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### 1515 Macombs LLC v. C.V.

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[\*1]

<b>1515 Macombs LLC v C.V.</b>
2023 NY Slip Op 50514(U)
Decided on March 7, 2023
Civil Court Of The City Of New York, Bronx County
Ibrahim, J.
Published by <a href="#">New York State Law Reporting Bureau</a> pursuant to Judiciary Law § 431.
This opinion is uncorrected and will not be published in the printed Official Reports.

Decided on March 7, 2023

Civil Court of the City of New York, Bronx County

<p><b>1515 Macombs LLC, Petitioner,</b></p> <p><b>against</b></p> <p><b>C.V., Respondent-Tenant.</b></p>
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L&T Index No. 36395-2019

Petitioner represented by:

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Legal Services NYC- Bronx

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Shorab Ibrahim, J.

RECITATION, AS REQUIRED BY CPLR 2219(A), OF THE PAPERS CONSIDERED IN THE REVIEW OF THIS MOTION BY THE RESPONDENTS TO DISMISS THE CASE OR STRIKE THE PLEADINGS PURSUANT TO CPLR § 3126: NYSCEF

Documents No. 23 through 43, 45. [FN1](#)

UPON THE FOREGOING CITED PAPERS, THE DECISION/ORDER IN THIS MOTION IS AS FOLLOWS:

### DISCUSSION

For the purpose of deciding the instant motion, the relevant facts are as follows: on January 13, 2020, petitioner stipulated it would provide all non-publicly available documents associated with the allegations comprising the Notice of Intent Not to Renew. (*see* NYSCEF DOC 38). Petitioner agreed to comply by January 31, 2020. (*id.*). At that time, it was Maxima De La Rosa requesting the documents. Maxima De La Rosa passed away during this proceeding. However, the matter continues against her son, C.V. Mr. V. is noted as a tenant in the predicate notice and the petition, (*see* NYSCEF Doc. 20, Decision and Order on Mot. Seq. 2), though he was a minor when the matter commenced.

After this court denied respondent's prior motion to dismiss, (*id.*), respondent moved for discovery. (*see* NYSCEF Doc. 23). On November 17, 2022, the parties settled the discovery motion by stipulation wherein petitioner agreed to provide discovery responses by December 30, [\*2]2022, almost three (3) years after petitioner originally agreed to provide documents. (*see* NYSCEF Doc. 32). It was understood that C.V. was requesting the same documents that Maxima De La Rosa did in January 2020. [FN2](#) Critically, the stipulation provides, "upon petitioner's failure to provide discovery responses by 12/30/22, petitioner will be precluded from offering responsive documents at trial." (*id.*). That negotiated settlement must be treated as a conditional stipulation of preclusion. (*see e.g. Khan v Old Navy*, 166 AD3d 599, 600 [2nd Dept 2018] (stipulation functioned as a conditional order of preclusion; to avoid its adverse impact, a party is required to demonstrate a reasonable excuse for its failure to comply with its terms and a potentially meritorious claim); *see also, Luo v Yang*, 150 AD3d 726, 727 [2nd Dept 2017] (A conditional order of preclusion requires a party to provide certain discovery by a date certain, or face the sanctions specified in the order) [citations omitted]; *Silva v Lakins*, 118 AD3d 556 [1st Dept 2014]). Petitioner has not moved to vacate the November 17, 2022 stipulation or sought an extension of time to comply with its requirements.

Respondent now moves to dismiss the proceeding or to strike the pleadings. Both requests are made pursuant to CPLR § 3126. Petitioner's opposition consists of an attorney affirmation alleging that petitioner did not comply with the December 30, 2022 deadline because the parties were discussing a global settlement. The matter is fully briefed and was

argued on March 3, 2023.

For the reasons stated below, the motion must be denied.

CPLR § 3126 relief may be sought when a party allegedly fails to comply with disclosure requirements. Various relief can be sought:

1. an order that the issues to which the information is relevant shall be deemed resolved for purposes of the action in accordance with the claims of the party obtaining the order; *or*
2. an order prohibiting the disobedient party from supporting or opposing designated claims or defenses, from producing in evidence designated things or items of testimony, or from introducing any evidence of the physical, mental or blood condition sought to be determined, or from using certain witnesses; *or*
3. an order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or any part thereof, or rendering a judgment by default against the disobedient party. [emphasis added].

Here, the parties charted their course. It was decided among them that if the petitioner did not comply by a date certain, certain documents would be precluded. (*see* CPLR § 3126 (2)). That was the bargain *both* sides made. Petitioner must abide by it and so must respondent. Petitioner's self-serving allegations that it was because of ongoing settlement discussions that records were not produced are afforded no weight by the court. Petitioner signed an unequivocal stipulation that precludes evidence if documents were not produced by a date certain. It acted at its own peril by choosing not to produce those documents.

The court notes that the discovery request included interrogatories; the failure to provide same might have precluded petitioner from providing testimony related to those items. However, the November 17, 2022 stipulation specifically and unequivocally only precludes responsive *documents*.

CPLR § 3126 uses the word "or" rather than "and." This indicates that only one form of sanction can be meted out against the non-cooperating party. Of course, there may be times when an order precluding certain evidence may operate to preclude a party from proving a claim. Those circumstances might require dismissal. ([\*see Ubozoh v Mueller, 204 AD3d 485\*](#) [1st Dept 2022]) (Since plaintiff cannot offer medical evidence of her alleged injuries, she will not be able to meet her threshold burden of showing that she sustained a serious injury as a result of the motor vehicle accident. As a result, plaintiff will not be able to make a prima

facie case, and the complaint should be dismissed in its entirety.)).

To the extent that respondent's motion might be considered one for summary judgement [\[FN3\]](#) [given that the petitioner is precluded from offering the type of documentary evidence normally needed to establish a non-primary residence claim], it must also be denied. It is not uncommon for a respondent to prove certain defenses at trial with mostly testimonial evidence. ([see 530 Second Ave. Co. LLC v Zenker, 160 AD3d 160](#) [1st Dept 2018] (the absence of documentary evidence does not undermine a succession rights claim when the totality of the testimonial evidence, as here, establishes the requisite emotional and financial commitment) *citing Arnie Realty Corp. v Torres*, 294 AD2d 193, 193-194 [1st Dept 2002]; (*178 E. 70th St., LLC v. Weismann*, 2018 NY Slip Op. 51717(U), \*1 [App Term, 1st Dept 2018] (the lack of formalization of legal and financial obligations between respondent and tenant, is not dispositive and does not preponderate over the plausible and credited testimonial evidence); *Roberts Ave. Assocs. v Sullivan*, 2003 NY Slip Op 50191(U), \*1 (App Term, 1st Dept 2003 (The absence of documentary evidence of intermingling of finances does not undermine respondent's claim where the parties had limited assets, and where other criteria for succession are present); *300 E. 34th St. Co. v Habeeb*, 248 AD2d 50 [1st Dept 1997])).

On the petitioners' side, nuisance claims are routinely established through testimony. ([see e.g. 17th Holding, LLC v Rivera, 21 Misc 3d 55](#), 56-58 [App Term, 2nd Dept 2008]; [405 East 56th Street, LLC v Morano, 19 Misc 3d 62](#), 63 [App Term, 1st Dept 2008]). It is possible, in theory, for petitioner to prove that C.V. did not primarily reside in the subject apartment during the relevant time period with testimonial evidence and whatever documentary evidence is not precluded. (*compare Ubozoh v Mueller*, 204 AD3d at 485). The court notes that only non-publicly available documents have been precluded. Likewise, respondent bound itself to preclusion. There have been no *subsequent* events which support dismissal.

### CONCLUSION

For these reasons, respondent's motion is denied in all respects. The parties are directed to appear for pre-trial conference on March 30, 2023, at 2:15PM. This constitutes the Decision of the court. It will be posted on NYSCEF.

Dated: March 7, 2023  
Bronx, New York  
SO ORDERED,

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HON. SHORAB IBRAHIM  
JUDGE, HOUSING PART I

### Footnotes

**Footnote 1:** Documents 33-43 and 45 relate to the instant motion (seq. 4). The other cited documents relate to seq. 3 (respondent's motion seeking discovery). As there is reference to those papers herein, they are cited.

**Footnote 2:** The November 2022 stipulation references the January 2020 stipulation.

**Footnote 3:** Post answer, a motion to dismiss ought to be characterized as one for summary judgment. ([see \*Shephard v Friedlander\*, 195 AD3d 1191](#), n. 1 [3rd Dept 2021]).

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