Board of Mgrs. of the 94 Prospect Place Condominium v 94 Prospect, LLC
2017 NY Slip Op 30543(U)
March 22, 2017
Supreme Court, Kings County
Docket Number: 500894/16
Judge: Lawrence S. Knipel
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At an IAS Term, Part Comm-4 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 22nd day of March, 2017.

P R E S E N T:

HON. LAWRENCE KNIPEL,
Justice.

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THE BOARD OF MANAGERS OF THE 94 PROSPECT PLACE CONDOMINIUM, et al.,

Plaintiffs,

- against -

Index No. 500894/16

94 PROSPECT, LLC, et al.,

Defendants.

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The following papers numbered 1 to 10 read herein:

	Papers Numbered
Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed	1, 2-3, 4-5, 6-7
Opposing Affidavits (Affirmations)	8, 9
Reply Affidavits (Affirmations)	
12/8/16 Affidavit (Affirmation) of Justin B. Perri	10
Other Papers	

Upon the foregoing papers, plaintiffs the Board of Managers of the 94 Prospect Place Condominium (the Board), Jamie Bialor and Scott Rothenberg move to compel discovery from defendants 94 Prospect, LLC (94 LLC), Ben Werczberger (Ben), Miriam Werczberger (Miriam), Martin Handler, Traditional Home Builders Inc. (THB) and Shulem Neiman. Defendants cross-move for an order, pursuant to CPLR 3103, issuing a protective order as to certain demands in plaintiffs' Notice of Discovery and Inspection (DNI). Plaintiffs also

move for an order (a) striking the answer of defendants and entering a default, (b) alternatively or additionally, entering default against those defendants who failed to provide verifications to defendants' answer, (c) alternatively or additionally, finding liability against defendants who failed to obtain insurance in breach of the Offering Plan, (d) deeming admitted the items in plaintiffs' Notice to Admit for failure to provide verifications, and (e) awarding sanctions. Defendants further move to amend their answer.

Plaintiffs commenced this action on January 22, 2016 to recover damages sustained by common elements and individual units in the subject condominium building as the alleged result of defective construction of the building's foundation, roof and structural elements. 94 LLC was the sponsor of the condominium project which involved the construction of a four unit building at 94 Prospect Place in Brooklyn. Ben and Miriam were the principals of 94 LLC. Pursuant to the Offering Plan, certified by 94 LLC and Ben and accepted for filing in 2009, the building was to be completed in accordance with the plans and specifications set forth therein and all applicable New York City Administrative Code requirements. The sponsor board identified in the Offering Plan consisted of Ben, Miriam and Handler. Construction of the building was undertaken and completed by THB. Neiman was the president of THB. A certificate of occupancy was procured in June 2011 and closings on three of the units took place shortly thereafter.

According to the verified complaint, in or around August 2011, the foundation of the building flooded and the unit owners complained of significant water damage to and mold

growing on the walls of their units. Following the flood, THB attempted to make repairs and install waterproofing but did not correct the defects to the foundation. In January 2013, Unit #1, which includes the ground floor and a section of the basement of the building, was sold to Rothenberg and Bialor. Rothenberg and Bialor allege that the 2011 flood and damage to the foundation was not disclosed to them prior to the sale. Subsequent flooding through the foundation occurred in 2013 and 2014 causing substantial damage. In addition to the structural problems involving the foundation, plaintiffs also claim defective workmanship to the roof of the building. Plaintiffs set forth causes of action sounding in breach of contract against 94 LLC and Ben based on misrepresentations in the Offering Plan and individual unit purchase agreements, breach of contract against Ben, Miriam and Handler (the sponsor board members) based on misrepresentations in the condominium by-laws, breach of express warranty against 94 LLC and Ben, breach of implied warranty against all defendants, breach of fiduciary duty against Ben, Miriam and Handler, common law fraud against 94 LLC, Ben, Miriam and Handler, common law fraud against Neiman and THB and an accounting against 94 LLC, Ben, Miriam and Handler.

On March 14, 2016, defendants filed an answer which was verified only by Handler and Neiman. On March 28, 2016, plaintiffs served upon defendants a DNI requesting documents. On April 19, 2016, plaintiffs served defendants with a First Notice to Admit and and a Notice to Take the Examination Before Trial (EBT) of Miriam. On June 3, 2016, a preliminary conference (PC) was held in this part. Pursuant to the PC order, defendants were

required to respond to the DNI and Notice to Admit by June 30, 2016. The PC order also provided that interrogatories by either party were to be served by September 30, 2016, with responses to be served thirty days thereafter and that EBTs of defendants were to take place the first week of August 2016.

Defendants served a response to plaintiffs' DNI which consisted mostly of objections on grounds of vagueness/over breadth, burdensomeness and/or privilege. The demands objected to include a request for documents relied on for verification of defendants' answer (No. 2), e-mails/communications between defendants and plaintiffs and defendants and their agents, employees, contractors and consultants regarding the allegations in the complaint (Nos. 3-6), documents concerning the Offering Plan and purchase agreements (Nos. 7-8), documents concerning insurance contracts procured by defendants (Nos. 9-11), documents concerning THB and the condominium (No. 12), shareholder ledger books, meeting minutes, by-laws and tax returns of THB (Nos. 14-17), documents sufficient to identify any entity other than THB which employed or was owned and/or operated by Neiman from 2007 to present (No. 19), documents concerning 94 LLC and the condominium (No. 20), ledger books, meeting minutes, tax returns and by-laws of 94 LLC (Nos. 22-25), documents sufficient to identify all housing projects for which any of the defendants was a sponsor, builder, contractor or owner from 2007 to present (No. 27), documents concerning financing for such projects (No. 28), documents concerning delivery of insurance contracts from defendants to plaintiffs (Nos. 34-35), documents concerning materials and processes used

in construction of the condominium (Nos. 41-47), documents concerning the three events of flooding and notices or disclosures (Nos. 54-65) and documents concerning residential projects on which THB or Neiman worked prior to 2007 (No. 66). Plaintiffs notified defendants that there were substantial deficiencies in defendants' response and proposed to meet and confer with defendants to discuss the issues. Attempts by the parties to resolve the discovery issues proved unsuccessful, leading to the instant motions by plaintiffs to, among other things, compel disclosure and strike defendants' answer and defendants' cross motion for a protective order.

CPLR 3101(a) provides that "[t]here shall be full disclosure of all matter material and necessary in the prosecution or defense of an action, regardless of the burden of proof." However, unlimited disclosure is not mandated, and the court may deny, limit, condition, or regulate the use of any disclosure device to prevent unreasonable annoyance, expense, embarrassment, disadvantage, or other prejudice to any person or the courts (*see* CPLR 3103 [a]; *Montalvo v CVS Pharm., Inc.*, 102 AD3d 842, 843 [2d Dept 2013]; *County of Suffolk v Long Is. Power Auth.*, 100 AD3d 944, 946 [2d Dept 2012]; *Accent Collections, Inc. v Cappelli Enters., Inc.*, 84 AD3d 1283 [2d Dept 2011]). Upon review of plaintiffs' DNI, the court agrees that certain requests are vague and/or overbroad (specifically, demand No. 7 ["Each document concerning the Plan"], demand No. 8 [Each document concerning the Purchase Agreements] and demand No. 20 ["Each document concerning 94 Prospect LLC and the Condominium"]) or are not ostensibly relevant to plaintiffs' causes of action

(specifically, demand Nos. 19, 27, 28 & 66). Accordingly, plaintiffs' motion to compel is denied, and defendants' cross motion is granted, to the extent that defendants shall not be compelled to respond to these enumerated demands as stated in plaintiffs' first DNI without prejudice to plaintiffs serving a second DNI with more narrowly-tailored disclosure requests and/or to bring a further motion demonstrating the relevancy of the documents requested. Plaintiffs' motion to compel is otherwise granted, and defendants' cross motion is denied, to the extent that defendants shall produce the documents (not already provided) requested in demands Nos. 2, 3-6, 9-11, 12, 14-17, 22-25, 34-35, 41-47 and 54-65 within sixty days of the date of entry this order or provide an affidavit from one with personal knowledge attesting that a diligent search was performed and the requested documents could not be located or are not in existence. With respect to the demands for documents which defendants claim are privileged, a privilege log shall be produced.

"The determination whether to strike a pleading for failure to comply with court-ordered disclosure lies within the sound discretion of the trial court" *(Fishbane v Chelsea Hall, LLC*, 65 AD3d 1079, 1081 [2d Dept 2009]; *see Apladenaki v Greenpoint Mtge. Funding, Inc.*, 117 AD3d 976 [2d Dept 2014]; *Arpino v F.J.F. & Sons Elec. Co., Inc.*, 102 AD3d 201, 209 [2d Dept 2012]). "However, the drastic remedy of striking a pleading pursuant to CPLR 3126 should not be imposed unless the failure to comply with discovery demands or orders is clearly willful and contumacious. Willful and contumacious conduct may be inferred from a party's repeated failure to comply with court-ordered discovery,

coupled with inadequate explanations for the failures to comply or a failure to comply with court-ordered discovery over an extended period of time" (*Orgel v Stewart Tit. Ins. Co.*, 91 AD3d 922, 923 [2d Dept 2012] [citations and internal quotation marks omitted]; *see Rock City Sound, Inc. v Bashian & Farber, LLP*, 83 AD3d 685, 686-687 [2d Dept 2011]). While plaintiffs maintain that defendants have not complied with the dates set forth in the PC order and have been dilatory and uncooperative thus far, the court does not find that defendants have demonstrated a pattern of non-compliance or have engaged in conduct warranting striking of their pleading. As a result, that part of plaintiffs' motion to strike defendants' answer is denied.

That part of plaintiffs' motion seeking default judgments against those defendants who failed to provide verifications to defendants' answer is denied. "Pursuant to CPLR 3022, when a pleading is required to be verified, the recipient of an unverified or defectively verified pleading may treat it as a nullity provided that the recipient with due diligence returns the [pleading] with notification of the reason(s) for deeming the verification defective" (*Lepkowski v State of New York*, 1 NY3d 201, 210 [2003] [internal quotation marks and citation omitted]). Although the Court of Appeals has declined to identify the period of time in which "due diligence" must be exercised (*Matter of Miller v Board of Assessors*, 91 NY2d 82, 86 [1997]), some lower courts have held that a notice that the pleading will be treated as a nullity must be given within 24 hours (*Theodoridis v American Transit Ins. Co.*, 210 AD2d 397, 397 [2d Dept 1994]; *Lentlie v Egan*, 94 AD2d 839, 840 [3d

Dept 1983]; *O'Neil v Kasler*, 53 AD2d 310 [4th Dept1977]). Defendants' answer was filed electronically (and thus deemed served on plaintiffs) on March 14, 2016. However, it does not appear that plaintiffs notified defendants of the defect until July 1, 2016, when plaintiffs sent a letter to defendants addressing discovery noncompliance. Under the circumstances, the court finds that plaintiffs failed to respond with due diligence under CPLR 3022.

That part of plaintiffs' motion for an order finding liability against defendants for failure to obtain insurance as required by the Offering Plan is denied. Plaintiffs, who are in essence moving for summary judgment on this issue, contend that a party's breach of a contractual obligation to procure insurance makes it liable for all resulting damages to a plaintiff. However, the cases relied upon by plaintiffs (*Kennelty v Darlind Constr.*, 260 AD2d 443 [2d Dept 1999]; *Spector v Cushman & Wakefield, Inc.*, 34 Misc 3d 1204[A], 2011 NY Slip Op 52426[U] [Sup Ct, NY County 2011]) involve situations where a general contractor was found entitled to indemnification from a subcontractor based on the latter's failure to procure insurance covering the general contractor against liability to a third party. The instant action is distinguishable as does not involve a third party seeking to impose vicarious liability against and recover damages from plaintiffs who in turn are seeking indemnification from defendants who promised to insure against such damages. Moreover, while defendants' compliance of those provisions in the Offering Plan relating to insurance is not yet demonstrated from disclosure, plaintiffs have not established as a matter of law that defendants' did *not* procure the required insurance.

CPLR 3123(a) requires a party to respond to a notice to admit within 20 days of service of the notice "*or within such further time as the court may allow*," and further provides that "the party to whom the request is directed [must] serve[ ] upon the party requesting the admission a sworn statement either denying specifically the matters of which an admission is requested or setting forth in detail why he cannot truthfully either admit or deny those matters " (emphasis added). That part of plaintiffs' motion deeming the items in plaintiffs' Notice to Admit admitted by defendants for failure to provide verifications from each defendant is conditionally granted unless an amended/supplemental response with verifications is served on plaintiffs within sixty (60) days of the entry of this order. That part of plaintiffs' motion for sanctions is denied.

Finally, defendants' motion to amend their answer to include a defense that plaintiffs are improperly splitting a cause of action is granted. In the absence of prejudice or surprise to the opposing party, leave to amend an answer should be freely given where the proposed amendment is neither palpably insufficient nor patently devoid of merit (*see* CPLR 3025[b]; *Tomasino v American Tobacco Co.*, 57 AD3d 652, 653 [2d Dept 2008]; *Matter of Roberts v Borg*, 35 AD3d 617, 618 [2d Dept 2006]). The proposed new defense alleges that plaintiffs have sued in small claims court for "all or part of the same relief" sought in the instant case and obtained a money judgment. There is a prohibition against splitting a single claim into multiple legal actions (*see Craig–Oriol v Mount Sinai Hosp.*, 201 AD2d 449 [2d Dept 1994]). For instance, ""causes of action' may not be 'split' to obtain small claims

jurisdiction" (*Conway v DeJesu Maio & Assoc.*, 44 Misc 3d 277, 279 [Dist Ct, Suffolk County 2014]). While plaintiffs contend that the small claims action involved repairs to the floor in Unit #1 which are not the subject of this lawsuit, the proposed defense as alleged is not "palpably insufficient" or "patently devoid of merit" and there is no demonstrable prejudice to plaintiffs by the amendment. "[A] court should not examine the merits or legal sufficiency of the proposed amendment unless it is palpably insufficient or patently devoid of merit on its face" (*Confidential Lending, LLC v Nurse*, 120 AD3d 739, 741 [2d Dept 2014]). The verified amended answer, annexed to the defendant's motion for leave to amend their pleading, is hereby deemed served upon plaintiffs, nunc pro tunc.

The foregoing constitutes the decision and order of the court.

E N T E R,

J. S. C.

HON. LAWRENCE KNIPEL