

One Bryant Park LLC v AXA Ins. Co.

2020 NY Slip Op 31932(U)

June 12, 2020

Supreme Court, New York County

Docket Number: 655640/2017

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

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ONE BRYANT PARK LLC; DURST DEVELOPMENT,
L.L.C., and TISHMAN CONSTRUCTION CORPORATION
OF NEW YORK,

Plaintiffs,

vs.

DECISION AND ORDER
INDEX NUMBER
655640/2017

AXA INSURANCE COMPANY; AXA CORPORATE
SOLUTIONS ASSURANCE; AXA CORPORATE
SOLUTIONS ASSURANCE (US REINSURANCE TRUST);
PERMASTEELISA NORTH AMERICA CORP.; TRAVELERS
PROPERTY AND CASUALTY COMPANY OF AMERICA;
ALLIED WORLD ASSURANCE COMPANY (US) INC.;
COMPONENT ASSEMBLY SYSTEMS, INC.; and ROBERT
MCCULLOUGH,

Defendants.

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FRANK P. NERVO, J.S.C.

Travelers Property Casualty (“Travelers”) seeks an order, pursuant to CPLR § 3216 striking the complaints of One Bryant Park, Durst Development, and Tishman Construction (collectively “DJ plaintiffs”) for their failure to provide discovery as ordered by this Court’s December 11, 2019 Decision and Order. Travelers also seeks to compel DJ plaintiffs’ insurer and defense firm, AIG Property Casualty and Pillinger Miller Tarallo LLP, produce all non-privileged documents responsive to its May 22, 2019 subpoena and provide a privilege log for withheld documents. Tishman opposes, contending that plaintiffs have either complied with the Court’s order or are actively attempting to comply.

A recitation of the factual background of this matter is discussed in this Court’s decision on motion sequences 001 and 002, and will not be repeated here.

As an initial matter, counsel for Tishman purports to submit its opposition on behalf of all DJ plaintiffs; however, Tishman’s counsel is not counsel of record for One Bryant Park or Durst, nor have One Bryant Park or Durst executed a stipulation substituting their current counsel. Accordingly, the Court considers Tishman’s

opposition only on behalf of Tishman, and not all DJ plaintiffs. As counsel for One Bryant Park and Durst have not filed opposition, the motion is unopposed as to them.

CPLR § 3126 subsection three provides that the Court may strike a pleading 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. This remedy is 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]). 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]). Failure to oppose a motion under CPLR § 3126(3), and thus to provide a reasonable excuse for noncompliance, gives rise to an inference of willful and contumacious conduct, warranting striking a pleading (*Figiel v. Met Food*, 48 AD3d 330 [1st Dept 2008]).

The Court’s December 11, 2019 Decision and Order required DJ plaintiffs disclose material sought by Travelers, as well as create a privilege log for material protected by attorney work product privilege, and furnish such log to all parties seeking discovery within 30 days of notice of entry. Notice of entry was filed December 12, 2019, thus discovery was due January 13, 2020. Although Tishman contends that it complied with this Court’s prior order, it also admits it did provide all discovery required as it proffers its continued efforts to locate material as militating against striking its pleading. Tishman’s contention that the delay was caused, in part, by the COVID-19 pandemic is without merit. Discovery was due January 13, 2020, two months before the State’s shutdown as a consequence of COVID-19. Likewise without merit, is Tishman’s argument that only DJ plaintiffs are prejudiced by their failure to comply with this Court’s order. Depositions are dependent on documentation due Travelers per this Court’s prior order and cannot take place until such documentation is provided, prejudicing Travelers.

Tishman is mistaken that “years of delay,” and “violation of numerous court orders” are required to impose sanctions under CPLR § 3216 (opposition at ¶ 44). The Court has broad discretion to impose sanctions under CPLR § 3126 for bad faith nondisclosure (*Sage Realty Corp. v. Proskauer Rose LLC*, 275 AD2d 11, 17 [1st Dept 2000]; *Bako v. V.T. Trucking Co.*, 143 AD2d 561 [1st Dept 1988]). Tishman is unable to provide an excuse for its failure to provide the ordered discovery *prior* to January 13, 2020, the deadline for such discovery provided in this Court’s prior order. Notwithstanding, Tishman avers it is making efforts to provide the discovery previously ordered. Accordingly, the Court finds Tishman’s violation of this Court’s December 11, 2019 order willful and in bad faith; however, in its discretion the Court provides Tishman with 90 days from notice of entry of this order to comply with the December 11, 2019 order. Affidavits of compliance shall be served, including *Jackson* affidavits for materials which cannot be located, contemporaneously with the required discovery. Failure to comply will result in the imposition of sanctions, including but not limited to striking pleadings, as appropriate.

One Bryant Park and Durst have not provided discovery as ordered by this Court. Their failure to oppose this motion, taken together with their violation of this Court’s December 11, 2019 order, is circumstantial evidence supporting a finding of willful noncompliance. They have presented no evidence of their compliance or efforts to comply. Notwithstanding, given the Court’s preference for adjudicating matters on the merits and the impacts of COVID-19, One Bryant Park and Durst shall comply with this Court’s December 11, 2019 Decision and Order within 90 days from notice of entry of this order, or their complaints will be stricken and sanctions imposed, as appropriate.

To the extent movant seeks to compel responses to its interrogatories and demands, movant is directed to serve same which comply with the rules of this Court’s Commercial Division within 30 days of notice of entry of this order. Responses shall be served within 60 days thereafter.

Accordingly, it is

ORDERED that the motion is granted to the extent of conditionally striking Tishman Construction Corporation of New York's pleading should it fail to provide discovery, as previously ordered by this Court's December 11, 2019 Decision and Order, within 90 days of notice of entry of this order; and it is further

ORDERED that the pleadings of One Bryant Park and Durst Development LLC are conditionally stricken should they fail to provide discovery, as previously ordered by this Court's December 11, 2019 Decision and Order, within 90 days of notice of entry of this order; and it is further

ORDERED affidavits of compliance, including Jackson affidavits shall be served contemporaneously with all discovery responses; and it is further

ORDERED that Travelers Property and Casualty Company of America shall amend its interrogatories and demands, as necessary, to comply with the rules of this Court's Commercial Division and serve same within 30 days of notice of entry of this order, and responses shall be served within 60 days thereafter; and it is further

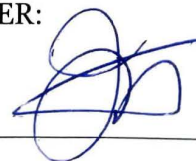
ORDERED that all parties respond to any outstanding discovery requests or demands within 90 days of notice of entry of this Decision and Order; and it is further

ORDERED the deadline to file the Note of Issue is extended to November 30, 2020.

THIS CONSTITUTES THE DECISION AND ORDER OF THE COURT.

Dated: June 12, 2020

ENTER:



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