

<b>Pizzarotti, LLC v Phipps &amp; Co.</b>
2020 NY Slip Op 30844(U)
March 23, 2020
Supreme Court, New York County
Docket Number: 6653996/2018
Judge: Gerald Lebovits
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**SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY**

**PRESENT: HON. GERALD LEBOVITS PART IAS MOTION 7EFM**

*Justice*

-----X

PIZZAROTTI, LLC,

Plaintiff,

- v -

PHIPPS & CO., BCD CONSULTANTS LLC, PHIPPS  
CONSTRUCTION INC., JEROME JOHNSON PHIPPS,  
MAYA PHIPPS, SG BLOCKS INC., and  
MAHESH SHETTY,

Defendants.

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INDEX NO. 6653996/2018

MOTION DATE 01/31/2020

MOTION SEQ. NO. 006

**DECISION + ORDER ON  
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 006) 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 156

were read on this motion to

COMPEL

*Gila Mandelcorn, Esq.*, New York, NY, for plaintiff.

*Gabriel Fishbarg, Esq.*, New York, NY, for defendant Phipps & Co.

Gerald Lebovits, J.

This motion arises out of a dispute between plaintiff, Pizzarotti, LLC, which is a construction management firm, and defendant Phipps & Co., a construction contractor.

According to the allegations of the complaint, Pizzarotti originally hired Phipps & Co. (Phipps) to perform certain aspects of a construction project, and released \$500,000 to Phipps to cover costs involved in the project (including paying subcontractors and vendors). Phipps later notified Pizzarotti that it was unable to perform the contracted-for work and withdrew (without returning the \$500,000 payment), forcing Pizzarotti to engage another contractor and delaying the project by several months. Pizzarotti then brought this action. As relevant here, Pizzarotti alleged that Phipps's withdrawal caused Pizzarotti significant damages in delay and replacement costs, and seeking return of the \$500,000 (or an accounting of how Phipps spent those funds).

In discovery, Phipps propounded several interrogatories seeking information about Pizzarotti's claimed damages. Phipps was not, however, satisfied with Pizzarotti's responses to those interrogatories. Phipps now moves (i) to compel Pizzarotti to supplement its responses, under CPLR 3124, and (ii) for discovery sanctions under CPLR 3126.

## DISCUSSION

This motion concerns Pizzarotti's responses to Phipps's Interrogatories Nos. 1, 2, and 6, which seek related (and overlapping) information about the nature, calculation, and amount of Pizzarotti's claimed damages. As an initial matter, this court does not agree with Phipps's contention that Pizzarotti's responses are so inadequate as to warrant sanctions under CPLR 3126. That said, the court concludes under CPLR 3124 that Pizzarotti must supplement its responses to these interrogatories, at least to an extent.

**Interrogatory No. 1** relates to Pizzarotti's first cause of action. It requests, as to that cause of action, "(A) the amount of damages alleged; (B) the method whereby you calculated said damages; and (C) identify any and all documents, relating to such damages." (NYSCEF No. 145 at 4.)

In response, Pizzarotti stated that damages include but were not limited to "(1) replacement costs (2) the delay costs (calculated by the several months between when Phipps & Co. was to mobilize on the site and when the replacement contractor mobilized); (3) the \$500,000 deposit," and attorney fees and costs. (NYSCEF No. 146, at 2.) In addition, Pizzarotti asserted that this interrogatory was premature, because the damages claimed under the first cause of action were "ongoing and increasing and therefore difficult to quantify with certainty at this time"; and it maintained that determining the precise amount of damages would require calculation by an expert, which had not yet been undertaken. (*Id.* at 2, 3.) Pizzarotti has also stated that it provided documents that (i) provided "the cost of the replacement contract"; and (ii) made clear "when Phipps was scheduled to mobilize on the project and when the replacement subcontractor ultimately mobilized, which will be used to calculate the delay damages sought." (NYSCEF No. 160 at 2.)

Phipps argues that this interrogatory response (and its accompanying documents) are insufficient. This court agrees, in part. Pizzarotti's response fails to explain why it believes that the damages claimed under the first cause of action are ongoing and increasing. Presumably, this statement would apply to the delay costs incurred by Pizzarotti (as opposed to the replacement costs, which would seem to be fixed); but it is not clear on this record *why* the delay costs continue to increase. It is also not clear what other types of damages Pizzarotti might seek beyond those specified in its response.

For that matter, it is not clear to this court what the claimed delay costs consist of—that is, what harm to the project resulted from the delay between Phipps' scheduled mobilization on the project and the mobilization by Phipps' replacement, and what costs Pizzarotti was forced to incur as a result. Similarly, with respect to replacement costs, it is not clear whether Pizzarotti's claimed replacement-cost damages are simply the greater amount that it had to spend to retain a replacement contractor than it did to retain Phipps, or also encompass other costs as well.

Thus, even if, as Pizzarotti asserts, the specific *amount* of its costs must still await determination by a retained expert, Pizzarotti still must supplement its response to this interrogatory within 30 days from service of notice of entry to the following extent. Pizzarotti must (i) provide additional information regarding the nature and components of its delay costs

and why it believes those costs to be ongoing and increasing; (ii) clarify the nature and components of its claimed replacement costs; (iii) clarify whether Pizzarotti intends to claim other categories of damages beyond those already listed in its initial response to this interrogatory.

Additionally, if this supplemental response indicates that there are components of Pizzarotti's claimed replacement-cost damages beyond merely the difference in bid price of the two contractors, Pizzarotti must indicate in its response whether the documents it has already produced support those additional damages components, and if so must identify with specificity the particular produced documents it is relying upon. If Pizzarotti is in possession of any additional documents supporting these claimed components of damages, Pizzarotti must produce those documents along with its supplemental response.

**Interrogatory No. 2** relates to Pizzarotti's second cause of action. This interrogatory again seeks "(A) the amount of damages alleged; (B) the method whereby you calculated said damages; and (C) identify any and all documents relating to such damages." (NYSCEF No. 145 at 4.) Pizzarotti, repeated its objection that the interrogatory was premature, and stated that the damages included, but were not limited to, (i) the \$500,000 payment, (ii) attorney fees and costs, and (iii) punitive damages. (*See* NYSCEF No. 146 at 3.)

As to this interrogatory, Pizzarotti must, within 30 days of service of notice of entry (i) clarify whether it intends to claim other categories of damages beyond those already listed in its initial response to this interrogatory; (ii) clarify whether any items of claimed damages under this cause of action are ongoing and increasing *other than* litigation-related fees and costs (and if so, what those items are); (iii) provide the legal basis under which Pizzarotti might be entitled to obtain punitive damages under this cause of action; and (iv) explain why the amount of punitive damages (or at a minimum the ratio between punitive and compensatory damages) under this cause of action remains impossible to determine.

**Interrogatory No. 6** relates to Pizzarotti's affirmative defenses to Phipps's counterclaims. Pizzarotti's reply in opposition to Phipps's counterclaims raises as a second affirmative defense that Phipps is not entitled to recover because the "costs to complete the work, delay costs, and other costs, expenses, and assessments against or otherwise incurred by Pizzarotti, attributable to and arising out of or in connection with Defendants material breaches and failures" exceed the counterclaims. (NYSCEF No. 144 at 2.)

Interrogatory No. 6 therefore seeks "the amount of (1) "costs to complete the work", (2) "delay costs", and (3) "other costs, expenses, and assessments against or otherwise incurred by Pizzarotti" alleged in the Second Affirmative Defense to the counterclaims." And for each such amount, this interrogatory also asks Pizzarotti to "set forth the method whereby you calculated said damages and identify any and all documents relating to said damages," and also to "[i]dentify each and every oral communication between plaintiff, on the one hand, and any and all defendants, on the other hand." (NYSCEF No. 145 at 5.) Pizzarotti's response repeats its prematurity objection, and otherwise refers Phipps to Pizzarotti's responses to Interrogatory Nos. 1 and 2. (NYSCEF No. 146 at 4.)

This court’s discussion above of Pizzarotti’s obligation to supplement its responses to Interrogatory Nos. 1 and 2 covers much of the ground as to No. 6, as well. In addition, though, Pizzarotti must also within 30 days of notice of entry supplement its response to No. 6 to clarify what is meant by “costs to complete the work” that are “attributable” to “Defendants material breaches and failures” —*i.e.*, whether that refers to added replacement costs referred to in the response to No. 1, or some type of costs. If the latter, Pizzarotti must identify the type of costs and explain its nature and components (and whether that type of claimed costs is supported by any not-yet-produced documents). Additionally, Pizzarotti must clarify whether “other costs, expenses, and assessments against or otherwise” encompasses any costs that it intends to claim beyond replacement costs, delay costs, and litigation-related fees and costs; if so, Pizzarotti must also identify those costs and their source.

To the extent that the supplemental response to this interrogatory identifies any new types of costs, Pizzarotti must within 30 days of notice of entry produce the documents in its possession that support those new claimed costs. If Pizzarotti believes that it already has produced all such documents, Pizzarotti must identify those documents with specificity. Pizzarotti need not, however, identify all oral communications between its representatives and representatives of defendants.

Accordingly, it is

ORDERED that the branch of Phipps & Co.’s motion seeking discovery sanctions under CPLR 3126 is denied; and it is further

ORDERED that the branch of Phipps & Co.’s motion seeking under CPLR 3124 to compel Pizzarotti to supplement certain discovery responses is granted in part and denied in part as set forth above; and it is further

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

  
**HON. GERALD LEBOVITZ**  
 J.S.C.

03/23/20  
 DATE

CHECK ONE:	<input type="checkbox"/> CASE DISPOSED	<input type="checkbox"/> DENIED	<input checked="" type="checkbox"/> NON-FINAL DISPOSITION	<input type="checkbox"/> OTHER
APPLICATION:	<input type="checkbox"/> GRANTED		<input checked="" type="checkbox"/> GRANTED IN PART	
CHECK IF APPROPRIATE:	<input type="checkbox"/> SETTLE ORDER		<input type="checkbox"/> SUBMIT ORDER	
	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN		<input type="checkbox"/> FIDUCIARY APPOINTMENT	<input type="checkbox"/> REFERENCE