

101 W. 78th, LLC v New York Mar. and Gen. Ins. Co.
2019 NY Slip Op 31426(U)
May 14, 2019
Supreme Court, New York County
Docket Number: 650393/2017
Judge: Robert R. Reed
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.
This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. ROBERT R. REED PART 43

Justice

-----X

101 WEST 78TH, LLC,

Plaintiff,

- v -

NEW YORK MARINE AND GENERAL INSURANCE COMPANY,
THE SWEET CONSTRUCTION GROUP, LTD.

Defendant.

-----X

INDEX NO. 650393/2017

MOTION DATE N/A, N/A

MOTION SEQ. NO. 001 002

DECISION AND ORDER

The following e-filed documents, listed by NYSCEF document number (Motion 001) 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50

were read on this motion for

DISCOVERY

The following e-filed documents, listed by NYSCEF document number (Motion 002) 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88

were read on this motion for

PARTIAL SUMMARY JUDGMENT

In this insurance coverage action, motion sequences 001 and 002 are consolidated for disposition and are granted in part and denied in part for the reasons stated below.

In motion sequence 001, defendant Sweet Construction Group, LTD. (Sweet) moves, pursuant to CPLR 3124 and 3126, (1) to compel plaintiff to provide responses to the following discovery demands: (i) Sweet’s first notice of discovery and inspection, (ii) Sweet’s Article 31 demand, and (iii) Sweet’s first set of interrogatories, and (2) to compel plaintiff to pay Sweet’s attorneys’ fees incurred in making this motion. Plaintiff opposes, arguing that discovery sought by Sweet, of documents in the underlying action are governed by a confidentiality stipulation and order, signed by the parties to the underlying action and so-ordered by the court. Plaintiff also cross-moves, pursuant to CPLR 3126 (2), (1) to strike defendant Sweet’s answer and render a default judgment against sweet for its willful and contumacious refusal to provide duly

demanded discovery, or, in the alternative to strike defendant's answer if demanded discovery is not provided within 30 days, and to require defendant New York Marine and General Insurance Company (NY Marine) to sign a confidentiality stipulation proposed by plaintiff before production of discovery responses relating to the underlying action can be produced, and for attorneys' fees and costs associated with this motion. Defendant NY Marine is in partial agreement to strike co-defendant Sweet's answer and opposes plaintiff's cross-motion requesting the court to order NY Marine to sign a confidentiality stipulation.

"The party seeking to compel production must make a strong showing of necessity" *Weingarten v Braun*, 158 A.D.3d 519 (1ST Dept. 2018). Here, Sweet has met its burden in showing that the documents demanded are material and necessary for the adjudication of this matter. The Notice of Discovery and Inspection was served upon plaintiff before the signing of the confidentiality agreement in the underlying case. Moreover, at a compliance conference on April 19, 2018, this court ordered plaintiff to provide the outstanding discovery in the underlying action. Sweet's motion to compel is granted: plaintiff is ordered to provide responses to defendant Sweet's discovery demands and documents regarding the settlement in the underlying action within 30 days, or plaintiff's complaint will be stricken. The portion of Sweet's motion requesting attorneys' fees is denied. Plaintiff's cross-motion is denied in its entirety.

With regard to motion sequence 002, Sweet moves for partial summary judgment on its cross-claim against co-defendant NY Marine for defense in the action and to require NY Marine to reimburse Sweet for its defense costs incurred to date in this matter. The proponent of a motion for summary judgment carries the initial burden of production of evidence as well as the burden of persuasion. *Alvarez v Hospital*, 68 NY2d 320. Thus, the moving party must tender sufficient evidence to demonstrate as a matter of law the absence of a material issue of fact. Once

that initial burden has been satisfied, the “burden of production” (not the burden of persuasion) shifts to the opponent, who must now go forward and produce sufficient evidence in admissible form to establish the existence of a triable issue of fact. Sweet attaches as an exhibit a copy of the insurance policy entered into with NY Marine. Co-defendant NY Marine opposes Sweet’s motion, arguing (a) that the claims against Sweet do not fall within the coverage of the NY Marine policy, (b) that coverage is potentially barred under NY Marine’s contractual liability and property damage exclusions and (c) that Sweet has failed to show that the defenses and/or exclusions raised by NY Marine cannot prevail. Sweet has in its moving papers failed to specifically identify controlling language in the insurance policy that removes all questions as to coverage and exclusions. Thus, Sweet has failed to make prima facie showing of its entitlement to relief, and, as a result, Sweet’s motion for partial summary judgment is denied.

Accordingly, it is

ORDERED that motion sequence 001 to compel is granted, and, therefore, plaintiff must provide responses to Sweet’s discovery demands and all documents regarding the settlement in the underlying action within 30 days of the entry of this order, or plaintiff’s complaint will be stricken; and it is further

ORDERED that the portion of motion sequence 001 seeking attorneys’ fees is denied; and it is further

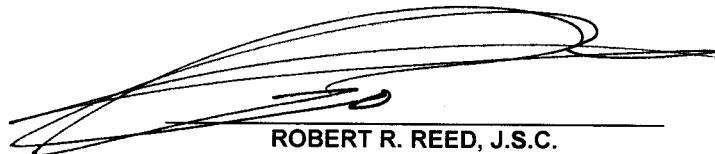
ORDERED that plaintiff’s cross-motion is denied in its entirety; and it is further

ORDERED that motion sequence 002, seeking partial summary judgment, is denied in its entirety.

This constitutes the decision and order of the court.

5/14/2019

DATE



ROBERT R. REED, J.S.C.

CHECK ONE:

CASE DISPOSED

GRANTED

DENIED

NON-FINAL DISPOSITION

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE