

**147 E. 117 St. Corp. v NYC Partnership Hous. Dev.
Fund Co.**

2016 NY Slip Op 30075(U)

January 12, 2016

Supreme Court, New York County

Docket Number: 157337/2013

Judge: Donna M. Mills

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IAS PART 58

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147 E. 117 St. Corp.,

Plaintiff,

Index
Number:

-against-

157337/2013

NYC Partnership Housing
Development Fund Company,
Inc., Banta Home Corp., The
Bluestone Organization,
Inc., and Consolidated
Edison Company of New York,
Inc.,

Defendants.

-----X

Donna M. Mills, J.:

Defendants Banta Home Corp. (Banta), The Bluestone
Organization, Inc. (Bluestone) and NYC Partnership Housing
Development Fund Company, Inc. (NYC Partnership, collectively,
the Moving Defendants) move, pursuant to CPLR 3126 and 3042 (c),
to preclude plaintiff from producing evidence for failure to
serve an adequately specific bill of particulars and to dismiss
plaintiff's complaint for failure to comply with court orders
directing discovery.

Underlying Allegations and Procedural Background

Plaintiff alleges that it is the owner of a three-story
residential building (the Building), with four residential units,
located at 147 East 117th Street, New York, New York (complaint,

¶¶ 8-10). It states that, in March 2007, NYC Partnership bought the building adjacent to the Building on the west side and that NYC Partnership retained Bluestone as developer and Banta as general contractor for a project (the Project) to demolish the building on its property and to construct a new seven story residential condominium building (*id.*, ¶¶ 11-14). Plaintiff asserts that, due to negligence in the planning and execution of the Project, it incurred damages from falling debris, leaking water onto the Building's foundation, structure and interior, mold damage to the Building and a reduction in the rent paid by its tenants (*id.*, ¶¶ 40-43, 47-50, 55-56). It also contends that Consolidated Edison Company of New York, Inc. (Con Edison) negligently maintained the manhole on the sidewalk in front of the Building (*id.*, ¶¶ 57-64).

Plaintiff commenced this action on August 9, 2013 by filing a summons and complaint, seeking \$350,000 in damages from the Moving Defendants and \$150,000 from Con Edison. The Moving Defendants interposed their answer on October 15, 2013, together with a demand for a bill of particulars and discovery demands. A preliminary conference was held on September 19, 2014 and the preliminary conference order (the PC Order) directed plaintiff to supply a bill of particulars by November 14, 2014 and other discovery by December 19, 2014. On January 23, 2015, a compliance conference was held and the compliance conference

order (the CC Order) directed compliance with the outstanding paper discovery within 30 days. On February 24, 2015, the Moving Defendants made a motion to preclude and dismiss, based upon plaintiff's failure to supply the discovery ordered in the PC and CC Orders. Plaintiff supplied a bill of particulars and a discovery response on March 20, 2015. However, the bill of particulars and the discovery response were inadequate and, on April 24, 2015, the court so-ordered a stipulation (the Stipulation) at a status conference, under which plaintiff agreed to provide additional specificity, including the date and time of each occurrence for each defendant, specific dollar amounts of damages, documents relating to the damages, a description of the property lost, copies of checks paid to contractors for repairs, the identity of any witnesses and expert reports, all within 30 days. On May 27, 2015, the court denied the Moving Defendants' motion, in light of the Stipulation (the May 2015 Order).

In the instant motion, the Moving Defendants state that plaintiff has failed to supply a supplemental bill of particulars or the discovery directed by the Stipulation (Prince affirmation dated July 16, 2015, ¶¶ 20-22). In opposition, plaintiff has annexed a copy of the previously served bill of particulars and discovery response that was accepted as inadequate by virtue of the Stipulation and stated, without presenting any evidentiary support, that its engineering expert was "ill" (Fischman

affirmation, ¶ 18). Con Edison has joined in the Moving Defendants' request for relief, but it has not brought a motion or a cross motion.

Discovery

Generally, CPLR 3101 (a) requires "full disclosure of all matter *material and necessary* in the prosecution or defense of an action, regardless of the burden of proof" (see e.g., *Matter of Kapon v Koch*, 23 NY3d 32, 36 [2014] italics in original). Moreover, "a broad interpretation of the words 'material and necessary' is proper [and they are] to be interpreted liberally to require disclosure . . . of any facts bearing on the controversy" (*Allen v Crowell-Collier Publ. Co.*, 21 NY2d 403, 407, 406 [1968]; *Osowski v AMEC Constr. Mgt., Inc.*, 69 AD3d 99, 106 [1st Dept 2009]). This includes not only admissible material, but also "matter that may lead to the disclosure of admissible proof" (*Montalvo v CVS Pharmacy, Inc.*, 81 AD3d 611, 612 [2d Dept 2011]; *Twenty Four Hour Fuel Oil Corp. v Hunter Ambulance*, 226 AD2d 175, 175-176 [1st Dept 1996]). Also, "the party seeking to preclude discovery . . . [has] the burden of proving that the material was not discoverable" (*Vivitorian Corp. v First Cent. Ins. Co.*, 203 AD2d 452, 452-453 [2d Dept 1994]; see also *Sage Realty Corp. v Proskauer Rose*, 251 AD2d 35, 40 [1st Dept 1998]). Finally, "[t]he drastic sanction of striking a pleading is inappropriate absent a clear showing that the failure

to comply with discovery directives was willful, contumacious or the result of bad faith" (*Banner v New York City Hous. Auth.*, 73 AD3d 502, 503 [1st Dept 2010]; see also *Delgado v City of New York*, 47 AD3d 550 [1st Dept 2008]).

Discussion

Plaintiff has not asserted that the Moving Defendants are not entitled to the specificity and the documents set forth in the Stipulation and the May 2015 Order, but contends that it has not acted wilfully or in bad faith in failing to produce the discovery (Fischman affirmation, ¶ 15). However, plaintiff's failure to provide the discovery the Moving Defendants seek and the particularity on its claims impedes the Moving Defendants' ability to defend this action. Since plaintiff has not abided by its obligation to provide discovery directed by the PC Order, the CC Order, the Stipulation and the May 2015 Order, the court must craft an order that ensure that the Moving Defendants have a reasonable ability to defend themselves in this action. The court will not impose "the drastic sanction of striking [plaintiff's complaint]," but the lesser penalty of preclusion unless plaintiff fully complies with its discovery obligations expeditiously (*Banner*, 73 AD3d at 503). The Moving Defendants' motion is granted to the extent of precluding plaintiff from producing evidence in support of its claims against them unless plaintiff supplies a supplemental bill of particulars with the

particularity set forth in, and discovery responses that fully comply with the documents identified in the Stipulation and the May 2015 Order within 30 days after service of a copy of this order with notice of entry.

Order

It is, therefore,

ORDERED that the motion of Banta Home Corp., The Bluestone Organization, Inc. and NYC Partnership Housing Development Fund Company, Inc. is granted to the extent of precluding plaintiff from presenting proof at trial as against said defendants unless within 30 days after service of a copy of this order with notice of entry, plaintiff serves a supplemental bill of particulars with the information directed in the April 24, 2015 stipulation and the May 27, 2015 order and a discovery response with the information and documents required by the stipulation dated April 24, 2015 and the May 27, 2015 order and is otherwise denied.

Dated: JAN. 12 , 2016

ENTER:



J.S.C.

DONNA M. MILLS, J.S.C.