

**New Empire Bldr. Corp. v Onboard Hospitality LLC**

2024 NY Slip Op 34199(U)

November 25, 2024

Supreme Court, New York County

Docket Number: Index No. 652533/2020

Judge: Nancy M. Bannon

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This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY**

**PRESENT:** HON. NANCY M. BANNON **PART** **61M**

*Justice*

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NEW EMPIRE BUILDER CORP.,  
Plaintiff,

- v -

ONBOARD HOSPITALITY LLC et al  
Defendants.

-----X

**INDEX NO.** 652533/2020  
**MOTION DATE** 07/19/2024  
**MOTION SEQ. NO.** 010

**DECISION + ORDER ON  
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 010) 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340

were read on this motion to/for DISCOVERY.

In this breach of contract action concerning a construction agreement between the plaintiff, New Empire Builder Corp. (“New Empire”) and defendant Onboard Hospitality LLC (“Onboard”), the court (Ostrager, J. [Ret.]) held a preliminary conference on December 9, 2020, and issued an order setting February 4, 2022, as the Note of Issue filing deadline. Since that preliminary conference, numerous discovery conferences have been held, seven additional motions were filed, and the parties appear to have expended much time and effort needlessly attacking each other in filings and letters to the court. Additionally, the Note of Issue filing deadline was extended to November 30, 2023, and then again to January 31, 2024.

In a status conference order dated October 4, 2023, Justice Ostrager opined that, “[n]otwithstanding prior admonitions to the parties to meet and confer to resolve discovery issues in this 2020 case, there are still unresolved discovery issues occasioned by the fact that counsel do not appear to talk with each other to resolve the discovery issues through productive meet and confer sessions.” In that order, Justice Ostrager directed that the parties were free to make motions to compel but that the Note of Issue filing date remained January 31, 2024.

On October 27, 2023, New Empire moved, *inter alia*, pursuant to CPLR 3124 to compel Onboard to produce documents pertaining to work and repairs to the foundation of the subject

construction project by non-party Saenz Corporation (“Saenz”), and pursuant to CPLR 3126 to sanction Onboard for its failure to comply with discovery demands by precluding it from submitting evidence at trial in support of its defense (MOT SEQ 009). Pursuant to an order dated December 20, 2023, and a stipulation so-ordered by the court (Ostrager, J. [Ret.]) the same day, MOT SEQ 009 was withdrawn based on Onboard’s production, as relevant here, of affidavits from its principal, John Sharma, and its office administrator, Praveen George, stating that they had conducted a search of Onboard’s records and that there were no additional documents responsive to New Empire’s discovery demands that had not already been produced. No Note of Issue was filed by the deadline of January 31, 2024.

In a status conference order dated April 5, 2024, this court noted that no Note of Issue had been timely filed nor was a motion made to extend the deadline. The court further noted that no depositions had yet been conducted due to discord between the parties’ counsel, which does not constitute a reasonable excuse for failing to comply with court-ordered deadlines. The court nevertheless granted a further extension of the Note of Issue deadline, to June 28, 2024, to allow the parties time to conduct depositions. No extensions were granted for additional document discovery. The new Note of Issue deadline was marked “Final – No Extensions.”

In a status conference order dated June 6, 2024, the court set new deadlines for the completion of certain depositions that still remained outstanding, without reasonable excuse, but declined to allow New Empire to serve additional document demands or to further extend the Note of Issue deadline, which remained June 28, 2024. Once again, the Note of Issue deadline was marked “Final – No Extensions.” Once again, no Note of Issue was filed by the deadline.

On June 29, 2024, New Empire filed the instant motion (MOT SEQ 010), which is effectively a modified version of its prior discovery motion (MOT SEQ 009). The present motion seeks, pursuant to CPLR 3126, (i) to strike Onboard’s answer and affirmative defenses for failure to comply with discovery demands by withholding documents concerning work done by Saenz on the foundation of the subject construction project, and (ii) to preclude Onboard from offering a defense at trial and/or submitting evidence at trial concerning work done by Saenz. In the alternative, New Empire seeks a further extension of the Note of Issue deadline and to compel Onboard to provide additional discovery responses and produce additional responsive documents concerning the work purportedly done by Saenz. New Empire contends, in effect, that testimony given by Sharma at his deposition on May 3, 2024, reveals that Onboard has

pertinent documents responsive to New Empire's demands that were not disclosed in discovery. Onboard opposes the motion.

In light of the procedural history set forth above, dating from June of 2020, New Empire has not demonstrated entitlement to any of the relief sought by its motion

After extending the initial Note of Issue deadline by almost two years, Justice Ostrager made clear to the parties that, while they could pursue motions to compel additional discovery, the Note of Issue deadline would remain January 31, 2024. After New Empire ignored that deadline entirely, the parties were given a further extension of the Note of Issue deadline to June 28, 2024. However, the court made clear in consecutive status conference orders that this deadline was final and would not be further extended. New Empire has not, at any point, provided a reasonable excuse for failing to timely complete discovery and file the Note of Issue.

No relief is warranted against Onboard pursuant to CPLR 3126. The statute authorizes the court to sanction a party who "refuses to obey an order for disclosure or willfully fails to disclose information which the court finds ought to have been disclosed" and that "a failure to comply with discovery, particularly after a court order has been issued, may constitute the "dilatatory and obstructive, and thus contumacious, conduct warranting the striking of the [pleading]." Kutner v Feiden, Dweck & Sladkus, 223 AD2d 488, 489 (1<sup>st</sup> Dept. 1998); see CDR Creances S.A. v Cohen, 104 AD3d 17 (1<sup>st</sup> Dept. 2012); Reidel v Ryder TRS, Inc., 13 AD3d 170 (1<sup>st</sup> Dept. 2004). However, New Empire does not demonstrate that Onboard has failed to comply with any court orders directing the production of the additional discovery sought by the present motion. Nor does New Empire demonstrate a willful failure to disclose information responsive to its discovery demands. Contrary to New Empire's contention, Sharma's deposition testimony, taken as a whole, does not clearly demonstrate that Onboard has additional documents in its possession responsive to New Empire's discovery demands that ought to have been disclosed. In any event, Sharma's deposition was conducted on May 3, 2024, but New Empire did not file the present motion until June 29, 2024, after the Note of Issue deadline had already passed.

In considering a motion seeking to extend the time to file a Note of Issue, the court "may properly consider factors such as the length of the delay, whether the opposing party has been prejudiced by the delay, the reason given for the delay [and] whether the moving party was in default before seeking the extension." Grant v City of New York, 17 AD3d 215, 217 (1<sup>st</sup> Dept.

2005) *quoting* Tewari v Tsoutsouras, 75 NY2d 1,12 (1989). Considering these factors, no extension is warranted here. New Empire defaulted not once, but twice, on the deadline to file the Note of Issue. Moreover, since all discovery deadlines have long passed, any request for additional documents is untimely, and no further discovery will be directed. Indeed, the original deadline for completing document production was May 28, 2021. The extension of the Note of Issue deadline from January 31, 2024, to June 28, 2024, was solely to allow time for the completion of depositions. No additional time was given for further document discovery. To the contrary, the court’s status conference order dated June 6, 2024, expressly declined to allow additional document discovery.

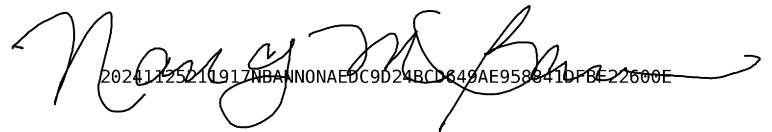
Simply put, New Empire ran itself out of time on this case, without excuse, even before it was re-assigned to this court. It was nevertheless lucky enough to receive a further five-month extension of the Note of Issue deadline, but it again defaulted by failing to timely file the Note of Issue without reasonable excuse. Therefore, its motion is denied in its entirety. However, the option of settlement remains, and the parties shall immediately meet and confer in that regard.

Accordingly, upon the foregoing papers and the court’s prior orders, it is

ORDERED that the plaintiff’s motion is denied in its entirety, and it is further

ORDERED that the parties shall promptly comply with any ADR order issued by the court.

This constitutes the Decision and Order of the court.



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11/25/2024  
DATE

NANCY M. BANNON, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE