

Simoni v Fifth on the Park Condo, LLC
2018 NY Slip Op 31462(U)
July 2, 2018
Supreme Court, New York County
Docket Number: 150839-2013
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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JOHN B. SIMONI, JR.,

Plaintiff,

-against-

FIFTH ON THE PARK CONDO, LLC,

Defendant.

-----X

DECISION & ORDER
Index No. 150839-2013

Mot. Seq. 003

ARLENE P. BLUTH, JSC

Plaintiff's motion to strike the note of issue and to compel Defendant to produce documents for supplemental discovery is granted in part and denied in part.

Background

This action arises from John Simoni, Jr.'s ("Plaintiff") purchase of a condominium unit at 1485 Fifth Avenue in Manhattan from Fifth on the Park Condo, LLC ("Defendant"). Plaintiff seeks to strike the Note of Issue ("NOI") filed by Defendant and to compel the Defendant to produce documents in response to his supplemental discovery demand. Defendant filed the NOI on November 27, 2017 and states that it was proper and should not be stricken and that all relevant discovery is complete.

Plaintiff purchased the unit in 2012 and this lawsuit was commenced in January 2013. Plaintiff argues that the unit he purchased contains numerous defects that violate the purchase agreement he entered into with Defendant. Plaintiff seeks to recover damages he purportedly suffered as a result of a myriad of construction, design, and utility defects within his unit, which included: lack of fire stopping in the unit walls, failure to provide ventilation and exhaust for the

bedrooms and kitchen, and faulty bathroom plumbing. Plaintiff is the only resident in the building to sue Defendant; a building-wide settlement was reached between the Defendant and every other purchaser in the building besides Plaintiff.

Procedural History

On September 8, 2016 Plaintiff was dissatisfied with Defendant's responses to a discovery exchange and moved to strike the Defendant's pleading. Defendant cross-moved, *inter alia*, for a protective order arguing that Plaintiff's discovery demands were overly broad. The Court granted Defendant's motion in January 2017 and advised that Plaintiff's future discovery requests should be limited to issues specifically relating to his unit (NYSCEF Doc. No. 90 at 6). During a compliance conference on April 25, 2017 the Court directed the parties to serve supplemental discovery demands and file the NOI at the close of discovery (NYSCEF Doc. No. 95). Plaintiff then served Defendant with a second set of discovery requests including 35 document demands. Defendant responded by objecting to Plaintiff's additional discovery demands and did not produce any further documents. Defendant filed the NOI on November 27, 2017.

Plaintiff moves to strike the NOI and to compel Defendant to comply with the remaining discovery demands within 20 days or have its answer stricken. Plaintiff alleges that Defendant responded to supplement discovery requests but did not provide any documents and seeks Defendant's compliance with demands 5, 7, 11, 14, 17, 23, 25, 26 and 29.

Defendant claims the NOI should remain because all relevant discovery is complete. Defendant states that it does not want Plaintiff to continuously delay this action and opposes Plaintiff's request for a conditional compliance order, alleging it already provided some of the

currently requested documents and gave sufficient reasons why the rest could not be produced. Defendant claims Plaintiff's demands are still overly broad and apply to more than just Plaintiff's condominium unit. Defendant alleges Plaintiff is attempting to prolong this action and harass Defendant.

Plaintiff claims he seeks basic records from Defendant and has a right to them even if they provide information that is not exclusively about his unit.

Discussion

CPLR 3214 states "[i]f a person fails to respond or comply with any request, notice, interrogatory, demand, question or order under this article...the party seeking disclosure may move to compel compliance or a response." Furthermore, "discovery determinations rest within the sound discretion of the trial court" (*Andon ex rel. Andon v 302-304 Mott St. Assocs.*, 94 NY2d 740, 745, 731 NE2d 589 [2000] [citations omitted]).

"There shall be full disclosure of all matter material and necessary in the prosecution or defense of an action, regardless of the burden of proof" (CPLR 3101[a]). "The words material and necessary, are...to be interpreted liberally to require disclosure, upon request, of any facts bearing on the controversy which will assist preparation for trial by sharpening the issues and reducing delay and proximity" (*Allen v Cromwell-Collier Pub. Co.*, 21 NY2d 403, 406, 288 NYS2d 449 [1968] [internal quotations omitted]). "Discovery demands are improper if they are based upon hypothetical speculations calculated to justify a fishing expedition" (*Forman v Henkin*, 134 AD3d 529, 530, 22 NYS3d 178 [1st Dept 2015]).

Demands 5 & 7

In Demand 5 Plaintiff requests "[a]ll contracts, subcontracts, construction management agreements entered into by [Defendant] with whomever and which concern the trades applicable

to any and all of the Unit Defects, including without limit fire stopping, controlled inspections for fire stopping, heating/ventilation and air conditioning, plumbers, appliance supplier and installer and carpentry.” Demand 7 asks for “[a]ll sketches, diagrams, plans, ‘filed plans’ as referred to in [Plaintiff’s] Purchase Contract, as well as all drawings, vellums, mylars, specifications, shop drawings, submittals, shop drawing logs, product samples, mock-ups, renderings, models, as-built drawings, progress prints, blue prints or the like which concern any of the [unit defects].”

Both demands are substantively the same as the demands the Court declared to be too broad in the January 2017 order. Plaintiff has failed to show how these documents will lead to the discovery of relevant evidence about whether his unit was properly constructed in accordance with the purchase agreement. Providing this information would require Defendant to produce documents unrelated to the allegations of this lawsuit and would require production of virtually every contract Defendant entered into for the condominium construction. Plaintiff’s request for Demands 5 and 7 is denied.

Demand 11

Demand 11 requests “all controlled inspection reports concerning fire stopping that would include any penetrations into or with the Unit.” The Court finds that Defendant must comply with this request. While this demand will provide Plaintiff with information about the building as a whole and more than just his unit, it is information related to Plaintiff’s allegations and may be material and necessary. Providing documents that contain more information than what is related to Plaintiff’s specific unit does not automatically exclude Plaintiff from access to those documents if the information is relevant to Plaintiff’s causes of action. Simply because the fire stopping material might exist in reports that detail other units does not make the material

outside the scope of discovery. Plaintiff is entitled to the report that references the fire stopping in his unit regardless of whether that report references other units. If the report only references the building as a whole, then Plaintiff is still entitled to it.

Defendant failed to articulate why a global settlement agreement reached with other unit owners that classified the reports as confidential should apply to Plaintiff. Plaintiff cannot be bound by a confidentiality agreement he never signed, especially where Defendant has not provided a reasonable argument for the need to keep the information that is the subject of the agreement private.

Demand 17

In Demand 17 Plaintiff requests “[a]ll photographs, videotapes, DVDs or other pictorial representations in whatever format...in connection with any work performed at any time that pertains in any manner to the Unit.” Defendant claims that Plaintiff is requesting these to delay and harass Defendant and also that no documentation such as this exists. While Plaintiff has not specified a reason for requiring such documents, it is reasonable to believe that such documentation could provide information relevant to any deficiencies in the unit and any attempts to fix the deficiencies. Plaintiff’s motion to compel production of such documentation is granted and if such documentation does not exist Defendant will produce a *Jackson* affidavit stating it does not possess this information.

Demand 25

Demand 25 requests “[t]he ‘filed building plans and specifications’ as referred to in article 18 of the Purchase Contract and all Documents concerning such filed building plans and specifications.” Plaintiff’s request to produce the filed building plans and specifications is denied. Plaintiff does not provide specific reasons as to how the defects in the unit are related to

the filed building plans and specifications and has not shown how the plans are material and necessary to this case. The Court will not speculate as to why Plaintiff might need these plans. In any event the building plans are publicly available through the Department of Buildings and Plaintiff will be able to obtain the records on his own (*Ashkinazy v American Airlines, Inc.*, 2 Misc3d 140(A), 784 NYS2d 918 [1st Dept 2004] [holding “[t]he defendant’s sweeping discovery demand was properly rejected, where defendant failed to persuasively show why such information is material and necessary to its defense of plaintiff’s claim...and where...at least ‘some’ of the information sought is ‘available from public records’”]).

Demand 14, 23, 26, 29

Demand 14 requests “[a]ll warranty notices and Sponsor responses;” Demand 23 requests “the ‘punch list items in the Unit’ as referred to in article 18 of the Purchase Contract and all Documents concerning same;” Demand 26 requests “[a]ll Documents evidencing that all appliances and building systems for the Unit were in working order as of the time of the closing as referred to in article R-8 of the Purchase Contract rider;” and Demand 29 requests “[a]ll documents supporting that conditions in the Unit were ‘corrected, repaired or resolved’ as alleged in the Amended Answer, including at paragraphs 34-38.”

Plaintiff claims that Defendant has not produced this information. Defendant claims that it already produced all non-privileged documents responsive to these requests. The Court finds these requests to be specific and directly related to Plaintiff’s allegations and the Plaintiff is entitled to these documents during discovery. Defendant will produce these documents to Plaintiff or provide an affidavit from the client (not necessarily a *Jackson* affidavit) that it produced all relevant documents within its possession.

Striking Note of Issue

Because the Court has granted several of Plaintiff's discovery requests, discovery has not been completed and so the note of issue is stricken. The plaintiff must serve this order on the clerk of trial support within ten days of entry.

To the extent that Defendant seeks an enlarged protective order (*see* NYSCEF Doc. No. 110 at 12 [Defendant's Memo in Opposition]), that request is denied because Defendant did not cross-move for that relief.

Accordingly, it is hereby

ORDERED that the motion to vacate the note of issue is granted and the note of issue is vacated, this action is stricken from the trial calendar and, upon service of this order upon her, the clerk of trial support shall mark the court's records accordingly; and it is further

ORDERED that plaintiff's motion to compel defendant to produce documents in response to demands numbered 11, 14, 17, 23, 26, 29 is granted to the extent set forth above and denied with respect to demands numbered 5, 7, and 25; and it is further

ORDERED that Defendant shall comply with the granted discovery demands and deliver hard copies to plaintiff on or before September 7, 2018 and defendant shall bring another copy to the conference (extra set may be in electronic form); and it is further

ORDERED that the parties shall appear for a conference in Room 432, 60 Centre Street, New York, New York on September 27, 2018 at 2:15PM.

Dated: July 2, 2018
New York, New York



ARLENE P. BLUTH, JSC

HON. ARLENE P. BLUTH
J.S.C.