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| Ben Krupinski Builder v Baum |
| 2007 NY Slip Op 31191(U) |
| May 10, 2007 |
| Supreme Court, Suffolk County |
| Docket Number: 0027146/2004 |
| Judge: Melvyn Tanenbaum |
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**SUPREME COURT - STATE OF NEW YORK
I.A.S. PART XIII SUFFOLK COUNTY**

PRESENT:

Hon. MELVYN TANENBAUM
Justice

MOTION #003, 004 - Mot D
R/D: 040607
S/D 043007

BEN KRUPINSKI BUILDER and ASSOCIATES, INC.,

PLTF'S/PET'S ATTY:
LYNN & GARTNER, LLP
330 Old Country Road, Suite 103
Mineola, New York 11501

Plaintiff,

- against -

THEODORE BAUM, RUTH BAUM, 1800 MEADOW
LANE-R-LLC, as trustee of the RUTH BAUM REVOCABLE
TRUST, and ARCS MORTGAGE, INC.,

DEFT'S/RESP'S ATTY:
BENJAMIN E. CARTER, ESQ.
220 Roanoke Avenue
Riverhead, New York 11901

Defendants.

Upon the following papers numbered 1 to 19 read on this motion for an order pursuant to CPLR §

_____ Notice of
Motion/Order to Show Cause and supporting papers 1-6 ; Notice of Cross Motion and supporting papers 7-13 Answering
Affidavits and supporting papers 14-15 Replying Affidavits and supporting papers 16-19 Other
_____ ; (and after hearing counsel in support and opposed to the motion) it is,

ORDERED that this motion by defendants for a protective order pursuant to CPLR §3103 initially limiting discovery to the issue of whether plaintiff is a licensed home improvement contractor and was licensed during the time work was performed on defendants residence and the cross motion by plaintiff for an order pursuant to CPLR §3124, 3126, 3216 & 3404 dismissing defendants counterclaim as abandoned, striking defendants answer for failure to provide responses to plaintiffs discovery demands, or in the alternative compelling defendants to provide adequate responses to movants discovery demands are determined as follow:

Plaintiff Ben Krupinski Builder and Associates, Inc. performed extensive home improvement work on defendants residence. Plaintiffs mechanics lien foreclosure action seeks to recover the sum of \$646,940.49 for services rendered and materials furnished by the contractor.

By short form Order (Oliver, J.) dated April 20, 2005 defendants motion for an order dismissing plaintiffs complaint on the basis that plaintiff was not a licensed home contractor at the time services were rendered was granted. By short form Order (Oliver, J.) dated July 29, 2005 plaintiffs motion for an order pursuant to CPLR §2221 to renew the prior motion and Order was denied. By Decision and Order dated January 30, 2007 the Supreme Court Appellate Division, Second Department reversed the trial Court's order ruling that:

.....the plaintiff raised a triable issue of fact by submitting the affidavit of the Chairman of the Licensing Review Board of the Town of Southampton, who stated that the plaintiff was in fact lawfully licensed because its principals held licenses to perform home improvement work in the Town. The record further reveals the existence of a question of fact as to whether the agreement which authorized the Town to issue home improvement licenses for the Village of Southampton was still in effect (see e.g. Code of the Village of Southampton §67-11). Accordingly, upon renewal, the Supreme Court should have denied the defendants' motion for summary judgment.

Defendants motion seeks an order limiting discovery to the issue of whether the builder/contractor was licensed and had authority to perform services on the residence during the period the work was performed. Defendants claim that a preliminary determination of that issue could spare the parties additional cost, time and expense for lengthy pre-trial proceedings.

Plaintiffs cross motion seeks an order dismissing defendants counterclaim claiming that defendants abandoned those claims based upon their two and one half year delay in responding to plaintiffs discovery demands. Plaintiffs also seek an order to compel defendants to provide responses to their discovery demands including their first set of interrogatories. Plaintiffs contend that significant delay has resulted from defendants failure to provide discovery and that the contractor is entitled to an expeditious recovery of the more than \$600,000.00 owed to Krupinski by defendants for work performed. Plaintiff claims defendants motion must be denied since the home improvement contractor license provision applies to protect consumers who are individual homeowners and does not apply to corporate owners of premises to be used as rental property.

The legal grounds for dismissing a complaint or counterclaim on the basis of want of prosecution are set forth pursuant to CPLR §3216.

CPLR §3216 provides:

Want of prosecution.

(a) Where a party unseasonably neglects to proceed generally in an action or otherwise delays in the prosecution thereof against any party who may be liable to a separate judgment, or unreasonably fails to serve and file a note of issue, the court, on its own initiative or upon motion, may dismiss the party's pleading on terms. Unless the order specifies otherwise, the dismissal is not on the merits.

(b) No dismissal shall be directed under any portion of subdivision (a) of this rule and no court initiative shall be taken or motion made thereunder unless the following conditions precedent have been complied with:

- (1) Issue must have been joined in the action;
- (2) One year must have elapsed since the joinder of issue;
- (3) The court or party seeking such relief, as the case may be, shall have served a written demand by registered or certified mail requiring the party against whom such relief is sought to resume prosecution of the action and to serve and resume prosecution of the action and to serve and file a note of issue within ninety days after receipt of such demand, and further stating that the default by the party upon whom such notice is served in complying with such demand within said ninety day period will serve as a basis for a motion by the party serving said demand for dismissal as against him for unreasonably neglecting to proceed.

(c) In the event that the party upon whom is served the demand specified in subdivision (b)(3) of this rule serves and files a note of issue within such ninety day period, the same shall be deemed sufficient compliance with such demand and diligent prosecution of the action; and in such even, no such court initiative shall be taken and no such motion shall be made, and if taken or made, the court initiative or motion to dismiss shall be denied.

No basis exists to grant plaintiffs application to dismiss defendants counterclaim since a 90 day demand has never been served on the defendants. Nor is there any basis under these circumstances to dismiss the counterclaim as abandoned pursuant to CPLR §3404.

CPLR §3126 provides:

§3126. Penalties for refusal to comply with order or to disclose.

If any party, or a person who at the time a deposition is taken or an examination or inspection is made, is an officer, director, member, employee or agent of a party or otherwise under a party's control, refuses to obey an order for disclosure or willfully fails to disclose information which the Court finds ought to have been disclosed pursuant to notice duly served, the Court may make such orders with regard to the failure or refusal as are just . . .".

In order to strike a pleading for non-compliance with an order pursuant to CPLR §3126, it must be shown that the plaintiff's default was "deliberate and contumacious" SCHARLACK v. RICHMOND MEMORIAL HOSPITAL, 127 AD2d 580, 511 NYS2d 380 (2nd Dept., 1987) BAUMANN v. DEE, 100 AD2d 504, 471 NYS2d 707 (2nd Dept., 1984); BATTAGLIA v. HOFMEISTER, 100 AD2d 833, 473 NYS2d 838 (2nd Dept., 1984)).

CPLR §3103 authorizes the court broad discretion and power to prevent abuse which may arise in a system of liberal disclosure, including regulating and limiting the time and place of taking depositions and physical examinations (O'NEILL v. OAKGROVE CONSTRUCTION, INC., 71 NY2d 521, 528 NYS2d 1 (1988); ASCONA CIE, INSTALT v. HORN, 32 AD2d 755, 301 NYS2d 414 (1st Dept., 1969); MARINE MIDLAND NATIONAL BANK OF TROY v. HOUSTIN, 30 AD2d 610, 290 NYS2d 285 3rd Dept., 1968)).

Although the issue of plaintiffs capacity to maintain this action and/or whether plaintiff "Krupinski" and/or "Krupinski's" principals were licensed home improvement contractors having authority under the relevant local ordinances to perform construction work in Southampton Village is ordinarily a simple determination, in this case substantial issues of fact exist concerning not only those issues but also whether the corporate defendants/homeowners are entitled to the "standing/capacity to sue" protections afforded consumers under the relevant licensing statutes and ordinances. Based upon these circumstances defendants application for a bifurcated discovery process is more likely to delay the ultimate resolution of discovery rather than to expedite it. Defendants motion for a protective order limiting discovery in the preliminary stages must therefore be denied.

The parties are however entitled to an expeditious resolution of all discovery issues. Accordingly, it is

ORDERED that defendants motion for an order pursuant to CPLR §3103 is denied, and it is further

ORDERED that plaintiffs motion for an order pursuant to CPLR §3124, 3136, 3216 & 3404 is granted solely to the extent that Defendants are directed to provide adequate and complete responses to plaintiffs discovery demands within 60 days of service of a copy of this order with notice of entry, and it is further

ORDERED that a conference shall be held on June 15, 2007 at 9:30 a.m. at the Supreme Court Trial Term Part XIII, 400 Carleton Avenue, Central Islip, New York for the purpose of resolving all outstanding discovery issues.

Dated: May 10, 2007

MELVYN TANENBAUM

J.S.C.

NON-FINAL DISPOSITION