

**Birds & Bubbles NYC LLC v 100 Forsyth LLC**

2020 NY Slip Op 30854(U)

March 23, 2020

Supreme Court, New York County

Docket Number: 651980/2017

Judge: Gerald Lebovits

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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. GERALD LEBOVITS PART IAS MOTION 7EFM**

*Justice*

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**INDEX NO. 651980/2017**

BIRDS & BUBBLES NYC LLC,  
  
Plaintiff,

**MOTION DATE 12/18/2019**

**MOTION SEQ. NO. 004**

- v -

100 FORSYTH LLC, E&J ALL SEASONS CONSTRUCTION  
CORP., 2M MECHANICAL LLC, EXSA CORP.,  
  
Defendants.

**DECISION + ORDER ON  
MOTION**

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The following e-filed documents, listed by NYSCEF document number (Motion 004) 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85

were read on this motion for SUMMARY JUDGMENT.

*O'Donoghue PLLP*, New York, NY (Kevin S. O'Donoghue of counsel), for plaintiff.  
*Kaufman Dolowich & Voluck, LLP*, New York, NY (Michael V. De Santis of counsel), for defendant 100 Forsyth, LLC.

Gerald Lebovits, J.:

This case arises out of a commercial landlord dispute over a flooding incident that allegedly resulted from negligent renovation work. Plaintiff Birds & Bubbles, NYC, LLC, was a restaurant conducting business at the property (the Premises), located at 100 Forsyth Street in New York County, which was owned by defendant 100 Forsyth, LLC. Plaintiff argues that due to the alleged negligence on the part of 100 Forsyth and/or its contractors (defendants E&J All Seasons Construction Corp. and Exsa Corp.), plaintiff was constructively evicted from the Premises, causing it to suffer damages of \$1,500,000.

Plaintiff now moves under CPLR 3126 to preclude further discovery and under CPLR 3212 for summary judgment on 100 Forsyth's alleged negligence.<sup>1</sup> 100 Forsyth cross-moves to strike plaintiff's complaint for failure to provide discovery in violation of court order or, in the alternative, to compel discovery.

<sup>1</sup> Plaintiff's notice of motion states that it seeks discovery preclusion "[p]ursuant to CPLR § 3216," which is not relevant here. That discrepancy, though, appears to have been merely a typographical error.

## BACKGROUND

Plaintiff and 100 Forsyth entered into a lease on or about April 15, 2014, in which plaintiff leased the lower level of commercial retail space and outdoor garden from 100 Forsyth to operate restaurant business. In February 2017, 100 Forsyth retained E&J and Exsa to perform on the Premises construction work that allegedly caused extensive flooding and mold conditions. Due to these conditions, plaintiff closed its business. Plaintiff thereafter brought this action against 100 Forsyth on or about April 12, 2017. After learning the names of the contractors, plaintiff amended its complaint to add E&J and Exsa as codefendants.

E&J and Exsa failed to respond to plaintiff's complaint. Plaintiff then sought and obtained default judgments against each of them. (*See* NYSCEF Nos. 28, 57.)

Plaintiff now moves to preclude 100 Forsyth from deposing a representative of plaintiff (or from obtaining any other discovery) and to grant summary judgment on plaintiff's claims against 100 Forsyth. 100 Forsyth cross-moves to dismiss plaintiff's claims against it or to compel discovery. These claims are discussed in turn.

## DISCUSSION

### **I. The Branch of Plaintiff's Motion Seeking to Preclude Defendant 100 Forsyth from Obtaining Further Discovery**

Because this dispute involves discovery, this court lays out in detail the discovery process and exchanges between the parties.

The alleged flooding accident occurred in February 2017; plaintiff filed its complaint on April 12, 2017. Plaintiff thereafter amended its complaint on May 13, 2017, and 100 Forsyth filed a verified answer on June 19, 2017.

On August 2, 2017, 100 Forsyth served its first notice for discovery and inspection, demanding documents including communications between plaintiff and defendant contractors, plaintiff's revenue and profits, and evidence reflecting the alleged flooding, leaks, and mold conditions. (Notice of Discovery, NYSCEF No. 71, at 5-7.)

On September 29, 2017, in response to 100 Forsyth's discovery demands, plaintiff's counsel shared a Dropbox link allegedly containing "most of the larger documents." Counsel promised to send the rest by email later. (Email, NYSCEF No. 72.) On November 26, 2017, 100 Forsyth's counsel sent an email to plaintiff's counsel indicating that he could not open the Dropbox documents, with the exception of the document concerning insurance information. Plaintiff's counsel responded that he would resend the documents. (Email, NYSCEF No. 74.) On or about June 18, 2018, 100 Forsyth served plaintiff a letter demanding that plaintiff provide missing documents. A preliminary-conference order dated November 1, 2018, suggests that plaintiff failed to provide the requested documents by that date. (*See* Preliminary Conference Order, NYSCEF No. 76.)

The November 1, 2018, conference order directed the parties to complete depositions by February 28, 2019. (Preliminary Conference Order, NYSCEF No. 63, at 2.) That did not occur. A compliance conference was held on August 28, 2019; 100 Forsyth, without explanation, did not appear at the conference. (Compliance Conference Order, NYSCEF No. 63, at 1.) The compliance-conference orders direct that all depositions and discovery for all parties be completed before October 20, 2019. (*Id.*)

Plaintiff attempted on September 3 and September 5, 2019, to schedule a deposition of plaintiff's witnesses for either September 16 or September 17. (Email, NYSCEF No. 66.) An attorney at 100 Forsyth's law firm responded to the email, stating that he was not handling the case and forwarded the email to the attorney who was handling on the case. (*Id.*) After failing to confirm the dates with 100 Forsyth's counsel, plaintiff informed counsel in an email on October 23, 2019, that "we will move accordingly and proceed with the case in the coming weeks." (*Id.*)

On or about October 29, 2019, 100 Forsyth, apparently having not received the documents that plaintiffs were directed by the preliminary conference order to provide, sent a letter to plaintiff to demand them, and sent a follow-up letter the next day. (Letter, NYSCEF Nos. 81, 82.) In plaintiff's reply papers on this motion, counsel asserts that "not only were responses provided but additional guidance on how to find documents was given to defendants, and additional documents were added"; and counsel criticizes the attorney for 100 Forsyth for failing to include in its motion papers responsive communications from plaintiff to defendant. (Affirmation in Opposition to the Cross-Motion of Defendant 100 Forsyth, NYSCEF No. 85 at ¶¶ 8, 10.) But plaintiff oddly fails to attach those communications *either*. Plaintiff also provides no detail about what information it gave to defendant or when it gave that information.

Plaintiff now moves to preclude further discovery, relying on 100 Forsyth's failure to respond to plaintiff's attempt to schedule a deposition prior to the discovery deadline set by the August 2019 compliance-conference order (which has now passed). In response, 100 Forsyth argues that it would have been pointless to conduct a deposition of plaintiff without the documents that plaintiff promised that it would provide—and that the preliminary conference order directed plaintiff to provide as far back as November 1, 2018.

This court finds 100 Forsyth's argument persuasive. It would be futile for 100 Forsyth to attempt to conduct a deposition without documents that it would need to properly prepare (and to question plaintiff's witness). Plaintiff asserts on reply that this objection is merely feigned, because plaintiff timely provided 100 Forsyth with the documents at issue. (*See* NYSCEF No. 85, at ¶¶ 8-10.) But, as noted above, plaintiff provides no support for this assertion (such as attaching emails to opposing counsel about the newly provided documents, screenshots of plaintiff's Dropbox document repository, or the like). The court declines at this time to preclude 100 Forsyth from taking further discovery absent any showing from plaintiff that it had complied with its own discovery obligations. To the extent that 100 Forsyth might otherwise be precluded from taking further discovery because the discovery deadline set by this court's August 2019 conference order has now passed, the court concludes that the deadline should be vacated.

To be clear, it might be that plaintiff has, as it claims, properly and timely provided the required document discovery to 100 Forsyth, and that defendant nonetheless failed to timely

schedule and conduct a deposition of plaintiff. This court's ruling is therefore without prejudice to renewal should plaintiff establish that it has, in fact, complied with its discovery obligations (and that defendant failed to do so). But on the present record, plaintiff simply has not established that its motion to preclude further discovery should be granted.

Plaintiff does have one additional argument in support of its motion: that it would be pointless for defendant 100 Forsyth to take any further discovery as to liability, because the default judgments against defendants E&J and Exsa definitively establish liability as to 100 Forsyth as well. (*See* NYSCEF No. 85 at ¶ 7.) But, as discussed further below, the premise of this argument is incorrect. Plaintiff may not rely simply on the default judgments against the other defendants to meet its burden as to defendant 100 Forsyth.

Thus, on this record, 100 Forsyth should be permitted to obtain additional discovery from plaintiff. Plaintiff's motion to preclude is denied.

## **II. The Branch of Plaintiff's Motion Seeking to Hold Defendant 100 Forsyth Vicariously Liable for EXSA and E&J's Alleged Negligence**

Plaintiff moves for summary judgment against 100 Forsyth under CPLR 3212 on plaintiff's causes of action for negligence and breach of the covenant of quiet enjoyment under the lease, seeking to hold 100 Forsyth liable for flooding and mold on the Premises.

"[T]he proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact." (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986].) And such evidence must be tendered in admissible form. (*See Friends of Animals, Inc. v Associated Fur Mfrs., Inc.*, 46 NY2d 1065, 1067-1068 [1979].) "Failure to make such prima facie showing requires denial if the motion, regardless of the sufficiency of the opposing papers." (*Alvarez*, 68 NY2d at 324 [internal citations omitted].) Only after prima facie entitlement has been established must the opposing party "assemble, lay bare, and reveal his proofs in order to show his defenses are real and capable of being established on trial." (*Genger v Genger*, 123 AD3d 445, 447 [1st Dept 2014] [internal quotation marks omitted].)

Plaintiff argues that 100 Forsyth, as a landlord, was vicariously liable to plaintiff, its tenant, for any negligent acts of 100 Forsyth's contractors (Exsa and E&J). Plaintiff asserts that the default judgments obtained against Exsa and E&J definitively establish that they were negligent—and thus that 100 Forsyth is vicariously liable in negligence. This court disagrees.

Although plaintiff did obtain default judgments against Exsa and E&J, those judgments determine negligence and liability only as to plaintiff's claims against them—they do not, without more, establish Exsa and E&J's negligence for purposes of plaintiff's vicarious liability claim *against 100 Forsyth*. (*See Balanta v Stanlaine Taxi Corp.*, 307 AD2d 1017, 1018 [2d Dept 2003].) That is, notwithstanding the default judgments, in order to recover against 100 Forsyth on a vicarious liability theory, plaintiff must still affirmatively establish that Exsa and E&J acted negligently. (*See Francesco v Empress Ambulance Serv., Inc.*, 100 AD3d 589, 590-591 [2d Dept 2012]; *see also Holt v Holt*, 262 AD2d 530, 530 [2d Dept 1999] [holding that

“notwithstanding default judgment obtained by plaintiff against one of parties who allegedly perpetrated fraud that induced plaintiff to convey subject property, plaintiff must still meet his burden of proving, over appellants’ defense, that their mortgage should be set aside as consequence of alleged fraud.”.)

Thus, in order to obtain summary judgment against 100 Forsyth on this cause of action, plaintiff must make a prima facie showing that, as a matter of law, Exsa and E&J were negligent. But plaintiff has not offered proof in admissible form—such as an affidavit by person with knowledge or testimony offered at a deposition—that might show the negligence of 100 Forsyth’s contractors. (*See* NYSCEF Nos. 61-66 [papers offered in support of summary judgment].) Absent such evidence, plaintiff has failed to meet its prima facie summary-judgment burden on this cause of action.<sup>2</sup>

As an alternative to this vicarious-liability claim, plaintiff argues that 100 Forsyth breached its common-law duty to exercise reasonable care to prevent its contractors from committing negligence. Plaintiff argues that a duty is breached either “in the negligence hiring or supervision of the contractors, Exsa & E&J, or by otherwise allowing (or failing to prevent) the negligent acts or omissions of the contractors from damaging the plaintiff.” (Memorandum of Law, NYSCEF No. 67, at 7.) It is unclear, however, what specific act 100 Forsyth committed that would give rise to a direct negligence claim on this theory. If negligent hiring and retention is plaintiff’s claim, this claim fails because a negligent-hiring claim requires a showing “that the employer was on notice of the relevant tortious propensities of the wrongdoing employee.” (*Gomez v City of New York*, 304 AD2d 374, 374 [1st Dept 2003].) No factual allegation has been raised to support this claim.

Plaintiff also argues that 100 Forsyth owed a nondelegable duty under the lease to make necessary repairs and to ensure plaintiff’s right to quiet enjoyment as a tenant. “To make out a prima facie case of breach of the covenant of quiet enjoyment, a tenant must establish that the landlord’s conduct substantially and materially deprived the tenant of the beneficial use and enjoyment of the premises.” (*Jackson v Westminster House Owners Inc.*, 24 AD3d 249, 250 [1st Dept 2005] [internal citations omitted].) “There must be an actual ouster, either total or partial, or if the eviction is constructive, there must have been an abandonment of the premises by the tenant.” (*Id.*) “[A]lterations to leased premises, made with the consent of the tenant, do not amount to an eviction.” (*Id.*) Further ouster or abandonment must have occurred before the rent has become due. (*Dave Herstein Co. v Columbia Pictures Corp.*, 4 NY2d 117, 121 [1958].) Mere diminution of beneficial enjoyment of the property is insufficient to maintain such an action. (*Id.*)

Here, however, the only evidence plaintiff proffers relating to this claim is a set of emails indicating that flooding on the Premises allegedly forced plaintiff to close the business. No affidavit of witnesses of personal knowledge is presented; no deposition has been taken; no evidence sufficient to establish the extent and scope of the alleged flooding and mold has been

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<sup>2</sup> Additionally, absent a showing by plaintiff that it fully complied with its discovery obligations and that 100 Forsyth waived its right to depositions, this court would likely be required to deny summary judgment under CPLR 3212 (f) in any event.

provided; no invoice of rent has been filed. This court finds that plaintiff has also failed to meet its prima facie burden on its quiet-enjoyment claim against 100 Forsyth, as well.

Finally, plaintiff argues that 100 Forsyth had a statutory nondelegable duty to maintain the Premises. That a duty of the owner is nondelegable, though, does not necessarily render defendant liable for breach absent evidence of negligence; and plaintiff fails to show that the particular nondelegable duties on which it is relying here give rise to a strict-liability cause of action. Plaintiff's nondelegable-duty claim draws principally on two statutes: Real Property Law § 235-b and Multiple Dwelling Law §§ 78 and 80.<sup>3</sup> But RPL § 235-b's scope is expressly limited to *residential* premises (*see* Real Property Law § 235-b [1]), and in any event does not create a strict-liability cause of action. (*See Carpenter v Smith*, 191 AD2d 1036, 1036 [4th Dept 1993].) Nor do either MDL § 78 or § 80 make a building owner strictly liable for any breach of the duties imposed by those provisions. (*See Liranzo v Apartment Co., LLC*, 148 AD3d 589, 589 [1st Dept 2017] [§ 80]; *Jacobson v 142 E. 16 Coop. Owners*, 292 AD2d 211, 211-212 [1st Dept 2002].)

For the foregoing reasons, plaintiff's motion for summary judgment is denied.

### **III. Defendant 100 Forsyth's Cross-Motion to Strike Plaintiff's Complaint or to Compel Further Discovery**

Under CPLR 3124, a party may move to compel discovery "[i]f a person fails to respond to or comply with any request, notice, interrogatory, demand, question or order." Here, 100 Forsyth served its notice for discovery and inspection and notice for interrogatories on or about August 2, 2017, and, after plaintiff's insufficient response, sent a good-faith letter to plaintiff on June 18, 2018, listing in detail what documents requested had been missing from plaintiff's response and why they were relevant. On November 1, 2018, this court issued a preliminary-conference order requiring, among other things, that plaintiff provide documents listed in the June 18, 2018, good-faith letter. Plaintiff has not shown that it ever provided those documents. And this court is not persuaded by plaintiff's argument that the cross-motion to compel was untimely.

This court declines 100 Forsyth's request to dismiss plaintiff's complaint under CPLR 3126. But plaintiff must, within 30 days of service of a copy of this order with notice of entry, either provide the document discovery requested in 100 Forsyth's June 2018 good-faith letter, or provide proof that these documents were previously turned over. If 100 Forsyth thereafter notices a deposition of a representative of plaintiff, and plaintiff believes that the deposition should be barred as waived in light of plaintiff's timely production of written discovery, plaintiff should promptly efile a letter to the court setting forth the basis for barring the deposition (including proof of when plaintiff produced the written discovery at issue), and should also send a copy of the letter (and any attachments) to chambers, by email to mhshawha@nycourts.gov.

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<sup>3</sup> Plaintiff's memorandum of law does not specify the Multiple Dwelling Law section on which it is relying. This court assumes from context that plaintiff's argument is based on MDL §§ 78 and 80. Plaintiff also cites New York City Administrative Code § 27-128; but that section was repealed effective July 1, 2008, and therefore does not apply here.

Accordingly, it is hereby

ORDERED that the branch of plaintiff's motion seeking to preclude defendant from obtaining further discovery is denied; and it is further

ORDERED that the branch of plaintiff's motion seeking summary judgment in its favor is denied; and it is further

ORDERED that the branch of defendant's cross-motion to strike plaintiff's complaint is denied; and it is further

ORDERED that the branch of defendant's cross-motion seeking to compel plaintiff to produce certain written discovery is granted to the extent described above; and it is further

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

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

3/23/2020  
DATE

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