

Oswald v City of Albany
2018 NY Slip Op 33463(U)
August 21, 2018
Supreme Court, Albany County
Docket Number: 901427-15
Judge: Denise A. Hartman
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STATE OF NEW YORK
SUPREME COURT

COUNTY OF ALBANY

ANNE V. OSWALD,

Plaintiff,

DECISION AND
ORDER

-against-

Index No. 901427-15

CITY OF ALBANY, NEW YORK, 733 BROADWAY LLC,
AND VP BUILDERS EC, INC.,

Defendants.

HON. DENISE A. HARTMAN, AJSC

APPEARANCES:

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No Other Appearances on This Motion

Hartman, J.

In this negligence action, plaintiff Anne V. Oswald seeks to recover for injuries she allegedly sustained when she tripped over an appurtenance related to municipal water service embedded in the sidewalk in front of property owned by defendant 733 Broadway LLC. On March 14, 2016, the Court denied the City's motion to dismiss. The parties commenced document discovery shortly thereafter. In September 2017, plaintiff amended her complaint to add VP Builders EC, Inc. as a defendant. The Court issued an order on November 27, 2017, setting a schedule for remaining discovery.

Plaintiff's counsel now moves against 733 Broadway LLC to compel discovery of certain documents and for penalties and sanctions against 733 Broadway LLC and/or its counsel for failure to respond timely to his discovery requests. 733 Broadway LLC opposes the motion, arguing that penalties under CPLR 3126 are not available because plaintiff obtained no prior court order to compel, and that plaintiff in any event has acquired virtually all the information and documents her counsel requested.

The Court concludes that while defendant's conduct may not have been willful or contumacious, it reflects a disregard of proper procedure and careful attention to plaintiff's counsel's reasonable discovery requests. The Court finds it appropriate to impose a monetary sanction against defendant and its counsel, jointly, in the total amount of \$5,000, plus the costs of this motion.

Background

Plaintiff commenced this action in November 2015, alleging that on October 13, 2014, she tripped over a water line cap, also known as a “valve box” or “curb box,” protruding from the sidewalk in front of 733 Broadway. She alleges, among other things, that both the City of Albany and 733 Broadway LLC had a duty to maintain the appurtenance, and were negligent in the performance of their duty, both by omission and by affirmative act. From the documents provided to the Court on this motion, it appears that a construction and renovation project was in progress in 2014 on the property at 733 Broadway to re-fit the building to serve as an office and apartment complex, and that during the project, one month before plaintiff’s accident, the water line from the curb box into the building may have been shut off due to a water leak into the basement of the building.

In March 2016, plaintiff’s counsel served discovery demands on 733 Broadway LLC, including a demand for a bill of particulars and an omnibus discovery request. In the demand for a bill of particulars, plaintiff’s counsel sought the names and addresses of anyone claimed as witnesses to the maintenance and repairs of the sidewalk or curb box or any structures or improvements at 733 Broadway; and documents, contracts, agreements, records, and correspondence regarding any construction, maintenance, repairs, or work done on the premises or in connection with the water supply

system or flooding at the premises. His omnibus demands included requests for a verified statement setting forth the names and addresses of defendant's subsidiaries, affiliates, and parent entities; documents, correspondence and notices related to operating instructions and maintenance, repairs or work done on the curb box or the incident that occurred on October 13, 2014. Plaintiff's counsel also sought documents, contracts, agreements, records, and/or correspondence regarding any lease of all or any part of the premises; documents concerning the management or maintenance of the premises; licenses or permits for any construction, maintenance, repair, or other work and/or financing of this work on the premises; inspection, management, and maintenance logs for the premises; and plans, surveys, maps blueprints, and/or diagrams of the premises.

In May 2016, 733 Broadway LLC responded with a copy of the declarations page for its insurance policy; one photograph of the valve cap; the four-page deed to the property; a single-page site survey for the premises; its own corporate name; and the name of one witness, Mr. Thomas Ostoyich, identified as the project manager. Otherwise, defendant's counsel asserted that the discovery requests were beyond the scope of permissible discovery, or alternatively, "over objection," that 733 Broadway LLC had no responsive documents in its possession.

On May 23, 2016, plaintiff's counsel then noticed depositions for Mr. Ostoyich and for Mr. Larry Nix, who had signed as "Owner/Representative" for the premises on a Water Shutoff Consent Form submitted to the City of Albany's Department of Water and Water Supply on September 14, 2014, one month before plaintiff's accident. Counsel for 733 Broadway LLC objected to the production of Mr. Nix, claiming that he was not its employee, but rather an employee of a "subcontractor" that worked on the project. Plaintiff's counsel later learned through other discovery or FOIL requests that the subcontractor that Mr. Nix worked for was VP Builders EC, Inc. In September 2017, plaintiff filed and served an amended complaint, on stipulation of the original defendants, to add VP Builders as a defendant.

The parties proceeded with the deposition of Mr. Ostoyich in February 2018. 733 Broadway's counsel had not objected to plaintiff's request to produce Mr. Ostoyich, even though, like Mr. Nix, he was not an employee of 733 Broadway LLC. According to plaintiff's counsel, three days before the deposition, 733 Broadway's counsel provided him three photographs of the valve box, a copy of the contract between VP Builders and Norstar Building Corporation (Norstar), and an insurance certificate for VP Builders. At the deposition, Mr. Ostoyich explained that he was an employee of Norstar, which managed the renovation project at 733 Broadway that was ongoing in 2014. During the project, a water leak into the basement of the building necessitated

necessitated the request of Mr. Nix, an employee of subcontractor VP Builders, to shut off the water line serving the property. Mr. Ostoyich disclosed that he maintained an electronic file for the entire project, including documents, correspondence, and emails, in his computer at Norstar's offices. When plaintiff's counsel requested those files, counsel for 733 Broadway LLC refused to provide them, stating that he represented only 733 Broadway LLC, not Norstar, which had not been named as a party in this action.

Plaintiff's counsel persisted in his requests for disclosure of the documents in Norstar's possession, and counsels' relationship devolved into discord. Plaintiff's counsel then turned to other avenues to secure the documents he sought, making a FOIL request to municipal agencies and serving a subpoena duces tecum on Norstar. Ultimately, plaintiff's counsel received most of the documents he requested, including Norstar's voluminous documents associated with the project.

Plaintiff's counsel argues that most of these documents should have been produced by 733 Broadway's counsel in response to plaintiff's original discovery requests. In support of his motion, plaintiff's counsel submitted evidence of a closely intertwined relationship between 733 Broadway LLC and Norstar. The "Operating Agreement of 733 Broadway LLC," which defines 733 Broadway LLC's purpose as "ownership, development, operation and management of the real estate known as 733 Broadway" in the City of Albany,

identifies Norstar as its principal member, controlling 80 percent of the stock. Its only other member is Black Locust LLC, which controls the remaining 20 percent of stock. Under the Operating Agreement, Norstar retained the right to purchase Black Locust's interest.

Moreover, 733 Broadway LLC and Norstar share common officers. In the documents submitted to the Court, Mr. Richard Higgins is identified as the Vice President of 733 Broadway LLC. He is also identified as the "Vice President of Norstar Investment, USA, Inc, manager of 733 Broadway LLC (the Company), the Owner of 733 Broadway Apartments." And he is identified as the sole owner of "Black Locust," which controls the remaining 20 percent of 733 Broadway LLC's stock. In addition to Richard Higgins, Ms. Lori Harris is listed in some documents as an officer of both 733 Broadway LLC and Norstar.

These documents identify Norstar as "the Manager" of 733 Broadway LLC. The signature blocks on several of these documents reflect the intertwined relationship between 733 Broadway LLC as Owner and Norstar as Manager of its enterprises:

733 BROADWAY LLC
By: Norstar Investment USA, Inc., Manager

BY: s/ _____
Richard J. Higgins
Vice President

The documents indicate that Norstar acted as the agent of 733 Broadway LLC in the management of the construction project at 733 Broadway in 2014.

Plaintiff's counsel argues that given this intertwined relationship, 733 Broadway LLC and/or its counsel should be sanctioned for failing to disclose documents and information in response to his discovery requests. Specifically, he argues that defendant's counsel was required to disclose the project file and other documents held by Norstar because 733 Broadway LLC was effectively in control of the requested documents held by Norstar. Counsel for 733 Broadway responds that it was not required to disclose documents in Norstar's possession because Norstar is a separate company, which he does not represent. In any event, defendant's counsel argues, plaintiff's counsel has now been provided, or he has otherwise obtained, nearly all documents and information requested in his discovery requests.

At oral argument of this motion, plaintiff's counsel conceded that he has now received nearly all the documents and information he requested in discovery, except for payment documents and emails related to plumbing work on the project. Counsel for 733 Broadway LLC stipulated that such documents will be provided, regardless of whether they are maintained by 733 Broadway LLC or Norstar. Thus, the only issue before the Court is plaintiff's counsel's request for sanctions.

Analysis

The Court finds that Norstar acted as 733 Broadway LLC's agent in managing the premises and construction project at 733 Broadway. As such, 733 Broadway LLC was effectively in control of the documents in Norstar's possession regarding the project. And regardless of whether 733 Broadway LLC should have produced the project files maintained in Norstar's electronic database, defendant's counsel failed to timely provide plaintiff with other information and documents that were undoubtedly relevant to plaintiff's claim and within 733 Broadway LLC's possession. Accordingly, the Court finds it appropriate to impose sanctions in the amount of \$5,000, plus the costs of this motion, on 733 Broadway LLC and its counsel, jointly, payable to plaintiff to compensate for the efforts plaintiff's counsel was forced to undertake to secure the documents by other methods and to deter future lax responses to reasonable discovery requests.

Under CPLR 3126, if a party, or a person under a party's control, refuses to obey an order for disclosure or willfully fails to disclose information which the court finds ought to have been disclosed, that party may face various penalties, including an order striking pleadings or parts thereof, staying further proceedings until the order is obeyed, dismissing the action or any part thereof, or rendering a judgment by default against the disobedient party (see *Pangea Farm, Inc. v Sack*, 51 AD3d 1352, 1354 [3d Dept 2008]). "[T]he nature

and degree” of sanctions to be imposed “is a matter committed to the court’s sound discretion” (*Pangea Farm*, 51 AD3d at 1354; see *Altu v Clark*, 20 AD3d 749, 750 [3d Dept 2005]). Striking an answer is a drastic remedy and inappropriate absent a clear showing that the failure to comply with discovery demands is willful and contumacious (see *CDR Creances S.A.S. v. Cohen*, 23 NY3d 307, 318, 321 [2014]; *Pangea Farms*, 51 AD3d at 1354; *Altu*, 20 AD3d at 750). Contrary to defendant’s assertion, no court order is required as a condition precedent for imposition of sanctions under CPLR 3126, so long the party against whom penalties are sought has notice and an opportunity to be heard (see, generally, e.g., *Gokey v DeCicco*, 24 AD3d 860 [3d Dept 2005]; *Osterhoudt v Walmart Stores, Inc.*, 273 AD2d 673 [3d Dept 2000]; *Birch Hill Farm, Inc. v Reed*, 272 AD2d 282 [2d Dept 2000]).

In addition to CPLR 3126, 22 NYCRR 130-1.1 authorizes the Court “in its discretion,” to “award to any party or attorney in any civil action or proceeding before the court, except where prohibited by law, costs in the form of reimbursement for actual expenses reasonably incurred and reasonable attorney’s fees, resulting from frivolous conduct.” Or the Court, “in its discretion may impose financial sanctions upon any party or attorney in a civil action or proceeding who engages in frivolous conduct” (*id.*; see *Barco Auto Leasing Corp. v Grant Thornton, LLP*, 298 AD2d 341, 342-343 [3d Dept 2001]).

“For purposes of [22 NYCRR 130-1.1], conduct is frivolous if:

(1) it is completely without merit in law and cannot be supported by a reasonable argument for an extension, modification or reversal of existing law;

(2) it is undertaken primarily to delay or prolong the resolution of the litigation, or to harass or maliciously injure another; or

(3) it asserts material factual statements that are false.

Frivolous conduct shall include the making of a frivolous motion for costs or sanctions under this section. In determining whether the conduct undertaken was frivolous, the court shall consider, among other issues the circumstances under which the conduct took place, including the time available for investigating the legal or factual basis of the conduct, and whether or not the conduct was continued when its lack of legal or factual basis was apparent, or should have been apparent, or was brought to the attention of counsel or the party”

(22 NYCRR 130-1.1 [c] [3]).

Plaintiff’s counsel relies on *Pegasus Aviation I, Inc. v Varig Logistica SA* (26 NY3d 543 [2015]), for the proposition that defendant was obligated to disclose the documents in Norstar’s possession. There the Court of Appeals upheld the lower courts’ finding that the defendant had control of documents and had negligently destroyed them, and remitted the case to Supreme Court to determine whether to impose a sanction (*see id.* at 551–554). Plaintiff’s counsel’s argument is well-taken that the closely intertwined relationship between 733 Broadway LLC and Norstar gives rise to a finding of control sufficient to find a duty of disclosure. The Court finds that, given the

intertwined relationship of the two entities, with Norstar being the defendant's Manager and effectuating agent for the ongoing project at 733 Broadway, defendant had sufficient control over Norstar to obligate it to provide the documents in Norstar's possession. Indeed, defendant produced Norstar's employee Mr. Ostoyich for deposition testimony. On the other hand, *Pegasus* is not squarely controlling here, inasmuch as Norstar is the parent company, with 733 Broadway LLC being the subsidiary entity. Also, plaintiff's counsel does not argue that, except for time and expenses incurred, plaintiff was prejudiced by counsel's failure to turn over the requested documents sooner. He concedes that he learned of Norstar's involvement in the project in October 2016 and does not claim that he had no opportunity to join Norstar as an additional party defendant within the statute of limitations, as he did VP Builders in October 2017.

While the Court is troubled by the failure of 733 Broadway LLC's counsel to timely disclose documents that plaintiff's counsel reasonably requested, it does not find that the conduct of defendant's counsel was so willful and contumacious, or that plaintiff was so prejudiced, that the severe sanctions of striking the answer or precluding evidence would be warranted under CPLR 3126 (*see Appler v Riverview Obstetrics & Gynecology, PC*, 9 AD3d 577, 578 [3d Dept 2004] [acknowledging "general policy which favors resolution of disputes on the merits"]). Nor does the Court find it appropriate to order

defendant's counsel to produce Mr. Ostoyich for a supplemental deposition, since plaintiff's counsel has not specified why he needs further inquiry. Nevertheless, as discussed below, the Court finds it appropriate to order a monetary sanction, under CPLR 3126 and 22 NYCRR 130-1.1, in order to "deter his dilatory behavior in the future" (*Altu*, 20 AD3d at 750 [internal quotation marks omitted]).

Defendant's counsel's argument that 733 Broadway LLC was not required to turn over the project file or other documents in Norstar's possession does not explain defendants' failure to respond to plaintiff's other discovery requests in a timely manner. In his request for a bill of particulars, plaintiff's counsel sought the names and addresses of anyone claimed as witnesses to the maintenance and repairs of the sidewalk or curb box or any structures or improvements at that location. Defendant's counsel provided the name of only one individual, Mr. Ostoyich, even though defendant, as owner of the property, was integrally involved in the renovation project on its property, as reflected in the signatures on various documents of its Vice President, Mr. Higgins. The officers of 733 Broadway LLC surely would have had knowledge of others involved in the major, long-term construction project on property that it owned.

Plaintiff's counsel also requested in his omnibus demands a verified statement setting forth the names and addresses of defendant's subsidiaries, affiliates, and parent entities. But defendant's counsel did not timely disclose

the identity of Norstar, its closely related parent company and manager of 733 Broadway LLC. Nor did defendant's counsel disclose "any and all documents, contracts, agreements, records, and/or correspondence (including electronic mail) regarding any of the following: the lease of all or any part of the premises; management or maintenance of the premises; licenses for any construction, maintenance, repair, or other work and/or financing of this work on the premises; and/or permits for any construction, maintenance, repair, or other work on the premises." There can be no doubt that defendant had possession or control of documents, permits, leases, and agreements with Norstar, the City of Albany, and the City of Albany Industrial Development Agency regarding construction, maintenance, repairs, and other work being done on its property.

It was only through other discovery and the Freedom of Information Law that plaintiff's counsel was able to acquire documents describing the relationship of 733 Broadway LLC to others involved in the project and the role these other entities played. For example, he obtained through a FOIL request an affidavit of Richard Higgins, signed on behalf of 733 Broadway LLC as Vice President and listing Norstar as manager, attesting to documents that were submitted to the City of Albany Industrial Development Agency in conjunction with an application for financial assistance for the \$5 million project to renovate and reconstruct the building at 733 Broadway and turn it into

apartments and a commercial and retail facility. Likewise, he was able to obtain the "Operating Agreement of 733 Broadway LLC," dated September 17, 2004, describing the purposes of 733 Broadway LLC as "ownership, development, operation, and management" of the project located at 733 Broadway, and identifying its members as Norstar and Black Locust. Additionally, defendant's counsel obtained a copy of the "Lease Agreement" between the City of Albany Industrial Development Agency and 733 Broadway LLC, dated August 1, 2014, again signed by Richard Higgins as Vice President of Broadway LLC and listing Norstar as its manager.

Defendant's counsel provided none of these documents in response to plaintiff's counsel's discovery requests. He undoubtedly could have and should have provided much more information in response to requests for information in the original discovery requests. And he could have and should have turned over many of the documents plaintiff's counsel was able to obtain through other sources. The Court is convinced that defendant's counsel's refusal to provide the requested information and documents was dilatory and caused plaintiff's counsel to expend substantial time and effort to discover them elsewhere.

Under these circumstances, the Court in its discretion finds it appropriate to assess a \$5,000 fine, plus costs, to deter such stonewalling in the future and to help defray the expenses incurred by plaintiff to obtain the documents and information through other sources. The Court acknowledges

that plaintiff's counsel's insistence on strict and timely compliance with discovery rules and his tenacious attempts to follow up may have perturbed counsel. However it was entirely reasonable for plaintiff's counsel to seek information from 733 Broadway LLC about the ongoing construction project at the property it owned, and about the entities involved in the project. That information appears to be squarely relevant to plaintiff's claim that defendants negligently performed actions to shut off the water at the valve on the sidewalk at 733 Broadway after water leaked into the building's basement during construction, mere weeks before plaintiff's accident.

Accordingly, it is

ORDERED that plaintiff's motion is granted to the extent that the Court orders monetary sanctions in favor of plaintiff and against defendant 733 Broadway LLC and its counsel, jointly, in the amount of \$5,000, plus the costs of this motion, payable to plaintiff's counsel within thirty (30) days of the date this Decision and Order and a bill of costs is served upon defendant's counsel with notice of entry.

This constitutes the decision and order of the Court. The original decision and order is being transmitted to plaintiff's counsel. All other papers are being transmitted to the County Clerk for filing. The signing of this decision and order does not constitute entry or filing under CPLR 2220 and counsel is not

relieved from the applicable provisions of that rule respecting filing and service.

Dated: August 21, 2018
Albany, New York

Denise A. Hartman
HON. DENISE A. HARTMAN
Acting Justice of the Supreme Court

D.A.O.
8/21/18

Papers Considered

- Notice of Motion for Penalties and Sanctions, dated March 30, 2018
- Attorney's Affirmation in Support of Phillip A. Oswald, dated March 30, 2018, with Exhibits A through FF
- Attorney's Affirmation of Good Faith of Phillip A. Oswald, dated March 30, 2018
- Memorandum of Law in Support, dated March 30, 2018
- Affirmation in Opposition of Michael J. Murphy, dated May 18, 2018
- Memorandum of Law in Opposition, dated May 18, 2018
- Attorney Reply Affirmation in Further Support of Phillip A. Oswald, dated May 24, 2018, with Exhibits A-E
- Reply Memorandum of Law in Further Support, dated May 24, 2018