

MP145 WS Owner LLC v Pace Cos. N.Y., LLC

2024 NY Slip Op 31446(U)

April 16, 2024

Supreme Court, New York County

Docket Number: Index No. 654556/2021

Judge: Andrew Borrok

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 53

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MP145 WS OWNER LLC, 10 HURON FS CONDO LLC, 19
INDIA FEE OWNER LLC,

Plaintiff,

- v -

THE PACE COMPANIES NEW YORK, LLC D/B/A THE
PACE COMPANIES, EDWARDS AND ZUCK,
P.C., ISMAEL LEYVA ARCHITECT, P.C., STANTEC
INC., NOBLE CONSTRUCTION GROUP, LLC, 23 INDIA
RU OWNER LLC, 23 INDIA CU OWNER

Defendant.

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INDEX NO. 654556/2021
MOTION DATE 01/19/2024,
01/26/2024
MOTION SEQ. NO. 006 007

**DECISION + ORDER ON
MOTION**

HON. ANDREW BORROK:

The following e-filed documents, listed by NYSCEF document number (Motion 006) 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 210, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240

were read on this motion to/for DISCOVERY.

The following e-filed documents, listed by NYSCEF document number (Motion 007) 203, 204, 205, 206, 207, 208, 209, 211, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 225

were read on this motion to/for DISMISS.

Upon the foregoing documents and for the reasons stated on the record (*tr.* 4.15.24), the Defendant Pace Companies New York LLC (**Pace**)’s motion to dismiss (Mtn. Seq. No. 007) is granted solely to the extent that the Plaintiff MP145 WS Owner LLC’s claims against Pace are dismissed because MP145 WS Owner LLC does not have standing and, as the Plaintiff admits, MP145 WS Owner LLC does not assert claims against Pace in this case. The Defendant’s motion is otherwise denied at this stage of the litigation because the Close-Out Agreement is a valid liquidation agreement and purports to assign the right to assert the claims asserted in this lawsuit to the Plaintiffs 10 Huron FS Condo LLC and 19 India Fee Owner LLC. Section 8 of the Close-Out Agreement provides that (1) the general contractor (**Noble**) admits liability to the Plaintiffs

10 Huron FS Condo LLC and 19 India Fee Owner LLC (the **Close-Out Plaintiffs**) for increased costs caused by Noble's subcontractors, including Pace, (2) liquidates Noble's liability in the amount the Close-Out Plaintiffs can recover in this action against Pace, and (3) provides for a pass-through of that recovery (80% of net recovery to the Close-Out Plaintiffs, 20% of the net recovery to Noble) (NYSCEF Doc. No. 206, § 8; *Bovis Lend Lease LMB Inc. v GCT Venture, Inc.*, 285 AD2d 68, 70 [1st Dept 2001]). The plain language of the Close-Out Agreement makes clear the parties' intent to assign Noble's claims to the Close-Out Plaintiffs and allow them to sue upon these claims (*Tyree Org., Ltd. v Cashin Assoc., P.C.*, 14 Misc 3d 1220(A) [NY Sup 2007], citing *Am. Banana Co., Inc. v Venezolana Internacional de Aviacion S. A. (VIASA)*, 67 AD2d 613 [1st Dept 1979]). Pace simply is not entitled to dismissal based on the fact that the provision does not use the magic word "assign."

With respect to the motion to compel (Mtn. Seq. No. 006), an issue was brought to the Court's attention at oral argument. Adam Levy testified at his deposition that after a litigation hold was in place, a server crash occurred at Pace and that there was a 90% loss of documents. In opposition to the motion compel and to induce this Court to find that Pace had met its discovery obligation, Pace submitted an affidavit of Mr. Joon Choi (NYSCEF Doc. No. 230). The affidavit is materially misleading. To wit, the affidavit makes no mention of the server crash, when the server crash occurred, what caused the server crash, or the fact that the search may well be deficient because it is missing an alleged 90% of the documents. It only indicates that a search was performed and that all responsive documents found were produced.

Although the Plaintiffs requested costs and an adverse inference, the record is not sufficiently developed yet to warrant sanctions. The Plaintiffs are however entitled to post-EBT discovery from both Mssrs. Levy and Choi as to the server crash, an updated affidavit from Mr. Choi addressing this issue which his affidavit fails to mention and potentially a forensic examination of the server if the documents are not backed up elsewhere and made available to the Plaintiffs immediately. Following that, the Plaintiffs may, if appropriate, move by order to show cause for appropriate sanctions and relief.

Accordingly, it is hereby

ORDERED that the Defendant's motion to dismiss (Mtn. Seq. No. 007) is granted to the extent set forth on the record and otherwise denied; and it is further

ORDERED that the Plaintiffs' motion to compel is granted to the extent set forth on the record; and it is further

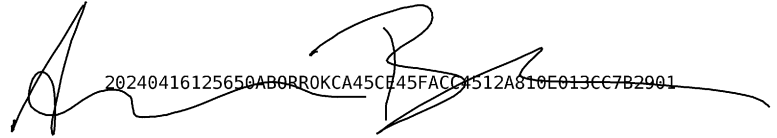
ORDERED that the Plaintiffs issue any supplemental discovery requests on or before April 19, 2024; and it is further

ORDERED that Pace shall submit the supplemental affidavit and responses to the Plaintiffs' post-EBT demands on or before May 6, 2024; and it is further

ORDERED that leave is granted to the Plaintiff to move by order to show cause to seek discovery sanctions, if appropriate.

4/16/2024

DATE



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ANDREW BORROK, J.S.C.

CHECK ONE:

CASE DISPOSED

GRANTED

SETTLE ORDER

INCLUDES TRANSFER/REASSIGN

DENIED

NON-FINAL DISPOSITION

GRANTED IN PART

SUBMIT ORDER

FIDUCIARY APPOINTMENT

OTHER

REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: