

TSFV Holdings, LLC v Mulberry Dev., LLC
2020 NY Slip Op 32739(U)
August 21, 2020
Supreme Court, New York County
Docket Number: 652865/2016
Judge: Robert R. Reed
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. ROBERT R. REED PART 43

Justice

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TSFV HOLDINGS, LLC,
Plaintiff,

INDEX NO. 652865/2016
MOTION DATE 09/15/2020
MOTION SEQ. NO. 008

- v -

MULBERRY DEVELOPMENT, LLC, ROBERT LAVECCHIA
Defendant.

DECISION + ORDER ON MOTION

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The following e-filed documents, listed by NYSCEF document number (Motion 008) 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279 were read on this motion for SANCTIONS

Upon the foregoing documents, it is ordered that this motion is denied.

In this breach of contract action, plaintiff TSFV Holdings, LLC moves for an order, pursuant to CPLR 3126, (1) to declare that defendants Mulberry Development LLC (Mulberry) and Robert Lavecchia (Lavecchia) (together, defendants) have engaged in willful noncompliance with respect to plaintiff's request for production of documents, (2) to strike defendants' answer in this action and to dismiss the complaint in a second action involving the same parties if defendants fail to produce the documents they are withholding, or, in the alternative, (3) to preclude defendants from arguing that they used funds paid to them by plaintiffs to pay subcontractors or for other business-related expenses and that defendants did not cause subcontractors to walk off the project that is the subject of the action, and, finally, pursuant to 22 NYCRR 130-1.1 (a), for attorney's fees and costs resulting from defendants willful failure to properly respond to plaintiff's request for production of documents. Plaintiff contends that defendants have failed to provide supplemental affidavits compliant with guidance given by the First Department in Jackson v. New York, 185 AD2d 768 (1st Dept 1992). Defendants oppose,

arguing that the supplemental affidavits provided indeed are compliant with *Jackson v. New York* and adequately detail the places and steps taken in their efforts to retrieve the sought-after documents.

On November 20, 2018, Lavecchia appeared for a deposition and testified, inter alia, regarding emails and other documents for which he had not conducted a search. Lavecchia testified that he did not personally do a search of his computer, that he still had emails from 2015 and said emails were saved via a backup on a cloud (*see* NYSCEF Doc. No. 260, EBT of Lavecchia, page 20, line 25, Page 21, lines 2-17). Lavecchia also testified that no one in his office completed a search for hard copy documents related to the litigation (*see* NYSCEF Doc. No. 260, EBT of Lavecchia, page 21, lines 18-25, page 22, lines 1-11). In addition, Lavecchia testified to text messages that were exchanged that were in his custody and control that had not been produced as of that date (*see* NYSCEF Doc. No. 260, EBT of Lavecchia, page 219, lines 5-25, page 220, lines 2-6). Plaintiff's counsel made a demand for the above-identified documents on the deposition record. Defendants later provided affidavits stating that there were no additional documents (*see* NYSCEF Doc. No. 263, Initial Jackson Affidavits).

At a March 5, 2020 status conference, this court directed defendants to file supplemental affidavits compliant with the First Department's decision in *Jackson v. New York*. On March 12, 2020, defendants submitted two additional affidavits. Plaintiff deems these affidavits insufficient and not compliant with *Jackson*. According to plaintiff, they fail to set forth any information about defendants' system for preserving documents and also fail to explain the disappearance of documents previously in defendants' possession.

CPLR 3101 requires full disclosure of all matter material and necessary in the prosecution or defense of an action. The phrase "material and necessary" is "to be interpreted

liberally to require disclosure, upon request, of any facts bearing on the controversy which will assist preparation for trial by sharpening the issues and reducing delay and prolixity. The test is one of usefulness and reason” (*Allen v. Crowell-Collier Publishing Co.*, 21 NY2d 403.)

CPLR 3126 authorizes the court to sanction a party who “refuses to obey an order for disclosure or willfully fails to disclose information which the court finds ought to have been disclosed.” In addition, a failure to comply with discovery, particularly after a court order has been issued, may constitute the “dilatory and obstructive, and thus contumacious, conduct warranting the striking of [a party’s pleading]” (*Kutner v Feiden, Dweck & Sladkus*, 223 AD2d 488, 489 [1st Dept 1998]). “The striking of a party’s pleadings should not, however, be imposed except in instances where the party seeking disclosure demonstrates conclusively that the failure to disclose was willful, contumacious or due to bad faith” (*Hassan v Manhattan & Bronx Surface Tr. Operating Auth.*, 286 AD2d 303, 304 [1st Dept 2001]).

When a party responds to a discovery request by stating that the documents requested do not exist or the documents are not in a party’s control, custody or possession, that party must provide a detailed statement by someone with knowledge of the facts attesting to the status of the documents detailing “where the subject records were likely to be kept, what efforts, if any, were made to preserve them, whether such records were routinely destroyed, or whether a search had been conducted in every location where the records were likely to be found” (*Jackson v. City of New York*, 185 AD2d at 770). The affidavit must provide the court “with a basis to find that the search had been a thorough one or that it had been conducted in a good faith effort to provide these necessary records” (*id.* at 770).

Defendants provided plaintiff two supplemental affidavits detailing where the search for the alleged missing documents took place, the locations said documents were likely to be kept if

they existed, and the search terms used to find said documents. Defendants attested that a diligent search was done of the corporation's existing books and records, servers and backup cloud, including the QuickBooks program, electronic mails and text messages that were preserved in the servers, and stated that all documents associated with the subject project would have been kept in these locations. Defendants listed the search terms that were used to conduct a search of the aforementioned locations. Defendants also attested that no documents and records were destroyed or deleted. Defendants have set forth their efforts to comply in the affidavits provided, attested to the locations that were searched, and further attested that no records were destroyed. Defendants' affidavits detailing their searches are minimally enough to demonstrate the good faith effort required by *Jackson*. Plaintiff need not be content with the inconsistency between Lavecchia's deposition testimony and the results of defendants' additional searches -- and perhaps may be able to exploit such inconsistency through examination at trial. That said, plaintiff has failed to demonstrate affirmatively that defendants failed to disclose information that ought to have been disclosed or refused to obey a court order for disclosure.

The portion of plaintiff's motion for sanctions is denied. Plaintiff has not established that defendants' actions were in any way undertaken to delay or prolong litigation, or to harass or maliciously injure another (22 NYCRR 130-1.1[c] [2]). Awards of costs are in the court's discretion (*see* CPLR 8106) -- and the court finds no reason to grant such relief on this motion.

Accordingly, it is

ORDERED that plaintiff's motion is denied in its entirety; and it is further

ORDERED that all further discovery in this matter shall be completed by September 30, 2020; and it is further

ORDERED that, within 14 days from completion of discovery as hereinabove directed, plaintiff shall cause the action to be placed upon the trial calendar by the filing of a new note of issue and certificate of readiness; and it is further

ORDERED that all applications for sanctions and costs are denied.

This constitutes the Decision and Order of the court.


8/21/2020
DATE

CHECK ONE:

APPLICATION:

CHECK IF APPROPRIATE:

<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	DENIED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	<input type="checkbox"/>	OTHER
<input type="checkbox"/>	GRANTED			<input type="checkbox"/>	GRANTED IN PART		
<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



 ROBERT R. REED, J.S.C.