

<b>Bernstein v Michael Piccirillo Architecture</b>
2019 NY Slip Op 34218(U)
August 5, 2019
Supreme Court, Westchester County
Docket Number: 60040/2016
Judge: Joan B. Lefkowitz
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This opinion is uncorrected and not selected for official publication.

To commence the statutory time period for appeals as of right [CPLR 5513(a)], you are advised to serve a copy of this order, with notice of entry upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF WESTCHESTER - COMPLIANCE PART

-----X  
BENJAMIN BERNSTEIN and LYNNE BERNSTEIN,

Plaintiffs,

- against-

MICHAEL PICCIRILLO ARCHITECTURE and  
MARINELLI BROTHERS CONSTRUCTION CO. LLC,

Defendants.

-----X  
MARINELLI BROTHERS CONSTRUCTION CO. LLC,

Third-Party Plaintiff,

- against-

JVC INSULATION CONTRACTORS, LLC, MICHAEL F. BURRELL d/b/a MICHAEL'S PLUMBING, HEATING & MECHANICALS, JMB ELECTRIC INC., RICH GREGORY PLUMBING AND HEATING, INC., EUROPEAN MASONRY CONTRACTORS, INC., J. DUQUE CONSTRUCTION CORP., ADVANCED HEATING & AIR CONDITIONING CORPORATION, ULTRAIRE COMPANY INC., 123 HVAC HEATING & COOLING, INC., PRESTIGE FLOORING & INTERIORS, INC., PUTNAM PROPANE GAS, INC, PUTNAM PROPANE OF CARMEL, NY and MILLENNIUM WALL SYSTEMS, INC.,

Third-Party Defendants.

-----X  
LEFKOWITZ, J.

The following papers were read on this motion by third-party defendant Advanced Heating & Air Conditioning Corporation ("Advanced") seeking an order pursuant to CPLR 3024 and CPLR 3126 striking the third-party complaint due to the willful failure of defendant/ third-party plaintiff Marinelli Brothers Construction Co. LLC ("Marinelli") to provide a proper/complete response to Advanced's demand for a verified bill of particulars, or,

**DECISION & ORDER**

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alternatively, precluding Marinelli from introducing/offering any evidence at the time of trial in support of its allegations against Advanced, and for such other and further relief as to this Court may seem just, proper, and equitable:

Order to Show Cause; Affirmation in Support; Exhibits A-H; Affirmation of  
Good Faith  
Affirmation in Opposition; Exhibit A  
NYSCEF File

Upon the foregoing papers and the proceedings held on August 5, 2019, this motion is determined as follows:

### ***Background***

In 2011 plaintiffs retained Piccirillo Architecture PLLC (“Piccirillo”) to design the renovation and expansion of their home located at 310 Lake Shore Road, in Putnam Valley, New York (the “premises”). In 2012 plaintiffs retained Marinelli to provide general contracting services with respect to the renovation.

Plaintiffs commenced this action alleging, inter alia, negligence and breach of contract against Piccirillo and Marinelli by the filing of a summons and complaint on July 21, 2016. Marinelli commenced a third-party action on November 14, 2018 against numerous subcontractors, including Advanced, alleging common law indemnification and contribution. Advanced served its answer to the third-party complaint on January 7, 2019.

By Decision and Order dated April 16, 2019, this Court, (Giacomo, J.), denied the motion by third-party defendants Prestige Flooring & Interiors, Inc., JMB Electric Inc., and JVC Insulation Contractors, LLC to sever the third-party complaint. On or about April 19, 2019, Advanced served, inter alia, a demand for a bill of particulars on plaintiffs and a demand for a third-party bill of particulars on Marinelli. On or about June 11, 2019 Advanced served its responses to the demand for a bill of particulars.

### ***The Parties' Contentions***

Advanced argues that Marinelli has repeatedly failed to properly respond to its demand for a bill of particulars and that this failure requires striking the third-party complaint as to Advanced. Specifically, Advanced argues that Marinelli's responses to paragraphs 4, 5, 6, 7, 8, 9, 12, and 13, are inadequate. These paragraphs request information concerning, inter alia: “[t]he exact place on the premises where it [is] alleged that this third-party defendant's [Advanced] negligence or breach allegedly took place” (paragraph 4), “the specific acts and omissions which constituted the negligence, breach of contract, defective workmanship or materials or other culpable conduct of this answering third-party defendant [Advanced]” (paragraph 5), “the exact manner in which the claimed breach is alleged to have occurred” (paragraph 6), all sections and

sub-sections of all statutes, laws, ordinances or New York State Rules and Regulations alleged to have been violated by this third-party defendant (paragraphs 7 & 8), the nature and exact location of any defect claimed, notice provided to Advanced thereof, any opportunity to cure same (paragraph 9), whether Marinelli will be “seeking indemnity claim acts or omissions other than those claimed by plaintiffs, as the basis of indemnity” (paragraph 12), and the “particular acts and/or omissions ... which third-party plaintiff claims as the basis for its claims of contribution, common law indemnity; contractual indemnity; breach of any contract or warranty (paragraph 13).

In opposition Marinelli states that its responses provided Advanced with sufficient information regarding the nature of its third-party claims. Marinelli contends that its claims against Advanced sound in contribution and indemnification arising from any successful claims made by plaintiffs against Marinelli for work performed by Advanced. Marinelli maintains that it does not allege an independent claim against Advanced and does not possess information concerning the specific details of plaintiffs’ claims concerning the work performed by Advanced and that this information is within plaintiffs’ possession. Marinelli argues that insofar as it has provided responses to the demand for a bill of particulars and the Court has not directed Marinelli to supplement those responses, Advanced has not demonstrated willful and contumacious conduct to warrant relief provided by CPLR 3126. Additionally Marinelli asserts that all of plaintiffs’ responses and prior deposition testimony have been exchanged with Advanced, and notes that Advanced had sufficient information to depose plaintiff Lynn Bernstein producing over 140 pages of testimony regarding the details of the plaintiffs’ claims regarding the HVAC work.

*Analysis:*

CPLR 3126 provides that if any party “wilfully fails to disclose information which the court finds ought to have been disclosed,” the court may, inter alia, issue an order of preclusion or an order striking the pleadings, dismissing the action, or rendering judgment by default against the disobedient party. “The nature and degree of the penalty to be imposed on a motion pursuant to CPLR 3126 is a matter generally left to the discretion of the Supreme Court” (*Carbajal v Bobo Robo*, 38 AD3d 820 [2d Dept 2007]). To invoke the drastic remedy of striking a pleading a court must determine that the party’s failure to disclose is wilful and contumacious (*Greene v Mullen*, 70 AD3d 996 [2d Dept 2010]; *Maiorino v City of New York*, 39 AD3d 601 [2d Dept 2007]). “Wilful and contumacious conduct can be inferred from repeated noncompliance with court orders ... coupled with no excuses or inadequate excuses” (*Russo v Tolchin*, 35 AD3d 431, 434 [2d Dept 2006]; see also *Prappas v Papadatos*, 38 AD3d 871, 872 [2d Dept 2007]).

A bill of particulars is an amplification of a pleading (*Northway Engineering, Inc. v Felix Industries, Inc.*, 77 NY2d 332, 336 [1991]). Parties are required to particularize only that for which they have the burden of proof (*Hydromatics, Inc. v County National Bank*, 23 AD2d 576 [2d Dept 1965]); Siegel, N.Y. Prac. § 238 [6th ed.] [Note: online treatise]). Additionally, the purpose of a bill is to amplify the pleadings not to gain disclosure of evidentiary material (*Arroyo v Fourteen Estusia Corp.*, 194 AD2d 309 [1<sup>st</sup> Dept 1992]).

A review of the responses provided by Marinelli to Advanced's demand for a bill of particulars shows that the bill provided by Marinelli has adequately and appropriately responded to Advanced's demand. The claims contribution and indemnification made by Marinelli are derivative and based solely on plaintiffs' underlying claims concerning the work performed by Advanced. Moreover, the demand for a bill of particulars served by Advanced on plaintiffs, is indistinguishable from the one served upon Marinelli, and Advanced has had the opportunity to question plaintiffs about their claims. Therefore any information concerning the details of their claims has or can be provided by plaintiffs who have first hand knowledge of their specific allegations concerning the work performed by Advanced.

All other arguments raised on this motion and evidence submitted by the parties in connection thereto have been considered by this Court, notwithstanding the specific absence of reference thereto.

Accordingly, it is:

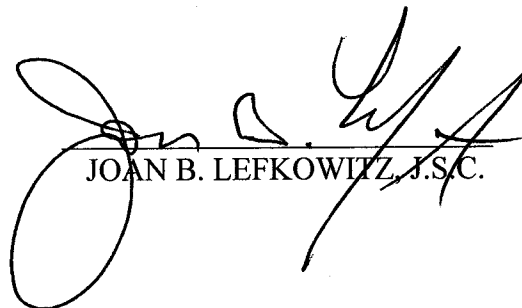
ORDERED that the motion by Advanced Heating & Air Conditioning Corporation seeking to strike the third-party complaint is denied in its entirety; and it is further

ORDERED that the parties shall appear for the previously scheduled conference in the Compliance Part, Courtroom 800, on August 9, 2019 at 9:30 a.m; and it is further

ORDERED that Advanced Heating & Air Conditioning Corporation shall serve a copy of this decision and order with notice of entry upon all parties within five (5) days of entry and shall file proof of service within five (5) days of service to the NYSCEF website.

The foregoing constitutes the Decision and Order of this Court.

Dated: White Plains, New York  
August 5, 2019



JOAN B. LEFKOWITZ, J.S.C.

Service upon participating counsel via NYSCEF

Service upon the following third-party defendants by First Class Mail:

Michael Burrell  
Rich Gregory Plumbing  
European Masonry  
Orlando, LLP  
Ultraire Co., Inc.  
123 HVAC Heating  
Millennium Wall Systems

cc: Compliance Part Clerk