

**Atlantic Demolition Corp. v Consolidated Edison Co.
of N.Y., Inc.**

2007 NY Slip Op 30636(U)

April 9, 2007

Supreme Court, New York County

Docket Number: 0600478/2004

Judge: Sherry Klein Heitler

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

PRESENT: Sherry Klein HEITLER
Justice

PART 30

A TLANTIC DEMOLITION CORP

INDEX NO.

600478/04

- v -

CONSOLIDATED EDISON COMPANY
OF NEW YORK, INC.

MOTION DATE

MOTION SEQ. NO.

03

MOTION CAL. NO.

The following papers, numbered 1 to _____ were read on this motion to/for _____

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

is decided in accordance with the
memorandum decision dated 4.9.07

FILED

APR 11 2007

NEW YORK
COUNTY CLERK'S OFFICE

Dated: 4.9.07

Sherry Klein Heitler
HON. SHERRY KLEIN HEITLER
J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 30**

----- X
ATLANTIC DEMOLITION CORP.,

Plaintiff,

- against -

Index No. 600478/04

DECISION AND ORDER

CONSOLIDATED EDISON COMPANY OF
NEW YORK, INC.,

Defendant.

----- X
ATLANTIC DEMOLITION CORP.,

Third-Party Plaintiff,

- against -

BEDROCK DEVELOPMENT, INC.,

Third-Party Defendant.

----- X
PINNACLE ENVIRONMENTAL CORP.,

Plaintiff,

- against -

ATLANTIC DEMOLITION CORP. and
CONSOLIDATED EDISON COMPANY OF
NEW YORK, INC.,

Defendants.

----- X
BEDROCK DEVELOPMENT, INC.,

Third-Party Plaintiff,

- against -

ATLANTIC DEMOLITION CORP. and
CONSOLIDATED EDISON COMPANY OF
NEW YORK, INC.,

Third-Party Defendants.

----- X
SHERRY KLEIN HEITLER, J.:

Atlantic Demolition Corp. (Atlantic) moves for an order: (1) compelling Bedrock Development, Inc. (Bedrock) and non-party Sean Flaherty (Flaherty) to provide the name, address, and telephone number of the owner of the warehouse where Bedrock's documents are stored; (2)

compelling Bedrock and Flaherty to provide written consents for access to the warehouse documents, and to produce the documents demanded by its CPLR 3111 notice dated July 28, 2006; (3) granting it leave to take follow-up discovery of Bedrock and/or witnesses that Bedrock identified who have documents that Bedrock may be lacking; and (4) in the alternative, striking all of Bedrock's pleadings.

Consolidated Edison Company of New York (Con Ed) cross-moves for summary judgment dismissing Bedrock's claims against it for failure to produce relevant documents, and cancelling and discharging Bedrock's lien.

Subsequent to the filing of its motion, Atlantic learned that the evidence that it seeks is no longer available (as discussed below). Thus, Atlantic, as is the case with Con Ed, seeks sanctions dismissing Bedrock's claims and counterclaims.

The following is culled from the parties' pleadings. In February 2002, Atlantic and Con Ed entered into a contract for the demolition of large equipment at a Con Ed generating station located at 506 East 75th Street, New York, New York (Project). In April 2002, Atlantic, as general contractor, hired Bedrock, as subcontractor, to perform the demolition work on the Project on Atlantic's behalf. Atlantic also entered into a contract with Pinnacle Environmental Corp. (Pinnacle) to perform asbestos, lead abatement, and other related work on the Project.

Atlantic alleges that it had completed most of its work when, on December 19, 2003, Con Ed halted the work on the Project. Atlantic seeks payment from Con Ed for the work that it performed on Con Ed's behalf, as well as payment for lost past and future income and profits, and the value of an ongoing, successful business.

Con Ed contends that Atlantic materially breached their contract because it performed poorly and caused an inexcusable delay as it failed to timely perform its work which caused Con Ed to be

cited or advised of safety and environmental concerns. In its counterclaims, Con Ed seeks judgment in the amount of \$514,258.31, for the costs that it allegedly incurred by retaining another contractor to complete the work remaining after it terminated Atlantic.

As against Bedrock, Atlantic alleges that: (1) Bedrock is liable for indemnification or contribution for any alleged breaches of contract that Con Ed asserts against it; (2) Bedrock breached its contract with it by failing to perform its work and failing to pay its expenses; (3) it overpaid Bedrock by paying it \$301,127.21, although Bedrock earned only \$144,800; (4) Bedrock breached its contract by filing an improper mechanic's lien that should be removed; and (5) Bedrock owes it \$7,000 for the unpaid balance due for work that Atlantic performed for Bedrock on a job for the Transit Authority on Stillwater Avenue in Brooklyn, New York.

Bedrock seeks a judgment against Con Ed and Atlantic in the amount of \$288,000, alleging that, during the course of its work on the Project, Atlantic authorized it to perform \$1 million of additional work. Bedrock claims that at the time that Con Ed issued the stop work order, it had provided labor in the amount of \$334,000, and provided \$66,000 of materials on the Project, but that Atlantic has paid it only \$117,000 for its work, although Atlantic has received in excess of \$350,000 for the work performed by Bedrock. Bedrock contends that it supplied labor and material for the Project in reliance on Con Ed's and Atlantic's forthcoming payment.¹

Pinnacle's action against Atlantic and Con Ed is based on the allegation that these defendants are in breach of contract by failing to pay it the full amount of the agreed-upon contractual price of \$857,647.62 for its work on the Project.

As for these motions, Atlantic contends that, prior to Bedrock's deposition, it served Bedrock with a request for documents pursuant to CPLR 3111, but that Bedrock did not bring any documents,

¹ The mathematical inconsistency is contained in Bedrock's pleadings.

contending that they were in a warehouse in Hempstead, New York, and that it could not get access to them for failure to pay its warehousing bill. Atlantic argues that the documents are essential because Bedrock claims entitlement to approximately \$300,000 for extra work, and these documents would support or refute such claim.

Con Ed also contends that Bedrock has not produced relevant documents that it requested relating to Bedrock's claim for damages of \$288,000, including Bedrock's bid preparation materials, time sheets supporting all the invoices for work paid for and unpaid, receipts supporting Bedrock's monthly expenses, and support for the extra work invoices. Con Ed contends that it cannot defend itself against Bedrock's claim without Bedrock's project records which would show the value of the unpaid contract work, material furnished, and the unpaid extra labor charges.

Movants also assert that, since at least December 2003, Bedrock had an obligation to safeguard the Project documents, and Bedrock was on notice that the evidence might be needed for future litigation.

According to Flaherty, Bedrock's president, the warehouse denied him access to the facility to retrieve the documents because Bedrock owes the warehouse \$19,000. Flaherty also claims that, unbeknownst to him, the warehouse discarded all of Bedrock's business properties and belongings that were kept in storage, including the documents sought by movants. He contends, however, that the failure to obtain the documents hindered its own case against Atlantic and Con Ed, but there are additional existing documents, already produced, that can be used to reconstruct the labor costs associated with Bedrock's claim for damages, including a number of invoices that reflect the number of employees, the hours worked, and the wages earned for the additional work that Bedrock claims in its complaint.

Atlantic's and Con Ed's motions request for sanctions is granted to the extent set forth below. The record establishes that Bedrock failed to take adequate steps to ensure the preservation of its warehouse-stored documents. Assuming the validity of Bedrock's own admission, the warehouse destroyed the documentation because it failed to pay a warehouse bill of \$19,000. Yet, Bedrock does not contend that it took any steps to prevent this by, for example, communicating to the warehouse that it, as well as other parties, needed the documents for purposes of on-going or potential litigation. Indeed, Bedrock was on notice since at least December 29, 2003 (which is the notarization date of its first notice of lien) of the relevancy of those documents. Bedrock further concedes that it had access to the storage facility through early 2005, more than a year and a half after Bedrock was served with a third party complaint. Spoliation sanctions are not limited to cases where evidence was destroyed willfully or in bad faith, because a party's negligent loss of evidence can be just as fatal to another party's ability to present a case or a defense (*Squitieri v City of New York*, 248 AD2d 201, 202 [1st Dept 1998]; *Adrian v Good Neighbor Apt. Assoc.*, 277 AD2d 146 [1st Dept 2000], *lv dismissed* 96 NY2d 754 [2001]).

The request to strike the pleadings is denied. CPLR 3126 affords a court broad discretion to sanction a party for failing to comply with a discovery order, or for destroying evidence prior to an adversary's inspection (*Sage Realty Corp. v Proskauer Rose LLP*, 275 AD2d 11, 16 [1st Dept 2000], *lv dismissed* 96 NY2d 937 [2001]). To further the policy that favors resolving actions on the merits, however, a court should only impose the drastic remedy of striking a party's pleadings when the discovery noncompliance was wilful, contumacious, or in bad faith (*Postel v New York Univ. Hosp.*, 262 AD2d 40, 41 [1st Dept 1999]). Striking pleadings, which would be tantamount to dismissal, would be too drastic where the opposition is not bereft of other evidence (*Cohen Bros. Realty v Rosenberg Elec. Contrs.*, 265 AD2d 242 [1st Dept 1999], *lv dismissed* 95 NY2d 791

[2000]). It does not appear that the missing documentation is the only relevant evidence pertaining to the claims at issue.

Under the circumstances in this case the court finds that a missing document charge is an appropriate sanction for the loss of this evidence (*Melendez v City of New York*, 2 AD3d 170 [1st Dept 2003]; *Balaskonis v HRH Constr. Corp.*, 1 AD3d 120 [1st Dept 2003]). This charge is suitable because, as discussed above, Bedrock failed to provide a reasonable excuse for the failure to produce the documents (*Dwight v New York City Tr. Auth.*, 30 AD3d 270 [1st Dept], *lv denied* 7 NY3d 711 [2006]). A missing document charge will give the jurors an opportunity to consider the effect of not producing the documents (*Bin Xin Tan v St. Vincent's Hosp. & Med. Ctr. of N.Y.*, 294 AD2d 122 [1st Dept 2002]).

Con Ed cross-moved to discharge the lien; Bedrock filed its lien on February 13, 2004 and it filed one extension in February 2005. Lien Law § 17 provides that a mechanic's lien survives for only one year, unless extended by order, by affidavit duly recorded, or, within that one-year period, the lienor commences an action to foreclose the lien and files a notice of pendency.

It is uncontroverted that Bedrock did not file any other extensions. Bedrock contends, however, that its lien continues because Pinnacle filed a mechanic's lien against Atlantic and Con Ed in May 2004, and, on April 26, 2005, it filed a lis pendens and formal complaint to foreclose on its mechanic's lien. It asserts further that, at the time of the foreclosure action, Bedrock's mechanic's lien was valid and, therefore, pursuant to Lien Law § 17, Pinnacle's filing of its foreclosure action effected a continuance of Bedrock's lien. This assertion is unpersuasive. Lien Law § 17 provides:

“If a lienor is made a party defendant in an action to enforce another lien, and the plaintiff or such defendant has filed a notice of the pendency of the action within the time prescribed in this section, the lien of such defendant is thereby continued.”

Bedrock cannot rely on this section of the Lien Law because Pinnacle did not make Bedrock a defendant in its action against Atlantic and Con Ed (*Matter of Assay Partners v Econowatt Corp.*, 176 AD2d 180 [1st Dept 1991]). Hence, the request to discharge the lien is granted because Bedrock failed to timely extend the lien (*D.A.G. Floors, Inc. v St. Paul Mercury Ins. Co.*, 35 AD3d 207 [1st Dept 2006]).

Accordingly, it is

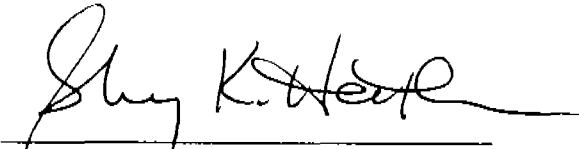
ORDERED that the motion by Atlantic Development Corp. and the cross motion by Consolidated Edison Company of New York for sanctions against Bedrock Development, Inc. is granted to the extent that these parties, in the event that this matter is submitted to the trier of fact, are entitled to a missing document charge pursuant to Pattern Jury Instructions - Civil - 1:77; and it is further

ORDERED that the cross motion by Consolidated Edison Company of New York for an order discharging the mechanic's lien filed by Bedrock Development, Inc. against Block 1486, Lot 5, located at 506 East 75th Street, New York, New York, is granted.

This shall constitute the decision and order of the court.

DATED: APRIL 9, 2007

FILED
APR 11 2007
NEW YORK
COUNTY CLERK'S OFFICE



SHERRY KLEIN HEITLER
J.S.C.