

**Galeas v MSBGC-NYC Support Corp.**

2020 NY Slip Op 31885(U)

June 17, 2020

Supreme Court, New York County

Docket Number: 151672/2018

Judge: Frank P. Nervo

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK, PART IV

-----X  
CARLOS GALEAS,

Plaintiff,

-against-

MSBGC-NYC SUPPORT CORP., T.G. NICKEL &  
ASSOCIATES, LLC

Defendants.

-----X  
And a third-party action

-----X  
FRANK P. NERVO, J.S.C.

DECISION AND ORDER

Index Number

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Defendants and third-party plaintiffs MSBGC and T.G. Nickel seek an order pursuant to CPLR § 3126 striking the answer of third-party defendant C&L Concrete Corp and dismissing plaintiff's complaint for failure to comply with this Court's prior order. Alternatively, movants seek to compel discovery sought in their demand letters of January 24, 2020 and June 5, 2018.

Plaintiff opposes the motion, contending he has provided complete responses to the demands, or alternatively, is actively seeking to provide all requested outstanding discovery. Plaintiff contends that his compliance, albeit untimely and potentially incomplete, evinces a willingness to comply with the Court's prior order or, at a minimum, bars this Court from finding his noncompliance willful and contumacious.

C&L Concrete also opposes the motion, contending that it was not a party to this action at the time the discovery demands were served, and has not been served with these demands after joining the matter as a Third-party Defendant. C&L Concrete

offers insurance policy information in its opposition, assuming the demand was of a standard nature seeking same.

As an initial matter, the instant motion violates the Court's rules and the conference order dated November 1, 2019, which direct "any further discovery application shall be made by order to show cause" (NYSCEF Doc. No. 48; Part 4 Rules Supreme Court – New York County Dedicated Trial Division, Justice Frank P. Nervo "Discovery relief. Applications to resolve discovery disputes arising after a compliance conference has been held shall be made by order to show cause... this includes relief pursuant to CPLR §§ 3124 and 3126"). This prior Court order requiring discovery disputes be brought by order to show cause is also included in plaintiff's motion as Exhibit J (NYSCEF Doc. No. 61). Despite the Court's prior order, and in contravention of this Part's rules, movants seek the instant relief by motion. Failure to comply with the Court's rules would ordinarily warrant denying the motion. However, the rules requiring discovery related motions be made by order to show cause have been suspended in light of the impacts of COVID-19. Notably, these rules were in effect on this motion's March 16, 2020 return date, however, denial on this basis would result in the inefficient refiling of this motion, given the current suspension of these rules. Consequently, the Court will not deny this motion for failure to comply with the Court's rules.

CPLR § 3126 governs sanctions for a party's nondisclosure and for persons controlled by a party. Subsection three provides that the Court may strike a pleading, stay proceedings, dismiss an action, or enter a default judgment when it finds, inter alia,

that a party has refused to obey an order for disclosure or willfully fails to disclose information that ought to have been disclosed. These remedies are drastic and should only be imposed when the movant has “clearly shown that its opponent’s nondisclosure was willful, contumacious or due to bad faith” (*Commerce & Indus. Ins. Co. v. Lib-Com Ltd.*, 266 AD2d 142 [1st Dept 1999]; *see also Siegman v. Rosen*, 270 AD2d 14 [1st Dept 2000]). A pattern of default, lateness and failure to comply with court orders, can give rise to an inference of willful and contumacious conduct (*see Merchants T & F, Inc. v. Kase & Druker*, 19 AD3d 134 [1st Dept 2005]; *see also Shah v. Oral Cancer Prevention Intl., Inc.*, 138 AD3d 722 [2d Dept 2016] Willful failure may be established by repeated failure to comply with court orders directing disclosure, including court orders issued at conferences).

Plaintiff has provided a response to the October 16, 2018 demand and provided various authorizations (NYSCEF Doc. No. 65). Movant, however, contends plaintiff’s response does not provide authorizations for all medical providers who have treated him for the injury alleged in this matter. Plaintiff, in opposition, does not argue that these providers treated him for an unrelated condition, nor does he proffer any reason why authorizations for these medical providers’ records<sup>1</sup> would be improper. Consequently, such authorizations and records are properly sought. Contrary to plaintiff’s position, when ordered by the Court, “belated compliance with discovery” (Opposition at ¶ 6) is not as a panacea militating against finding willful and contumacious bad faith noncompliance sufficient to strike a pleading (*Merchants T & F, Inc. v. Kase & Druker*,

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<sup>1</sup> The Court includes records pertaining to plaintiff’s workers compensation entities within “medical providers’ records”.

*supra*; *Shah v. Oral Cancer Prevention Intl., Inc., supra*). However, the failure to comply with a preliminary conference order and compliance conference order, under these circumstances and given plaintiff's ongoing attempts to comply, does not support striking plaintiff's complaint, at this time. Such circumstances do, nevertheless, warrant ordering compliance and conditionally sanctioning plaintiff if he should fail to comply with this order.

Notwithstanding C&L Concrete's contention that it was not a party to this matter when the discovery demands were served, it was ordered to respond to these demands by the Court's July 19, 2019 and November 1, 2019 conference orders, and did not contend it had not been served the demands at conference.

Accordingly, it is

ORDERED that the motion is granted to the extent of requiring plaintiff provide a complete response to demand letter of October 16, 2018, including medical authorizations for the providers and workers compensation entities outlined in movant's January 24, 2020 letter, to the extent not already done, within 30 days of notice of entry of this order; and it is further

ORDERED that plaintiff shall provide movants with his W-2 employment records for the years 2015 to present within 30 days of notice of entry of this order; and it is further

ORDERED that Defendant/Third-party Plaintiff MSBGC-NYC Support Corp. and T.G. Nickel & Associates, LLC shall serve discovery demands on Third-party Defendant C&L Concrete Corp. within 30 days of notice of entry of this order and Third-party Defendant C&L Concrete Corp. shall respond to said demands within 30 days of service; and it is further

ORDERED that the deadline to file the Note of Issue is extended to October 30, 2020, and counsel are reminded that part rules require applications to extend this deadline be brought by order to show cause; and it is further

ORDERED that any party's noncompliance with this order shall result in sanctions including striking pleadings or the preclusion of material at the time of trial, as appropriate and in the Court's discretion, upon further application.

THIS CONSTITUTES THE DECISION AND ORDER OF THE COURT.

Dated: June 17, 2020

ENTER:



Hon. Frank P. Nervo, J.S.C.