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

PRESENT: HON. PAUL WOOTEN PART 7
Justice

LUIS CASAS, By His Guardian, BETTY CASAS,
Plaintiff,

-against-

CONSOLIDATED EDISON COMPANY OF NEW YORK, INC.,
Defendant.

INDEX NO. 115106/2004

MOTION SEQ. NO. 008

The following papers were read on this motion by plaintiff for declaratory judgment and cross-motion by defendant for summary judgment.

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits (Memo)	
Reply Affidavits — Exhibits (Memo)	

Cross-Motion: ☒ Yes ☐ No

The motions and cross-motions currently before the Court, under motion sequence numbers 008, 009 and 010 are hereby consolidated for disposition.

This is a personal injury action in which plaintiff, Luis Casas (hereinafter Casas or plaintiff), by his guardian Betty Casas, seeks damages for injuries he allegedly sustained on August 6, 2003. It is his contention that, at approximately 9:00 A.M., while working as a janitorial employee of nonparty Nelson Maintenance Services (Nelson) in the basement of defendant Consolidated Edison Company of New York, Inc. (Con Ed)'s Waterside facility in lower Manhattan, a large piece of cement fell from the ceiling and struck his head and hand, causing serious physical injuries. These include a traumatic brain injury with severe neuro-cognitive deficits.

Plaintiff commenced this action sounding in negligence and Labor Law by serving and filing a summons and complaint on or about October 25, 2004. Issue was joined by service of

Con Ed's answer on or about November 19, 2004, and discovery ensued. In March 2005, Con Ed commenced a third-party action against Nelson for indemnification, breach of contract, and negligence. That action was voluntarily discontinued by Con Ed on or about June 15, 2005. The procedural history, as relevant to the consolidated motions, is as follows.

For various reasons, discovery has not proceed in an orderly manner, resulting in repeated court appearances, discovery motions, and court orders. By motion, dated June 23, 2006, plaintiff sought an order striking defendant's answer, or in the alternative, for an order striking defendant's answer based upon Con Ed's failure to provide demanded discovery and to produce a witness for deposition. The discovery had been the subject of both the preliminary conference order and follow-up compliance conference orders, and Con Ed's failure to produce a defense witness followed its repeated adjournments of plaintiff's deposition. The motion was resolved by the order of the Hon. Michael Stallman, before whom this matter was then pending, dated October 26, 2006, and the so-ordered stipulation of the parties, dated October 19, 2006 and signed by Justice Stallman on October 26, 2006 (hereafter, the October 26th Order, or Order, as appropriate). The so-ordered stipulation states:

> [Defendant] to provide supplemental responses to items J, K, L, O, Q, T, U of [plaintiff's] Notice for D & I dated 2/18/05 and combined demands dated within 30 days and/or if unable to provide an affidavit of a person with knowledge, as to a search for same. Failure to do so w/I 30 days will result in defendant['s] answer being stricken.
> [Defendant] to provide responses to [plaintiff's] notice for D & I dated 10/13/06 w/I 30 days; [Defendant] to provide Phyllis Burnett and the Con Ed maintenance Department Supervisor at time of incident for EBT 12/19/06; if no longer is employed to provide last known address; all records demanded to be provided for basement #2.
> Compliance Conference date 11/30/06 @ 10:30 NO/I: 1/5/07.

The orders were filed with the New York County Clerk's office on October 31, 2006.

Although plaintiff filed a Note of Issue on or about November 30, 2006, the parties pursued additional and/or pre-trial discovery, engaged in motion practice and entered into so-

ordered stipulations pertaining to, among other things: a further deposition of plaintiff regarding his allegations of newly discovered injuries; an exchange of authorizations; the appointment of a guardian ad litem and a deposition of Casas's Article 81 guardian ad litem, Betty Casas; supplemental bills of particulars; plaintiff's witness list; and the designation, completion and exchange of independent medical examination (IME) reports, and where appropriate, follow-up reports for neurologic, neuropsychiatric and occupational therapy IMEs. The parties also litigated issues pertaining to the appointment of the guardian ad litem and plaintiff's change of counsel, and they participated in an, albeit unsuccessful, mediation in October 2007 (*see* orders dated 10/24/07; 12/20/07; 2/28/08; 8/7/08; 5/14/09; and 9/17/09).

On October 22, 2009, plaintiff served Con Ed with a copy of the October 26th Order, with Notice of Entry. On or about November 18, 2009, Con Ed served a Notice of Appeal to the Supreme Court, Appellate Division, First Department, indicating its intent to appeal "each and every part" of the Order. Con Ed, however, never perfected the appeal.

A compliance conference was held on January 14, 2010, which resulted in a discovery order directing plaintiff to supply additional authorizations and to submit to an additional IME. This was followed by Con Ed's service of a motion, on or about February 16, 2010. The relief Con Ed sought was an order vacating that aspect of Justice Stallman's October 26th Order which contains the provision conditionally striking Con Ed's answer. At or about the same time Con Ed served the vacatur motion, and it produced its response to the long-sought-after disclosure.

The responses, contained in a document entitled "Defendant's Supplemental Response to Plaintiff's Notice for Discovery & Inspection and Combined Demands Dated February 18, 2005," consisted chiefly of assertions that: (1) the document, if it exists, is a matter of public record, and therefore is not discoverable; (2) the requested discovery is not in Con Ed's possession; (3) Con Ed is attempting to obtain the requested records and will provide same if

and when they are located; (4) upon information and belief, plaintiff's accident was not investigated by the Department of Buildings; (5) the facility was decommissioned, sold, and is no longer in existence, and a search of available records did not reveal any documents responsive to plaintiff's requests; and (6) at time of the accident, Con Ed maintained records for the Waterside facility on a computer database, and that the search conducted of the database revealed two blueprints, two (unclear) copies of (what appear to be) work tickets, and one work order, dated March 10, 2002, which notes that the ceiling in basement # 2 has a safety hazzard of loose ceiling concrete for which netting was installed, on April 23, 2002, to catch debris falling from the ceiling.

Plaintiff opposed the motion on the grounds that: (1) the responses were inadequate and untimely; and (2) the vacatur motion itself was an untimely motion, as Con Ed's failure to timely seek relief from the October 26, 2006 so-ordered, self-executing, stipulated order prevented it from later contesting its (the Order's) terms and conditions.

This Court referred the motion back to Justice Stallman, who, by order dated July 29, 2010, resolved the motion. The July 29, 2010 order states, in relevant part:

> Defendant moves to vacate a so-ordered stipulation dated October 19, 2006 (so ordered on October 26, 2006) which resolved plaintiff's motion to strike defendant's answer for failing to provide discovery. The pertinent part of the so-ordered stipulation for which vacatur is sought states:
>
> "[Defendants] to produce supplement responses to items'[*sic*] J,K,L,O,Q,T,U of [plaintiff's] Notice of D&I dated 2/18/05 and combined demands dated [*sic*] within 30 days and/or if unable to provide an affidavit of a person with knowledge as to a search for same. *Failure to do so w/l [within] 30 days will result in Defendant['s] answer being stricken.*"
>
> * * *
>
> "Stipulations of settlement are judicially favored and should not be lightly cast aside. Thus, a party will not be relieved from the consequences of a stipulation unless there was sufficient cause to invalidate it, such as fraud, mistake, collusion, accident or some other ground. The party seeking to vacate the stipulation should do so with reasonable promptness under the circumstances."
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> *Charlop v A.O. Smith Water Products*, 64 AD3d 486, 486 (1st Dept 2009) (citations omitted). Here, there is no cause to justify vacating the stipulation dated October 19, 2006 and so-ordered on October 26, 2009. It cannot be said

> that defendant acted with reasonable promptness under the circumstances, because defendant's motion was made more than three years after the stipulation was so-ordered.
> Defendant-movant should not be heard to complain that the consequences of its failure to comply with the terms of providing discovery were too harsh, when movant's counsel agreed to those terms, including the amount of time to comply with the discovery. Faced with a motion to strike its answer for allegedly not having complied with discovery, defendant bargained for and accepted a conditional order striking its answer. In sum, defendant essentially argues that it should be excused from the consequences of any noncompliance because it has meritorious defenses. This argument is unavailing. "If the credibility of court orders and the integrity of our judicial system are to be maintained, a litigant cannot ignore court orders with impunity." *Kihl v Pfeffer*, 94 NY2d 118, 123 (1999).
>
> Therefore, defendant's motion is denied.
>
> Whether defendant failed to comply with the so-ordered stipulation and whether plaintiff was/is entitled to an order striking defendant's answer are not issues before this Court. The action is now assigned to Justice Wooten and enforcement of the so-ordered stipulation is a matter that should not be addressed to this Court. Accordingly, issues of whether the conditional order striking the answer was waived or abandoned, or whether plaintiff is estopped from asserting the conditional order are not before this Court (emphasis in original).

Thereafter, Con Ed motioned this Court for an order striking plaintiff's complaint or vacating the note of issue based upon defendant's need for further discovery. The motion, dated September 20, 2010, was resolved pursuant to a so-ordered stipulation of the parties, dated January 5, 2011, which states, in relevant part:

> 1. NOI vacated. [Plaintiff] to file NOI by 3/21/11
> 2. [Plaintiff] to provide Az's [authorizations] for certified records from [plaintiff's] treating neuro-ophthalmologist and neuro-audiologist w/in 15 days
> 3. IMEs of [plaintiff] by: Dr. Richard DeBenedetto, Dr. Harvey Rosenblum and a neuro-audiologist all to be noticed and conducted w/in 60 days [without] videotaping.
> 4. [Defendant] agrees to filing of NOI upon compliance of this order.

The Note of Issue was filed on March 21, 2011, and Casas has appeared for defendant's IMEs.

Currently before the Court are the consolidated motions and cross-motions in which the parties seek orders supporting their divergent positions. A closer examination of the motions reveals that, despite the multiple applications for various forms of relief, plaintiff essentially seeks an order confirming that defendant's answer was stricken and that the trial would only

pertain to the issue of damages, and an order directing Con Ed to pay sanctions for its service of a summary judgment motion for a dismissal of Labor Law claims which plaintiff had previously withdrawn on the merits. Defendant seeks a declaration that its answer was not stricken, a trial as to both liability and damages, additional discovery, and a determination that Casas is collaterally estopped from litigating claims for injuries arising after September 4, 2008.

According to plaintiff, Con Ed did not comply with any aspect of the October 26th Order, and no evidence has been submitted to the contrary. Despite all of its motions, affirmations in opposition, cross-motions and explanations, Con Ed has failed to demonstrate that it met the conditions set forth in the October 26th Order, which resulted in the striking of its answer 30 days later, no later than Monday, November 27, 2006.

Among the myriad of arguments offered to convince the Court that the answer was not stricken, or that it should be reinstated, are Con Ed's assertions that plaintiff abandoned any claimed default by defendant with respect to the October 26th Order, and/or abandoned the entire action, by failing to serve a copy of the October 26th Order with notice of entry within one year's time. These contentions are meritless and contrary to the clear terms of the Order.

When faced with a motion to strike its answer based upon its recalcitrance, Con Ed's counsel negotiated the language contained in the stipulated, so-ordered, self-executing Order. The parties did not agree and stipulate to, nor did Justice Stallman insert, any additional preconditions for the self-executing Order to take effect. Not only is the requirement for either party to serve a copy of the order with notice of entry absent from the October 26th Order, but Con Ed did not move for relief from this Order which it signed off on, until its *November 18, 2009* Notice of Appeal to the Supreme Court, Appellate Division, First Department, which it then chose not to perfect.

As referenced above, the answer was stricken due to Con Ed's noncompliance, 30 days after the October 26th Order was issued. The Court of Appeals, in *Kihl v Pfeffer* (94 NY2d 118,

123 [1999]), addressed the issue of noncompliance as follows:

> If the credibility of court orders and the integrity of our judicial system are to be maintained, a litigant cannot ignore court orders with impunity. Indeed, the Legislature, recognizing the need for courts to be able to command compliance with their disclosure directives, has specifically provided that a 'court may make such orders . . . as are just,' including [an order striking out pleadings] (CPLR 3126). Finally, we underscore that compliance with a disclosure order requires both a timely response and one that evinces a good-faith effort to address the requests meaningfully.

It is evident now, as it was to the Court addressing the vacatur motion, that Con Ed's disclosure efforts were not timely, nor did they "evince[] a good-faith effort to address the requests meaningfully" (*id.*).

Moreover, even if, as Con Ed asserts in some of its papers, its production of discovery was hindered by the facility's closure prior to the commencement of the action, a question would arise as to whether it was reasonable, under the circumstances, for Con Ed not to have preserved the records and/or other evidence related to plaintiff's accident. However, the evidentiary submissions currently before the Court seem to indicate that the Waterside facility was not closed at the time the action was commenced. According to the affidavit of Con Ed's Section Manager, Patrick Williams, sworn to on February 5, 2010, "[b]y the time suit was brought, the Waterside facility was winding down its operations, and shortly thereafter, in early 2005, it ceased operations altogether, having been decommissioned as a power plant, and the property sold" (Con Ed Notice of Cross-Motion, Exhibit O). Con Ed's assertion to the effect that a search was made of available records (after the closing of the facility) which did not reveal any documents responsive to plaintiff's requests, is unavailing, as it is woefully inadequate. Con Ed not only fails to identify precisely what records were searched, by whom, when and where, no information is provided as to when, where, how or by whom other attempts were made to gather records previously kept by, or related to, the Waterside facility in general, and Casas's accident in particular. Therefore, Con Ed's failure to comply with its disclosure

obligations and its failure to comply with multiple discovery orders, whether by intent, inaction, or otherwise, caused excessive delays in this action, hindered plaintiff's ability to prosecute his claims, and warranted striking of the answer.

Also indicative of the fact that the answer had been stricken and that the parties expected a trial only as to damages, is the discovery defendant pursued after it missed the deadline set in the October 26th Order. A review of the discovery demands made, and court orders issued, subsequent to the Order, reveals that Con Ed sought and was granted further depositions and additional IMEs, including an occupational therapy examination which pertained, largely, to Casas's claims of injury and disability.

With respect to the aspect of Con Ed's motion which seeks a partial summary judgment dismissal of plaintiff's Labor Law and liability claims, and plaintiff's cross-motion for an order granting sanctions based upon the frivolous nature of the motion, the requested relief is denied for the following reasons.

In his complaint, Casas alleged violations of Labor Law §§ 200, 240, 241 (6), and pled specific violations of the Industrial Code. As part of its motion, Con Ed tacitly acknowledges that the accident occurred when a piece of cement dislodged from the facility's ceiling and struck Casas while he swept the basement floor, and then advances detailed arguments as to why each of the claimed Labor Law and Code violations does not apply to these facts.

Plaintiff asserts that sanctions are appropriate because, by affirmation, dated April 28, 2010, he had already conceded that his Labor Law claims are inapplicable to the facts of his case. Notwithstanding the acknowledgment, plaintiff never formally withdrew these claims, rendering his request for sanctions based upon defendant's motion to dismiss these charges unjustified. Moreover, defendant is entitled to a summary judgment dismissal of plaintiff's causes of action which allege violations of Labor Law §§ 200, 240, 241 (6), and violations of the Industrial Code.

Despite the language contained in Con Ed's notice of motion demanding an order "pursuant to CPLR 3212 granting partial summary judgment to the defendant on liability," the supporting attorney's affirmation makes clear that, aside from the issue of the Labor Law claims, the main thrust of Con Ed's motion is its request for an order preventing Casas from litigating the issue of causally related disability beyond September 4, 2008. The affirmation does not contain any arguments with respect to the balance of plaintiff's negligence/liability claims, which as plaintiff correctly points out, is no longer a disputed issue. Con Ed's request for an order affecting plaintiff's proof of damages is not frivolous, and therefore, not sanctionable.

Con Ed's motion to collaterally estop plaintiff from offering evidence that he suffers from permanent disabilities stemming from the August 6, 2003 accident is based upon a final administrative determination by New York's Workers' Compensation Board.

It is undisputed that following his accident, Casas applied for and received Workers' Compensation (WC) benefits based upon the injuries he sustained on August 6, 2003. According to the WC records:

> [a]ccident, notice, and causal relationship were established for the claimant's head and left hand injuries in the decision filed March 29, 2004. Thereafter, the established case was amended to include the claimant's neck and back injuries (in the decision filed June 1, 2004), post-traumatic stress disorder and depressive disorder (in the June 13, 2005 decision) and right knee injury (in the decision filed September 21, 2007) (*see* Con Ed Notice of Motion, Exhibit S).

A hearing was held before a WC Law Judge on March 19, 2009, to determine whether the credible medical evidence supported a classification of permanent disability. On March 19, 2009, the Law Judge made a determination, which was filed on March 24, 2009, and later affirmed and made part of a final administrative finding, specifically finding that Casas sustained no further causally related disability after September 5, 2008. Con Ed asserts that Casas had

a full and fair opportunity to present medical evidence and litigate the issue before the WC Board, and that he failed to appeal the adverse finding to the Appellate Division. Based upon the finality of the determination, Con Ed seeks an order collaterally estopping plaintiff from offering evidence that his post-September 5, 2008 disability was causally related to his August 6, 2003 accident.

In support of its position, Con Ed relies on, and submits a copy of, a decision involving the same issue which was resolved by another Supreme Court, Civil Term motion court here in New York County (*Auqui v Seven Thirty Ltd. Partnership,* Sup Ct, NY County, October 7, 2009, index No. 100232/04). The motion court issued an order precluding the plaintiff from relitigating the duration of work-related injury on the ground that this issue was fully litigated in the administrative proceedings conducted by the WC Board.

However, in a split decision, dated April 5, 2011, the Appellate Division reversed the lower court (*Auqui v Seven Thirty Ltd. Partnership,* 83 AD3d 407 [1st Dept 2011]), stating, in relevant part:

> The determination that workers' compensation coverage would terminate as of a certain date for plaintiff's injuries (. . . which were caused when plaintiff was struck in the head by a falling sheet of plywood in the course of his employment) is not, nor could it be, a definitive determination as to whether plaintiff's documented and continuing injuries were proximately caused by defendant's actions. While factual issues necessarily decided in an administrative proceeding may have collateral estoppel effect, it is well settled that 'an administrative agency's final conclusion, characterized as an ultimate fact or mixed question of fact and law, is not entitled to preclusive effect' (*id.* at 408 [internal citations omitted]).

Inasmuch as the First Department just addressed this issue, this Court is bound to follow the precedent set in *Auqui v Seven Thirty Ltd. Partnership* until the Court of Appeals or the First Department pronounces a contrary rule.

Accordingly, for the reasons set forth above, it is

ORDERED that the motions and cross-motions are granted to the extent that:

1) it is hereby DECLARED that:

(a) defendant's answer was stricken pursuant to the terms of the October 26th Order;

(b) trial of this action is limited to the issue of damages; and it is further

ORDERED that the motion by defendant for partial summary judgment dismissing the plaintiff's claims sounding in Labor Law is granted and the second, third and fourth causes of action of the complaint are dismissed; and it is further

ORDERED that in all other respects, the motions and cross-motions are denied.

This constitutes the Decision and Order of the Court.

Dated: 9-27-2011 **Enter:**

Paul Wooten **J.S.C.**

Check one: [ ] **FINAL DISPOSITION** [X] **NON-FINAL DISPOSITION**

Check if appropriate: [ ] **DO NOT POST**