

23-50 Water Edge, LLC v Fedele

2010 NY Slip Op 33564(U)

December 14, 2010

Sup Ct, Queens County

Docket Number: 23437/2008

Judge: Janice A. Taylor

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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE JANICE A. TAYLOR
Justice

IA Part 15

23-50 WATER EDGE, LLC.,

x

Plaintiff,

-against-

RUSSELL FEDELE, WALTER C. MAFFEI, AT
ONE DESIGN, INC., JOHNNY'S PLUMBING
AND HEATING CONTRACTOR, INC., and
TRI-STATE INDUSTRIAL SYSTEMS, INC.,

Defendants.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF QUEENS

x

In the Matter of the Application of
23-50 WATERS EDGE, LLC,

x

Petitioner,

For a Judgment Under Article 78 of the Civil
Practice Law and Rules,

-against-

NEW YORK STATE DIVISION OF HOUSING
AND COMMUNITY RENEWAL,

Respondent.

RE: PAR Dkt. No.: W1 110027-RO
DRO Dkt. Nos.: UH 110009-RK
(TE 110042-OM)
Premises: 23-50 Waters Edge Drive
Bayside, New York 11360

x

Index
Number 23437 2008

Motion
Date October 18, 2010

Motion Seq. No. 2

Index
Number 9526 2010

Motion
Date October 12, 2010

Motion Seq. No. 1

The following papers numbered 1 to 24 read on this motion by Tri-State Industrial Systems, Inc. (Tri-State), to dismiss the complaint insofar as asserted against it for failure to comply with discovery orders; cross motion by Maffei to dismiss the complaint insofar as asserted against it for failure to comply with discovery orders; and Article 78 petition by 23-50 Waters Edge, LLC (Owner), challenging an order of the New York State Department of Housing and Community Renewal (DHCR).

	<u>Papers Numbered</u>
Notice of Motion/Petition - Affidavits - Exhibits.....	1-7
Notice of Cross Motion - Affidavits - Exhibits	8-11
Answering Affidavits - Exhibits.....	12-20
Reply Affidavits.....	21-24

Upon the foregoing papers it is ordered that the motion, petition and cross motion are decided as follows:

This is a property damage action wherein plaintiff seeks to hold defendants liable for alleged damage to plaintiff's property during the course of an adjacent construction project. Plaintiff is the owner of a 120-unit residential building in Bayside, New York. Plaintiff claims that water flowing from or being pumped from an adjoining property owned by co-defendant Russell Fedele damaged plaintiff's property. The Fedele property underwent a renovation which included constructing an extension and new water drainage from the property. The renovations were performed by Tri-State based upon plans prepared by defendant Walter Maffei, an architect. Tri-State moves to dismiss the complaint on the grounds that plaintiff has repeatedly failed to respond to court-ordered discovery demands. Plaintiff opposes the motion.

On or about September 12, 2008, plaintiff served Tri-State with a summons and complaint. A stipulation was entered into between plaintiff and Tri-State on or about October 14, 2008, extending Tri-State's time to respond to the summons and complaint. Tri-State served its answer on November 5, 2008, along with a notice for depositions. Walter C. Maffei joined issue with service of an answer dated October 2, 2008, and At One Design, Inc. joined issue with service of an answer dated January 27, 2009. Tri-State alleges that, to date, it has not been provided with a copy of the answer served on behalf of Russell Fedele.

On or about December 10, 2009, Tri-State served combined demands on the plaintiff. On or about December 18, 2008, Tri-State served plaintiff with a demand for a verified bill

of particulars. On February 5, 2009, Tri-State wrote a letter to plaintiff setting forth plaintiff's failure to furnish a bill of particulars and a response to the combined demands served by Tri-State. On or about February 27, 2009, Tri-State served plaintiff with a notice for discovery and inspection and demand for authorizations.

A preliminary conference was scheduled for July 7, 2009. Tri-State was the only party to appear. The court adjourned the preliminary conference to July 21, 2009, at which time the court issued a preliminary conference order (PCO), ordering, inter alia, that plaintiff serve a bill of particulars and furnish duly executed written authorizations within thirty (30) days and that all parties respond to Tri-State's combined demands and notice for discovery and inspection within thirty (30) days.

Tri-State submits that on September 16, 2009 and on October 20, 2009, they spoke with plaintiff's counsel regarding outstanding discovery demands; and on November 13, 2009, Tri-State sent a good faith letter to plaintiff's counsel demanding that it provide responses to Tri-State's demands within ten (10) days to avoid motion practice. Tri-State submits that on December 15, 2009, they sent all parties another good faith letter regarding outstanding discovery.

On or about January 20, 2010, Tri-State moved to dismiss the instant action on the ground that plaintiff failed to respond to Tri-State's combined demands dated December 10, 2008; demand for a verified bill of particulars dated December 18, 2009; demand for authorizations dated February 27, 2009; and notice for discovery and inspection dated February 27, 2009. The motion was resolved by a so-ordered stipulation on March 9, 2010, which directed that plaintiff's *complete* responses were to be received in hand by Tri-State by April 30, 2010, or the complaint would be dismissed against Tri-State and/or Maffei with no further action by Tri-State required. Tri-State forwarded a copy of the so-ordered stipulation to all parties on March 16, 2010.

Plaintiff furnished responses to Tri-State's demand for a verified bill of particulars and combined demands on or about April 29, 2010. Tri-State contends, however, that the responses were "woefully incomplete and did not enter the realm of sufficiency." For example, with respect to Tri-State's demand for a verified bill of particulars, plaintiff's response was as follows:

- a. Item 4 of the demand demanded that plaintiff state the acts constituting trespass on its property. The response referred Tri-State to its answer to item 3 - a different demand entirely, having nothing to do with trespass.
- b. Items 3, 4 and 5 of the demand demanded that plaintiff state the acts of omission or commission constituting a nuisance, trespass on its

property or negligent or reckless contact. Instead of responding to each inquiry with a responsive statement, plaintiff merely recited the language of the New York Administrative Code section 27-207; did not identify what Tri-State is alleged to have done or not done to cause the damage; and did not identify how Tri-State is alleged to have violated that section.

Tri-State goes on to recite how plaintiff's responses are "unresponsive" to approximately 15 other demands ranging from items 7 through 30. In short, plaintiff repeatedly refers Tri-State to a set of documents or the Administrative Code without identifying which documents were meant to respond to a particular demand.

The record reveals that plaintiff has been served with various discovery demands since November 5, 2008. This court ordered plaintiff to provide a verified bill of particulars and responses to these demands by way of a preliminary conference order as well as a so-ordered stipulation, which followed a prior motion to dismiss by Tri-State. The so-ordered stipulation required plaintiff to submit "complete" responses or else the action would be deemed dismissed as against Tri-State with no further action required. Plaintiff voluntarily submitted to the so-ordered stipulation containing additional dismissal language and then submitted responses which were incomplete. In effect, plaintiff appears to have willfully refused to provide the majority of the discovery demanded.

Pursuant to CPLR 3126(3), the Supreme Court possesses the discretion, inter alia, to dismiss an action as a sanction for willful discovery defaults (*see Zletz v Wetanson*, 67 NY2d 711 [1986]; *DeJulio v Wulf*, 260 AD2d 425 [1999]; *Brady v County of Nassau*, 234 AD2d 408 [1996]). "While the nature and degree of the penalty to be imposed on a motion pursuant to CPLR 3126 is a matter of the Supreme Court's discretion * * * striking 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" (*Birch Hill Farm v Reed*, 272 AD2d 282 [2000]; *see Polanco v Duran*, 278 AD2d 397 [2000]; *Martignetti v Ricevuto*, 271 AD2d 508 [2000]). Here, plaintiff's willful and contumacious conduct may be inferred from its repeated failure to comply with the court-ordered discovery schedule (*Nowak v Veira*, 289 AD2d 383 [2001]; *see Birch Hill Farm v Reed, supra*; *Ranfort v Peak Tours*, 250 AD2d 747 [1998]). The record supports the determination that plaintiff, through delays and other strategies, engaged in a course of conduct designed to yield one-sided disclosure in its favor, culminating in its disregard of an order compelling disclosure. Where a party in these circumstances disobeys a court order and by his conduct frustrates the disclosure scheme provided by the CPLR, dismissal of the pleading is within the broad discretion of the trial court (*see Zletz v Wetanson, supra*).

Upon plaintiff's failure to comply with the conditional order of dismissal, that order became absolute (*see Echevarria v Pathmark Stores, Inc.*, 7 AD3d 750 [2004]), providing

the court with a basis upon which to enter judgment against the plaintiff dismissing the complaint with prejudice (*Ragubir v 44 Court Street, LLC*, 60 AD3d 833 [2009]). To avoid the adverse impact of that order and the judgment entered thereon, the plaintiff is required to demonstrate a reasonable excuse for its default in providing the records and the existence of a meritorious claim (*see Echevarria v Pathmark Stores, Inc., supra; Cenzano v Cenzano*, 250 AD2d 568 [1998]). However, plaintiff failed to proffer a reasonable excuse for its failure to comply with the conditional order of dismissal, or for its repeated failure to comply with other court orders directing discovery (*see Clarke v United Parcel Serv.*, 300 AD2d 614 [2002]; *Ranfort v Peak Tours, supra; Cenzano v Cenzano, supra; Unity Mfg. Corp. v St. Paul Fire & Mar. Ins. Co.*, 97 AD2d 462 [1983]). Moreover, plaintiff failed to establish a meritorious cause of action. Accordingly, the motion to dismiss the complaint insofar as asserted against Tri-State is granted.

Cross Motion by Maffei

Maffei's cross motion must be denied by this court. Pursuant to CPLR § 2215, a cross motion can only be made as against a moving party. Here, defendant Tri-State is the movant, yet defendant Maffei seeks to dismiss the plaintiff's complaint. Accordingly, defendant Maffei's cross motion is denied. However, it is noted that the "so-ordered" stipulation dated March 9, 2010 directed that the complaint would be dismissed as against defendant Tri-State and/or Maffei if plaintiff failed to respond to the outstanding discovery demands by April 30, 2010. As previously stated, this court finds plaintiff's responses to the served demands to be inadequate and determines that plaintiff has failed to comply with the "so-ordered" stipulation. Accordingly, the complaint is hereby dismissed as against defendant Maffei.

Article 78 Petition

On May 17, 2005, 23-50 Waters Edge, LLC (Owner), filed an application for a building-wide rent increase for the building located at 23-50 Waters Edge Drive, Bayside, New York 11360, based on the installation of a major capital improvement (MCI). The Owner's application included, among other things, a list of the affected tenants, a list of the cost of improvements, canceled checks, invoices from contractors, and a copy of documents from the New York City Department of Buildings (DOB), in support of its application.

On May 25, 2005, the tenants were notified of the Owner's application and various tenants submitted responses to DHCR objecting to the MCI. The Tenants' Association was represented by an attorney and objected to the MCI by letter received August 15, 2005. The letter specifically claimed DHCR must require an electrical permit and approval for the elevator upgrade. The Owner requested a 90-day extension until November 30, 2005, to answer the Tenants' Association's allegations.

On December 7, 2005, DHCR requested follow-up information for the MCI application. One of the items requested was for a certificate of electrical inspection (CEI), for the elevator upgrade portion of the MCI. On January 18, 2006, DHCR sent the Owner a final notice requesting the CEI for the elevator upgrade or a letter in lieu of the CEI. On February 6, 2006, the Owner responded that no CEI was required and attached DOB's elevator application sign-off.

On July 17, 2006, the rent administrator (RA) issued an order granting an MCI rent increase effective July 1, 2005. The Tenants' Association filed a petition for administrative review (PAR), and a request for reconsideration by August 10, 2006. The Tenants' Association felt that its response was not considered and that the tenants did not have an opportunity to review or respond to the Owner's reply to their response.

The RA issued an order pursuant to reconsideration on July 29, 2008, which modified the previously-issued order of July 17, 2006. The order pursuant to reconsideration adjusted the room count of the building from 395 to 393, which resulted in a \$9.56 per room, per month increase; found that the tenants had now been given due process; and modified the effective date of the rent increases from July 1, 2005 to December 1, 2007. The basis for the change in the effective date was the RA's assertion that the "certificate of electrical inspection from the DOB for the elevator was not signed off until November 21, 2007, and that, therefore, the Owner was not entitled to collect any MCI increase during the period that the electrical inspection had not been approved."

The Owner timely filed a petition for administrative review (PAR) against that order. In its PAR, the owner alleged, in substance, that the RA incorrectly sought a certificate of electrical inspection; that an "electrical sign-off" is not required by the DHCR in order to obtain an MCI for elevator upgrading; and that even if a delayed effective date were imposed for the elevator, the effective date for the other three approved items should not have been changed. By order and opinion denying the PAR, dated and issued February 19, 2010, the Deputy Commissioner denied the Owner's PAR and affirmed the RA's order of July 29, 2008. The instant Article 78 ensued challenging the order and claiming that the effective date of the RA's reconsideration order should be July 1, 2005 or in the alternative, that the other installations, including a sidewalk ramp and roofing, should be assigned an earlier date.

It is well settled that judicial review of an administrative determination pursuant to CPLR 78 is limited to a review of the record before DHCR and the question of whether its determination was arbitrary or capricious and has a rational basis in the record (*see* CPLR 7803(3); *Gilman v New York State Div. of Hous. & Community Renewal*, 99 NY2d 144 [2002]; *Nestor v New York State Div. of Hous. & Community Renewal*, 257 AD2d 395 [1999]). Here, DHCR's denial of the Owner's PAR has a rational basis in the record and is neither arbitrary nor capricious (*see Matter of 370 Manhattan Ave. Co., L.L.C. v New York State Div. of Hous. & Community Renewal*, 11 AD3d 370 [2004]). A

certificate of electrical inspection is required for any MCI that includes rewiring. Contrary to petitioner's assertions, the DOB does require this sign-off for electrical wiring work as evidenced by DOB's own informational pamphlet on electrical permits.

Moreover, the agency's interpretation of its operational practices and controlling authority is entitled to deference (*see Kurcsics v Merchants Mut. Ins. Co.*, 49 NY2d 451 [1980]).

Accordingly, the petition challenging the order and claiming that the effective date of the RA's reconsideration order should be July 1, 2005 or in the alternative, that the other installations, including a sidewalk ramp and roofing, should be assigned an earlier date, is denied.

Conclusion

The motion to dismiss the complaint insofar as asserted against Tri-State is granted. The motion to dismiss the complaint insofar as asserted against Maffei is granted. The Article 78 petition is denied.

Dated: December 14, 2010

J.S.C.