possible.” (*Singer v Riskin*, 137 AD3d 999, 1001 [2d Dept 2016], citing *Krause v Lobacz*, 131 AD3d 1128, 1129 [2d Dept 2015]).

Upon review of the documents submitted in support of the motion, the court finds that plaintiff and defendant Home Depot have not demonstrated that defendants 122-24 Lexington Ave. Corp., Skyland Management Inc., Skyland Management Inc., Skyland Management Group LLC, Isaac Dabakaroff and Daniel Dabakaroff, noncompliance was "both deliberate and contumacious" and, therefore, sufficient to warrant the drastic remedy of striking of their answer (*Brigham*, 189 AD3d at 476 [internal citation omitted]). Accordingly, the motion seeking the discovery sanction of striking said defendants answer under CPLR 3126 is denied.

Plaintiff and defendant Home Depot have, however, demonstrated that the outstanding discovery and depositions are relevant and should be provided. Accordingly, the court in its discretion, finds that the note of issue date should be extended to allow for the completion of the outstanding discovery. Therefore, it is hereby


ORDERED that plaintiff's motion to strike (motion sequence number 003) is denied; and it is further

ORDERED that defendants 122-24 Lexington Ave. Corp., Skyland Management Inc., Skyland Management Inc., Skyland Management Group LLC, Isaac Dabakaroff and Daniel Dabakaroff, shall respond to plaintiff’s discovery demands dated May 20, 2019, and shall respond to defendant Home Depot’s outstanding post deposition discovery demands dated January 14, 2022, on or before January 9, 2023; and it is further

ORDERED that the deposition of Daniel Dabakaroff shall be completed on or before February 2, 2023; and it is further

ORDERED that plaintiff’s time to file the Note of Issue is extended to March 24, 2023; and it is further

ORDERED that the parties shall appear for a status conference in Room 543, 60 Centre Street, on March 14, 2023, at 9:30 A.M.

12/14/2022					
DATE			WILLIAM PERRY, J.S.C.		
CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	
	<input type="checkbox"/>	GRANTED	<input checked="" type="checkbox"/>	DENIED	<input type="checkbox"/>
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>	GRANTED IN PART	<input type="checkbox"/>
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	SUBMIT ORDER	<input type="checkbox"/>
			<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/>
				OTHER	<input type="checkbox"/>
				REFERENCE	<input type="checkbox"/>