

<b>Andrews v Jablko Constr., LLP</b>
2019 NY Slip Op 34094(U)
February 11, 2019
Supreme Court, Westchester County
Docket Number: 58913/2017
Judge: Joan B. Lefkowitz
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To commence the statutory time period for appeals as of right [CPLR 5513(a)], you are advised to serve a copy of this order, with notice of entry upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF WESTCHESTER-COMPLIANCE PART

-----X  
JOSEPH ANDREWS,

Plaintiff,

-against-

JABLKO CONSTRUCTION, LLC, WOODHAIL RYE DEVELOPMENT, LLC, CATERPILLAR, INC., H.O. PENN MACHINERY COMPANY, INC., H.O. PENN MACHINERY LEASING, LLC, H.O. PENN LEASING LLC, AND H.O. PENN MACHINERY SALES & RENTALS,

Defendants.

-----X  
H.O. PENN MACHINERY COMPANY, INC. AND  
H.O. PENN LEASING, LLC,

Third-Party Plaintiffs,

-against-

KENLAR ELECTRIC, INC.,

Third-Party Defendant.

-----X  
CATERPILLAR, INC.,

Second Third-Party Plaintiff,

-against-

KENLAR ELECTRIC, INC.,

Second Third-Party Defendant.

-----X  
LEFKOWITZ, J.

**DECISION and ORDER**  
**Index No. 58913/2017**  
**Motion Date: Jan. 7, 2019**  
Seq. No. 2

The following papers were read on this motion by plaintiff for an order compelling defendant/ third-party plaintiff Caterpillar, Inc. (“Caterpillar”) to respond to plaintiff’s October 30, 2018 discovery demands and for such other and further relief that this court may deem just and proper.

Order to Show Cause; Affirmation in Support; Exhibits 1-8  
Affirmation in Opposition by Caterpillar; Exhibits A-L

Upon the foregoing papers and proceedings held on January 7, 2019, this motion is determined as follows:

Plaintiff commenced this action by the filing of a summons and verified complaint on March 27, 2017, seeking damages for injuries he sustained while working at a construction site, when a Caterpillar front loader rolled from a parked and off position into plaintiff. Plaintiff alleges in his complaint, inter alia, that the solenoid valve of the parking brake failed to return to its de-energized position when the key was turned off which allowed the front loader to move striking plaintiff.

Plaintiff served a notice for discovery and inspection on June 28, 2017. On July 31, 2017 Caterpillar served responses to plaintiff’s June 28, 2017 discovery demands. A Preliminary Conference Order (Lefkowitz, J.) was entered on August 24, 2017 which directed inter alia, the completion of all discovery on or before June 26, 2018. Plaintiff’s deposition was completed on January 18, 2018. Caterpillar appeared for deposition by its Chief Engineer, Michael Calamari (“Calamari”), on May 1, 2018. Plaintiff served post-deposition demands dated June 27, 2018.

On September 4, 2018 the court issued a Trial Readiness Order. On September 27, 2018 the court vacated the Trial Readiness Order and directed, inter alia, that Caterpillar respond to plaintiff’s post-deposition demands within seven days.<sup>1</sup> That Order further directed the parties to appear for a compliance conference on October 15, 2018 at which time the case would be certified as ready for trial. Caterpillar served written responses dated October 8, 2018 to plaintiff’s post-deposition demands. On October 15, 2018 the court issued a Trial Readiness Order. By letter dated October 30, 2018 plaintiff sought additional documents and other information concerning the original park brake solenoid valve that was installed in the Caterpillar 930K Wheel Loader and documents/information concerning the solenoid valve part number 448-4307 and any other solenoid valve used as a replacement for the original valve. Plaintiff also sought service letters: REBE9245m REBE9408 and REBE9241 (the “October 30 demands”).

Plaintiff now seeks to compel Caterpillar to produce responses to the October 30 demands. At the outset plaintiff argues that Caterpillar failed to object to the demands and therefore has waived any objections it may have to those demands. Additionally, plaintiff argues that the information sought is directly related to the front loader machine at issue and the park brake solenoid valve which may have failed at the time of the accident. Plaintiff contends that it

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<sup>1</sup> Compliance Conference Referee Report and Order entered September 28, 2018.

was established during Calamari's deposition that the valve was at one point replaced by a redesigned valve, but it is unclear whether the new valve was installed in the front loader involved in this accident. At oral argument and in his papers plaintiff contends that since defendants are entitled to additional discovery with respect to plaintiff's November 14, 2018 surgery, compelling Caterpillar to produce responses to the October 30 demands letter will not delay the matter or prejudice defendants. Plaintiff states that any failure by his counsel to raise these demands at the compliance conference was unintentional and that plaintiff would be greatly prejudiced without the discovery he now seeks.

In opposition Caterpillar argues that plaintiff's failure to object to Caterpillar's responses to the post-deposition demands, to seek an extension of the Preliminary Conference Order deadlines, and plaintiff's failure to seek additional time to review documents produced by Caterpillar does not entitle plaintiff to additional discovery. Additionally Caterpillar disputes plaintiff's contentions this discovery is necessitated as a result of responses to its post-deposition demands. Caterpillar contends that the documents plaintiff seeks are documents which concern information which could have been requested at any point since this action was commenced.

Insofar as most, if not all, of the documents which plaintiff now seeks relate to issues which were apparent at the commencement of this case, the Court finds plaintiff's contentions to the contrary without merit. Equally without merit is plaintiff's contention that Caterpillar's entitlement to further discovery concerning plaintiff's November surgery, provides plaintiff with the opportunity for additional discovery. Plaintiff has failed on his papers and at oral argument to explain why plaintiff delayed scheduling Caterpillar's deposition, or why plaintiff waited to seek responses or court intervention with respect to plaintiff's post deposition demands.

The Court of Appeals has stressed the importance of adhering to deadlines as follows:

As this Court has repeatedly emphasized, our court system is dependent on all parties engaged in litigation abiding by the rules of proper practice. The failure to comply with deadlines not only impairs the efficient functioning of the courts and the adjudication of claims, but it places jurists unnecessarily in the position of having to order enforcement remedies to respond to the delinquent conduct of members of the bar, often to the detriment of the litigants they represent. Chronic noncompliance with deadlines breeds disrespect for the dictates of the Civil Practice Law and Rules and a culture in which cases can linger for years without resolution. Furthermore, those lawyers who engage their best efforts to comply with practice rules are also effectively penalized because they must somehow explain to their clients why they cannot secure timely responses from recalcitrant adversaries, which leads to the erosion of their attorney-client relationships as well. For these reasons, it is important to adhere to the position we declared a decade ago that "[i]f the credibility of court orders and the integrity of our judicial system are to be maintained, a litigant cannot ignore court orders with impunity" (*Gibbs v St. Barnabas*

*Hosp.*, 16 NY3d 74, 81 [2010] [internal citations omitted]).

Notwithstanding the foregoing, the Court is constrained to grant plaintiff's motion. To do otherwise would be to unfairly punish plaintiff for his counsel's failure to diligently pursue this discovery. Accordingly, plaintiff's motion is granted to the limited extent that plaintiff is entitled to responses to the October 30 demands. Plaintiff is cautioned that no further requests for discovery by plaintiff will be authorized by the Court.

All other arguments raised and evidence submitted by the parties have been considered by this court notwithstanding the specific absence of reference thereto.

In light of the foregoing it is:

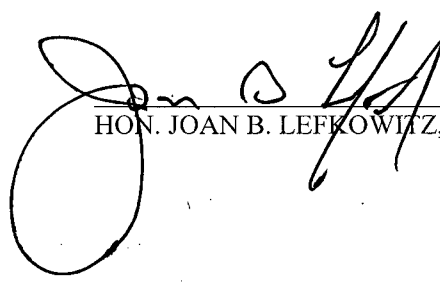
ORDERED that Caterpillar, Inc. shall provide responses to plaintiff's October 30, 2018 demands so as to be received in hand on or before February 28, 2019; and it is further,

ORDERED that plaintiff shall serve a copy of this Decision and Order with Notice of Entry upon counsel for all parties within three days of its entry; and it is further

ORDERED that all parties are directed to appear, as previously scheduled, for a conference in the Compliance Part, Room 800, on March 1, 2019, at 9:30 a.m. at which time it is anticipated that a Trial Readiness Order will be issued.

The foregoing constitutes the Decision and Order of this Court.

Dated: White Plains, New York  
February 11, 2019

  
HON. JOAN B. LEFKOWITZ, J.S.C.

Service upon all counsel via NYSCEF  
cc: Compliance Part Clerk