

Phillips-Frett v Home Depot, Inc.
2019 NY Slip Op 33732(U)
November 1, 2019
Supreme Court, Bronx County
Docket Number: 22959/2014
Judge: Laura G. Douglas
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX, PART 11

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BETTY PHILLIPS-FRETT,

Index No. 22959/2014

Plaintiff,

DECISION/ORDER

-against-

HOME DEPOT, INC.,

Present:
Hon. Laura G. Douglas
J.S.C.

Defendant.

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HOME DEPOT, INC.,

Third-Party Plaintiff,

-against-

HOP HOME SERVICES, BOROWIDE ELECTRICAL
CONTRACTORS, INC., and AMERIFLO PLUMBING &
HEATING, INC.,

Third-Party Defendants.

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Recitation, as required by Rule 2219(a) of the C.P.L.R., of the papers considered in the
review of this motion and cross-motion to dismiss complaint and related relief:

<u>Papers</u>	<u>Numbered</u>
Notice of Motion by Defendant/Third-Party Plaintiff, Good Faith Affirmation of Megan Marchick Le, Esq. dated September 4, 2018, Affirmation of Megan Marchick Le, Esq. dated September 4, 2018 in Support of Motion, and Exhibits ("A" through "M").....	1
Notice of Cross-Motion by Third-Party Defendant Ameriflo Plumbing & Heating, Inc., Good Faith Affirmation of Beth Rogoff-Gribbins, Esq. dated September 10, 2018, Affirmation of Beth Rogoff-Gribbins, Esq. dated September 10, 2018, and Exhibits ("A" through "I").....	2
Affirmation of Jamie Brody Johnson, Esq. dated September 24, 2018 in Support of Motion and Exhibits ("A" through "K").....	3
Affirmation of Pamela D. Hayes, Esq. dated February 4, 2019 in	

Opposition to Motions and Exhibits..... 4

Reply Affirmation of Megan Marchick Le, Esq. dated February 20, 2019..... 5

Reply Affirmation of Beth Rogoff-Gribbins, Esq. dated February 12, 2019 and Exhibits (“A” through “D”)..... 6

Reply Affirmation of Jamie Brody Johnson, Esq. dated February 14, 2019..... 7

This motion and cross-motion are consolidated for purposes of Decision/Order and, upon the foregoing papers and after due deliberation, the Decision/Order on this motion and cross-motion is as follows:

Defendant/third-party plaintiff Home Depot, Inc. (“Home Depot”) seeks an order pursuant to CPLR § 3126(3) dismissing the plaintiff’s complaint with prejudice as a penalty for her purported failure to comply with Home Depot’s discovery demands and this Court’s discovery scheduling orders dated June 26, 2017 and July 17, 2017 or, alternatively, an order pursuant to CPLR Rule 3124 compelling the plaintiff to comply with these demands and orders or be precluded from offering such evidence or testimony at trial, and an order directing the plaintiff to complete her deposition after fully complying with these demands and orders. Third-party defendant Ameriflo Plumbing & Heating, Inc. (“Ameriflo”) cross-moves for similar relief. The motion and cross-motion are granted solely as ordered below and are otherwise denied.

The plaintiff seeks monetary damages allegedly resulting from the defendants’ breach of a contract to perform certain work at the plaintiff’s residence. Home Depot and Ameriflo contend that the following disclosure remains outstanding:

1. Records referenced in the plaintiff’s discovery and bill of particulars, including a receipt for microwave oven, invoice for service for refrigerator to try and fix it for \$450, credit card bills, receipts, checks, documentation for list by plaintiff, documentation of damages, and photographs; and
2. Authorizations to obtain the plaintiff’s income tax records and employment records, including job applications, evaluations, attendance records, paid vacation and sick time details, and wage records; and
3. An authorization to obtain the homeowner’s claim and subrogation files for the claim; and

4. Fresh, HIPAA-compliant authorizations for the plaintiff's medical treatment for any alleged personal injury due to the claim, including records from Jacobi Hospital and the plaintiff's primary care physician; and
5. Pages 2-4 of the Home Depot invoice dated July 29, 2012, page 2 of the Home Depot invoice dated September 18, 2012, and page 2 of the Home Depot invoice dated September 27, 2012; and
6. Legible copies of the Home Depot invoices dated September 11, 2012 and September 18, 2012; and
7. All photographs and video footage of the plaintiff's kitchen and bathroom since 2010; and
8. Electronic data, including voice recognition devices and activity trackers; and
9. Renter's insurance information; and
10. Invoices, receipts, and/or cancelled checks regarding service calls, repairs, and/or maintenance of the plaintiff's refrigerators since 2010; and
11. Emails regarding the subject kitchen and/or bathroom renovation; and
12. Identity of all contractors who performed any repairs, maintenance, and/or renovation in the plaintiff's kitchen or bathroom since 2010; and
13. Receipts from the plaintiff's cancelled vacation; and
14. The names and last known addresses of all non-party witnesses.

The parties' so-ordered stipulation dated June 26, 2017 and this Court's Compliance Conference order dated July 11, 2017 required the plaintiff to produce these items. In opposition, the plaintiff acknowledges that she still owes the defendants her income taxes from 2013-2015. The plaintiff has already submitted to a deposition and has furnished significant discovery to date. She attaches various items that have been previously disclosed, including the names of defendants' workers, records from Jacobi Medical Center, and various receipts and invoices. However, the authorization for the release of the plaintiff's records from Jacobi Hospital was not completely filled out. The plaintiff shall furnish a fresh, duly-executed authorization to obtain these records. The unsworn letter from what appears to be the plaintiff's employer does not satisfy the plaintiff's disclosure obligation in this area. The plaintiff responded that she has no information from her cancelled trip to Myrtle Beach and no other documentation that has been demanded. The plaintiff

is precluded from using any item at trial which had not been previously exchanged in discovery.

To the extent that the plaintiff claims that she does not possess a copy of certain responsive document(s) and/or that she is unable to locate these item(s) after a search, she is to provide the defendants with an affidavit from someone with personal knowledge attesting that no such document(s) exist beyond what has already been furnished and detailing the search conducted for responsive document(s) in accordance with *Henderson-Jones v. City of New York*, 87 AD3d 498 [1st Dept. 2011] and *Jackson v. City of New York*, 185 AD2d 768 [1st Dept. 1992]. To the extent that the plaintiff contends that she has previously furnished the items requested, she is to re-serve same in a new response.

Accordingly, it is hereby

ORDERED that the plaintiff provide the moving defendants with the disclosure enumerated in this order and the so-ordered stipulation dated June 26, 2017 no later than 30 days following service of a copy of this order with notice of entry; and it is further

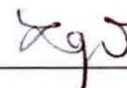
ORDERED that the plaintiff is precluded from using any item at trial that has not been previously disclosed in accordance with the terms of this Order; and it is further

ORDERED that the plaintiff shall appear for a continued deposition no later than January 15, 2020.

This constitutes the Decision and Order of this Court.

Bronx, New York

November 1, 2019



HON. LAURA G. DOUGLAS

J.S.C.