

Goldstein v Chelsea Rose Constr. Corp.

2010 NY Slip Op 30705(U)

March 23, 2010

Supreme Court, Suffolk County

Docket Number: 1799/2007

Judge: Joseph Farneti

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SHORT FORM ORDER

INDEX NO. 1799/2007

SUPREME COURT - STATE OF NEW YORK
I.A.S. TERM, PART 37 - SUFFOLK COUNTY

PRESENT:

HON. JOSEPH FARNETI
Acting Justice Supreme Court

DAVID GOLDSTEIN and DEBRA
 GOLDSTEIN,

Plaintiffs,

-against-

CHELSEA ROSE CONSTRUCTION CORP.
 d/b/a THE DECK & PATIO COMPANY,

Defendant.

 CHELSEA ROSE CONSTRUCTION CORP.
 d/b/a THE DECK & PATIO COMPANY,

Third-Party Plaintiff,

-against-

T & T MASONRY CORP., T & S UNITED,
 BRYAN MURPHY, KELLY VARLEY,
 CHARLES J. MURPHY and MARIE R.
 MURPHY,

Third-Party Defendants.

ORIG. RETURN DATE: JUNE 12, 2009
 FINAL SUBMISSION DATE: JUNE 25, 2009
 MTN. SEQ. #: 001
 MOTION: MOT D

ORIG. RETURN DATE: JUNE 12, 2009
 FINAL SUBMISSION DATE: JUNE 25, 2009
 MTN. SEQ. #: 002
 CROSS-MOTION: XMOT D

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Upon the following papers numbered 1 to 11 read on these motions _____
TO STRIKE PLEADINGS AND TO COMPEL

Notice of Motion and supporting papers 1-3; Notice of Cross-motion and supporting papers 4-6; Affirmation in Partial Opposition and supporting papers 7, 8; Affirmation in Opposition and supporting papers 9, 10; Reply Affirmation 11; it is,

ORDERED that this motion by defendant/third-party plaintiff
CHELSEA ROSE CONSTRUCTION CORP. d/b/a THE DECK & PATIO
COMPANY ("Chelsea Rose") for an Order:

- (1) pursuant to CPLR 3126, dismissing plaintiffs' complaint and striking the answer of third-party defendants BRYAN MURPHY and KELLY VARLEY ("third-party defendants") for their failure to permit Chelsea Rose, its attorneys, and someone acting on its behalf to enter upon their premises located at 7 Fieldway Court, Huntington, New York and 40 Warner Road, Huntington, New York, for the purpose of inspecting, measuring, surveying, sampling, testing, photographing and/or videotaping said premises; or, in the alternative
- (2) pursuant to CPLR 3124, compelling plaintiffs and the third-party defendants to permit Chelsea Rose, its attorneys, and someone acting on its behalf to enter upon their premises located at 7 Fieldway Court, Huntington, New York and 40 Warner Road,

Huntington, New York, for the purpose of inspecting, measuring, surveying, sampling, testing, photographing and/or videotaping said premises; and

(3) pursuant to CPLR 3126, striking the answer of the third-party defendants for their failure to provide the discovery demanded in Chelsea Rose's Notice for Discovery and Inspection, dated July 7, 2008; or, in the alternative

(4) pursuant to CPLR 3124, compelling the third-party defendants to provide the discovery demanded in Chelsea Rose's Notice for Discovery and Inspection, dated July 7, 2008,

is hereby **GRANTED** to the extent provided hereinafter; and it is further

ORDERED that this cross-motion by the third-party defendants for an Order, pursuant to CPLR 3126, dismissing the third-party complaint of Chelsea Rose, or, in the alternative, compelling further discovery, in particular further depositions of the parties, is hereby **GRANTED** to the extent provided hereinafter.

This action was commenced by plaintiffs on or about January 12, 2007, to recover damages for property damage allegedly sustained by plaintiffs as a result of flooding that occurred on April 23, 2006. Plaintiffs claim that Chelsea Rose negligently performed certain renovations and landscaping at plaintiffs' premises located at 7 Fieldway Court, Huntington, New York ("plaintiffs' premises"), causing plaintiffs to suffer damages in the amount of \$225,000. Plaintiffs have asserted causes of action sounding in breach of contract and negligence, as well as a cause of action for fraudulent misrepresentation which seeks punitive damages in the amount of \$250,000. On April 22, 2008, Chelsea Rose commenced a third-party action against T & T MASONRY CORP. (the contractor that performed certain construction work in the basement of plaintiffs' premises), T & S UNITED (a sub-contractor that was hired to install an emergency egress window and associated emergency egress window well in plaintiffs' basement), and BRYAN MURPHY, KELLY VARLEY, CHARLES J. MURPHY and MARIE R. MURPHY (the owners of the abutting premises to the rear of plaintiffs' premises and commonly known as 40 Warner Road, Huntington, New York ["third-party defendants' premises"]). Chelsea Rose claims that

plaintiffs' damages were caused by the negligence of T & T MASONRY CORP. and T & S UNITED in performing work on plaintiffs' basement, and by the construction of a horse stable/corral on the third-party defendants' premises which "changed the natural character of the surface of the ground and its ability to absorb surface water."

Chelsea Rose has now filed the instant application seeking the relief described hereinabove. Chelsea Rose indicates that on or about July 14, 2008, it served upon third-party defendants a Notice for Discovery and Inspection dated July 7, 2008, which sought, among other things, records concerning the construction of a horse stable/corral on their property. On or about November 18, 2008, the third-party defendants served a response thereto, indicating that copies of the records would be provided under separate cover. Chelsea Rose contends that to date, no such records have been provided.

Moreover, on or about April 14, 2009, Chelsea Rose served Notices to Permit Entry Upon Real Property upon plaintiffs and the third-party defendants, seeking to enter upon plaintiffs' premises and the third-party defendants' premises for the purpose of inspecting, measuring, surveying, sampling, testing, photographing and/or videotaping both premises. On or about April 16, 2009, third-party defendants served a Notice of Rejection upon Chelsea Rose, on the grounds that Chelsea Rose's Notice was "overbroad, vague, improper and irrelevant." By stipulation dated May 29, 2009, Chelsea Rose withdrew that portion of its motion as to plaintiffs only, as plaintiffs agreed to permit a physical inspection of their premises on a date to be determined.

In opposition to Chelsea Rose's application, the third-party defendants argue that they rejected Chelsea Rose's Notice to Permit Entry Upon Real Property based on the ground that the Notice was not sufficiently particular to give the third-party defendants' notice as to which portion of their premises Chelsea Rose wishes to inspect. In addition, the third-party defendants contend that the inspection should not be permitted as the property is not in the same condition as it was on April 23, 2006, the date of the alleged incident. As such, the third-party defendants argue that any inspection conducted now would be based on "mere speculation" and could be prejudicial to the third-party defendants. Further, the third-party defendants indicate that notwithstanding a thorough search conducted by BRYAN MURPHY, the records concerning the construction of a stable/corral on his property cannot be located. The third-party

defendants have served a Supplemental Response to Notice for Discovery and Inspection, dated June 19, 2009, in accordance with the foregoing.

The third-party defendants have also filed the instant cross-motion to dismiss the third-party complaint, or, in the alternative, to compel further depositions of the parties. The third-party defendants allege that depositions of all parties were completed on March 20, 2009. Thereafter, on May 8, 2009, Chelsea Rose served a Supplemental Discovery Response attaching three color photographs of plaintiffs' premises taken in November of 2005 and a CD containing three video clips of water at plaintiffs' premises taken on April 23, 2006, the date of the alleged incident. The third-party defendants argue that Chelsea Rose wilfully failed to disclose these items until after the depositions of the parties as they were taken many years ago, and that Chelsea Rose failed to disclose who took the photographs or video clips in order to verify their authenticity. As such, the third-party defendants seek further depositions of the parties as well as a deposition of the person/entity who took the photographs and video clips. Chelsea Rose contends that it was not until after the depositions that Chelsea Rose acquired the additional photographs and videos.

On this record, the Court finds that it would be inappropriate to strike Chelsea Rose's third-party complaint or the third-party defendants' answer. A court may strike a pleading as a sanction against a party who "refuses to obey an order for disclosure or wilfully fails to disclose information which the court finds ought to have been disclosed" (CPLR 3126). The nature and degree of the penalty to be imposed pursuant to CPLR 3126 is a matter of the court's discretion (*see Espinal v City of New York*, 264 AD2d 806 [1999]; *Soto v City of Long Beach*, 197 AD2d 615 [1993]). The striking of a pleading is appropriate where there is a clear showing that the failure to comply with discovery demands is willful, contumacious, or in bad faith (*see Rowell v Joyce*, 10 AD3d 601 [2004]; *Beneficial Mtge. Corp. v Lawrence*, 5 AD3d 339 [2004]; *cf. Harris v City of New York*, 211 AD2d 663 [1995]). Willful and contumacious conduct can be inferred from a party's repeated failures to adequately respond to both discovery demands or court directives to comply with such demands, coupled with inadequate explanations for the failures to comply (*see Schwartz v Suebsanguan*, 15 AD3d 565 [2005]; *Rowell v Joyce*, 10 AD3d 601, *supra*; *Penafiel v Poretz*, 298 AD2d 446 [2002]).

Here, Chelsea Rose served a Supplemental Discovery Response when it allegedly came into possession of additional photographs and videos.

The third-party defendants responded to Chelsea Rose's Notice to Permit Entry Upon Real Property, albeit with a rejection based upon the procedural and other grounds described hereinabove, and has further responded to Chelsea Rose's Notice for Discovery and Inspection with a Supplemental Response indicating that the records concerning the construction of a stable/corral cannot be located. As such, the Court does not find Chelsea Rose's or the third-party defendants' conduct herein to be willful or contumacious. Accordingly, that branch of Chelsea Rose's motion to strike the third-party answer, and that branch of the third-party defendants' cross-motion to strike Chelsea Rose's third-party complaint, are both **DENIED**.

With respect to that branch of Chelsea Rose's motion to compel the third-party defendants to provide the discovery demanded in Chelsea Rose's Notice for Discovery and Inspection, as discussed, the third-party defendants have represented to the Court that the documents sought by Chelsea Rose cannot be located. As such, the third-party defendants cannot be compelled to produce such documents (*see e.g. Euro-Central Corp. v Dalsimer, Inc.*, 22 AD3d 793 [2005]). Accordingly, that branch of Chelsea Rose's motion to compel the third-party defendants to provide the discovery demanded in Chelsea Rose's Notice for Discovery and Inspection, is **DENIED**.

Next, that branch of Chelsea Rose's motion to compel the third-party defendants to permit Chelsea Rose, its attorneys, and someone acting on its behalf to enter upon their premises located at 40 Warner Road, Huntington, New York, for the purpose of inspecting, measuring, surveying, sampling, testing, photographing and/or videotaping said premises, is **GRANTED**. CPLR 3101 (a) provides for disclosure of "all matter material and necessary in the prosecution or defense of an action, regardless of the burden of proof" (CPLR 3101 [a]). "New York has long favored open and far-reaching pretrial discovery" (*DiMichel v South Buffalo Ry. Co.*, 80 NY2d 184 [1992], *cert denied sub nom Poole v Consolidated Rail Corp.*, 510 US 816 [1993]), and "[t]here shall be full disclosure of all matter material and necessary in the prosecution or defense of an action, regardless of the burden of proof" (CPLR 3101 [a]; *Northway Eng'g v Felix Indus.*, 77 NY2d 332 [1991]). Moreover, CPLR 3120 (1) (ii) provides that after commencement of an action, a party may serve another party with notice "to permit entry upon designated land or other property in the possession, custody or control of the party served for the purpose of inspecting, measuring, surveying, sampling, testing, photographing or recording by motion pictures or otherwise the

property or any specifically designated object or operation thereon.” Such motions are routinely granted when a central issue in the case is the condition of the real property under inspection (see *Iskowitz v Forkosh Constr. Co.*, 269 AD2d 131 [2000]; *Haddad v Salzman*, 173 AD2d 522 [1991]; *County of Chenango Indus. Dev. Agency v Lockwood Greene Engrs.*, 111 AD2d 508, 510 [1985]). In this property damage action, the Court finds that, contrary to the third-party defendants’ contention, an inspection of the third-party defendants’ premises is relevant to the issues raised herein. In addition, although the third-party defendants objected to the Notice as overbroad and vague, the Court finds that given the fact that Chelsea Rose claims that the third-party defendants’ construction of a horse stable/corral changed the natural character of the surface of the ground and its ability to absorb surface water, Chelsea Rose could not limit its Notice to a particular portion of the premises to be inspected. With respect to the third-party defendants’ argument that an inspection would be prejudicial as many years have passed since the date of the alleged incident, the Court finds that such issue may be the subject of cross-examination at trial as to the findings of Chelsea Rose’s inspection.

Finally, that branch of the third-party defendant’s motion to compel further depositions of the parties is **GRANTED** to the extent that the matter is referred to the compliance conference currently scheduled for **April 29, 2010, at 9:30 a.m., in Part 37**. Also at the compliance conference, the Court will address the scheduling of the inspection of the third-party defendants’ premises, if it is not yet completed by that date.

The foregoing constitutes the decision and Order of the Court.

Dated: March 23, 2010



HON. JOSEPH FARNETI
Acting Justice Supreme Court