

Arthur Lange, Inc. v Slagle

2018 NY Slip Op 33719(U)

January 29, 2018

Supreme Court, Westchester County

Docket Number: 52125/2017

Judge: Joan B. Lefkowitz

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This opinion is uncorrected and not selected for official publication.

To commence the statutory time period for appeals as of right [CPLR 5513(a)], you are advised to serve a copy of this order, with notice of entry upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER-COMPLIANCE PART

-----X
ARTHUR LANGE, INC.,

Plaintiff,

DECISION & ORDER

-against-

Index No. 52125/2017
Motion Date: Jan. 29, 2018

Seq. No. 3

ROBERT D. SLAGLE and ROBERT J. STICCA,
Defendants.

-----X
LEFKOWITZ, J.

The following papers were read on this motion by plaintiff for an order pursuant to CPLR 3124 and 3101 compelling defendants to produce documents related to the purchase and refinancing of certain premises.

Order to Show Cause - Affirmation in Support - Exhibits A-M
Affirmation in Opposition - Exhibits 1-4

Upon the foregoing papers and the proceedings held on January 29, 2018, this motion is determined as follows:

Factual and Procedural Background

Plaintiff commenced this action by filing a summons and verified complaint on February 16, 2017 (Pl. Ex. C). Defendants filed a verified answer with counterclaims on April 5, 2017 (Pl. Ex. D), and plaintiff filed a reply to the counterclaims on April 25, 2017 (Pl. Ex. E).

Plaintiff's complaint contains the following allegations. Plaintiff was hired by defendants to renovate defendants' home in Yonkers, New York (hereinafter "the premises") on December 24, 2015. When plaintiff was hired, defendants had already terminated a home renovation contract for the premises with another company, and refused to pay that company \$60,000 for work performed. At the time plaintiff was hired to complete the renovation, defendants knew that they lacked sufficient funds to pay plaintiff to perform the work required. Plaintiff commenced the renovation project on December 26, 2015, and in keeping with the parties' contract, sent monthly, itemized invoices to defendants for time spent and materials purchased. Defendants made monthly payments beginning in January 2016. In March 2016, at defendants' request, plaintiff expanded the scope of the renovation project to include the basement area.

Between January 2016 and July 5, 2016, defendants made payments to plaintiff in the amount of \$91,774, \$62,226.41, \$20,000, and \$140,000.

Additional allegations set forth in the complaint are as follows. On July 6, 2016, plaintiff presented defendants with a final invoice in the amount of \$155,750. While defendants had previously assured plaintiff that they had the finances to pay the final invoice and that they were pleased with plaintiff's performance, defendants began to question the propriety of the invoices beginning in August 2016, although they also claimed that they would pay the final invoice upon receipt of funds from a real estate transaction unrelated to the premises. Plaintiff relied on this representation. Thereafter, instead of making the final payment, defendants challenged plaintiff's billing methods, the integrity of plaintiff's workers, and the extent of the work performed. Defendants also tried to convince plaintiff to perform additional work prior to payment of the final invoice, and to accept less money than the final invoice amount of \$155,750. To date, defendants have not paid the final invoice.

Based on the foregoing, plaintiff seeks damages for fraud, misrepresentation, breach of contract, breach of the duty of good faith and fair dealing, and unjust enrichment.

In their verified answer with counterclaims, defendants alleged that they have not paid the \$155,750 because "Plaintiff's work was poor, substandard, not in accordance with industry standards, and damaged Defendants' premises leaving Defendants, not Plaintiff, with substantial damages and losses to remediate and correct. Further, upon information and belief, Plaintiff's 'invoice' sought compensation for hours of work never performed by Plaintiff and vastly exceeded the amount agreed for the work performed, much less the poor and shoddy work performed by Plaintiff" (Pl. Ex. D ¶59). Defendants further alleged that in total, they have paid plaintiff in excess of \$314,000. Defendants seek damages for negligence, conversion, larceny and violation of lien law, and willful exaggeration of lien.

Defendants moved to dismiss the complaint on November 8, 2017. Thereafter, plaintiff filed a cross-motion for leave to amend its complaint on December 12, 2017. Both motions remain pending.

The Instant Motion

The following demands made in plaintiff's Notice to Produce dated April 26, 2017, are relevant to the instant motion:

7. The name and identity and address of the real estate salesperson, agent, broker and or entity that represented the defendants in the purchase transaction of the subject premises.
8. A duly executed authorization in the name of [plaintiff's counsel] to obtain records maintained by the real estate company, agent and broker related to the purchase of the premises.

9. The name and identity and address of the real estate appraisal person, company or entity retained by defendants that appraised the subject premises prior to purchase.
10. A duly executed authorization in the name of [plaintiff's counsel] to obtain records maintained by the real estate appraisal person, company or entity retained by the defendants.
11. The name and identity of the financial institution, credit union, bank or lender that provided a mortgage to the defendants for the subject premises.
12. A duly executed authorization in the name of [plaintiff's counsel] to obtain records maintained by financial institution, credit union, bank or lender that provided a mortgage to the defendants for the subject premises.
13. The name and identity of the financial institution, credit union, bank or lender that provided a home equity loan or home equity line of credit to the defendants for the subject premises.
14. A duly executed authorization in the name of [plaintiff's counsel] to obtain records maintained by financial institution, credit union, bank or lender that provided a home equity loan or home equity line of credit to the defendants for the subject premises.
15. The name and identity of the lawyer, firm or legal institution retained by the defendants to represent them in the purchase transaction and closing of the subject premises.
16. A duly executed authorization in the name of [plaintiff's counsel] to obtain records maintained by lawyer, firm or legal institution retained by the defendants to represent them in the purchase transaction and closing on the subject premises (Pl. Ex. A).

In their response to the demands listed above, defendants asserted that each demand was "overly broad and unduly burdensome, intended to harass and impose unnecessary or unreasonable burdens on Defendants, and purporting to require discovery beyond that imposed by the CPLR. Defendants further object to this demand on the grounds that it is not relevant to the claims or defenses in this case and is not likely to lead to the discovery of admissible evidence" (Pl. Ex. B). Defendants also objected to demand no. 16 based on attorney-client and work-product privileges (Pl. Ex. B).

Plaintiff now moves pursuant to CPLR 3124 and 3101(a) to compel defendants to provide all requested information and/or documents with respect to the demands numbered 7 through 16.

The Parties' Contentions

In its affirmation in support, plaintiff contends that the requested discovery "is relevant and material and necessary to plaintiff in the prosecution of its claims and in defense of

defendants' counter claims and affirmative defenses" (Pl. Aff. ¶28). More specifically, plaintiff claims that disclosure of the documents and information requested "will put the lie to the contentions in defendants' affirmative defenses and counter claims which allege that defendants[] refusal to pay plaintiff's final invoice is a result of shoddy workmanship and overbilling of labor costs; plain and simple, the sale of their town home and the line of credit extended to defendants by Wells Fargo Bank that defendants were relying on to fully finance the costs of their home renovation turned out to be less than they expected and for that reason they decided find (sic) cause not to pay the plaintiff's final invoice of \$155,750" (Pl. Aff. ¶30). It further argues that no "privilege of confidentiality or otherwise applies to information requested in the subject Notice to Produce," but even assuming that some privilege might normally apply, defendants "waived any and all confidentiality privileges with regard to all documents and communications between the defendants and their attorneys, lending officers and real estate brokers" (Pl. Aff. ¶29).

Defendants reply that to date, they have "produced over 500 documents including photographs, correspondence between the parties, [and] evidence of payments to Plaintiff" (Def. Aff. ¶13). They contend that plaintiff seeks "documents such as their loan application (#12, 14, 16), which would necessarily require disclosure of tax returns and other sensitive information that are routinely deemed outside the purview of discovery under New York law. The foregoing demands have no possible relevancy to the issue of whether Defendants violated any agreements or understandings between the parties" (Def. Aff. ¶14). Defendants further complain that plaintiff's demands are overbroad, observing that "Plaintiff goes so far as to demand an open-ended authorization to obtain all records from Defendants' banks, attorneys, and brokers" (Def. Aff. ¶14 [emphasis in original]).

Defendants next posit that although plaintiff's proposed amended complaint seeks "to fabricate a fraudulent 'motive' on Defendants' part" by alleging that "a reappraisal of Defendants' home prompted Defendants to not pay Plaintiff the sums demanded by Plaintiff," "Plaintiff fails to articulate in its Proposed Amended Complaint how said allegation, even if true, satisfies the pleading standards for fraud or is substantively different from their claim for breach of contract" (Def. Aff. ¶¶15-16). They also reason that even if plaintiff's fraud claims survive defendants' pending motion to dismiss, "the documents sought—Defendants' financial information—do not bear on any of the elements of Fraud or Misrepresentation" (Def. Aff. ¶18). Defendants theorize that plaintiff is merely engaging in a "fishing expedition," and has failed to satisfy its burden of proof with respect to entitlement to discovery (Def. Aff. ¶¶20-21). Lastly, they argue that "Defendants have not waived any privilege by asserting an objection to Defendants' (sic) overbroad Demands; rather they are preserving it. Plaintiff does not specify any specific documents they seek since they simply seek to invade the files of Defendants' counsel with respect to the purchase and refinancing of their home" (Def. Aff. ¶22).

Analysis

CPLR 3101(a) broadly mandates full disclosure of all matter material and necessary in the prosecution or defense of an action. The phrase "material and necessary" is "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 prolixity. The test is

one of usefulness and reason” (*Allen v Crowell-Collier Publishing Co.*, 21 NY2d 403, 406 [1968]; *Foster v Herbert Slepoy Corp.*, 74 AD3d 1139, 1140 [2d Dept 2010]). Although the discovery provisions of the CPLR are to be liberally construed, a party does not have the right to uncontrolled and unfettered disclosure (*see Foster v Herbert Slepoy Corp.*, 74 AD3d at 1140; *Gilman & Ciocia, Inc. v Walsh*, 45 AD3d 531 [2d Dept 2007]). The party seeking disclosure bears the burden of demonstrating that the method of discovery sought will result in the disclosure of relevant evidence or is reasonably calculated to lead to the discovery of information bearing on the claims (*see Foster v Herbert Slepoy Corp.*, 74 AD3d at 1140). The court has broad discretion to supervise discovery and to determine whether information sought is material and necessary in light of the issues in the matter (*see Mironer v City of New York*, 79 AD3d 1106, 1108 [2d Dept 2010]; *Auerbach v Klein*, 30 AD3d 451, 452 [2d Dept 2006]).

Plaintiff’s motion must be denied in all respects, as plaintiff has failed to establish the propriety of any of the demands that are the subject of this motion (*see Diaz v City of New York*, 117 AD3d 777 [2d Dept 2014]). None of these demands are relevant to the issues in this action.¹ Moreover, demand nos. 8, 10, 12, and 14 are overbroad, while demand no. 16 is overbroad and seeks documents that may be subject to privilege.²

All other arguments raised on this motion and evidence submitted by the parties in connection thereto, have been considered by this court, notwithstanding the specific absence of reference thereto.

In view of the foregoing, it is hereby

ORDERED that plaintiff’s motion is denied in its entirety; and it is further,

ORDERED that plaintiff shall serve a copy of this Decision and Order, with notice of entry, upon defendants within seven days of entry; and it is further,

ORDERED that the parties are directed to appear for a conference in the Compliance

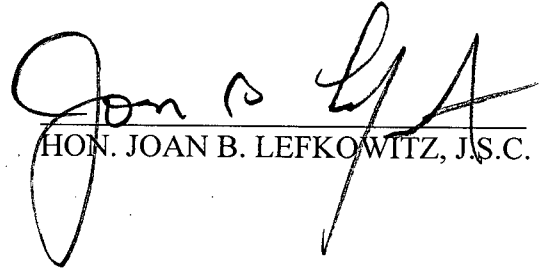
¹ The Court notes that the bulk of plaintiff’s affirmation in support of this motion relates to allegations in the proposed amended complaint that are not present in the original complaint. In light of the fact that plaintiff’s cross-motion for leave to amend the complaint remains undecided, plaintiff’s focus is improper. In any event, the Court observes that demand nos. 7- 12 and 15-16 are irrelevant not only to the pleadings already filed but also to the new allegations in the proposed amended complaint. The Court further notes that plaintiff is already in possession of the information sought in demand no. 13 (*see Pl. Exs. J & K; Pl. Aff. ¶¶12, 30*), and, as previously stated above, demand no. 14 is overbroad.

² To the extent that any privileges might normally apply, the Court agrees with defendants’ contention that they have not waived those privileges.

Part, Courtroom 800, on February 15, 2018 at 9:30 A.M.

The foregoing constitutes the Decision and Order of this Court.

Dated: White Plains, New York
January 29, 2018



HON. JOAN B. LEFKOWITZ, J.S.C.

To:

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