

<b>Board of Mgrs. of the 184 Thompson Condominium v B. Geller Restoration, Inc.</b>
2017 NY Slip Op 32368(U)
November 8, 2017
Supreme Court, New York County
Docket Number: 153466/2013
Judge: Arlene P. Bluth
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**SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 32**

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**THE BOARD OF MANAGERS OF THE 184 THOMPSON  
CONDOMINIUM**

**Plaintiff,**

**-against-**

**B. GELLER RESTORATION, INC.,**

**Defendant.**

----- X  
**B. GELLER RESTORATION, INC.,**

**Third-Party Plaintiff,**

**-against-**

**BLACK SUN CONSTRUCTION and UNIVERSAL  
RESTORATION CORPORATION,**

**Third-Party Defendants.**

----- X  
**STRATHMORE INSURANCE COMPANY, as subrogee  
OF THE 184 THOMPSON CONDOMINIUM and all other  
named insureds under policy number 8131M12532,**

**Plaintiff,**

**-against-**

**B. GELLER RESTORATION, INC.,**

**Defendant.**

----- X  
**STATE FARM FIRE AND CASUALTY COMPANY  
AS SUBROGEE OF STANLEY MIESZKOWSKI,**

**Plaintiff,**

**-against-**

**B. GELLER RESTORATION, INC., and  
DOUGLAS ELLIMAN PROPERTY MANAGEMENT,**

**Defendants.**

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**Index No. 153466/2013  
Motion Seq: 004**

**DECISION & ORDER**

**HON. ARLENE P. BLUTH**

**Index No. 154401/13  
Action No. 2**

**Index No. 453015/15  
Action No. 3**

The motion by plaintiff to strike defendant B. Geller Restoration's answer for failure to provide discovery is denied. The cross-motion by defendant for sanctions is denied.

### **Background**

This action arises out of roof and parapet work completed by a subcontractor hired by defendant at plaintiff's condominium. Plaintiff claims the work was done improperly and that the building suffered substantial water damage after a storm.

Plaintiff claims that defendant was directed to turn over requested documents on numerous occasions. On March 10, 2015, the Court ordered defendant to produce outstanding documents and noted that defendant's failure to produce discovery on or before April 10, 2015 would be deemed willful and contumacious (NYSCEF Doc. No. 40). Plaintiff claims that defendant turned over some discovery and documents thereafter.

The instant motion arises out of a purported missing job file that was not turned over until April 6, 2017. During defendant's deposition, plaintiff claims it learned that defendant maintained a job file for its work at the property and that this file had not been produced in connection with this litigation. Plaintiff requested the file from defendant's counsel via a letter dated March 8, 2017 (the same day as the deposition). Plaintiff contends that defendant's counsel sent an email dated April 4, 2017 insisting that the job file would be produced but plaintiff claims it has not received this discovery. Plaintiff argues that it has been prejudiced by defendant's failure to produce the job file and asks that the Court to strike defendant's answer.

In opposition and in support of its cross motion, defendant claims that counsel for plaintiff never inquired as to whether defendant maintained records in the regular course of business until the

deposition of defendant's witness on March 8, 2017. Defendant argues that there has never been a Court order compelling production of a job file. Defendant claims it served this job file on April 6, 2017— before the instant motion was filed. Defendant also contends that the job file was served nearly 30 days before the next scheduled deposition, which provided plaintiff enough time to review the documents in preparation for that deposition. Defendant seeks sanctions on the ground that the instant motion is frivolous.

In reply, plaintiff emphasizes that its previous requests encompassed the job file— plaintiff requested all documents in defendant's possession related to the work done at the premises.

In reply to its cross-motion, defendant claims that the failure to produce the job file is not evidence of willful conduct because no one from plaintiff's counsel's office ever indicated that the job file was missing.

### **Discussion**

In order to prevail on a motion to strike an answer, plaintiff must “show conclusively that defendants' failure to disclose was willful, contumacious or due to bad faith” (*Pezhman v Dept. of Educ. of City of New York*, 95 AD3d 625, 625, 944 NYS2d 128 [1st Dept 2012] [internal quotations and citation omitted]). “[E]xtreme conduct is required before imposition of the ultimate penalty— striking the answer” (*id.* at 625-26 [internal quotations and citation omitted]).

Here, the record before the Court indicates that the job file simply fell through the cracks. Plaintiff, who claims that a job file is “normally the most important set of documents in a contractor case,” never specifically requested the file as part of its discovery requests. Instead, plaintiff only made general requests for documents relating to the work done at the premises. The fact that defendant did

not produce a specific set of documents does not establish that defendant's conduct was willful or contumacious. Certainly, defendant or defendant's counsel should have conducted a more thorough investigation for relevant documents. But the fact is that once plaintiff specifically asked for the job file, defendant produced it within a month.

There is no basis to strike the answer based on the 2015 Court order. That order applied to plaintiff's general request for relevant documents and plaintiff admits defendant produced documents in response to that directive. This Court will not impose the extreme penalty of striking an answer where the existence of additional documents was discovered during a deposition and subsequently produced.

At oral argument, defendant claimed that many of the documents contained in the job file were merely duplicates of other documents already produced. In response, plaintiff's counsel could not articulate what documents in the job file were not previously produced and, therefore, plaintiff could not show what prejudice it suffered. For some reason, plaintiff did not wait to review the contents of the job file before making the instant motion or amend its motion once it identified what documents (if any) were produced for the first time.

The Court also denies defendant's cross-motion for sanctions. Clearly, this job file should have been located and produced earlier because it falls within plaintiff's broad discovery demand. And it's likely best practice to ask a client about how and where it maintains records for each construction job. But the fact that it was not produced does not constitute bad faith conduct by defendant. In fact, the undisputed timeline of events suggests just the opposite—once the file was discovered, defendant located the file and produced it in less than a month.

Accordingly, it is hereby

ORDERED that plaintiff's motion to strike defendant's answer is denied; and it is further

ORDERED that defendant's motion for sanctions is denied.

This is the Decision and Order of the Court.

The parties are directed to appear for their already-scheduled status conference on November 14, 2017 at 2:15 p.m.

**Dated: November 8, 2017**  
**New York, New York**



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**ARLENE P. BLUTH, JSC**