

**Boltin v Board of Mgrs. of the 447-453 W. 18th St.
Condominium**

2020 NY Slip Op 30434(U)

February 10, 2020

Supreme Court, New York County

Docket Number: 655633/2018

Judge: Gerald Lebovits

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(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. GERALD LEOVITS PART IAS MOTION 7EFM

Justice

-----X

CAROLYN BOLTIN,

Plaintiff,

- v -

BOARD OF MANAGERS OF THE 447-453 WEST 18TH STREET CONDOMINIUM, KIM PILLEMER, RYAN ASHER, MICKAEL OHANA, 447-453 WEST 18 LP, MADISON EQUITIES, LLC, JOHN DOE, JANE DOE,

Defendants.

-----X

INDEX NO. 655633/2018
MOTION DATE 12/19/2019
MOTION SEQ. NO. 003

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 003) 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 106, 107

were read on this motion to

STRIKE PLEADINGS

Haskel & Wright PLLC, Mineola, NY (Brandon M. Zlotnick of counsel), for plaintiff.
Fixler & LaGattuta, LLP, New York, NY (Paul F. LaGattuta III of counsel), for defendant Board of Managers of the 447-453 West 18th Street Condominium.

Gerald Lebovits, J.:

This motion concerns discovery disputes in a property-damage action, in which plaintiff, Carolyn Boltin, alleges that her condominium unit sustained damage from a number of different water leaks originating outside her unit. Boltin sued (among others) the board of her condominium, defendant Board of Managers of the 447-453 West 18th Street Condominium.

Boltin and the Board have disputed the scope and extent of information and documents the Board is required to produce to Boltin in discovery, both in letters exchanged between counsel and at discovery conferences before this court. Boltin now moves for an order under CPLR 3126 striking the Board's answer for failure to comply with the Board's discovery obligations or, in the alternative, an order under CPLR 3124 compelling the Board to supplement its discovery responses. Boltin's motion to strike is denied; her motion to compel is granted in part and denied in part.

I. Boltin's Demand for a Further Supplemental Bill of Particulars as to the Board's Affirmative Defenses

Boltin previously demanded that the Board provide her a bill of particulars (or BP) as to the affirmative defenses raised in the Board's answer. The Board provided a bill of particulars,

which Boltin contended was improperly unverified and insufficient in any event. The parties contested the validity and sufficiency of the Board's BP at a compliance conference before this court. Upon reviewing the Board's response, the court directed the Board to serve a supplemental, verified BP (*see* NYSCEF No. 20), and the Board did so.

Boltin now argues that the Board's supplemental BP remains insufficient (and unverified) and asks this court either to strike the Board's answer as a discovery sanction or to direct the Board to supplement its BP further. (*See* NYSCEF Nos. 37, 38, 106.) This court agrees with Boltin that the Board's supplemental BP remains insufficient in certain respects and that it is improperly unverified. (*See* CPLR 3044 [governing verification of bills of particulars].) That said, the severe sanction of striking the Board's answer is not warranted here. The court concludes instead that the Board must serve a further supplemental BP within 30 days of service of this order with notice of entry, but only to the extent set forth below.

One of the parties' principal disagreements on this branch of the current motion concerns the Board's objection that Boltin seeks information of an evidentiary nature that should be sought through interrogatories or document requests rather than through a BP demand. (*See e.g.* NYSCEF No. 87, at 12-14.) This court has considered each of Boltin's demands, bearing in mind that the line between amplifying a pleading and seeking evidentiary information is not always sharp and clear.

Upon that consideration, this court reaches the following conclusions as to Boltin's demand for further supplementation of the Board's bill of particulars:

The Board's response or objection to the following BP demands is not sufficient and must be further supplemented: 1,¹ 3, 6,² 9, 15, 16, 17, 18, 20, 22, 26, and 30.

¹ In further supplementing its response to Demand No. 1 to provide a reasonable level of detail, the Board should refrain from merely copying the response from a different action involving an unrelated form of accident and injury, as evidently occurred in preparing the Board's prior responses to this demand. (*See e.g.* Supplemental Bill of Particulars, NYSCEF No. 101, at 4 [alleging that the "want of due care of plaintiff consisted of the following omissions and commissions . . . fail[ing] to properly, adequately and sufficiently keep a lookout up, down and to the sides".])

² BP Demand No. 6 seeks amplification of the Board's affirmative defense that its liability is limited by CPLR article 16. (*See* NYSCEF No. 40, at ¶ 51.) The Board suggests, citing *Marsala v Weinraub* (208 AD2d 659 [2d Dept 1994]), that it does not bear the burden of proof on this defense and therefore need not respond to Demand No. 6. (*See* NYSCEF No. 87, at 11-12.) This suggestion is incorrect. Under CPLR 1603, a defendant must prove that its equitable share of liability (if any) for plaintiff's injuries is less than 50% in order to invoke the liability-limitation provisions of CPLR 1601. *Marsala* held only that a defendant is not obligated to *plead* in the answer that defendant is entitled to the benefit of CPLR 1601 should it meet its burden of proof. (*See* 208 AD2d at 690.) Here, though, the Board *did* plead as an affirmative defense that its liability is limited by CPLR article 16. Boltin is thus entitled to seek amplification of that affirmative defense. Nor would amplifying that affirmative defense necessarily require production of evidentiary material. (*See e.g. id.* at 692-693, 697-698 [Ritter, J., concurring])

The Board's response to the following BP demands need not be further supplemented because the response provided is sufficient: 5, 8, and 12.

The Board's response or objection to the following BP demands need not be further supplemented because the demands are duplicative: 2, 13, and 19.

The Board's response or objection to the following BP demands need not be further supplemented because the demands improperly seek material of an evidentiary nature: 4, 6, 7, 10, 11, 14, 21, 23, 24, 25, 27, 28, 29, 31, 32, and 33.

II. Boltin's Demand for Further Supplemental Responses to Her Document Requests

Boltin previously served a set of document requests on the Board. The Board objected to every request (chiefly as vague and overbroad) and declined to produce any documents. This court directed the Board to supplement its responses to Boltin's document requests, including by answering the appropriate portions of a request that on the whole is overbroad.) The Board served a supplemental response, in which it produced some documents but—notwithstanding this court's order—continued to decline altogether to respond to many of the requests as overbroad.

Boltin now moves to strike the Board's answer as a sanction under CPLR 3126 for failing properly to supplement its document responses in compliance with this court's order. In the alternative, Boltin seeks an order directing the Board to supplement further its document responses, under CPLR 3124. Although the Board has not fully complied with the court's conference order to provide partial responses to otherwise-overbroad document requests, the court declines to strike the Board's answer—not least because many of the Board's objections as to the overbreadth of Boltin's document requests are well-taken. This court concludes, though, that the Board must serve further supplemental document responses, albeit only to the extent set forth below. The Board must serve those further supplemental responses within 30 days of service of this order with notice of entry, except as set forth below.

As a general matter, the parties disagree about whether the water leaks into Boltin's apartment should be treated as having begun in 2016 (as the Board suggests) or 2013 (as Boltin contends). For purposes of the present discovery dispute (and on the record presented on this motion), this court agrees with the Board.

Boltin's complaint and her bill of particulars specify and describe a number of water leaks occurring on particular dates in the period 2016 to 2018. (*See* Compl., NYSCEF No. 1, at ¶¶ 18-22; Verified Bill of Particulars, NYSCEF No. 88, at ¶¶ 1, 3.) Boltin has not, however, identified any particular water leaks occurring prior to that time. At most, her bill of particulars states that "Leaks also occurred at frequent intervals between 2013 and July 2017, the exact dates and times of which are currently unknown but will be furnished when available." (NYSCEF No.

[describing defendants' description in bills of particulars of their CPLR article 16 defenses].) The Board must therefore further supplement its response to Boltin's BP Demand No. 6.

88, at ¶ 1.) This vague and somewhat conclusory assertion does not warrant this court treating Boltin's injuries for discovery purposes as having begun in 2013.

With respect to specific document requests, it is not entirely clear which document requests remain disputed. The court's resolution of the disputes that it understands still to exist is as follows:

Request 1: The request is overbroad in both its substantive and temporal scope. The Board need not respond further.

Request No. 2: The Board shall produce copies of all documents that were transmitted (i) between the parties listed in the request, (ii) in the period from April 1, 2014, through November 13, 2018, inclusive, which (iii) identify water leaks through the façade of the building affecting apartments in the building other than Apartment 8D (from causes not internal to the apartments into which the water leaked). The Board also shall produce the exhibits to the Indemnification Agreement, referenced in Boltin's letter dated October 17, 2019, to the extent not already provided. (*See* NYSCEF No. 58, at 2.) The request is otherwise overbroad in substantive and temporal scope and need not be responded to further.

Request No. 5: The scope of this request is substantially overbroad in relation to its asserted relevance, namely, aiding in the determination of how the repeated leaks into Boltin's apartment affected the apartment's market value—particularly since much of the information that would be relevant to this determination is publicly available. This court declines to do Boltin's work for her and prune this request down to an appropriate scope. The Board need not, therefore, respond further to the request as currently framed. This determination is without prejudice to reconsideration, should Boltin serve a narrower and more precise supplemental document request on this topic. Any such supplemental request must be served within 30 days of service of notice of entry of this order.

Request Nos. 7-9: To the extent not already provided, the Board shall produce copies of (i) all contracts, reports, and correspondence, that were (ii) entered into between April 1, 2014, and November 13, 2018, inclusive, and (iii) relate to work performed in the building to address water leaks through the façade of the building that affected apartments in the building other than Apartment 8D. These requests are otherwise overbroad in substantive and temporal scope and need not be responded to further. With respect to responsive documents that already were produced by the Board, the Board shall supplement its response to more specifically identify which documents (and which page ranges within those documents) are responsive to which of Boltin's requests.

Request No. 10: Within 30 days following the entry of a confidentiality order regarding the information sought in this request, the Board shall produce copies of checks that are dated between April 1, 2014, and November 13, 2018, inclusive, and that relate to work performed in the building to address water leaks through the façade of the building that affected apartments in the building other than Apartment 8D. To the extent that the Board believes some or all of these materials are privileged, the Board shall provide an appropriate privilege log.

Request No. 12: Within 30 days following the entry of a confidentiality order regarding the information sought in this request, the Board shall produce copies of documents sufficient to identify employees of the Board or the 447-453 West 18th Street Condominium who witnessed, repaired, or had any role addressing water leaks through the façade of the building and affected apartments in the building other than Apartment 8D between April 1, 2014, and November 13, 2018, inclusive. To the extent that the Board believes some or all of these materials are privileged, the Board shall provide an appropriate privilege log. With respect to responsive documents that already were produced by the Board, the Board shall supplement its response to more specifically identify which documents (and which page ranges within those documents) are responsive to which of Boltin's requests.

Request No. 14: Within 30 days following the entry of a confidentiality order regarding the information sought in this request, the Board shall produce copies of inspection reports prepared between April 1, 2014, and November 13, 2018, pertaining to any apartment located in the façade of the building. To the extent that the Board believes some or all of these materials are privileged, the Board shall provide an appropriate privilege log.

Request Nos. 22-23: Within 30 days following the entry of a confidentiality order regarding the information sought in this request, the Board shall provide copies of any and all documents regarding (i) complaints made to or violations issued by any governmental regulatory authority that (ii) relate to water leaks through the façade of the building that affected apartments in the building other than Apartment 8D, but only to the extent that (iii) the complaint was made between April 1, 2014 and November 13, 2018 (inclusive) or the violation issued pursuant to a complaint that had been made during this period. To the extent that the Board believes some or all of these materials are privileged, the Board shall provide an appropriate privilege log.

Request No. 24: This request is extremely broad in substantive and temporal scope; and plaintiff has not articulated why the request is likely to lead to the discovery of material and necessary information. The Board need not respond further to this request.

Request No. 25: The documents sought in this request, if they exist, should already be in plaintiff's possession and would be publicly available in any event. The Board need not respond further to this request.

Request No. 26: The Board shall produce copies of documents sufficient to identify (i) all lawsuits or actions brought against the Board that are based upon or relate to (ii) water leaks through the façade of the building in which (iii) the water leaks were alleged to have occurred between April 1, 2014, and November 13, 2018, inclusive. The Board need not otherwise respond further to this request.

Request No. 27: The Board shall produce copies of documents sufficient to identify the individuals who served on the Board between April 1, 2014, and November 13, 2018, inclusive.

Request No. 28: This request is extremely broad in substantive and temporal scope and overly burdensome relative to any relevant information it might uncover. The Board need not respond further to this request. This determination is without prejudice to reconsideration, should

Boltin serve a narrower and more precise supplemental document request on this topic. Any such supplemental request must be served within 30 days of service of notice of entry of this order.

Request No. 29: Within 30 days of the entry of a confidentiality order regarding the information sought in this request, the Board shall produce copies of all checks and attendant documents relating to any insurer's reimbursement for damage caused by water leaks, to the extent that those checks or documents have not already been provided to Boltin.

Request No. 31: This request is extremely broad in substantive and temporal scope; and plaintiff has not articulated why the request is likely to lead to the discovery of material and necessary information. The Board need not respond further to this request.

Request No. 32: The Board shall produce a copy of the management agreement referenced in the Board's response to this request (*see* NYSCEF No. 53, at 10, to the extent that it has not been provided to plaintiff already).

Request No. 33: Within 30 days following the entry of a confidentiality order regarding the information sought in this request, the Board shall produce copies of all documents relied upon in answering Boltin's complaint. To the extent that the Board believes that any document responsive to this request is privileged, the Board shall provide an appropriate privilege log. The Board need not otherwise respond further to this request.

Accordingly, it is hereby

ORDERED that the branch of Boltin's motion seeking to strike the Board's answer under CPLR 3126 is denied; and it is further

ORDERED that the branch of Boltin's motion seeking to require the Board to provide a further supplemental bill of particulars regarding its affirmative defenses is granted to the extent set forth above in Point I and is otherwise denied, and the Board shall serve a further supplemental bill of particulars within 30 days of service of a copy of this order with notice of entry; and it is further

ORDERED that the branch of Boltin's motion seeking to require the Board to provide further supplemental document responses is granted to the extent set forth in Point II and is otherwise denied, and the Board shall serve those further supplemental responses within 30 days of service of a copy of this order with notice of entry, except to the extent that the deadline for service of the further responses is based upon the entry of a confidentiality order; and it is further

ORDERED that with respect to those further responses for which the deadline for service is based upon the entry of a confidentiality order, the parties shall make all reasonable efforts to agree upon the terms of such an order and to e-file a copy of an executed confidentiality agreement within 14 days for this court to so-order, and shall notify the court by telephone when the agreement is e-filed; and it is further

ORDERED that to the extent the parties are not able to agree within 14 days on the terms of a confidentiality order, the parties shall each e-file a one-page letter to the court explaining their disagreement and attaching a proposed confidentiality order, and shall notify the court by telephone when they have done so; and it is further

ORDERED that plaintiff shall serve a copy of this order with notice of its entry on all parties.

2/10/2020

DATE



GERALD LEBOVITS, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED DENIED

GRANTED IN PART OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE