

**Atlantic Mut. Ins. Co. v R/F Landscape
Architecture, P.C.**

2009 NY Slip Op 30845(U)

April 3, 2009

Supreme Court, New York County

Docket Number: 600582/03

Judge: Judith J. Gische

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

PRESENT: JUDITH J. GISCHE, J.S.C.

PART _____

Index Number : 600582/2003

ATLANTIC MUTUAL INSURANCE

VS.

RF LANDSCAPE ARCHITECTURE

SEQUENCE NUMBER : 004

DISMISS

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

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

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

motion (s) and cross-motion(s) decided in accordance with the annexed decision/order of even date.

FILED

APR 16 2009

COUNTY CLERK'S OFFICE
NEW YORK

Dated: 4/3/09

J.S.C.

JUDITH J. GISCHE, J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 10

-----x
ATLANTIC MUTUAL INSURANCE COMPANY
a/s/o ROBERT and MELISSA SOROS,

DECISION/ORDER

Index No.: 600582/03
Seq. No.: 004

Plaintiffs,

-against-

R/F LANDSCAPE ARCHITECTURE, P.C., FORD
CICA ROOFING & GENERAL CONTRACTORS,
INC., and JIM SCHUTTE, INC.,

Present:
Hon. Judith J. Gische
J.S.C.

Defendants.
-----x

Recitation, as required by CPLR § 2219 [a], of the papers considered in the review of this/these motion(s):

Papers

Def n/m (compel) w/ CEH affirm, exhs	1
Def x/mot w/ LT affirm, exhs	2
Plaintiff's affirm in opp, exhs	3
Plaintiff's affirm in opp to x/mot, exhs	4
DAS reply, exhs	5
LT reply	6
SFO order dated 1/20/09	

FILED
APR 4 15 2009
COUNTY CLERK'S OFFICE
NEW YORK

Upon the foregoing papers the court's decision is as follows:

This is a subrogation action for water damage sustained to a brownstone owned by Robert and Melissa Soros (the "insured") located at 263 West 11th Street, New York, New York (the "premises"). Defendant Fort-Cica Roofing & General Contractors, Inc. ("Fort-Cica") moves for an order pursuant to CPLR § 3126 dismissing plaintiff's complaint for failure to provide court ordered discovery, or in the alternative, for an order directing plaintiff to comply with such discovery under penalty of preclusion. Plaintiff

opposes the motion. Defendant Jim Schutte Incorporated ("Schutte") has submitted an affirmation in support of Fort-Cica's motion, and also cross-moves for an order tolling the interest accruing against Schutte because "plaintiff has intentionally and willfully stalled moving forward with this litigation." Plaintiff also opposes the cross motion.

The motion was originally made returnable on August 7, 2008. This motion was adjourned by the parties and was marked submitted on November 6, 2008 after oral argument. The parties appeared for a status conference on January 7, 2009, at which time the parties represented to the court that they were actively seeking to resolve the underlying discovery dispute. The court, therefore, restored the motion to the active calendar for January 30, 2009 for the parties to notify the court if the discovery issues had been resolved (see Short Form Order dated January 20, 2009). To date, the court has not received any indication that the discovery dispute has been otherwise resolved by the parties. The court's decision follows.

On or about July 20, 2002, a flood occurred at the premises. Plaintiff claims that the defendants each performed work on the drain, flashing and roofing at the premises. Plaintiff's alleges that the defendants were negligent by: [1] failing to take proper steps to prevent water damage to the premises; [2] failing to properly waterproof the roof and terrace in a fashion that would prevent water damage; [3] failing to provide proper sealing and/or flashing on the terrace roof to prevent water damage to the insured's property; [4] permitting remainder construction debris to clog the drains necessary for the proper drainage of water; [5] failing to properly size related drain equipment to allow for the safe disposal of ponding rain water on the terrace roof; [6] permitting a

dangerous condition to exist at the premises; [7] failing to correct the dangerous condition; [8] failing to take necessary precautions to prevent the damage to the insured's property; and [9] failing to follow proper plans for the installation fo the roof, flashing and drains pursuant to industry standards and related codes. Plaintiff has also asserted a cause of action against all defendants sounding in breach of contract. Plaintiff seeks damages in an amount no less than \$1 million.

This action was commenced on February 21, 2003. Fort-Cica served an answer on May 1, 2003, as well as discovery demands. On July 25, 2003, the Commonwealth Court of Pennsylvania ordered the liquidation of Legion Insurance Company, the insurer of defendant RF Landscape Architecture, P.C. ("RF Landscape"). Although the Bankruptcy Court's order has not been provided to the court, there is no dispute that the order of liquidation stayed this proceeding.

This stay was subsequently lifted and defendant RF Landscape answered plaintiff's complaint on March 24, 2005. On February 1, 2006, March 3, 2006, April 21, 2006 and July 31, 2006, Fort-Cica served further discovery demands on plaintiff. On June 12, 2007, all parties appeared before Judge Diamond for a status conference. At that time, the parties to this action executed a so-ordered stipulation which provided that by July 31, 2006, plaintiff would respond to Fort-Cica's demands dated February 1, 2006, March 3, 2006 and April 21, 2006. On February 28, 2008, J.H.O Cohen so-ordered a stipulation executed by the parties which provided that plaintiff would again respond to the aforementioned discovery demands within 30 days thereof. The February 28, 2008 order also required plaintiff to provide a cause and origin report and

certain unredacted note-pad entries. Fort-Cica has also provided copies of letters dated August 27, 2007 and May 12, 2008, wherein Fort-Cica reiterated its discovery demands.

Specifically, the outstanding discovery enumerated in the motion include: [1] plaintiff's response to Fort-Cica's Third Supplemental Notice of Discovery and Inspection to plaintiff dated March 3, 2006; [2] plaintiff's response to Fort-Cica's Fourth Supplemental Notice of Discovery and Inspection to plaintiff dated April 21, 2006; [3] plaintiff's response to Fort-Cica's Fifth Supplemental Notice of Discovery and Inspection to plaintiff dated July 12, 2007¹; and [4] the production of the cause and origin report and the unredacted notepad. Fort-Cica, in its reply, admits that since the making of this motion, plaintiff has served a copy of the cause and origin report and the unredacted notepad entries. The motion is otherwise supported by an affirmation of good faith attempt to resolve this discovery dispute. 22 NYCRR 202.7.

Plaintiff opposes the motion, in large part, arguing that it has produced "a substantial amount of discovery". Plaintiff has provided copies of its discovery responses. Plaintiff maintains that "a vast majority of the items sought by [Fort-Cica]" are not in his client's possession. Plaintiff generally maintains that these documents, if they existed, would be in the possession of Robert Soros, the subrogor. However, plaintiff has not provided an affidavit specifying what documents sought by Fort-Cica

¹ Fort-Cica, in its reply, seeks to correct an inadvertent typographical error which incorrectly identified its Fifth Supplemental Notice of Discovery and Inspection as being dated July, 31, 2006, rather than July 12, 2007, the latter being the correct date. Plaintiff has taken no issue with this defect, and therefore, the court will disregard Fort-Cica's error for purposes of resolving the instant discovery dispute.

plaintiff has been unable to locate. Plaintiff has not even provided a list to the court detailing such documents within the context of its opposition to the motion.

Plaintiff's attorney, Robert Sheps, claims that he has corresponded with Mr. Soros' office to obtain the information sought by Fort-Cica and that no documents were located. Plaintiff states that if no documents are in fact located, it will provide an affidavit of non-existence. Plaintiff has also provided to the court a copy of the cause and origin report and the unredacted portions of the claims materials plaintiff provided to Fort-Cica. Finally, plaintiff argues that sanctions are not warranted here.

Fort-Cica maintains that the responses are unresponsive to the subject discovery demands. Fort-Cica argues that the distinction between whether documents are in plaintiff's possession, or the possession of the subrogors, is of no moment, since the documents were demanded more than two and a half years ago. Fort-Cica argues that the delayed search by plaintiff demonstrates willfully and contumacious behavior which has severely prejudiced Fort-Cica's defense of this action.

Discussion

CPLR § 3101 (a) broadly defines the scope of disclosure as "all matter material and necessary in the prosecution or defense of an action, regardless of the burden of proof . . ." Allen v. Crowell-Collier Pub. Co., 21 N.Y.2d 403 (1968). The words, "material and necessary," are interpreted liberally so as to require disclosure of "any facts bearing on the controversy which will assist preparation for trial by sharpening the issues and reducing delay and prolixity. . ." Allen v. Crowell-Collier Pub. Co., supra at 407. The test is one of "usefulness and reason." Id.

The penalty to be imposed pursuant to CPLR § 3126 lies within the sound discretion of the trial court. Kihl v. Pfeffer, 94 NY2d 118 (1999). The striking of a pleading may be appropriate where there is a clear showing that the failure to comply with discovery demands is willful and contumacious. Marks v. Vigo, 303 AD2d 306 (1st Dept 2003). Town of Southampton v. Salten, 186 AD2d 796 (2d Dept 1992). Willful and contumacious behavior can be inferred from a party's repeated failure to respond to demands and/or to comply with discovery orders, coupled with inadequate excuses for those defaults. Siegman v. Rosen, 270 AD2d 14 (1st Dept 2000).

Plaintiff has responded to many of Fort-Cica's demands as follows:

Plaintiff is in the process of conducting a thorough search for all documents relative to this demand with its insured. All rights are reserved to supplement this response, at which time the documents requested will be disclosed to all parties in accordance with the CPLR and any express orders of the Court.

Plaintiff responds in this manner to Fort-Cica's demands for copies of blueprints for the renovation projects at the premises, names of any and all architects that have provided services to plaintiff for any work to be done at the premises, copies of contracts and correspondence between plaintiff, the insureds and Shelton, Mindel & Associates with regards to any ongoing work at the premises, the entire file maintained by the insured regarding the 1995 renovation of the premises, a copy of any and all contracts with ABR Construction, Dan Kiley & Associates, Edwina Vangal for the 1995 renovation of the premises, a copy of the insured's file regarding the post-loss renovation work, and a copy of the Atlantic Mutual Insurance policy for art claim. Plaintiff also raises general objections to many of Fort-Cica's demands.

Fort-Cica argues that plaintiff responses are non-responsive and severely prejudice Fort-Cica's defense because otherwise Fort-Cica is unable to assess plaintiff's damages in this case. Specifically, Fort-Cica argues that these documents are essential because at issue is the reasonableness of plaintiff's adjustment of the subrogors' claim given the high-end workmanship, materials and furnishings that were used in the 1995 renovations of the premises which was featured in Architectural Digest.

The court finds that plaintiff has in fact engaged in a pattern of conduct with respect to discovery in this action that demonstrates a blatant disregard for the court's orders, Article 31 of the CPLR and general rules of fairness in civil litigation. First, plaintiff's belated responses premised on the contention that the documents are in its subrogors' possession, and therefore, cannot be produced at the present time, are not responsive to the demands whatsoever. Therefore, many of Fort-Cica's demands remain outstanding. Further, plaintiff's repeated failure to provide the aforementioned discovery, the most recent request being almost made three years ago has not only delayed this action which would otherwise be ready for trial, but has severely prejudiced the defendants in a material way. The discovery sought by Fort-Cica is routine in a subrogation action and the court agrees with Fort-Cica that such discovery is material and necessary within the context of this action.

Moreover, plaintiff has not offered a reasonable excuse for its failure to provide substantive and complete responses to the defendant's requests for discovery and inspection and to comply with court orders directing such disclosure. Attorney Sheps

excuse for plaintiff's failure to respond, that his subrogor is incommunicado, is not reasonable under these circumstances. Such argument may have validity against the subrogor, but does not relieve plaintiff of the obligation to provide discovery in this case. Plaintiff has not demonstrated any efforts that it has made to secure these documents since they were demanded almost three years ago. Moreover, plaintiff acknowledges that it has a duty to provide an affidavit that such documents are not in its possession if that is the case, yet plaintiff has failed to do this, as well.

The court, therefore, grants Fort-Cica's motion to the following extent: plaintiff has thirty days to provide the defendants with the discovery set forth in this order. Plaintiff's failure to comply with this order will result in the automatic dismissal of the complaint against Fort-Cica upon Fort-Cica's filing of an affidavit of plaintiff's default with the court, on notice, without the need for further motion. Such dismissal is only against Fort-Cica. Although Schutte, in its cross-motion, has "submitted [an] affirmation in support of" Fort-Cica's motion, Schutte has not claimed that plaintiff currently owes it any items of discovery. Therefore, the relief sought by Fort-Cica is not warranted with respect to Schutte.

The cross-motion

Schutte seeks an order "tolling the 9% interest accruing per annum against Schutte, as plaintiff has intentionally and willfully stalled moving forward with this litigation." Specifically, Schutte argues that recusals by prior Justices of this court, as well as plaintiff's failure to turn over "vital discovery," the subject of prior court orders, until July 2008 (see So-Ordered Stipulation dated 2/28/08 and signed by J.H.O.

Cohen).provides grounds for this court to hold that Schutte should not be held liable for pre-judgment interest. Notwithstanding the fact that CPLR § 5301 provides that the date and rate for an award of pre-judgment interest is within the court's discretion, Schutte's application is premature. Discovery is not complete and the court declines to exercise its discretion and otherwise resolve the issue of what pre-judgment interest plaintiff is entitled to, if any. This denial is without prejudice to Schutte's right to move for such relief at an appropriate time.

Conclusion

In accordance herewith, it is hereby:

ORDERED that Fort-Cica's motion to compel discovery is granted to the following extent: plaintiff has thirty days to provide the defendants with the discovery set forth in this order. Plaintiff's failure to comply with this order will result in the automatic dismissal of the complaint against Fort-Cica upon Fort-Cica's filing of an affidavit of plaintiff's default with the court, on notice, without the need for further motion; and it is further

ORDERED that Schutte's cross-motion is denied in its entirety.

Any relief requested that has not been addressed herein has nonetheless been considered and is hereby expressly denied.

This constitutes the decision and order of the court.

Dated: New York, New York
April 3, 2009

FILED
APR 16 2009
COUNTY CLERK'S OFFICE
NEW YORK
Hon. Judith S. Saxe, JSC