

Lindemann v VNO 100 W. 33rd St. LLC
2020 NY Slip Op 33231(U)
October 1, 2020
Supreme Court, New York County
Docket Number: 159374/2015
Judge: Kathryn E. Freed
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. KATHRYN E. FREED **PART** **IAS MOTION 2EFM**

Justice

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INDEX NO. 159374/2015

SCOTT LINDEMANN,

Plaintiff,

MOTION SEQ. NO. 001

- v -

VNO 100 WEST 33RD STREET LLC and ICON
INTERIORS, INC.,

Defendants.

**DECISION + ORDER ON
MOTION**

-----X

ICON INTERIORS, INC.,

Def./Third-Party Plaintiff,

Third-Party
Index No. 595849/2015

-against-

CENTRE STREET SYSTEMS, INC.,

Third-Party Defendant.

-----X

VNO 100 WEST 33RD STREET LLC,

Def./Sec. Third-Party Plaintiff,

Second Third-Party
Index No. 595864/2018

-against-

HI TECH DATA FLOORS, INC.,

Sec. Third-Party Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62

were read on this motion to/for DISCOVERY.

In this personal injury/Labor Law action commenced by plaintiff Scott Lindemann, defendant/second third-party plaintiff VN0100 West 33rd Street, LLC, ("VN") and defendant Icon Interiors, Inc. move, pursuant to CPLR 3126, for an order compelling second third-party defendant

Hi Tech Data Floors, Inc. (“HTD”) to provide responses to VN’s combined discovery demands dated August 15, 2019 (“the 8/15/19 demands”) by a date certain upon penalty of preclusion, or for such other relief as this Court deems just and proper. After a review of the motion papers, as well as the relevant statutes and case law, the motion, which is unopposed, is decided as follows.

FACTUAL AND PROCEDURAL BACKGROUND:

Plaintiff was allegedly injured when he tripped and fell on a raised computer floor at 100 West 33rd Street in Manhattan on August 5, 2014. Plaintiff commenced the captioned action against VN and Icon by filing a summons and complaint on September 11, 2015, in which he alleged common-law negligence as well as violations of Labor Law sections 200 and 241(6). Doc.

1. VN and Icon then joined issue by filing their verified answers. Docs. 5, 7.

Icon thereafter commenced a third-party action against third-party defendant Centre Street Systems, Inc. (“CSS”), but that third-party action has since been discontinued and CSS is no longer a party. Docs. 8, 42.

In October 2018, VN commenced a second third-party action against HTD seeking contribution and common-law indemnification. Doc. 35. HTD joined issue by its answer filed January 4, 2019. Doc. 37.

A compliance conference was held in this matter on April 30, 2019. The order issued as a result of the conference, entered May 1, 2019, directed, inter alia, that certain discovery be provided to HTD, including discovery exchanged prior to the time HTD was impleaded. Doc. 41.

On or about August 15, 2019, VN’s attorneys, Lewis Brisbois Bisgaard & Smith, LLP (“LBBS”), served HTD with a set of combined discovery demands (“the 8/15/19 demands”). Doc. 43. In September 2019, LBBS also became counsel for Icon. Doc. 53.

A further compliance conference was held on December 10, 2019. The order issued as a result of the conference, entered December 17, 2019, directed that HTD be provided with, inter alia, certain discovery exchanged prior to the time it became a party. Doc. 46.

In a good faith effort to obtain responses to VN's 8/15/19 demands, LBBS represents that it wrote to HTD's attorney on August 15, 2019, October 10, 2019, and March 16, 2020. Doc. 60.¹ Despite these good faith efforts, however, HTD failed to respond to the 8/15/19 demands. Doc. 60.

On May 26, 2020, LBBS wrote to this Court to advise that HTD failed to provide a witness for deposition as directed by the compliance conference order entered December 17, 2019 and that it had still failed to respond to the 8/15/19 demands. Doc. 64. The same day, counsel for HTD wrote to this Court to explain that it did not produce a witness for deposition because it was still owed discovery pursuant to the order entered December 17, 2019. Doc. 65.² Counsel further represented that HTD had not responded to the 8/15/19 demands due in part to the Covid-19 pandemic. Doc. 65.

VN and Icon now move for the relief set forth above. In support of the motion, counsel for the movants³ argues that HTD must be compelled to respond to the 8/15/19 demands since it has failed to comply with the orders of this Court entered May 1, 2019 and December 17, 2019. Docs. 41, 46. Movants further assert that HTD has not sought an extension of time to provide responses to the 8/15/19 demands and has provided no excuse for failing to respond to the same.

¹ Counsel for the movants mistakenly represents that the March 16, 2020 letter was sent February 7, 2020. Doc. 50 at par. 12.

² This Court notes, however, that counsel for HTD did not contact this Court pursuant to the Part 2 Rules to seek an extension of time for the deposition. Nor did he move to compel the discovery he claims he is owed.

³ LBBS was counsel for both movants at the time the instant motion was filed. However, in July 2020, the firm of Ahmuty Demers & McManus, Esqs. was substituted as counsel for VN. Doc. 67

LEGAL CONCLUSIONS:

VN and Icon move, pursuant to CPLR 3126, to compel HTD to respond to the 8/15/19 demands. Although CPLR 3126 allows a court to impose penalties including, inter alia, striking a party's pleading if it fails to obey a discovery order or willfully fails to provide discovery (*see Rodriguez v United Bronx Parents, Inc.*, 70 AD3d 492 [1st Dept 2010]), movants merely seek to compel the production of discovery from HTD and do not seek such a severe sanction against it. Thus, the motion is actually brought pursuant to CPLR 3124, the statute which allows this Court the discretion to compel the production of discovery. *See O'Halloran v Metro. Transp. Auth.*, 169 AD3d 556, 557 (1st Dept 2019).

The circumstances herein warrant the granting of the motion to the extent that HTD is directed to provide responses to the 8/15/19 demands within 45 days. The 8/15/19 demands were sent to HTD over one year ago and HTD never objected to them or sought an extension of time to respond to the same. HTD does not oppose the instant motion and, thus, offers no excuse as to why it has failed to respond. Although counsel for HTD represents in a letter to this Court that it had difficulty responding to the demands because of the Covid-19 pandemic, he does not address the delay between August 2019 and the commencement of the pandemic in March 2020.

In the interests of fairness, however, this Court declines to impose the penalty of preclusion in the event HTD fails to respond to the 8/15/19 demands within 45 days. If HTD fails to respond to the demands within that time period, VN and Icon will need to move for discovery sanctions based on a violation of this order. This Court is reluctant to impose that penalty on HTD at this time for the following reasons. First, counsel for VN and Icon failed to comply with the Part 2 Rules by requesting a conference with this Court prior to filing the instant motion and obtaining this Court's permission to so move. Additionally, although VN and Icon argue that HTD violated

this Court’s orders entered May 1 and December 17, 2019, this contention is disingenuous since those orders did not direct HTD to produce any document discovery. On the contrary, those orders directed discovery to be provided *to* HTD. Further, the May 1, 2019 order allegedly violated by HTD was issued *prior* to the date on which the 8/15/19 demands were served. Finally, counsel’s contention that his August 15, 2019 letter to HTD’s attorney constituted a good faith attempt to obtain a response to the 8/15/19 demands is also disingenuous, since it was obviously just a cover letter for the demands.

Therefore, in light of the foregoing, it is hereby:

ORDERED that the motion by defendant/second third-party plaintiff VN0100 West 33rd Street, LLC and defendant Icon Interiors, Inc. seeking to compel discovery from second third-party defendant Hi Tech Data Floors, Inc. is granted to the extent that, within 45 days of the filing of this order on NYSCEF, second third-party defendant Hi Tech Data Floors, Inc. is directed to respond to the combined demands served by defendant/second third-party plaintiff VN0100 West 33rd Street, LLC dated August 15, 2019; and it is further

ORDERED that this constitutes the decision and order of the court.

10/1/2020
 DATE


 KATHRYN E. FREED, J.S.C.

CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	
	<input type="checkbox"/>	GRANTED	<input type="checkbox"/>	GRANTED IN PART	<input type="checkbox"/>
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>	SUBMIT ORDER	
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/>
					<input type="checkbox"/>
					REFERENCE