

Lefavre v 568 Broadway Holding LLC

2019 NY Slip Op 32727(U)

September 11, 2019

Supreme Court, New York County

Docket Number: 161241/2017

Judge: W. Franc Perry

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. W. FRANC PERRY PART IAS MOTION 23EFM

Justice

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KATHERINE LEFAVRE,

Plaintiff,

INDEX NO. 161241/2017

MOTION DATE July 18, 2019

MOTION SEQ. NO. 002

- v -

568 BROADWAY HOLDING LLC, 568 BROADWAY
PROPERTY LLC, AURORA CAPITAL ASSOCIATES, LLC,
A & H ACQUISITIONS CORP., SCF MANAGEMENT LLC,
ROCK GROUP NY CORP., SIMRANPAL SINGH, ROCK
GROUP ENTERPRISES CORP., RHG MANPOWER INC.,
DANIEL ODIGIE, DAN ENGINEERING SERVICES, SATO
CONSTRUCTION CO., INC., SATO CONSTRUCTION CO.
INC., D/B/A FLAG WATERPROOFING AND
RESTORATION LLC, FLAG WATERPROOFING AND
RESTORATION, LLC, MUGHAL GENERAL
CONSTRUCTION, INC.,

DECISION + ORDER ON
MOTION

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 002) 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 74, 75, 76, 77, 78, 79, 80, 81, 82, 87, 88, 89, 90, 101, 102, 103, 104, 105, 106, 108, 109, 110, 140

were read on this motion to/for STRIKE PLEADINGS

In this personal injury action, plaintiff Lefavre in motion sequence number 002, seeks an order pursuant to CPLR §3126 striking the answer of the defendants, RHG MANPOWER INC, MUGHAL GENERAL CONSTRUCTION INC., and ROCK GROUP CORP., for failing to comply with this court's prior orders requiring the production of discovery; plaintiff also seeks sanctions pursuant to 22 NYCRR 130-1.1, and an order pursuant to CPLR §3126 precluding defendants, RHG MANPOWER INC, MUGHAL GENERAL CONSTRUCTION INC., and ROCK GROUP CORP., from testifying or offering evidence at the time of trial. Alternatively, plaintiff seeks a conditional order pursuant to CPLR §3124 compelling defendants RHG MANPOWER INC, MUGHAL GENERAL CONSTRUCTION INC., and ROCK GROUP

CORP., (hereinafter "RHG", "Mughal" and "Rock Group"), to comply with this Court's prior directives regarding the production of all outstanding discovery. RHG and Mughal oppose the motion.¹

BACKGROUND

This matter involves three separate plaintiffs who have alleged damages related to personal injuries sustained on November 19, 2017 in connection with a sidewalk shed collapse at 568 Broadway. This court has consolidated these actions for purposes of discovery only, and has presided over several discovery conferences in this action. (NYSCEF Doc. No. 143). This discovery motion, brought by plaintiff Lefavre, concerns combined discovery demands she served upon defendants RHG and Mughal in August 2018, and discovery orders issued by the court pursuant to its preliminary conference order, and subsequent status conference orders. (NYSCEF doc. Nos. 47, 54, and 62). Plaintiff contends that the delay and the ultimate responses provided by RHG and Mughal are deficient and demonstrates conduct that is willful and contumacious. Plaintiff contends that defendants will never provide the discovery demanded until sanctioned and ordered to do so by the court.

As noted, the court is intimately familiar with the discovery issues in this matter, having presided over several discovery conferences and even allowing defendants RHG and Mughal additional time to comply with the outstanding discovery demands and to provide an affidavit outlining the efforts undertaken by defendants in searching for documents that may be responsive to plaintiff's combined demands and the court's discovery orders. (NYSCEF Doc. No. 95). Thereafter, defendants RHG and Mughal submitted supplemental papers to the court addressing the efforts undertaken to obtain documents responsive to the outstanding demands

¹ Plaintiff withdrew the motion against the Rock Group defendants prior to oral argument. (see NYSCEF Doc. No. 81, ¶3).

and opposing plaintiff's motion, arguing that defendants have acted in good faith in attempting to locate documents responsive to the requests and further noting that this action is in the early stages and deposition testimony, currently ongoing, may lead to locating additional responsive documents which will allow defendants to supplement their respective discovery responses.

ANALYSIS/STANDARD OF REVIEW

The court has broad discretion in supervising the discovery process under CPLR Article 31 and the nature and degree of the penalty to be imposed pursuant to CPLR 3126, based upon a party's failure to comply with disclosure orders, is committed to the sound discretion of the court. (see *Allen v. Crowell-Collier Publ. Co.*, 21 N.Y. 2d 403, 288 N.Y.S. 2d 449, 235 N.E. 2d 430 [1968]; *Palmenta v Columbia Univ.*, 266 AD2d 90, 698 NYS2d 657 [1999]; *Brooklyn Union Gas Co. v. American Home Assurance Co.*, 23 A.D. 3d 190, 803 N.Y.S. 2d 532 [1st Dept. 2005]). Striking an answer is inappropriate absent a clear showing that the failure to comply is willful, contumacious or in bad faith, which must be affirmatively established by the moving party, whereupon the burden shifts to the nonmoving party to establish a reasonable excuse, with appropriate findings to be made by the court. (see *Cespedes v Mike & Jac Trucking Corp.*, 305 AD2d 222, 758 NYS2d 489 [2003]; *Delgado v City of New York*, 47 AD3d 550, 850 NYS2d 401 [2008]; *Palmenta*, supra).

The public policy of this State, favors resolution of actions on the merits (*Corsini v U-Haul Intl.*, 212 AD2d 288, 630 NYS2d 45 [1995], lv dismissed in part and denied in part 87 NY2d 964, 664 NE2d 1254, 642 NYS2d 192 [1996]). As such, New York courts have consistently held that striking a party's pleading is an extreme and drastic sanction to be imposed sparingly. (See, *Dauria v. City of New York*, 127 A.D.2d 459, 511 N.Y.S.2d 271 [1st Dept. 1987]; *Commerce & Indus. Co. v Lib-Corn, Ltd.*, 266 AD2d 142, 699 N.Y.S.2d 16 [1st Dept.

1999] [striking of pleading "not a sanction to be routinely imposed whenever a party fails to comply with any item of discovery"]]).

Here, although plaintiff has demonstrated that defendants RHG and Mughal have failed to provide timely responses to her combined demands and the court's discovery orders, the court finds that defendants have provided a reasonable excuse for failing to initially identify the documents responsive to the demands and have produced additional documents in supplemental responses. Additionally, both defendants have demonstrated continuing good faith efforts to locate documents responsive to plaintiff Lefavre's demands and this court's discovery orders. Specifically, Mughal produced the affidavit of its president, Mohammad Ramzan, who indicates that upon a further search of Mughal's records he located a copy of the subcontract between Mughal and co-defendant Sato Construction regarding work it performed on the premises at 568 Broadway, which was produced. (NYSCEF Doc. No. 110). Moreover, Ramzan states that Mughal's records related to this job were turned over to co-defendant Sato Construction who hired Mughal to perform facade restoration work at 568 Broadway. (NYSCEF Doc. No. 110, ¶¶5-8).

With respect to RHG, plaintiff argues that co-defendant Rock Group's affidavit, indicates that RHG did work on the scaffolding that collapsed in the weeks prior to the occurrence; that they were contracted to perform work and issued invoices for work they performed at the site; and that RGH was called to the scene of the collapse and removed debris after the collapse. (NYSCEF Doc. Nos. 75 and 76). Plaintiff contends that this information was provided by co-defendant Rock Group and not one page of discovery was acknowledged or exchanged by RHG.

RHG argues that it has responded to plaintiff's demands in good faith and has communicated with plaintiff and explained its efforts in attempting to obtain documents

responsive to the demands from RHG's files. Additionally, RHG has submitted the affidavit of Gil Menashe, indicating that he is not in possession of certain documents requested by plaintiff and producing the documents he did possess in response to the demands. (NYSCEF Doc. No. 72). As such, RHG argues that plaintiff has not met her burden to demonstrate that RHG's conduct was willful and contumacious, sufficient to impose the drastic remedy of striking its answer. Moreover, although RHG was unable to secure an affidavit from its client detailing the efforts made to locate documents responsive to plaintiff's combined demands and this court's discovery orders, its counsel explained her efforts in attempting to secure said affidavit and requesting additional time to produce that affidavit. (NYSCEF Doc. No. 111, ¶9). The court notes that the affidavit has not been produced and directs RHG to provide said affidavit within 20 days.²

While defendants' delayed efforts to comply with this court's disclosure orders leave much to be desired, plaintiff has failed to make a clear showing that defendants' failure to comply with those orders was willful, contumacious or the result of bad faith (see *Cambrý v Lincoln Gardens*, 50 AD3d 1081, 1082, 857 NYS2d 225, 2008 NY Slip Op 4047 *2, 2008 N.Y. App. Div LEXIS 3868 [2d Dept 2008] ["Belated but substantial compliance with a discovery order undermines the position that the delay was a product of willful or contumacious conduct"]). Moreover, the court finds that defendants have demonstrated the efforts undertaken to locate responsive documents from their respective files. On this record, it would be unduly harsh and extremely prejudicial to strike defendants RHG's and Mughal's answers. (see *Heyward v. Benyarko*, 82 A.D.2d 751, 440 N.Y.S.2d 21 [1st Dept. 1981]).

² Plaintiff and RHG have written to the court identifying additional discovery issues related to RHG's discovery responses that arose after this motion was fully submitted which the court has directed will be addressed at the status conference scheduled for October 8, 2019.

Plaintiff has failed to establish that defendants have acted deliberately or with intent to delay or interfere with discovery in this case. Rather, it appears that defendants, in good faith, attempted to obtain documents that were responsive to the combined demands and the court's discovery orders from their respective clients who, upon further review, located and produced the documents they possessed. Accordingly, it is hereby,

ORDERED that plaintiff Lefavre's motion sequence 002 for an order striking the answer of defendants RHG MANPOWER INC, and MUGHAL GENERAL CONSTRUCTION INC., and seeking sanctions and costs pursuant to 22 NYCRR Section 130-1.1 is denied; and it is further

ORDERED that plaintiff Lefavre's motion seeking to preclude defendants, RHG MANPOWER INC, and MUGHAL GENERAL CONSTRUCTION INC., from testifying or offering evidence at the time of trial is denied; and it is further

ORDERED that RHG MANPOWER INC, produce an affidavit within 20 days, detailing the efforts made to locate documents responsive to plaintiff's combined demands and this court's discovery orders,

ORDERED that counsel are directed to appear for a status conference in Room 307, 80 Centre Street, New York, New York, on October 8, 2019, at 9:30 AM.

9/11/2019
DATE

WFP
W. FRANC PERRY, J.S.C.

CHECK ONE: CASE DISPOSED DENIED NON-FINAL DISPOSITION

APPLICATION: GRANTED DENIED GRANTED IN PART OTHER

CHECK IF APPROPRIATE: SETTLE ORDER SUBMIT ORDER FIDUCIARY APPOINTMENT REFERENCE

INCLUDES TRANSFER/REASSIGN