Short Form Order

NEW YORK STATE SUPREME COURT - QUEENS COUNTY

Present: HONORABLE PATRICIA P. SATTERFIELD IAS TERM, PART 19
Justice

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PAWEL CHOINSKI, KAZIMIERZ KUKACKI, and MAREK TRUSKOLASKI,

Plaintiffs,

-against-

BANK OF NEW YORK LEASE SERVICING,

Defendant.

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BANK OF NEW YORK, INC. s/h/a BANK OF NEW YORK LEASING SERVICING,

Third-Party Plaintiff,

-against-

AMERICAN HI-TECH, INC.,

Third-Party Defendant.

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AMERICAN HI-TECH, INC.,

Second Third-Party Plaintiff,

-against-

AMERICAN SCAFFOLDING CORP.,

Second Third-Party Defendant.

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Index No: 2805/03
Motion Date: 4/23/08
Motion Cal. No: 10
Motion Seq. No: 12

Third Party
Index No: 350608/03

Second/Third Party
Index No.:

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AMERICAN HI-TECH, INC., Third/Third Party
Index No: 35038/05

Third Third-Party Plaintiff,

-against-

VALEIRO ASSOCIATES CONSULTING ENGINEERS, P.C.,

Third Third-Party Defendant.

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AMERICAN HI-TECH, INC., Fourth/Third Party
Index No: 350484/05

Fourth Third-Party Plaintiff,

-against-

SKY CLIMBER, INC.,

Fourth Third-Party Defendant.

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The following papers numbered 1 to 24 read on this motion by plaintiffs for an order pursuant to CPLR § 3126, striking the answers of defendant/third-party plaintiff Bank of New York Lease Servicing, third-party defendant/second, third and fourth third-party plaintiff American Hi-Tech, Inc., and third third-party defendant Valeiro Associates Consulting Engineers, P.C., due to their failure to comply with court ordered discovery and plaintiffs' discovery notices, and setting this action down for an inquest on damages; or, alternatively, resolving the issue of liability in favor of plaintiffs and against defendant/third-party plaintiff Bank of New York Lease Servicing, third-party defendant/second, third and fourth third-party plaintiff American Hi-Tech, Inc., and third third-party defendant Valeiro Associates Consulting Engineers, P.C. and allowing discovery to proceed as to damages only, based on defendants' continued refusal to comply with the court-ordered discovery and plaintiffs' discovery notices, pursuant to CPLR § 3126; or alternatively, pursuant to CPLR § 3124, compelling defendant/third-party plaintiff Bank of New York Lease Servicing, third-party defendant/second, third and fourth third-party plaintiff American Hi-Tech, Inc., and third third-party defendant Valeiro Associates Consulting Engineers, P.C., under a conditional order of preclusion, on or before a date certain, to provide the court-ordered discovery and comply with the prior Court Orders and plaintiffs' discovery notices; and extending plaintiffs' time to file a Note of Issue in light of the outstanding discovery; and upon this cross-motion by third-party defendant/second, third and fourth third-party plaintiff American Hi-Tech, Inc., for an order, pursuant to CPLR § 3103, granting a protective order against plaintiffs' November 19, 2007 "demand" to conduct a deposition of the

investigator of third-party defendant/second, third and fourth third-party plaintiff American Hi-Tech, Inc.

	PAPERS NUMBERED
Notice of Motion-Affidavits-Exhibits.....	1 - 5
Notice of Cross-Motion-Affidavits-Exhibits.....	6 - 10
Affirmation in Opposition.....	11 - 18
Reply Affirmation-Exhibits.....	19 - 24

Upon the foregoing papers, it is ordered that the motion and cross-motion are disposed of as follows:

This is a labor law action for injuries allegedly sustained on November 29, 2001 by plaintiffs, laborers at a construction work site, while they were standing on top of a mechanical platform which was at an elevation of approximately 100 feet. Plaintiffs move for an order, pursuant to CPLR § 3126, striking the answers of defendant/third-party plaintiff Bank of New York Lease Servicing (hereinafter referred to as BNY), third-party defendant/second, third and fourth third-party plaintiff American Hi-Tech, Inc. (hereinafter referred to as AHT), and third third-party defendant Valeiro Associates Consulting Engineers, P.C. (hereinafter referred to as VACE), due to their alleged failure to comply with discovery, setting this action down for an inquest on damages and extending their time to file a note of issue in light of the outstanding discovery. In the alternative, plaintiffs seek to resolve the issue of liability in their favor and against BNY, AHT, and VACE, and allowing discovery to proceed as to damages only, or compelling BNY, AHT and VACE, under a conditional order of preclusion, to provide the court-ordered discovery, pursuant to CPLR § 3124. AHT cross-moves for an order, pursuant to CPLR § 3103, granting a protective order against plaintiffs' November 19, 2007 "demand" to conduct a deposition of AHT's investigator.

"Although actions should be resolved on the merits wherever possible (citations omitted), a court may, inter alia, strike the 'pleadings or parts thereof' as a sanction 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 [upon notice]' (CPLR 3126[3]). While the nature and degree of the penalty to be imposed on a motion, pursuant to CPLR 3126, is a matter of discretion with the court (citations omitted), 'striking [a pleading] is inappropriate absent a clear showing that the failure to comply with discovery demands is willful, contumacious, or in bad faith' (Espinal v. City of New York, 264 A.D.2d 806, 695 N.Y.S.2d 610)." Kuzmin v. Visiting Nurse Service of New York, 22 A.D.3d 643, 643-644 (2nd Dept. 2005); See, also, Chrostowski v. Chow, 37 A.D.3d 638 (2nd Dept. 2007); E.W. Howell Co., Inc. v. S.A.F. La Sala Corp., 36 A.D.3d 653 (2nd Dept. 2007); Shapiro v. Kurtzman, 32 A.D.3d 508 (2nd Dept. 2006); Assael v Metropolitan Transit Authority, 4 A.D.3d 443 (2nd Dept. 2004); Avenue C Const., Inc. v Gassner, 306 A.D.2d 506 (2nd Dept. 2003); Martin v Hall, 283 A.D.2d 615 (2nd Dept. 2001).

Here, upon a review of the record, there is insufficient evidence to establish the willful, deliberate and contumacious conduct on the part of either BNY, AHT, or VACE, to warrant the imposition of the severe penalty of the striking their respective pleadings. See, Botsas v. Grossman, 7 A.D.3d 654 (2nd Dept. 2004); Mabey v Winthrop University Hosp., 302 A.D.2d 371 (2nd Dept. 2003). Indeed, in light of the volume of discovery exchanged, the substantial compliance by BNY, AHT, or VACE with plaintiffs' demands, and the duplicative production of these documents necessitated by plaintiffs' incomplete file, coupled with the open-ended and indirect requests for discovery found in the papers supporting the motion, this Court finds that the instant request for discovery by plaintiff borders on the fringes of frivolity. Thus, those branches of the motion, pursuant to CPLR § 3126, seeking to strike the answers of BNY, AHT, and VACE, setting this action down for an inquest on damages and extending plaintiffs' time to file a note of issue, are denied. Likewise denied is that branch of the motion seeking the alternative relief resolving the issue of liability in plaintiffs' favor and against BNY, AHT, and VACE, and allowing discovery to proceed as to damages only.

AHT cross-moves for an order, pursuant to CPLR § 3103, granting a protective order against plaintiffs' November 19, 2007 "demand" to conduct a deposition of AHT's investigator. Plaintiffs contend that they are entitled to, inter alia, depositions of the investigators who provided surveillance for BNY and AHT pursuant to CPLR § 3101 (i), which states, in relevant part, that "[i]n addition to any other matter which may be subject to disclosure, there shall be full disclosure of any films, photographs, video tapes or audio tapes, including transcripts or memoranda thereof, involving a person referred to in paragraph one of subdivision (a) of this section. There shall be disclosure of all portions of such material, including out-takes, rather than only those portions a party intends to use."[1]

"CPLR § 3101(a) requires, in pertinent part, 'full disclosure of all matter material and necessary in the prosecution or defense of an action.' However, the principle of 'full disclosure' does not give a party the right to uncontrolled and unfettered disclosure, and the trial courts have 'broad power to regulate discovery to prevent abuse' (citation omitted)." Gilman & Ciocia, Inc. v. Walsh, 45 A.D.3d 531 (2nd Dept. 2007); Seaman v. Wyckoff Heights Medical Center, Inc., 25 A.D.3d 598 (2nd Dept. 2006). "What is 'material and necessary' is left to the sound discretion of the lower courts and includes 'any facts bearing on the controversy which will assist preparation for trial by sharpening the issues and reducing delay and prolixity. The test is one of usefulness and reason' (citation omitted)." Andon ex rel. Andon v. 302-304 Mott Street Associates, 94 N.Y.2d 740, 746 (2000); see, Espady v. City of New York, 40 A.D.3d 475 (1st Dept. 2007); Spencer v. City of New York, 293 A.D.2d 466 (2nd Dept. 2002). "While the 'material and necessary' standard set forth in CPLR 3101(a) is to be liberally construed (citation omitted), this does not mean that litigants have carte blanche to demand production of whatever documents they speculate might contain something

[1] As plaintiffs' moving papers are very vague with respect to what discovery is being sought as to which party, it is unclear, as BNY asserts in its opposing papers, if this relief was sought against BNY in the moving papers, or through the "Affirmation in Opposition and Reply." Nevertheless, this Court will entertain such request despite the potential impropriety of the request.

helpful. 'It is incumbent on the party seeking disclosure to demonstrate that the method of discovery sought will result in the disclosure of relevant evidence or is reasonably calculated to lead to the discovery of information bearing on the claims.'" Vyas v. Campbell, 4 A.D.3d 417 (2nd Dept. 2004); Beckles v. Kingsbrook Jewish Medical Center, 36 A.D.3d 733 (2nd Dept. 2007); Young v. Baker, 21 A.D.3d 550 (2nd Dept. 2005). Additionally, "the plain language of section 3101(i) eliminates any qualified privilege that previously attached to surveillance tapes []. Under the new provision, surveillance tapes (and other specified materials) are subject to "full disclosure." Thus, parties seeking disclosure of any of the specified items under section 3101(i) need not make a showing of "substantial need" and "undue hardship." Moreover, section 3101(i)'s "full disclosure" requirement is not limited to materials a party intends to use at trial. The provision compels disclosure of all the listed materials-including "out-takes"-whether or not they will be used at trial (see, CPLR 3101[i])." Tran v. New Rochelle Hosp. Medical Center, 99 N.Y.2d 383 (2003).

In the case at bar, this action has been marked by the contentiousness of the attorneys for the parties that has required far too much court involvement in the discovery process. Nevertheless, this Court finds that although the aforementioned section authorizes full discovery of the enumerated items, it does not give plaintiffs an unfettered right to depose the investigators of BNY and AHT, absent a showing of "substantial need" and "undue hardship." Compare, Zegarelli v. Hughes, 3 N.Y.3d 64 (2004) [Testimony from the videographer that he took the video, that it correctly reflects what he saw, and that it has not been altered or edited is normally sufficient to authenticate a videotape. Where the videographer is not called "[t]estimony, expert or otherwise, may also establish that a videotape 'truly and accurately represents what was before the camera.'"]. Thus as plaintiffs have failed to show how the depositions are material and necessary, the examinations of the non-party investigators are not warranted. To the extent that plaintiffs seek un-redacted surveillance reports from BNY and AHT, as the subject portions of the reports do not bear upon the surveillance of plaintiffs and contain transmissions prepared in anticipation for litigation, and therefore, privileged, plaintiffs are not entitled to further surveillance reports. Consequently, as the instant motion is not geared to "sharpening the issues and reducing delay and prolixity," the cross-motion for a protective order is granted and that branch to compel BNY, AHT and VACE, under a conditional order of preclusion, to provide the court-ordered discovery, pursuant to CPLR § 3124, is denied.

Accordingly, denied in its entirety is the motion by plaintiffs for an order pursuant to CPLR § 3126, striking the answers of defendant/third-party plaintiff Bank of New York Lease Servicing, third-party defendant/second, third and fourth third-party plaintiff American Hi-Tech, Inc., and third third-party defendant Valeiro Associates Consulting Engineers, P.C., due to their failure to comply with court ordered discovery and plaintiffs' discovery notices, and setting this action down for an inquest on damages; or, alternatively, resolving the issue of liability in favor of plaintiffs and against defendant/third-party plaintiff Bank of New York Lease Servicing, third-party defendant/second, third and fourth third-party plaintiff American Hi-Tech, Inc., and third third-party defendant Valeiro Associates Consulting Engineers, P.C. and allowing discovery to proceed as to damages only, based on defendants' continued refusal to comply with the court-ordered discovery and plaintiffs' discovery notices, pursuant to CPLR § 3126; or alternatively, pursuant to CPLR § 3124, compelling

defendant/third-party plaintiff Bank of New York Lease Servicing, third-party defendant/second, third and fourth third-party plaintiff American Hi-Tech, Inc., and third third-party defendant Valeiro Associates Consulting Engineers, P.C., under a conditional order of preclusion, on or before a date certain, to provide the court-ordered discovery and comply with the prior Court Orders and plaintiffs' discovery notices; and extending plaintiffs' time to file a Note of Issue in light of the outstanding discovery. The cross-motion by third-party defendant/second, third and fourth third-party plaintiff American Hi-Tech, Inc., for an order, pursuant to CPLR § 3103, granting a protective order against plaintiffs' November 19, 2007 "demand" to conduct a deposition of the investigator of third-party defendant/second, third and fourth third-party plaintiff American Hi-Tech, Inc., is granted, and by extension, plaintiffs are precluded from taking the depositions of the investigators of defendant/third-party plaintiff Bank of New York Lease Servicing, third-party defendant/second, third and fourth third-party plaintiff American Hi-Tech, Inc.

Dated: July 9, 2008

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J.S.C.