

**Wadsworth Condos LLC v Dollinger Gonski &
Grossman**

2014 NY Slip Op 30502(U)

February 27, 2014

Supreme Court, New York County

Docket Number: 600899/2009

Judge: Louis B. York

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

LOUIS B. YORK

PRESENT: _____ **J.S.C.**
Justice

PART 2

Index Number : 600899/2009
WADSWORTH CONDOS
vs.
DOLLINGER GONSKI
SEQUENCE NUMBER : 007
COMPEL

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____

The following papers, numbered 1 to _____, were read on this motion to/for _____

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). _____

Answering Affidavits — Exhibits _____ | No(s). _____

Replying Affidavits _____ | No(s). _____

Upon the foregoing papers, it is ordered that this motion is *decided in accordance with the accompanying order.*

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

FILED

MAR 05 2014

COUNTY CLERK'S OFFICE
NEW YORK

Dated: 2/28/14

Luy
_____, J.S.C.
LOUIS B. YORK

- 1. CHECK ONE: CASE DISPOSED ~~NON-FINAL DISPOSITION~~
- 2. CHECK AS APPROPRIATE: MOTION IS: GRANTED DENIED GRANTED IN PART OTHER
- 3. CHECK IF APPROPRIATE: SETTLE ORDER SUBMIT ORDER
- DO NOT POST FIDUCIARY APPOINTMENT REFERENCE

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

-----X
WADSWORTH CONDOS LLC, individually and
derivatively on behalf of WADSWORTH CONDOS, LLC
and 43 PARK OWNERS GROUP, LLC as the Owners, as
Tenants-In-Common, of Real Property located at One
Wadsworth Terrace, New York, New York,

Plaintiffs,

Index No.: 600899/2009

- against-

DOLLINGER GONSKI & GROSSMAN, MATTHEW
DOLLINGER, EM DESIGN GROUP, INC., MICHAEL
EVANS, SOLOMON ROSENZWEIG, PE P.C.,
SOLOMON ROSENZWEIG, YUSUF M. PATEL
and JOHN DOES 1-5, said names being fictitious,
intended to be other Building Professionals who have
worked on the Real Property located at One Wadsworth
Terrace, New York, New York,

FILED

MAR 05 2014

Defendants.

COUNTY CLERK'S OFFICE
NEW YORK

-----X
YORK, J.,

Plaintiffs Wadsworth Condos, LLC, and 43 Park Owners Group, LLC, move, pursuant to
CPLR 2004, 3101 (d) (1) (i) and 3101 (h), to compel defendants Dollinger, Gonski, & Grossman,
and Michael Dollinger (defendants), to accept plaintiffs' supplementary expert witness
disclosure, and to allow plaintiffs' experts to testify at trial. Defendants cross-move for an order
denying plaintiffs' motion to compel the acceptance of the expert disclosure.

FACTUAL ALLEGATIONS

This action involves allegations that defendants committed legal malpractice when they
allegedly commenced an action without plaintiffs' authorization. Plaintiffs served a summons
and complaint on defendants on March 24, 2009. Plaintiffs' first attorney of record in this action

was Silverman, Sclar, Shin, & Byrne. On October 5, 2009, the law firm of Shapiro & Shapiro, LLP, took over as plaintiffs' counsel, followed by Daniel Friedman, Esq. who served as counsel until March 24, 2011, at which time the law firm of Peter R. Ginsberg Law, LLC, was retained. Plaintiffs' present counsel is Marc M. Coupey, Esq., who became plaintiffs' sole counsel on August 17, 2012.

Plaintiffs contend that, on August 5, 2011, they served on all parties their initial response to defendants' demand for expert witness information in which they reserved their rights to provide defendants with expert information once they retained such experts. Plaintiffs maintain that on November 4, 2011, all parties were notified at the deposition of witness Joe Bobker that Michael Sullivan was going to be plaintiff's expert and what his probable testimony would be.

On December 2, 2011, plaintiffs filed the note of issue. Defendants moved to vacate the note of issue, however, the court denied such motion by order dated August 10, 2012. All defendants filed motions for summary judgment, and on January 22, 2013, this court issued an order dismissing plaintiffs' complaint against all of the defendants, with the exception of Dollinger, Gonski, & Grossman and Michael Dollinger. On February 4, 2013, defendants filed a notice of appeal of the decision. The appeal was perfected on July 30, 2013, and the filing date for plaintiffs' brief and defendants' reply, were pending at the time that this motion was filed. On September 10, 2013, the parties appeared at a court-ordered mediation, at which mediator Miles Vigilante ordered that the parties return on December 3, 2013, in order to discuss the status of the appeal and settlement negotiations. Defendants indicate that there has still been no trial date set for this case.

Plaintiffs served on defendants a supplementary expert witness disclosure dated August

19, 2013. Defendants maintain that the supplementary response did not include any disclosures pursuant to CPLR 3101 (d), and argue that plaintiffs have not retained an expert witness regarding the alleged claims for legal malpractice. By letter dated September 11, 2013, defendants indicated that they would move to preclude plaintiffs' experts from testifying at trial. Defendants contend that they advised plaintiff that, pursuant to a compliance conference order dated June 1, 2011, plaintiffs were to serve expert disclosure at or before the filing of the note of issue on December 2, 2011, and that the disclosure was untimely. On September 13, 2013, plaintiffs maintain that they wrote to this court seeking to schedule a status conference. Plaintiffs filed this motion before the court responded to the request for the conference.

Plaintiffs contend that defendants have been aware of plaintiffs intention to submit expert testimony at trial, and maintain that they have previously notified defendants that experts will review the materials exchanged in discovery. Plaintiffs argue that defendants will suffer no prejudice by allowing the testimony of expert witnesses at trial because no trial date has been set. Plaintiffs counsel further argues that they did not willfully or intentionally withhold disclosure of expert witness, and that the exchange of the expert witness information was missed, in part, due to the transfer of this case from prior counsel.

DISCUSSION

CPLR 3101 (d) (1) (i) provides in pertinent part:

“[u]pon request, each party shall identify each person whom the party expects to call as an expert witness at trial and shall disclose in reasonable detail the subject matter on which each expert is expected to testify, the substance of the facts and opinions on which each expert is expected to testify, the qualifications of each expert witness and a summary of the grounds for each expert's opinion. However, where a party for good cause shown retains an expert an insufficient period of time before the commencement of trial to give appropriate notice thereof, the

party shall not thereupon be precluded from introducing the expert's testimony at the trial solely on grounds of noncompliance with this paragraph. In that instance, upon motion of any party, made before or at trial, or on its own initiative, the court may make whatever order may be just.”

The Appellate Division, First Department, has held that “[p]reclusion of expert evidence on the ground of failure to give timely disclosure, as called for in CPLR 3101 (d) (1) (i), is generally unwarranted without a showing that the noncompliance was willful or prejudicial to the party seeking preclusion.” *Martin v Triborough Bridge & Tunnel Auth.*, 73 AD3d 481, 482 (1st Dept 2010) (citations omitted). *See also Handwerker v City of New York*, 90 AD3d 409, 409 (1st Dept 2011) (holding that there is no evidence of what prejudice defendants suffered or that plaintiff willfully failed to disclose the experts in a timely manner).

Here, defendants fail to meet their burden and do not demonstrate what, if any, prejudice they will suffer if plaintiffs serve expert disclosure. As discussed by both parties, a trial date has yet to be set, an appeal is presently pending regarding the motion for summary judgment, and this case is currently in the mediation process. Furthermore, defendants fail to demonstrate that the noncompliance in providing the discovery was willful in any way, and plaintiffs’ counsel affirms that the transfer of the files from the various firms contributed to the delay.

This court does not condone plaintiffs’ delay in providing the expert disclosure as directed by the compliance conference order, but in the interests of justice, the court will permit plaintiffs with one last opportunity to provide the disclosure. Therefore, plaintiffs must provide the expert disclosure within 20 days of service of notice of entry of this order together with a \$750 fine payable to defendants attorney for their delay in failing to comply with the courts preliminary conference order. If plaintiffs fail to comply with this order, do not provide the

expert disclosure within 20 days of service of notice of entry of this order, and remit the sanction amount of \$750, plaintiffs will be precluded from presenting such expert testimony at trial.

Finally, while the court grants the Dollinger defendants request for sanctions, the court declines to award them attorneys fees.

CONCLUSION and ORDER

Accordingly, it is hereby

ORDERED that plaintiffs Wadsworth Condos, LLC, and 43 Park Owners Group, LLC's motion to compel is granted to the extent that plaintiffs must provide defendants with their expert disclosure together with a sanction of \$750, within 20 days of service of notice of entry of ~~this order~~ ^{the order with *any*} and it is further

ORDERED that defendants Dollinger, Gonski, & Grossman and Matthew Dolinger's cross motion is conditionally granted to the extent that noncompliance with the directives set forth in this order will result in the preclusion of plaintiffs' experts at trial.

Dated: 2/27/14 .

ENTER:

Levy
J.S.C.

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NEW YORK

LOUIS B. YORK
J.S.C.