Beyer Blinder Belle Architects & Planners LLP v Server
2011 NY Slip Op 32550(U)
September 22, 2011
Supreme Court, New York County
Docket Number: 107967/09
Judge: Louis B. York
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SCANNED ON 9/28/2011

[* 1]

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

LOUIS B. YORK J.S.C.

PRESENT: _____ PART _____

Justice

Beyer Bleiden Belle

INDEX NO. 107967/09

MOTION DATE _____

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MOTION SEQ. NO. 001

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

FILED

SEP 27 2011

NEW YORK
COUNTY CLERK'S OFFICE

Upon the foregoing papers, it is ordered that this motion

MOTION IS DECIDED IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION.

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

Dated: 9/22/11

LOUIS B. YORK J.S.C.

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

☐ SUBMIT ORDER/ JUDG. ☐ SETTLE ORDER/ JUDG.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 2

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BEYER BLINDER BELLE ARCHITECTS & PLANNERS LLP,

Plaintiff,

-against-

CAROLE SERVER and OLIVER FRANKEL,

Defendants.

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FILED

SEP 27 2011

NEW YORK
COUNTY CLERK'S OFFICE

Index No.: 107967/09

YORK, J.:

In this action, plaintiff Beyer Blinder Belle Architects & Planners LLP, an architectural firm, alleges that the defendants, Carole Server and Oliver Frankel, owe it $122,000 for interior design and architectural planning for an apartment which defendants were in the process of purchasing. Defendants dispute the debt, alleging that plaintiff billed excessively for its work on the apartment, and engaged in fraudulent and deceptive billing practices. Defendants now move, pursuant to CPLR 3124, to compel plaintiff to comply with their August 19, 2010 demand for discovery and inspection, and to provide all email messages which were sent and/or received by its employees, Anna Grabowska, Margaret Kittinger, and Josie Choi, for various dates in July of 2008 through November of 2008. Plaintiff cross-moves, pursuant to CPLR 3124, to compel defendants to produce documents in response to plaintiff's August 24, 2010 notice for discovery and inspection.

In June of 2008, defendants entered into a contract to purchase the eighth-floor apartment of a newly-constructed condominium complex located at 34 Leonard Street, Manhattan, New York. On July 16, 2008, defendants retained plaintiff to provide design and architectural services

for the renovation of the apartment, including electrical work, lighting, millwork, furniture studies, landscape design, and the possible construction of a pool with a treadmill for lap swimming. Plaintiff maintains that it billed defendants on an hourly basis and submitted monthly invoices.

During the course of the project, plaintiff alleges that defendants became involved in a disagreement with the owner/developer of the apartment building, which resulted in defendants terminating the contract of sale for the unit. Plaintiff billed defendants a total of $141,552.19 for its work. Defendants objected to the amount which they were charged, and paid plaintiff $20,000, leaving an outstanding unpaid balance of $121,552.19. Defendants argue that they have not paid the remaining balance, because several employees working for plaintiff allegedly engaged in fraudulent billing practices, charged defendants for more hours than they actually worked on the project, and assisted on other projects when they billed full days of work to defendants. Defendants contend that Grabowska and Kittinger were deposed, and testified that they could not provide calendars or date books which documented the time which was spent on the project, because the work calendars were discarded at the end of each year.

Defendants maintain, that although plaintiff has previously produced all email messages relating to the project, plaintiff should be compelled to produce all email sent or received by Grabowska, Choi, and Kittinger, including those which were sent to other clients, during the days in 2010 in which they exclusively billed defendants for work. Defendants specifically request all email messages sent or received through plaintiff's email system by Kittinger, on August 11, 26; September 9, 24-26; October 10, 13, 22, 28-29; and November 12, 14, 21; by Grabowska on July 30; August 4-7; September 2-5, 8-12, 15-19, 22-24, October 8-10; 13, 23-24; 27-31; and

November 3-7; 10-14; 17-20; and by Choi on October 24, 27-31; November 3-7, 10-13, and 17-20. Plaintiff opposes this demand, arguing that the request for all email sent and received by Grabowska, Choi, and Kittinger is overbroad. Plaintiff contends that defendants had the opportunity to depose Kittinger and Grabowska, and were provided a substantial amount of discovery.

CPLR 3101 (a) requires the full disclosure of all information that is material and necessary to the defense or prosecution of an action. "The words, 'material and necessary,' are, in our view, to be interpreted liberally to require disclosure, upon request, of any facts bearing on the controversy which will assist preparation for trial by sharpening the issues and reducing delay and prolixity. The test is one of usefulness and reason." *Allen v Crowell-Collier Publ. Co.*, 21 NY2d 403, 406 (1968). "The burden of showing that the disclosure sought is improper is upon the party asserting it . . . ." *Roman Catholic Church of The Good Shepherd v Tempco Sys. & Rheem Mfr. Corp.*, 202 AD2d 257, 258 (1st Dept 1994) (citations omitted).

Here, the request for plaintiff to produce all email sent or received over the course of several months by Grabowska, Choi, and Kittinger is overbroad. Plaintiff has already produced over 1,000 pages of e-mail regarding the project, and has provided time sheets, invoices, and project meeting minutes. Although counsel for defendants argues that the existence of email sent to other clients would prove that defendants were billed for hours that were not spent on the project, such argument is speculative.

Also, the depositions of both Kittinger and Grabowska have been conducted, at which both employees testified about the amount of time which they spent working on the project. Kittinger testified that when she bills a client eight hours, she has spent at least eight hours on the

project, that even if she has other projects she is working on, she focuses on the billed project, and that the amount of time which was spent on defendants' apartment, was very reasonable. (Kittinger 5/13/10 EBT, at 179-180, 183-184, 243-244). Grabowska testified that she billed for the hours which she worked on the project, that she stayed late every day, and that she worked as efficiently as she could. (Grabowska 8/25/10 EBT, at 122, 125-128). Therefore, because the request for the email is overbroad and based upon speculative assumptions, the court declines to grant defendants' motion to compel.

Plaintiff cross-moves, to compel defendants to comply with the notice for discovery and inspection which is dated August 24, 2010. In the demand, plaintiff requests that defendants produce copies of all agreements in connection with the purchase of the apartment including, correspondence, email, faxes and writings between defendants and the owner of the building, as well as correspondence with the developer, Greg Rechler and R Squared Real Estate Company, regarding the termination of the purchase agreement. Plaintiff argues, that in addition to showing defendants' past and present ownership interest in the apartment, the documents may assist plaintiff in its defense to the counterclaims of fraud and deceptive billing. Plaintiff contends that it is clear from the documents previously exchanged during discovery, that only after having a disagreement with the owner/developer of the building, did defendants begin to object to the bills.

Defendants argue that this demand is overbroad because it is not disputed that the purchase of the apartment did not proceed because the developer failed to comply with the terms of the offering plan and defaulted on the mortgage, that the developer was foreclosed upon by the lender, and that a receiver was appointed to complete construction of the building. Defendants

maintain that they did not send a letter to the developer rescinding the contract until June 1, 2009, which was over six months after the billing dispute arose in November of 2008, and that email correspondence between defendant Carole Server and Kittinger in November and December of 2008 discusses problems which defendants were experiencing with the owner of the building.

The court declines to allow such discovery to be exchanged because plaintiff's request for further discovery is overbroad and based upon speculation. Plaintiff's contention that the disagreement between defendants and the owner influenced the decision to not pay the bills and to file the counterclaims for fraudulent billing and deception is not supported by factual allegations, but is based upon assumption. Also, defendants' ownership interest in the apartment is not in dispute, nor is it in dispute that the purchase agreement for the apartment was terminated.

Finally, pursuant to paragraph (2) of the additional directives of the September 15, 2010 compliance conference order, "[a]ny party having disclosure problems must contact the Part to arrange for a telephone conference with the Judge or his Law Secretary . . . before resorting to motion practice. Such a conference must be arranged before the last day for discovery. Failure to do so before the last day for discovery will result in the waiver of all further discovery." Plaintiff should have contacted Part 2 before it filed the note of issue on November 29, 2010, so that the court could have addressed this dispute.

CONCLUSION and ORDER

Accordingly, it is hereby

ORDERED that defendants Carole Server and Oliver Frankel's motion to compel

plaintiff Beyer Blinder Belle Architects & Planners LLP's to comply with its August 19, 2010 demand for discovery and inspection, is denied; and it is further

ORDERED that plaintiff Beyer Blinder Belle Architects & Planners LLP's cross motion to compel defendants Carole Server and Oliver Frankel to comply with its August 24, 2010 notice for discovery, is denied.

Dated: September 22, 2011

ENTER:

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J.S.C.

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