SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. W. FRANC PERRY** **PART** **IAS MOTION 23EFM**

Justice

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ROMAN KOLODZIEJSKI, MICHAL PYZIK, AND ZBIGNIEW ZELAZNY, INDIVIDUALLY AND ON BEHALF OF ALL OTHER PERSONS SIMILARLY SITUATED WHO WERE EMPLOYED BY JEN-MAR ELECTRIC SERVICE CORP., GMD SHIPYARD CORP., AND MICHAEL CRANSTON, AND/OR ANY OTHER ENTITIES AFFILIATED WITH, CONTROLLING, OR CONTROLLED BY JEN-MAR ELECTRIC SERVICE CORP., GMD SHIPYARD CORP., AND MICHAEL CRANSTON,

Plaintiff,

- v -

JEN-MAR ELECTRIC SERVICE CORP., GMD SHIPYARD CORP., AND MICHAEL CRANSTON, ALONG WITH ANY OTHER ENTITIES AFFILIATED WITH, CONTROLLING, OR CONTROLLED BY JEN-MAR ELECTRIC SERVICE CORP., GMD SHIPYARD CORP., AND MICHAEL CRANSTON,

Defendant.

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INDEX NO. 105627/2011

MOTION DATE 02/18/2020

MOTION SEQ. NO. 009, 010

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 009) 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126

were read on this motion to/for STRIKE PLEADINGS.

The following e-filed documents, listed by NYSCEF document number (Motion 010) 127, 128, 129, 130

were read on this motion to/for VACATE - DECISION/ORDER/JUDGMENT/AWARD.

In this action, plaintiffs, and other members of the putative class, are individuals who worked for defendants, Jen-Mar Electric Service Corp. and GMD Shipyard Corp., (collectively referred to as defendants and/or Jen-Mar) as carpenters, bricklayers and masons, who allege a single cause of action against defendants claiming that Jen-Mar breached public works contracts by failing to pay plaintiffs the prevailing rates of wages and supplemental benefits. By decision and order of this court, dated May 17, 2017, the action was restored to the active calendar, the default judgment entered against defendants was vacated and defendants were directed to answer

or otherwise respond to the complaint within 20 days. (NYSCEF Doc. Nos. 87 and 88). Thereafter, the defendants answered the complaint and appeared before the court for a preliminary conference, compliance conference and several status conferences wherein a discovery schedule was set forth. (NYSCEF Doc. Nos. 90, 93, 94, 95, 97, 98, 99).

In motion sequence number 009, plaintiffs seek an order pursuant to CPLR § 3126(3) to strike defendants' answer; pursuant to CPLR § 3215 to enter a default judgment against defendants Jen-Mar Electric Service Corp. and GMD Shipyard Corp. and reinstate this court's September 17, 2015 judgment, based on defendants' failure to comply with this court's discovery orders and for defendants' failure to respond to plaintiffs' outstanding discovery demands. Defendants did not oppose plaintiffs' motion. In motion sequence number 010, defendants seek an order pursuant to CPLR § 5015 vacating defendants' default in opposing plaintiffs' motion dated January 31, 2020 and denying plaintiffs' motion on the basis that the discovery demands were not annexed to the motion and plaintiffs did not respond to defendants' letter dated February 26, 2020 requesting copies of the discovery demands. The motions are consolidated for disposition.

DISCUSSION

This action has a protracted litigation history and has been pending in this court since May 12, 2011. (NYSCEF Doc. No. 1). As noted, in 2017 the defendants' default was vacated and the action was restored to the court's active calendar. Plaintiffs contend that defendants have repeatedly and willfully failed to participate in this litigation. Moreover, plaintiffs maintain that since appearing in this action and filing their answer to the complaint, defendants have failed to produce any responses to plaintiffs' discovery demands or comply with this court's various compliance and status discovery conference orders. Plaintiffs aver that this pattern of non-

compliance demonstrates willful and contumacious conduct warranting the striking of defendants' answer. As noted, defendants did not oppose plaintiffs' motion, instead filing a motion to vacate their default as defendants claim to be uncertain which discovery demanded by plaintiffs remains outstanding and claiming that plaintiffs did not, in good faith, attempt to resolve the discovery issues prior to filing their motion as required by 22 NYCRR §202.7.

The determination whether to strike a pleading lies within the sound discretion of the trial court (see CPLR 3126 [3]; (*Mew v Civitano*, 151 AD3d 840, 841, 56 N.Y.S.3d 560 [2d Dep't 2017]; *Walter B. Melvin, Architects, LLC v 24 Aqueduct Lane Condominium*, 51 AD3d 784, 785, 857 NYS2d 697 [2d Dep't 2008]; *Cianciolo v Trism Specialized Carriers*, 274 AD2d 369, 370, 711 NYS2d 441 [2d Dep't 2000]). However, the drastic remedy of striking an answer is not appropriate absent a clear showing that the failure to comply with discovery demands was willful or contumacious (see CPLR 3126 [3]; *Walter B. Melvin, Architects, LLC v 24 Aqueduct Lane Condominium*, 51 AD3d at 785; *Harris v City of New York*, 211 AD2d 663, 664, 622 NYS2d 289 [2d Dep't 1995]).

While it is apparent that discovery remains outstanding and defendants have failed to comply with this court's discovery orders, causing plaintiffs to seek the court's intervention to address this non-compliance, plaintiffs have not demonstrated that defendants willfully and deliberately failed to comply with outstanding discovery requests. Indeed, after defendants failed to appear at the December 3, 2019 conference, it does not appear that the parties communicated in any manner, to resolve the outstanding discovery issues.

Although a court may, in its discretion, strike a pleading as a sanction for failure to comply with discovery demands or orders (CPLR 3126[3]), such a drastic remedy is inconsistent with the courts' preference to reach the merits of a dispute wherever possible (*Caplin v.*

Ranhofer, 112 AD2d 821, 492 N.Y.S.2d 408 [1st Dept 1985]) and is inappropriate absent a clear showing that the failure to comply with discovery demands is willful and contumacious (*Michael v. St. Lukes-Roosevelt Hosp. Ctr*., 199 AD2d 195, 605 N.Y.S.2d 283 [1st Dept 1993]; *Catarine v. Beth Israel Med. Ctr*., 290 AD2d 213, 735 N.Y.S.2d 520 [1st Dept 2002]). Even where the proffered excuse is less than compelling, there is a strong preference in our law that matters be decided on their merits.

Here, defendants contend that plaintiffs' failure to attach the discovery demands to their motion and respond to the letter requesting copies of the outstanding demands, should result in the denial of plaintiffs' motion. Defendants maintain that they did not oppose plaintiffs' motion due to law office failure in not realizing that the February 18, 2020 return date was in the submissions part and not before the court. (NYSCEF Doc. No. 129). Notwithstanding this confusion, however, defendants have not demonstrated compliance with plaintiffs' demands and this court's various orders extending the discovery deadlines. The parties participated in five discovery conferences between May 30, 2018 and October 15, 2019, where the court extended the discovery deadlines and directed the attorneys to communicate with each other by October 22, 2019, indicating that no further adjournments would be granted without court approval. (NYSCEF Doc. No. 98).

Defendants did not appear at the December 3, 2019 status conference and claim that counsel attempted to attend the conference but was unable to do so; these motions followed. Despite the voluminous exhibits attached to plaintiffs' motion, it is not clear that the parties attempted to address the outstanding discovery prior to the filing of this motion, or that they communicated with each other at all to determine what discovery remains outstanding. In fact, it is not clear that defendants even have a copy of the discovery demands that plaintiffs are seeking

responses to and plaintiffs have failed to provide the court with any proof that the necessary good faith efforts to resolve the outstanding discovery issues were undertaken. (NYSCEF Doc. No. 101). It is well settled that prior to seeking the court's intervention to resolve a discovery dispute, it is incumbent upon the movant to undertake efforts between himself and the non-disclosing party to resolve the discovery dispute, and to submit an "affirmation of good faith" delineating his attempts to confer with counsel for the opposing party(see, 22 N.Y.C.R.R. § 202.7 [a],[c]; *Romero v. Korn*, 236 A.D.2d 598, 654 N.Y.S.2d 38 [2d Dept. 1997]; *Fanelli v. Fanelli*, 296 A.D.2d 373, 745 N.Y.S.2d 435 [2d Dept. 2002]).

CONCLUSION

Plaintiffs' motion to strike defendants' answer is denied and defendants' motion seeking to excuse its default in opposing plaintiffs' motion is granted. Defendants are reminded of their continuing obligation to comply with discovery deadlines and the orders of this court and that the failure to do so can result in the ultimate sanction of striking their answer. Accordingly, it is hereby,

ORDERED that plaintiffs' motion to strike is denied in part, but granted to the extent that defendants are ordered to respond to plaintiffs' discovery demands; and it is further

ORDERED that plaintiffs re-serve defendants' counsel by email and regular mail within 10 days, Plaintiffs' First Interrogatories, Documents Demands, and Notices of Deposition, originally served on July 6, 2018; and it is further

ORDERED that defendants shall produce to plaintiffs on or before September 4, 2020 complete responses and documents to Plaintiffs' First Interrogatories, Documents Demands, and Notices of Deposition, originally served on July 6, 2018 and re-served in accordance with this order; and it is further

ORDERED that plaintiffs' time to file the Note of Issue is extended from February 28, 2020 to November 20, 2020; and it is further

ORDERED that counsel for the parties are directed to confer with one another by telephonic or electronic means, within 30 days of plaintiffs' receipt of defendants' responses, and promptly thereafter send a joint e-mail to the clerk of Part 23 advising whether a status conference is necessary to schedule additional discovery.

Any requested relief not expressly addressed by the Court has nonetheless been considered and is hereby denied and this constitutes the decision and order of the Court.

7/22/2020
DATE

W. FRANC PERRY, J.S.C.

CHECK ONE:		CASE DISPOSED			X	NON-FINAL DISPOSITION	
		GRANTED		DENIED	X	GRANTED IN PART	OTHER
APPLICATION:		SETTLE ORDER				SUBMIT ORDER	
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN				FIDUCIARY APPOINTMENT	REFERENCE