

MDB Dev. Corp. v Naylor Concrete & Steel Erectors, LLC
2019 NY Slip Op 32383(U)
August 8, 2019
Supreme Court, New York County
Docket Number: 650622/2018
Judge: Joel M. Cohen
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. JOEL M. COHEN PART IAS MOTION 3EFM

Justice

MDB DEVELOPMENT CORP.,
Plaintiff,

- v -

NAYLOR CONCRETE & STEEL ERECTORS, LLC,
Defendant.

INDEX NO. 650622/2018
MOTION DATE N/A
MOTION SEQ. NO. 004

DECISION + ORDER ON MOTION

NAYLOR CONCRETE & STEEL ERECTORS, LLC,
Plaintiff,

Third-Party
Index No. 595254/2018

-against-

DOKA USA, LTD., UNITED TRANSIT MIX, INC., HD SUPPLY
CONSTRUCTION SUPPLY LTD., MEN OF STEEL REBAR
FABRICATORS LLC, SUNBELT RENTALS, INC., FIDELITY
AND DEPOSIT COMPANY OF MARYLAND ZURICH
AMERICAN INSURANCE COMPANY, WC 28 REALTY, LLC,
ABC CORPORATIONS 1-10, RICKY NAYLOR, JOHN DOES
1-10

Defendant.

The following e-filed documents, listed by NYSCEF document number (Motion 004) 107, 108, 109, 110,
111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 124, 126, 128, 129, 132, 133

were read on this motion to COMPEL DISCOVERY AND RECOVER ATTORNEYS' FEES

Upon the foregoing documents:

Third-Party Defendant/Third-Party Counterclaim Plaintiff Men of Steel Rebar
Fabricators LLC ("Men of Steel") seeks an Order compelling Defendant/Third-Party Plaintiff
Naylor Concrete & Steel Erectors and Third-Party Defendant Ricky Naylor (collectively "Naylor
Defendants") to respond to Men of Steel's outstanding discovery demands and interrogatories.

Counsel for Naylor Defendants has conceded the demands are outstanding and attributes the failure to respond to an inability to obtain documents from his clients, the Naylor Defendants. Indeed, the breakdown in communication with his clients has led to counsel for Naylor Defendants seeking to be relieved as counsel (see Motion Sequence 005).

Nevertheless, an inability or an unwillingness to produce documents and otherwise respond to Men of Steel's discovery demands is a plain violation of the Naylor Defendants' discovery obligations under the CPLR and warrants the issuance of a conditional order. CPLR §3216 (3); see also *Tejeda v 750 Gerard Properties Corp.*, 272 A.D.2d 124, 124 (1st Dept 2000) (court properly issued a conditional order directing plaintiff's compliance with discovery demands and later properly dismissed the complaint for plaintiff's failure to comply with the conditional order).

In these circumstances, Men of Steel is entitled to recover attorneys' fees incurred in filing this motion. See 22 NYCRR 130.1.1(c)(1). If the parties are unable to agree on the amount of attorneys' fees to which Men of Steel is entitled, the amount shall be set by a Judicial Hearing Officer in a separate proceeding.

Therefore, it is:

ORDERED that Third-Party Defendant Men of Steel's motion to compel compliance with its October 18, 2018 demands and interrogatories is granted; it is further

ORDERED that Defendant/Third Party Plaintiff Naylor Concrete & Steel Erectors LLC and Third-Party Defendant Ricky Naylor are to provide responses to the October 18, 2018 demands and interrogatories within 45 days from the date of this Order. Failure to comply with this directive may warrant the striking of Defendant/Third Party Plaintiff Naylor Concrete &

Steel Erectors LLC's Third-Party Complaint and its Answer to Men of Steel's Counterclaims; it is further

ORDERED that Men of Steel is awarded attorneys fees, payable by Naylor Defendants, in an amount to be determined by a Judicial Hearing Officer ("JHO"); it is further

ORDERED that the powers of the JHO/Special Referee to determine shall not be limited further than as set forth in the CPLR; and it is further

ORDERED that this matter is hereby referred to the Special Referee Clerk (Room 119 M, 646-386-3028 or spref@courts.state.ny.us) for placement at the earliest possible date upon the calendar of the Special Referees Part (Part SRP), which, in accordance with the Rules of that Part (which are posted on the website of this Court at www.nycourts.gov/supctmanh at the "Local Rules" link), shall assign this matter to an available Special Referee to determine as specified above; and it is further

ORDERED that counsel for Men of Steel shall serve a copy of this order with notice of entry on Naylor Defendants within five days and that counsel for Men of Steel shall, after thirty days from service of those papers, submit to the Special Referee Clerk by fax (212-401-9186) or email an Information Sheet (which can be accessed at <http://www.nycourts.gov/courts/1jd/supctmanh/refpart-infosheet-10-09.pdf>) containing all the information called for therein and that, as soon as practical thereafter, the Special Referee Clerk shall advise counsel for the parties of the date fixed for the appearance of the matter upon the calendar of the Special Referees Part; and it is further


ORDERED that the hearing will be conducted in the same manner as a trial before a Justice without a jury (CPLR § 4318) (the proceeding will be recorded by a court reporter, the rules of evidence apply, etc.) and that the parties shall appear for the reference hearing, including

with all such witnesses and evidence as they may seek to present, and shall be ready to proceed, on the date first fixed by the Special Referee Clerk subject only to any adjournment that may be authorized by the Special Referee's Part in accordance with the Rules of that Part; and it is further

ORDERED that, except as otherwise directed by the assigned JHO/Special Referee for good cause shown, the trial of the issue specified above shall proceed from day to day until completion.

This constitutes the Decision and Order of the Court.

8/8/2019
DATE


JOEL M. COHEN, 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