

<b>Aliberti v J. Kokolakis Contr., Inc.</b>
2018 NY Slip Op 34003(U)
February 14, 2018
Supreme Court, Bronx County
Docket Number: 23008/2015E
Judge: Lucindo Suarez
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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF BRONX: I.A.S. PART LPM

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JOSEPH ALIBERTI and BENITA ALIBERTI, his wife,  
  
Plaintiffs,

DECISION AND ORDER

Index No. 23008/2015E

- against -

J. KOKOLAKIS CONTRACTING, INC., LIRO  
PROGRAM AND CONSTRUCTION MANAGEMENT,  
PE P.C. d/b/a THE LIRO GROUP, JACOBS PROJECT  
MANAGEMENT CO., GIAQUINTO MASONRY, INC.  
and THE DORMITORY AUTHORITY OF THE STATE  
OF NEW YORK,

Defendants.

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J. KOKOLAKIS CONTRACTING, INC.,

Third-Party Plaintiff,

Third-Party Index No.  
43141/2015E

- against -

EASTERN PLUMBING & MECHANICAL  
CONTRACTING, INC.,

Third-Party Defendant.

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PRESENT: Hon. Lucindo Suarez

Upon the notice of motion dated November 14, 2017 of defendant/third-party plaintiff J. Kokolakis Contracting, Inc. and defendant Dormitory Authority of the State of New York and the affirmation and exhibits submitted in support thereof; the affirmation in opposition dated January 18, 2018 of defendant Giaquinto Masonry, Inc. and the exhibits submitted therewith; the reply affirmation dated January 22, 2018 of defendant/third-party plaintiff J. Kokolakis Contracting, Inc. and defendant Dormitory Authority of the State of New York and the exhibits submitted therewith; and due deliberation; the court finds:

Plaintiff commenced this Labor Law action to recover damages for injuries sustained on July 28, 2014 when he was struck by a falling mortar pan. The incident occurred in the first floor pool area of the Children's Center building at 1500 Waters Place, Bronx County. Defendant owner Dormitory Authority of the State of New York hired defendant/third-party plaintiff J. Kokolakis Contracting, Inc. (collectively "Kokolakis") as its general contractor. Kokolakis retained defendant Giaquinto Masonry, Inc. ("Giaquinto") and plaintiff's employer, third-party defendant Eastern Plumbing & Mechanical Contracting, Inc. ("Eastern"), as two of its subcontractors.

On April 3, 2017, Kokolakis served Giaquinto and Eastern with a Notice of Discovery and Inspection. An April 22 compliance conference order directed both to respond. The directive was repeated in another compliance conference order dated May 23 and in a so-ordered stipulation dated August 22. Giaquinto and Eastern responded to the notice on October 16. Giaquinto objected to the majority of the demands as overbroad, vague and unduly burdensome. It stated that it had no documents, was unable to locate them, or would provide them once plaintiff identified the specific accident location. Eastern raised similar objections and also objected on relevance. Eastern agreed to supplement its response once it obtained documents.

Kokolakis now moves pursuant to CPLR 3124 to compel Giaquinto and Eastern to furnish more thorough responses to the April 3 notice and for search affidavits for all items that could not be located. Kokolakis also moves pursuant to CPLR 3126 for a conditional order striking their answers if they fail to comply. In granting leave to move for relief, the court directed the parties to submit particularly detailed affirmations of good faith. The affirmation tendered by Kokolakis fails to meet the standards set forth in 22 NYCRR § 202.7(c). However, based upon the court's numerous conferences with the parties on discovery issues, it is evident that efforts to resolve the dispute without additional court intervention would have been futile. *See Baulieu v. Ardsley Assoc. L.P.*, 84 A.D.3d 666, 923 N.Y.S.2d 326 (1st Dep't 2011).

Kokolakis argues that the discovery requested is material and relevant and that the responses are inadequate. The subcontracts required Giaquinto and Eastern to maintain project documents for at least six years after final payment but both were unable to locate certain documents.<sup>1</sup> Kokolakis seeks complete responses to items 3, 4, 5, 9, 11, 12, 14 through 26 from Giaquinto and items 2, 3, 4, 6, 9, 11, 12, 14 through 25 from Eastern along with copies of their insurance policies.<sup>2</sup>

Giaquinto admits that it has not produced its excess insurance policy and requests additional time to do so. This action concerns only one incident but Kokolakis demands “all” documents for the entire project; such demands amount to a fishing expedition. It asks the court limit the demands accordingly. Giaquinto does not object to producing a search affidavit “as to those relevant documents as directed by this court and those documents that do not exist.”

Kokolakis urges the court to reject Giaquinto’s untimely served opposition. Kokolakis, though, has suffered no prejudice from the delay given that it was able to submit a reply. *See Serradilla v. Lords Corp.*, 117 A.D.3d 648, 987 N.Y.S.2d 320 (1st Dep’t 2014). Kokolakis argues that it has identified specific documents relevant to this action and Giaquinto never sought to modify the requests.

Eastern submitted no opposition.

CPLR 3101 calls for full disclosure of all evidence material and necessary in the prosecution or defense of an action. Pursuant to CPLR 3124, the court may compel a party to provide discovery. However, discovery may not be used as a fishing expedition. *See New York Community Bank v. Parade Place, LLC*, 96 A.D.3d 542, 947 N.Y.S.2d 426 (1st Dep’t 2012). The party seeking disclosure must show that “the method of discovery sought will result in the disclosure of relevant evidence or is

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<sup>1</sup> Kokolakis appears to conflate a contractual obligation to maintain project documents with a party’s disclosure obligations under the CPLR. Giaquinto and Eastern responded to the April 3 notice. This is sufficient under the CPLR even if Kokolakis deems the responses unsatisfactory under the subcontracts’ document retention provisions.

<sup>2</sup> Kokolakis mistakenly annexed Eastern’s response to plaintiff’s May 19, 2017 Notice for Discovery and Inspection. The court will overlook this error as Eastern electronically filed its response (NYSCEF Doc. No. 120).

reasonably calculated to lead to the discovery of information bearing on the claims.” *Abrams v. Pecile*, 83 A.D.3d 527, 528, 922 N.Y.S.2d 16, 17 (1st Dep’t 2011) (internal citations omitted). “The test of whether matter should be disclosed is ‘one of usefulness and reason.’” *City of New York v. Maul*, 118 A.D.3d 401, 402, 987 N.Y.S.2d 326, 328 (1st Dep’t 2014), quoting *Allen v. Crowell-Collier Publ. Co.*, 21 N.Y.2d 403, 235 N.E.2d 430, 288 N.Y.S.2d 449 (1968). A demand must describe each item and category with reasonable particularity. See CPLR 3120(2). Requests that are overly broad, unduly burdensome, irrelevant or vague are palpably improper. See *McMahon v. Cobblestone Lofts Condominium*, 134 A.D.3d 646, 22 N.Y.S.3d 50 (1st Dep’t 2015). The use of the term “all” does not automatically render a request improper if the request relates to specific subject matter such that the item to be produced may be readily identified. *Mendelowitz v. Xerox Corp.*, 169 A.D.2d 300, 304, 573 N.Y.S.2d 548, 550 (1st Dep’t 1991). Although Giaquinto did not timely object to the April 3 notice, the court is not foreclosed from exploring whether the demands are palpably improper. See *Lea v. New York City Tr. Auth.*, 57 A.D.3d 269, 867 N.Y.S.2d 918 (1st Dep’t 2008). Where a demand is overbroad or burdensome, the court may vacate the demand rather than prune it. See *Editel, N.Y. v. Liberty Studios*, 162 A.D.2d 345, 557 N.Y.S.2d 21 (1st Dep’t 1990).

Despite use of the term “all,” several requests seek documents that are material, relevant and readily identifiable. Item 2 (tape records, photograph, moving pictures, videotapes and diagrams of the area where the incident occurred); item 3 (notes, memoranda or diaries in connection with the work for six months prior to including the date of plaintiff’s incident); item 6 (correspondence with DASNY, Jacobs, and/or Kokolakis related to the incident); item 15 (daily time sheets and work or progress logs for six months prior to and including the date of the incident); items 16 and 17 (certified payroll records for six months prior to and including the date of the incident); item 19 (safety reports, plans, studies, analysis, results, and inspections related to safety procedures); item 20 (OSHA training documents for six months prior to and including the date of the incident); item 21 (site safety plan); item 22 (field

notes for six months prior to and including the date of the incident); and item 23 (notes, reports and documents of inspections of the work for six months prior to and including the date of the incident) are all relevant to Kokolakis' defenses and affirmative claims. The objections raised by Eastern and Giaquinto lack merit; they shall supplement their responses to the foregoing items.

Items 11 and 12 (blueprints, sketches, drawings and specifications) do not limit the response to a particular location. Item 18 (minutes from project meetings, safety meetings and/or toolbox meetings) and item 24 (complaints) do not specify a time frame. However, the items sought are material and relevant. Rather than vacating these demands, the responses to items 11 and 12 shall be limited to the accident location. Although Giaquinto claims plaintiff has not identified a specific accident location, the complaint and plaintiff's deposition testimony gave the parties adequate notice that the incident occurred in the first floor pool area at the Children's Center. Documents produced in response to items 18 and 24 shall be limited to the six month period prior to and including the date of the accident.

However, item 4 (correspondence with DASNY, Jacobs and/or Kokolakis), item 14 (complete project or job file), and item 25 (permits, approvals, submissions, certificates and licenses) are not tailored to elicit documents specific to this action. Item 9 (documents relating to the subcontractor's performance including field memos and daily reports) is duplicative of items 3, 15, and 22 and lacks a specific time frame. The court denies the motion to compel as to these items.

Kokolakis also seeks a more complete response to item 26 (all documents related to any cross-claims or counterclaims you may have against DASNY, Jacobs and/or Kokolakis) from Giaquinto. This item is insufficiently vague; Giaquinto need not furnish a further response.

As for insurance coverage information, Giaquinto and Eastern shall provide copies of their insurance policies as directed in the compliance conference order dated April 22, 2017.

Kokolakis also moves for an order directing Eastern and Giaquinto to provide search affidavits if responsive documents are not found. When discovery is not available, the court may direct a party

to provide an affidavit documenting that a “thorough search was conducted in good faith.” *See Henderson-Jones v. City of New York*, 87 A.D.3d 498, 505, 928 N.Y.S.2d 536, 542 (1st Dep’t 2011). To the extent responsive documents cannot be located or do not exist, Giaquinto and Eastern shall so state in sworn affidavits from persons with personal knowledge. The affidavits shall describe the date, time, and location of the search, describe the manner in which the search was conducted, and identify each person who conducted the search. As to their original responses stating that no records were found, Giaquinto and Eastern shall tender sworn affidavits that comply with the above requirements.

Kokolakis states the search affidavits should describe each company’s policy for retaining electronically stored information (“ESI”), state who was responsible for maintaining and retrieving ESI, and state whether a litigation hold was put into place. The April 3 notice, though, did not expressly refer to electronic discovery, and electronic discovery was not discussed at any prior court conference.<sup>3</sup> In any event, a description of the locations searched and the manner of the search should suffice.

Kokolakis also moves for a conditional order striking Giaquinto’s and Eastern’s answers if they fail to comply. CPLR 3126 provides that if a party “refuses to obey an order for disclosure or willfully fails to disclose information . . . the court may make such orders with regard to the failure or refusal as are just” including striking that party’s pleadings. Repeated noncompliance that is dilatory, evasive, obstructive and ultimately contumacious warrants the striking of that party’s pleadings. *See Arts4All, Ltd. v. Hancock*, 54 A.D.3d 286, 863 N.Y.S.2d 193 (1st Dep’t 2008), *affirmed*, 12 N.Y.3d 846, 909 N.E.2d 83, 881 N.Y.S.2d 390 (2009), *cert denied*, 559 U.S. 905, 130 S. Ct. 1301, 175 L. Ed. 2d 1076 (2010). Kokolakis has not demonstrated that the failure to provide comply with prior court orders was willful or contumacious. Issuing a conditional order is not the appropriate sanction at this time.

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<sup>3</sup> “Document” is defined in the April 3 notice as “any writing or recorded information of any kind.” The notice did not define the format or medium to be searched or the format or medium for production. The court will not speculate whether the notice encompassed both written and electronic discovery especially when the issue was not raised previously.

Accordingly, it is

ORDERED, that the motion of defendant/third-party plaintiff J. Kokolakis Contracting, Inc. and defendant Dormitory Authority of the State of New York to compel discovery, for search affidavits and for a conditional order striking the answers of defendant Giaquinto Masonry, Inc. and third-party defendant Eastern Plumbing & Mechanical Contracting, Inc. is granted to the extent below; and it is further

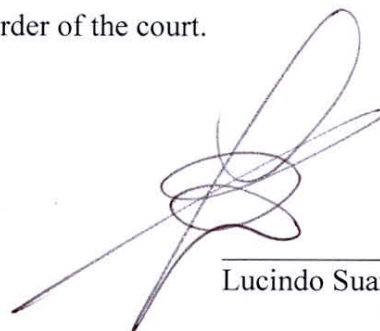
ORDERED, that within thirty (30) days after the date of this order, defendant Giaquinto Masonry, Inc. shall provide supplemental responses to items 3, 6, 11, 12, 15, 16, 17, 18, 19, 20, 21, 22, 23, and 24 of the Notice of Discovery and Inspection dated April 3, 2017 as set forth above; and it is further

ORDERED, that within thirty (30) days after the date of this order, third-party defendant Eastern Plumbing & Mechanical Contracting, Inc. shall provide supplemental responses to items 2, 3, 6, 11, 12, 15, 16, 17, 18, 19, 20, 21, 22, 23, and 24 of the Notice of Discovery and Inspection dated April 3, 2017 as set forth above; and it is further

ORDERED, that if defendant Giaquinto Masonry, Inc. and third-party defendant Eastern Plumbing & Mechanical Contracting, Inc. are unable to produce the documents requested or have already stated that no documents were located or do not exist, they shall each provide an affidavit from a person with knowledge describing the date, time, place and manner of the search within thirty (30) days after the date of this order.

This constitutes the decision and order of the court.

Dated: February 14, 2018



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Lucindo Suarez, J.S.C.