To be argued by:
MICHAEL T. REAGAN
Time Requested: 15 minutes

Supreme Court

State of New York

APPELLATE DIVISION — SECOND DEPARTMENT

DELFINO CARMONA,

Plaintiff-Respondent,

against

Docket No. 2019-04884

HUB PROPERTIES TRUST, HRPT PROPERTIES TRUST,

Defendants-Respondents,

and SKYLINE RESTORATION, INC.,

Defendant,

REIT MANAGEMENT & RESEARCH, LLC,

Defendant-Respondent,

and

SUTTON & EDWARDS MANAGEMENT,

Defendant.

(Caption continued on the inside of cover)

BRIEF FOR SECOND THIRD-PARTY DEFENDANT/FOURTH THIRD-PARTY DEFENDANT-APPELLANT J. DUCHI'S PAINTING CORP.

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SKYLINE RESTORATION, INC.,

Third-Party Plaintiff,

against

TORON RESTORATION CORP.,

Third-Party Defendant.

SKYLINE RESTORATION, INC.,

Second Third-Party Plaintiff,

against

J. DUCHI'S PAINTING CORP.,

Second Third-Party Defendant-Appellant.

DELFINO CARMONA,

Plaintiff-Respondent,

against

COMMONWEALTH REIT and HRPT PROPERTIES TRUST,

Defendants-Respondents.

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PRELIMINARY STATEMENT

The Second Third-Party Defendant/Fourth Third-Party Defendant-Appellant, J. Duchi's Painting Corp., (Duchi's Painting"), submits the within appellate brief in support of its instant appeal from the Order of the Supreme Court, County of Queens, (Hon. Leonard Livote), dated March 18, 2019, which granted Plaintiff-Respondent, Delfino Carmona's, ("plaintiff"), motion, and Defendants/Second Third-Party Plaintiffs/Third Third-Party Plaintiffs/Fourth Third-Party Plaintiffs-Respondents, HUB Properties Trust, HRPT Properties Trust and Reit Management & Research, LLC's, (hereinafter collectively referred to in the singular as "Hub"), cross-motion, each made pursuant to CPLR §3126(2), to strike Duchi's Painting's Answer for failure to appear at court ordered deposition.

SYNOPSIS OF LEGAL ARGUMENT

The drastic sanction of striking an answer for failure to appear at deposition is reserved for when an insurer's investigator makes a casual, one-time attempt to locate a client, and/or secure a witnesses cooperation. Where - *as here* – repeated, good-faith efforts to secure an insurer's insured's cooperation have been made, the striking of the defendant's answer is not warranted. Rather, under such circumstances, it is a sufficient sanction to preclude the defendant from the use of the defendant's testimony at the trial unless defendant submits to examination before the trial.

STATEMENT OF RELEVANT FACTS

This is an action in which plaintiff seeks, *inter alia*, Labor Law §240(1) recovery for personal injuries allegedly sustained in a fall from a scaffold. During discovery facts were uncovered establishing that plaintiff may have been employed by Duchi's Painting on the date of his accident; accordingly, Duchi's Painting was implead as a third-party defendant.

On May 15, 2017 a discovery order was entered into whereby Duchi's Painting was to appear for a deposition on or before July 28, 2017. After counsel for Duchi's Painting was unable to contact its client, in September, 2017, Kenneth J. Parker of KJP Associates, Inc., ("KJP") - an investigation firm licensed by the State of New York – was retained to contact Jose Duchimaza, the Principal of J. Duchi's Painting Corp, to discuss the incident in question and obtain any records that he may have pertaining to the employment of the plaintiff, Delfino Carmona. When KJP first made contact, Mr. Duchimaza informed KJP, by phone, that he never performed any work on Long Island and that he performs all his work in Portchester, New York. Nevertheless, a meeting was scheduled with Mr. Duchimaza, which was to take place on Friday, September 8, 2017. KJP agreed to bring a translator, and contacted Mr. Duchimaza the day before the appointment to confirm. Unfortunately, Mr. Duchimaza did not appear on the agreed upon date, time and place, after which

multiple calls to his phone were unanswered. Multiple messages were left on his phone, in both Spanish and English.

A phone conference was ultimately held with Jose Duchimaza - using a translator - on September 30, 2017. Jose Duchimaza advised that the company belongs to his brother, (German Duchimaza), and that he had no involvement. Jose Duchimaza had no records and again advised Duchi's never performed any work in Mineola.

KJP next contacted German Duchimaza – the individual listed as CEO of Duchi's Painting - by phone. German Duchimaza advised that he did recall plaintiff Carmona. However, as he was driving, a time was scheduled to have a conversation, using a translator. Mr. Duchimaza did not answer his phone at the appointed hour, and multiple messages left in both Spanish and English were not returned.

On Friday, April 27, 2018, KJP traveled to the residence of German Duchimaza in Brooklyn, N.Y. Mrs. Duchimaza answered the door and said that her husband was not at home. We then repeatedly called German Duchimaza's cell phone, and were finally able to speak with him on April 28, 2018. German Duchimaza advised that he was not involved with Duchi's Painting Corp.

On April 29, 2018, we traveled to Connecticut, to the home of Jose Duchima. We were informed by an individual who identified himself as Angel Duchima that Jose Duchima is no longer in the county. Angel Duchima would provide no further

information. The phone number we had for Jose Duchima was found to be disconnected and no longer in service.

In an effort to have German Duchimaza and Jose Duchima appear for deposition, we served them with subpoenas. (Copies are annexed). Neither Jose Duchima nor German Duchimaza responded to the subpoenas.

On August 14, 2018 a court order was entered into whereby Duchi's Painting was to appear for deposition on October 18, 2018.

On August 24, 2018, a deposition subpoena was once again served on Jose Duchima on August 24, 2018 and a deposition subpoena was again served on German Duchimaza on August 25, 2018. Additional copies were served via United States Postal Service. Neither Jose Duchima nor German Duchimaza appeared for deposition on the scheduled date of October 18, 2018.

LEGAL ARGUMENT

There Was No Willful, Contumacious or Bad Faith Conduct

"The nature and degree of a penalty to be imposed under CPLR 3126 for discovery violations is addressed to the court's discretion." Crupi v. Rashid, 157 A.D.3d 858, 859, 67 N.Y.S.3d 478, 478 (2d Dept. 2018). "The general rule is that the court will impose a sanction commensurate with the particular disobedience it is designed to punish and go no further than that." Id. Thus, "[b]efore a court invokes the drastic remedy of striking a pleading, or even of precluding all evidence, there

must be a clear showing that the failure to comply with court-ordered discovery was willful and contumacious." Id., *citing* Zakhidov v. Boulevard Tenants Corp., 96 A.D.3d 737, 739, 945 N.Y.S.2d 756, 757 (2d Dept. 2012) (same); see Roman v. City of New York, 38 A.D.3d 442, 443, 832 N.Y.S.2d 528, 529 (1st Dept. 2007) ("[t]he drastic sanction of striking pleadings is justified only when the moving party shows conclusively that the failure to disclose was willful, contumacious or in bad faith"); Fraracci v. Lasouska, 283 A.D.2d 735, 736, 724 N.Y.S.2d 218, 220 (3rd Dept. 2001) ("the drastic sanction of dismissal of an answer should only be imposed where the moving party makes a clear showing that the defendant willfully or contumaciously failed to comply with an order for disclosure").

"Even in cases where the proffered excuse is less than compelling, there is a strong preference in our law that matters be decided on their merits." Banner v. New York City Hous. Auth., 73 A.D.3d 502, 503, 900 N.Y.S.2d 857 (1st Dept. 2010) *quoting* Catarine v. Beth Israel Med. Ctr., 290 A.D.2d 213, 214, 735 N.Y.S.2d 520 (1st Dept. 2002). As the court noted in Rosen v. Corvalon, 309 A.D.2d 723, 766 N.Y.S.2d 555 (1st Dept. 2003):

> The refusal to strike defendant's answer for failure to appear at scheduled depositions was within the court's broad discretion in the supervision of disclosure. As we have noted, "a court should not resort to striking an answer for failure to comply with discovery directives unless noncompliance is clearly established to be both deliberate and contumacious. Moreover, even where the proffered excuse is less than compelling, there is a strong preference

> in our law that matters be decided on their merits" Defendant provided a reasonable excuse for his failure to appear.

Id, (citations omitted).

"[S]triking an answer is not warranted where good faith efforts have been made to locate a client." Mason v. MTA New York City Transit, 38 A.D.3d 258, 832 N.Y.S.2d 153 (1st Dept., 2007). Rather, this sanction is reserved for when an insurer's investigator makes a casual, one-time attempt to locate a client, and/or secure the witnesses' cooperation. See Montgomery v. Colorado, 179 A.D.2d 401, 402, 577 N.Y.S.2d 851, 852 (1st Dept. 1992) ("[w]hile it is an abuse of discretion to strike an answer upon evidence of a good-faith effort to produce a party for deposition, a casual, superficial and one-time attempt by an investigator to locate the party fails to meet the required showing of good-faith efforts"). As the court noted in Heyward v. Benyarko, 82 A.D.2d 751, 751, 440 N.Y.S.2d 21, 22 (1st Dept. 1981):

> While it is the obligation of the client to remain in contact with his attorney so that the attorney can communicate with him, the client's neglect of that obligation is not equivalent to a willful failure to appear for examination before trial as the client has not been informed of the examination. In the circumstances, we do not think that the real party in interest (presumably the insurance company) should be precluded from defending the action if the client cannot be located.

Id.

Under such circumstances, "it will be a sufficient sanction to preclude the defendant from the use of the defendant's testimony at the trial unless defendant submits to examination before the trial." Id., 82 A.D.2d at 751, 440 N.Y.S.2d at 22; see Campbell v. Peele, 289 A.D.2d 141, 142, 734 N.Y.S.2d 449, 450 (1st Dept. 2001) ("[t]he motion [to strike] was properly denied with a direction precluding the individual defendant from testifying at trial unless she appears for deposition at least 60 days prior to trial, in view of the individual defendant's apparent change of address and defense counsel's ongoing good faith efforts to locate her"); Patel v. DeLeon, 43 A.D.3d 432, 432-33, 840 N.Y.S.2d 632, 633 (2d Dept. 2007) ("[i]n the absence of evidence that the defendant [ ] willfully and contumaciously failed to appear for an examination before trial, the Supreme Court should not have conditionally stricken his answer. The appropriate remedy was to preclude DeLeon from offering any testimony at trial unless he is deposed before the trial").

To illustrate, in Cianciolo v. Trism Specialized Carriers, 274 A.D.2d 369, 711 N.Y.S.2d 441 (2d Dept. 2000) the trial court granted plaintiff's motion and struck the defendant's answer for failure to appear at deposition. Reversing the trial court order, the Appellate Division reasoned as follows:

> We agree with the appellants that it was an improvident exercise of discretion for the Supreme Court to preclude them from offering any testimony at trial. To invoke the drastic remedy of preclusion, which effectively results in the striking of a pleading, the court must determine that the party's failure to comply with a disclosure order was

> the result of willful, deliberate, and contumacious conduct or its equivalent. The record does not support a finding that the appellants willfully and deliberately failed to produce the appellant [ ] for a deposition. Rather, the record shows that counsel for the appellants lost contact with [its client], and that attempts by counsel and a private investigator to locate him were unsuccessful. There was no showing that the appellants were "guilty of a deliberately evasive, misleading and uncooperative course of conduct or a determined strategy of delay that would be deserving of the most vehement condemnation."

Id., 274 A.D.2d at 370, 711 N.Y.S.2d at 442-43 (internal quotations omitted).

The courts have repeatedly recognized that, under the circumstances presented here, is the defendant's insurance carrier which is the real party in interest, such that the striking of defendant's answer for failure to appear at deposition is an unduly harsh penalty, with the issuance of an order of preclusion a more appropriate remedy. See Shorter v. Luxury Auto Rentals, 234 A.D.2d 158, 159, 651 N.Y.S.2d 465, 465 (1st Dept. 1996) (modifying the "motion court's decision precluding the insurance carrier (the real party in interest) from producing witnesses on the issue of liability" (parenthesis in original); Hornedo v. N.Y.C. Transit Auth., 2017 NY Slip Op 32131(U), ¶ 3 (N.Y. Sup. 2017) (after noting that "[c]ounsel's assertion that [the] Court should decline to strike [defendants'] answer [was] unsupported by an adequately detailed explanation of the reasonable, good-faith efforts undertaken to locate them," holding that "[u]nder the circumstances …and in keeping with the need to consider that the real party in interest on behalf of [defendants] [was]

presumably an insurance company," holding "it [was] more appropriate to preclude said defendants from offering testimony as to liability rather than to strike their answer").

In this matter, Duchi's Painting's investigator, KJD, made significant, *repeated* attempts to secure the cooperation of Jose and German Duchimaza, unfortunately to no avail. However, the real party in interest is Duchi's Painting's insurer, and it was an unduly harsh and unwarranted penalty to strike Duchi's Painting's for the conduct of its insureds, over which it had no control. Thus, the proper sanction would have been preclusion.

CONCLUSION

For all the foregoing reasons, the Second Third-Party Defendant/Fourth Third-Party Defendant-Appellant, J. Duchi's Painting Corp., respectfully submits that the Order of the Supreme Court, County of Queens, (Hon. Leonard Livote), dated March 18, 2019, which granted Plaintiff-Respondent, Delfino Carmona's, ("plaintiff"), motion, and Defendants/Second Third-Party Plaintiffs/Third Third-Party Plaintiffs/Fourth Third-Party Plaintiffs-Respondents, HUB Properties Trust, HRPT Properties Trust and Reit Management & Research, LLC's, cross-motion to strike Duchi's Painting's Answer for failure to appear at court ordered deposition, should be reversed.

Respectfully submitted,

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PRINTING SPECIFICATIONS STATEMENT

Pursuant to 22 NYCRR 1250.8(b)(6) & (J), the undersigned counsel certifies that the Brief of Second Third-Party Defendant/Fourth Third-Party Defendant-Appellant, J. Duchi's Painting Corp., is in Times New Roman proportionally spaced typeface, 14-point size (Microsoft Office Word 2013), and that the entire Brief, excluding Point headings and footnotes, is double-spaced, that the footnotes are spaced typeface in 12 point size (Microsoft Office Word 2013), and that the Brief contains 2,121 words as computed by Microsoft Office Word 2013.

Dated: Uniondale, New York
November 12, 2019.