

All Craft Fabricators, Inc. v ATC Assoc. Inc.
2016 NY Slip Op 31062(U)
June 8, 2016
Supreme Court, New York County
Docket Number: 156897/2013
Judge: Manuel J. Mendez
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SUPREME COURT OF THE STATE OF NEW YORK – NEW YORK COUNTY

PRESENT: HON. MANUEL J. MENDEZ PART 13
Justice

ALL CRAFT FABRICATORS, INC. and DONALDSON INTERIORS, INC., Plaintiffs,

-against-

INDEX NO. 156897/13
MOTION DATE 03-23-2016
MOTION SEQ. NO. 006
MOTION CAL. NO.

ATC ASSOCIATES INC., CARDINO ATC, SKANSKA USA BUILDING INC., CERTIFIED MOVING AND STORAGE CO. LLC, HLW INTERNATIONAL LLP, WING INC., SPECIALTY TRADES, TERRASAN ENVIRONMENTAL SOLUTIONS INC., PINNACLE ENVIRONMENTAL CORP., THE MANHATTAN COMPANY OF NEW YORK, LLC, UNITED STATES PLYWOOD CORPORATION, CHAMPION INTERNATIONAL CORPORATION, OWENS CORNING, RPM INTERNATIONAL, INC., DAP PRODUCTS, INC. MASONITE CORPORATION, INTERNATIONAL PAPER COMPANY and OWENS-ILLIONOIS, INC.,

Defendants.

The following papers, numbered 1 to 9 were read on this motion to/ for Inspection and Disposal of Stored Materials and Cross-Motion to preserve stored materials pending review of documents by the United Nations and a determination of materials stored at plaintiffs' facility:

Notice of Motion/ Order to Show Cause -- Affidavits -- Exhibits ...
Answering Affidavits -- Exhibits cross motion
Replying Affidavits

Table with 2 columns: PAPERS NUMBERED, and rows for 1-4, 5-7, 8, 9.

Cross-Motion: X Yes No

Upon a reading of the foregoing cited papers, it is Ordered that defendant, Certified Moving and Storage Co., LLC's motion requiring any inspection of the stored crates at their facility to be done in accordance with the United Nations's conditions, to be conducted within sixty (60) days and allowing Certified to cooperate with the United Nations (UN) disposal of the subject materials, is granted to the extent stated herein. Plaintiffs' cross-motion seeking to preserve the stored crates at Certified's warehouse until the documents currently being reviewed by the UN are released to the parties, and the issue of the testing and storage of the remaining crates stored at plaintiffs' facility is resolved, is denied. Plaintiffs' motion filed under Motion Sequence 008, for an Order (a) pursuant to CPLR §3124, CPLR §3104, CPLR §3126 and CPLR §603, is granted as stated herein and in the attached Case Management Order Number 001 as it pertains to the cost of transportation and storage for crated materials in plaintiffs and Certified's possession to an agreed upon location. The remainder of the relief sought is denied.

Allcraft Fabricators, Inc. (hereinafter referred to individually as "Allcraft") was hired to do millwork for the renovation and refurbishment of the United Nations Headquarters located at 405 East 42nd Street, New York, New York (hereinafter referred to as "the project"). The project required having Allcraft work on wood panels and doors which were to be refurbished. The wood panels and doors were crated and sent to Allcraft's offices, and are alleged to have contained a core material that consisted of asbestos. Donaldson Interiors, Inc. (hereinafter referred to individually as "Donaldson") shared offices with Allcraft. Plaintiffs claim that their operating facilities and offices were damaged and contaminated causing the shut-down of operations, resulting in damages

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

to property, business interruption, loss of production and the cost of remedying the situation. Plaintiffs brought this action asserting claims for trespass, private nuisance, negligence, strict liability, and breach of warranty.

The UN had initially identified fifty (50) crates of wooden panels and doors to be refurbished. Approximately twenty-seven (27) crates were delivered to Allcraft and are the subject of this lawsuit. The remaining crates were stored ("stored crates") at defendant, Certified Moving and Storage Co. LLC's (hereinafter referred to as "Certified") facility, after initially being earmarked for future delivery to Allcraft. By letter dated January 20, 2016, Certified contacted the parties to this action advising that the UN wanted to dispose of the stored crates, but is willing to allow inspection of the stored crates conditioned on the inspecting parties agreeing to specific provisions. The provisions are, that the inspecting parties would bear responsibility for the stored crates once they leave Certified's facility, pay the cost of the inspection, and bear responsibility for costs of moving the stored crates to the location. The UN is willing to bear the costs for the eventual disposal of the stored crates.

Plaintiffs advised Certified that they want to perform an inspection of the crates, but did not consent to the additional terms. By letter dated February 9, 2016, plaintiffs objected to the proposed arrangement and included a Notice to Preserve, threatening spoliation sanctions if Certified failed to preserve the stored crates.

Certified seeks an Order: (1) requiring any inspection of the subject materials to be done in accordance with the UN's conditions (as stated in the January 20, 2016 letter), (2) requiring that any inspection be conducted within sixty (60) days and (3) allowing Certified to cooperate with the UN disposal of the subject materials.

Plaintiffs oppose the relief sought in Certified's motion and cross-move for an Order restraining and directing Certified to preserve the stored crates at Certified's warehouse until: (1) the documents currently being reviewed by the UN are released to the parties and (2) the issue of the testing and storage of the other UN materials stored at plaintiffs' facility is resolved. Plaintiffs alternatively seek to have this Court deny both the motion and cross-motion and allow the parties 30 days to move by notice of motion on the questions of evidence, preservation, and cost-sharing. Plaintiffs are willing to drop their demand for cost-sharing in disposal only if the parties can agree to share the costs of storage and transportation.

The UN is not a party to this action, and has voluntarily agreed to pay the costs of storing the crates at Certified's facilities for a "reasonable" period of time. Plaintiffs have failed to state a basis for delaying any inspection or testing of the crates currently located at Certified's facilities. Plaintiffs have also failed to establish that the issue of testing and storage of all of the crates cannot be resolved in this decision.

The issuance of an injunction is within the discretion of the trial court. A movant seeking a stay or injunction, is required to show, "(1) the likelihood of ultimate success on the merits; (2) irreparable injury to him absent granting of the preliminary injunction; and (3) that a balancing of the equities favors his position" (*Nobu Next Door, LLC v. Fine Arts Housing, Inc.*, 4 N.Y. 3d 839, 833 N.E. 2d 191, 800 N.Y.S. 2d 48 [2005]). A preliminary injunction functions to maintain the status quo until a full hearing can be had on the merits. It should not be granted unless its necessity and justification is clear based on undisputed facts (*Residential Board of Managers of the Columbia Condominium v. Alden*, 178 A.D. 2d 121, 576 N.Y.S. 2d 859 [1st Dept., 1991]).

Plaintiffs conclusory and speculative statements concerning the delay of inspection pending receipt of documentary discovery, does not support the need for a restraining order. Plaintiffs have not established that documentary discovery is necessary prior to inspection and testing. Certified has not stated that it would destroy the crates currently located at its facility prior to inspection or testing, merely that it is seeking to establish a specific timetable that will comport with the UN's position of "reasonable time period." Plaintiffs also failed to establish that there is a need to maintain the status quo until the crates in their possession are addressed or that the balancing of the equities are in their favor. Certified will be prejudiced and the balance of the equities are in its favor due to its having to continue to store potentially hazardous materials at its facility and to the extent it is not for a "reasonable" period, at Certified's own expense.

Plaintiffs subsequently filed a motion under Motion Sequence 008, seeking an Order: (a) pursuant to CPLR §3124 and §3104 compelling the parties to share the cost of transportation and storage for crated materials in plaintiffs and Certified's possession to an agreed upon location, and should the parties not agree within thirty (30) days, allowing plaintiff to select a third-party and arrange for the transportation and storage with costs shared on a per party basis; (b) pursuant to CPLR § 3126 compelling defendants, ATC Associates Inc., Cardino ATC, Skanska USA Building Inc., HLW International LLP, Terrasan Environmental Solutions Inc., Pinnacle Environmental Corp., The Manhattan Company of New York LLC, and Wing Inc. Specialty Trades (collectively referred to as the Construction Defendants) to provide documents responsive to plaintiff's demands within thirty (30) days or striking their answers, or alternatively (c) pursuant to CPLR §3126 precluding each of the Construction Defendants from testifying at the time of trial; (d) pursuant to CPLR § 3126 specifically sanctioning defendant Skanska USA Building Inc. for producing documents in other litigations that would be subject to the same UN privilege as cited in this litigation, and (e) pursuant to CPLR §603 bifurcating the claims against the Construction Defendants and proceeding through damages-only discovery and/or damages only trial.

The Court has broad discretion in supervising the discovery process under CPLR Article 31 (*Allen v. Crowell-Collier Publ.Co.*, 21 N.Y. 2d 403, 288 N.Y.S. 2d 449, 235 N.E. 2d 430 [1968] and *Brooklyn Union Gas Co. v. American Home Assurance Co.*, 23 A.D. 3d 190, 803 N.Y.S. 2d 532 [1st Dept., 2005]). The standard for discovery is that the producing party bear the initial cost of searching for, retrieval and production of discovery. The Court in its discretion can determine whether costs should be shifted between the parties where the cost is "significant" (*U.S. Bank Nat. Ass'n v. GreenPoint Mortgage Funding, Inc.*, 94 A.D. 3d 58, 939 N.Y.S. 2d 395 [1st Dept., 2012]).

The inability of the parties in this action to reach an agreement as to costs, fees and expenses for inspection and testing of crates, as stated in this motion and cross-motion, as well as under Motion Sequence 008, results in this Court imposing its own directive, which is incorporated in the attached Case Management Order Number 001.

Within 30 days of service of a copy of this Decision and Order with Notice of Entry pursuant to e-filing protocol upon all parties, any party interested and agreeing to conduct an inspection or testing on the crates in Certified's possession shall submit to this Court a signed stipulation to be "So Ordered." The signed stipulation shall designate to the Court the name of the facility for transportation and any inspection of the crates currently in Certified's possession as well as designate the expert or experts that the parties elect to use for inspection and testing in this case. Each participating party will agree to pay their share of the costs and expenses for inspection and testing, this includes plaintiffs and Certified, to the extent Certified elects to participate.

In the event that the parties cannot agree to enter into a signed stipulation, the crates currently in Certified's possession are to be transferred to a facility for inspection and testing designated by Certified, and the costs and expenses are to be shared equally by all parties to this action. If a party to this action does not wish to perform any inspection or testing on the crates currently in Certified's possession it may stipulate to not designate a facility, and waive its right to be present for the inspection and any testing.

Plaintiffs are currently storing the crates in their possession on their own property. They have not demonstrated that they are currently subject to additional costs, burden, or significant disadvantage. To the extent that plaintiffs are seeking to transfer the crates, including those in a 40 yard container to another facility, (Ferasco LLC, located at 14E Easy Street, in Bound Brook, New Jersey 08805), they will bear the initial related costs including transportation. Any party agreeing to conduct an inspection or testing on the crates in plaintiffs' possession shall submit to this Court a signed stipulation to be "So Ordered" designating either Ferasco and a facility to be used for transportation for any inspection of the crates currently in plaintiffs' possession, or the facility to be used for securing the crates at plaintiff's facility to avoid further contamination, as well as designate the expert or experts that the parties elect to use for inspection and testing in this case. Each participating party will agree to pay their share of the costs and expenses for inspection and testing.

In the event that the participating parties cannot agree to, or enter into a signed stipulation, the crates currently in plaintiffs' possession will be transferred to Ferasco LLC for inspection by the entity responsible for transportation designated by plaintiffs, with the costs and expenses shared equally by all parties to this action. If a party to this action does not wish to perform any inspection or testing on the crates currently in plaintiffs possession it may stipulate to not designate any facilities, and waive its right to be present for the inspection and any testing.

Within 30 days of service of a copy of this Decision and Order with Notice of Entry upon all parties by e-filing protocol, the parties that elect to participate in the inspection and/or testing must agree on dates that all designated experts can conduct the inspection and/or testing of the crates currently in plaintiffs' and Certified's possession. Such inspection date must be within 60 days of service of a copy of this Decision and Order with Notice of Entry upon all parties pursuant to e-filing protocol. Given that multiple experts may have to work somewhat cooperatively and/or sequentially, the Court recommends scheduling, or at least reserving, more than one day.

Not less than 30 days after the completion of the inspection and/or testing conducted by all participating parties, Certified shall be permitted to dispose of the crates currently in its possession at the UN's expense and plaintiffs will be allowed to dispose of the crates currently in their possession at their own expense.

Pursuant to CPLR §3126, there must be a showing of a willful violation of a prior Order for discovery and that the failure to provide discovery was willful, contumacious or due to bad faith (*Weissman v. 20 East 9th Street Corporation*, 48 A.D. 3d 242, 852 N.Y.S. 2d 67 [N.Y.A.D. 1st Dept., 2008]). The movant seeking dismissal pursuant to CPLR §3126 bears the burden of proof to establish severe prejudice without the discovery sought. Preclusion is an appropriate remedy to prevent the lack of evidence from being used by a party to its advantage (*Balwin v. Gerard Avenue, LLC*, 58 A.D. 3d 484, 871 N.Y.S. 2d 121 [1st Dept., 2009]). The burden then shifts to the non-moving party to establish that there is a reasonable excuse for the failure to provide discovery (*Reidel v. Ryder TRS Inc.*, 13 A.D. 3d 170, 786 N.Y.S. 2d 487 [1st Dept., 2004]).

Plaintiffs have not stated a basis pursuant to CPLR §3126 for sanctions due to failure of the Construction Defendants to provide discovery. The Construction Defendants have entered into contracts with the UN as part of the renovation project. They were both contractually and legally compelled to obtain review and approval from the UN, an entity that has immunity from the legal process, prior to the exchange of any documentary discovery in this action. The Office of the U.S. Attorney for the Southern District of New York, Preet Bharara, filed a "Statement of Interest" in this action on January 13, 2015, on behalf of the United States, in connection with the privileges and immunities of the UN. At a hearing on April 1, 2015, the Hon. Shlomo S. Hagler, directed that documentary discovery be conducted at and through the UN's offices, removing a temporary restraining order that was in effect at the time (Mot. Seq. 008, Exh. N).

In correspondence dated April 29, 2016, the U.S. Attorney's Office has advised this Court that plaintiffs have, "propounded numerous discovery demands to the Contractor Defendants," and although the UN is voluntarily reviewing documentation, it is an extensive process that is still pending. This Court disagrees with plaintiffs' unsupported position that this Court can compel the discovery sought directly from the Contractor Defendants avoiding UN review subsequent to the intervention of the U.S. Attorney. Plaintiffs have not shown that the Contractor Defendants acted willfully or contumaciously or in violation of a Court Order in failing to provide the documentary discovery sought, or that they utilized the UN privileges and immunities as a shield. There is no basis to strike pleadings or preclude the Contractor Defendant's testimony at this stage of the litigation.

Plaintiffs have not stated a basis to separately sanction defendant Skanska USA Building Inc. for producing documents in other litigations that would be subject to the same UN privilege as cited in this litigation. Plaintiffs refer to five e-filed labor law actions asserted against Skanska USA Building Inc., and an action brought in Federal Court in Massachusetts, arguing that discovery has been exchanged and the UN privileges and immunities were not raised in those actions. The Preliminary Conference Order in one of the cases plaintiffs cite states that discovery will be exchanged, "to the extent not protected by privileges & immunities of the contract with the U.N." Plaintiffs are not a party to any of the cited actions and the only basis for their argument are e-filed discovery Orders in actions that are different from this case.

CPLR § 603 allows the court in its discretion to sever any claims, and order a separate trial of any cause of action or issues (Baseball Office of Com'r v. Marsh & McLennan, Inc., 295 A.D. 73, 742 N.Y.S. 2d 40 [1st Dept., 2002]). Severance requires a showing of "prejudice or substantial delay," where there is a "common nucleus of facts." The avoidance of inconsistent verdicts and judicial efficiency are served by the joint trial format (Vecciarelli v. King Pharmaceuticals, Inc., 71 A.D. 3d 595, 899 N.Y.S. 2d 14 [1st Dept. 2010]). Plaintiffs' have not established misjoinder or that a joint trial will result in prejudice to a substantial right. They have also not stated a basis for the extraordinary relief of conducting a damages trial before a determination of liability solely on the claims asserted against the Contractor Defendants. Plaintiffs request for severance and bifurcation of the damage claims against the Construction defendants, will not result in judicial efficiency.

Accordingly, it is ORDERED that defendant, Certified Moving and Storage Co., LLC's motion requiring any inspection of the stored crates at their facility to be done in accordance with the United Nations's conditions, to be conducted within sixty (60) days and allowing Certified to cooperate with the United Nations (UN) disposal of the subject materials, is granted to the extent stated herein, and in the attached Case Management Order Number 001, and it is further,

ORDERED, that plaintiffs' cross-motion seeking to preserve the stored crates at Certified's warehouse until the documents currently being reviewed by the UN are released to the parties and the issue of the testing and storage of the remaining crates stored at plaintiffs' facility is resolved, is denied, and it is further,

ORDERED, that Plaintiffs' motion filed under Motion Sequence 008, for an Order (a) pursuant to CPLR §3124, CPLR §3104, CPLR §3126 and CPLR §603, is granted as stated herein and in the attached Case Management Order Number 001 as it pertains to the cost of transportation and storage for crated materials in plaintiffs and Certified's possession to an agreed upon location, and it is further,

ORDERED, that the remainder of the relief sought in plaintiff's motion filed under Motion Sequence 008, is denied.

ENTER:

MANUEL J. MENDEZ
J.S.C.



MANUEL J. MENDEZ,
J.S.C.

Dated: June 8, 2016

Check one: FINAL DISPOSITION X NON-FINAL DISPOSITION
Check if appropriate: DO NOT POST REFERENCE