

Yun Quan Gao v Waterfront Resort, Inc.

2021 NY Slip Op 33105(U)

November 16, 2021

Supreme Court, Queens County

Docket Number: Index No. 707824/2018

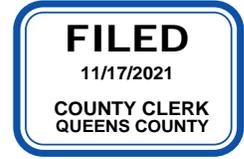
Judge: Chereé A. Buggs

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This opinion is uncorrected and not selected for official publication.

Short Form Order

NEW YORK SUPREME COURT-QUEENS COUNTY



Present: **HONORABLE CHEREÉ A. BUGGS**
Justice

IAS PART 30

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YUN QUAN GAO and QIU YING LIN,

Index No.:707824/2018

Plaintiffs,

Motion
Date: November 10, 2021

-against-

Motion Cal. No.: 8

WATERFRONT RESORT, INC. and KING'S
USA GROUP, INC.

Motion Sequence No.: 8

Defendants.

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WATERFRONT RESORT INC.,

Third-Party Plaintiff,

-against-

WING JAY CONSTRUCTION, INC., WING JAY
CONSULTANTS, INC, and WING JAY
CONSTRUCTION d/b/a WING JAY
CONSULTANTS, INC.,

Third- Party Defendants.

-----X
KING'S USA GROUP, INC.,

Second Third-Party Plaintiff,

-against-

WING JAY CONSTRUCTION, INC., WING JAY
CONSULTANTS, INC., and WING JAY
CONSTRUCTION, d/b/a WING JAY CONSULTANTS,
INC.,

Second Third-Party Defendants.

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The following e-filed papers numbered EF148-173, 176-179 submitted and considered on this motion by Plaintiffs Yun Quan Gao and Qiu Ying Lin (hereinafter “Plaintiffs”) seeking an Order pursuant to Civil Practice Law and Rules (“CPLR”) 3126 of the striking the answer of the defendants for the failure to appear for depositions and compelling the defendants to respond to Plaintiffs’ Notices to Produce, and for such other and further relief as this Court seems just and proper.

	<u>Papers Numbered</u>
Notice of Motion -Affidavits-Exhibits.....	EF148-161
Affirmation in Opposition-Affidavits-Exhibits.....	EF 162-165, 166-173
Reply-Affidavits-Exhibits.....	EF 176-179

Plaintiffs seek an Order pursuant to CPLR 3126 to strike the answer of the defendants for the failure to appear for depositions and compelling the defendants to respond to Plaintiffs’ Notices to Produce dated December 5, 2018, October 17, 2019, August 3, 2020 and April 26, 2021. Plaintiffs also seek the appearance of a witness in response to their Notice of Deposition dated March 23, 2021.

Plaintiff Yun Quan Gao alleged that he fell from a scaffold on May 4, 2018 while performing construction work on property owned by defendant Waterfront Resort, Inc. (hereinafter “Waterfront”). According to Plaintiffs, they served their first Notice to Produce on December 5, 2018. A Preliminary Conference was also held on that date, wherein the Court ordered the parties to appear for depositions on or before March 12, 2019 and to respond to all outstanding discovery demands within 45 days. A Compliance Conference was held on May 20, 2019, wherein the Court ordered the parties to appear for depositions on or before August 20, 2019 and to also respond to outstanding demands within 45 days of said Compliance Conference Order. Plaintiffs served a second Notice to Produce on or about October 17, 2019. Then, on or about August 3, 2020, Plaintiffs served a third Notice to Produce.

Pursuant to a So-Ordered Stipulation dated August 27, 2020, defendants were to appear for depositions on or before October 30, 2020 and to also respond to outstanding demands within twenty days of said stipulation. On March 23, 2021, Choy Ling Lam (hereinafter “Lam”) was produced by Waterfront and defendant General Contractor Kings’ USA (hereinafter “Kings”). Plaintiffs maintained that Lam had almost no knowledge of the construction or scaffold at issue or the accident. Plaintiffs stated that there was a project manager, Benjamin Lam, employed by Waterfront that was required to be produced because he had knowledge of the relevant facts of the case. Thus, Plaintiffs served a Notice of Deposition on March 23, 2021.

Then, Plaintiffs served a fifth Notice to Produce on April 26, 2021. Defendant Wing Jay Construction, Inc. (hereinafter “Wing Jay”) appeared at a deposition on April 27, 2021. Plaintiffs argued that despite Court Orders, all defendants have not adequately and properly provided the outstanding discovery and have refused to produce additional witnesses, thereby causing Plaintiffs

to make this instant application to the Court. Plaintiffs alleged that the defendants' answers should be stricken under CPLR 3126 on the grounds that Plaintiffs have been severely prejudiced by defendants failure to comply with discovery.

Discussion

Pursuant to CPLR § 3126, the drastic remedy of striking an answer is inappropriate absent a clear showing that the failure to comply with discovery demands or orders was willful or contumacious. (*See Teitelbaum v Maimonides Med. Ctr.*, 144 AD3d 1013 [2d Dept 2016].) Willful and contumacious conduct can be inferred from a party's repeated noncompliance with court-ordered discovery, coupled with either no excuses or inadequate explanations. (*See Arpino v F.J.F. & Sons Elec. Co., Inc.*, 102 AD3d 201 [2d Dept 2012].)

In opposition, Waterfront alleged that it had served responses to Plaintiffs' Notices to Produce on June 16 and June 30, 2021. Moreover, there is no evidence of any willful or contumacious conduct warranting the striking of its answer. Waterfront's deposition was deemed completed with the testimony of Lam. Contrary to plaintiffs' allegations, they failed to attach a complete copy of Lam's testimony, which would demonstrate that Lam in fact had knowledge of the facts herein and was an appropriate witness. Non-party depositions were upcoming, including an engineer Ben Lam, the employer's insurance broker, Kenneth Ma of Machite Insurance, deposition was scheduled to be held on July 9, 2021, and defendants' former employee Joyce Khoo, whose deposition was scheduled on August 10, 2021. Plaintiffs' Notice to Produce Benjamin Lam relies upon a news article cited in the moving papers which was dated 6 years prior to the 2018 accident. Benjamin Lam testified on July 1, 2021. It does not state that he was a Waterfront Project Manager or Waterfront employee at the time of the accident, which was denied by its witness at Lam's deposition. Therefore this motion as against Waterfront is now moot and improper.

Although its attorney affirmation and its affidavit of service were not signed or notarized, Wing Jay also opposed the motion, asserting that on June 2, 2021, it had provided a responses to Plaintiffs' Notices to Produce, and, Plaintiffs cannot demonstrate that the failure to comply was either willfull and contumacious and furthermore, the motion as against it is moot. Kings' also opposed the motion, its documentary submissions including the affidavit of Lam dated July 28, 2021, discovery responses and the deposition transcript of Benjamin Lam.

This motion was originally returnable on August 11, 2021, and has been adjourned several times, on September 29, 2021 and October 27, 2021 in an effort for the parties to attempt to resolve all discovery issues. In light of the Plaintiffs' contentions in their reply papers, and the parties contentions at a Microsoft Teams Conference held with the Court on November 11, 2021, issues related to outstanding document discovery have been resolved, and the only remaining dispute is between Plaintiffs and Kings. Plaintiffs alleged that the deposition of King's construction manager/superintendent Fan Cheuk Lin (hereinafter "Lin") is still outstanding, and that it is crucial to this case. In the alternative, Plaintiffs seek an Order precluding Lin from offering any testimony or evidence in this matter, whether it would be an affidavit submitted in motion practice or testimony at trial. Kings alleges that Lin had no connection to the subject project. In Plaintiffs' reply papers,

Plaintiffs asserted that Lam testified that she and her husband own both Waterfront and Kings. Waterfront owns the subject building and Kings is the General Contractor for the project. Plaintiffs stated that Kings provided responsive documents, but the amount of documents provided was lacking in light of this being such a huge construction project, a \$45 million dollar project to build 134-unit condominium complex, and that no accident report or daily reports were provided in discovery. Lam knew very little about construction, the subject project or the accident, and stated that Lin, the project manager, was not present during this three year construction. Plaintiffs allege that Lam’s testimony was “beyond incredible” and that contracts involving the site’s construction manager were only first mentioned during her deposition. Upon the Court’s consideration of the foregoing papers, it is

ORDERED, Plaintiffs’ motion is granted to the extent that Kings is directed to produce Fan Cheuk Lin on or before **December 22, 2021**, and it is further

ORDERED, that the failure of Kings to comply with this Order may result in sanctions, including preclusion from offering any evidence or testimony whether in the form of an affidavit submitted by Lin in motion practice or Lin’s testimony at trial; and it is further

ORDERED, that the time to move for summary judgment shall be extended to **April 20, 2022**.

The foregoing constitutes the decision and Order of this Court.

Dated: November 16, 2021



Hon. Chereé A. Buggs, JSC

