

M. Cohen & Sons, Inc. v Superior Steel Door & Trim Co., Inc.

2020 NY Slip Op 32854(U)

August 31, 2020

Supreme Court, New York County

Docket Number: 651942/2017

Judge: Nancy M. Bannon

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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. NANCY M. BANNON

PART IAS MOTION 42EFM

Justice

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M. COHEN AND SONS, INC.,
Plaintiff,

INDEX NO. 651942/2017

MOTION DATE 08/21/2020

MOTION SEQ. NO. 003

- v -

SUPERIOR STEEL DOOR & TRIM CO., INC.,
Defendant.

**DECISION + ORDER ON
MOTION**

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SUPERIOR STEEL DOOR & TRIM CO., INC.
Plaintiff,

Third-Party
Index No. 595675/2017

-against-

ASPEN AMERICAN INSURANCE COMPANY, M. COHEN &
SONS, INC., E.E. CRUZ & TULLY CONSTRUCTION CO., A
JOINT VENTURE, LLC, FEDERAL INSURANCE COMPANY,
FEDERAL AND DEPOSIT COMPANY OF MARYLAND,
ZURICH AND AMERICAN INSURANCE COMPANY, LIBERTY
MUTUAL INSURANCE COMPANY, THE CONTINENTAL
INSURANCE COMPANY, TRAVELERS CASUALTY AND
SURETY COMPANY OF AMERICA, XL SPECIALTY
INSURANCE COMPANY

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 003) 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104

were read on this motion to/for VACATE - DECISION/ORDER/JUDGMENT/AWARD.

In this action seeking damages arising from an alleged breach of a construction contract, commenced in April 2017, the defendant moves to vacate an order of this court dated January 16, 2020, which precluded it from offering evidence upon its failure to provide discovery (CPLR 3126). The motion is denied.

A preliminary conference order was issued on March 6, 2018, after mediation failed. The order required document production to be completed by May 11, 2018. A compliance conference order dated August 23, 2018, states that all parties failed to respond to demands and directed that they respond on or before October 23, 2018, and conduct depositions on or before December 14, 2018. A status conference order dated February 7, 2019, states that the plaintiff and defendant still owed document discovery and directed compliance on or before March 7, 2019, and depositions to be held on or before April 30, 2019.

A status conference order dated September 26, 2019, states that the defendant had not responded to the plaintiff's demand dated December 4, 2018, without excuse, and depositions were delayed due to the defendant's failure to timely provide document discovery. The order directed the defendant to provide all outstanding discovery on or before October 25, 2019, or it would be precluded pursuant to CPLR 3126. The dates were marked "Final 2x". The defendant did not comply.

The plaintiff moved pursuant to CPLR 3126 to strike the defendant's answer and counterclaims and to preclude the defendant from introducing evidence in support of its claims or defenses. In support of the motion, the plaintiff submitted, *inter alia*, the Affirmation of Good Faith of Joshua Deal, Esq, setting forth the discovery proceedings to date. Counsel also states that he attempted to obtain the defendants' compliance by sending an e-mail on February 8, 2109, and May 2, 2019, and calling counsel on October 24, 2019. The defendant finally responded to the plaintiffs' demand by submitting documents along with its opposition to the plaintiff's motion. In reply, the plaintiff noted that this production consisted of a "single 82-page flattened PDF that contains no metadata and no demarcation or identification of the documents produced." It included several invoices, 25 unidentified photographs and scanned copies of three email printouts without referenced attachments. In his reply, counsel for the plaintiff listed the documents that had been demanded but that the defendant had still not provided, including the defendant's communications with other contractors, plans, specifications or shop drawings,

inspection reports, punch lists, accounting records, project schedules, and releases or waivers provided to subcontractors.

At the next scheduled status conference, on January 16, 2020, the court issued an order stating that the defendant failed to timely respond to the plaintiff's December 4, 2018, demand. At that conference, the plaintiff informed that court that, although directed to respond on or before October 25, 2019, as per the court order, the defendant responded on December 11, 2019, and did so in an incomplete manner. The defendant's counsel conceded to the court that the defendant had failed to comply with the prior order. In the status conference order dated January 16, 2020, the court referenced its prior order and precluded the defendant from offering evidence in support of any defenses or in support of its counterclaims, and directed the depositions to go forward. Thereafter, by an order dated March 3, 2020, the court denied the plaintiff's motion as moot in light of the January 16, 2020, order granting preclusion. The defendant now moves to vacate the January 16, 2020, order. No opposition is submitted.

CPLR 3126 authorizes the court to sanction a party who "refuses to obey an order for disclosure or wilfully fails to disclose information which the court finds ought to have been disclosed" and that "a failure to comply with discovery, particularly after a court order has been issued, may constitute the "dilatatory and obstructive, and thus contumacious, conduct warranting the striking of the [pleading]." Kutner v Feiden, Dweck & Sladkus, 223 AD2d 488, 489 (1st Dept. 1998); see CDR Creances S.A. v Cohen, 104 AD3d 17 (1st Dept. 2012); Reidel v Ryder TRS, Inc., 13 AD3d 170 (1st Dept. 2004). The court can infer willfulness from repeated failures to comply with court orders or discovery demands without a reasonable excuse. See LaSalle Talman Bank, F.S.B. v Weisblum & Felice, 99 AD3d 543 (1st Dept. 2012); Perez v City of New York, 95 AD3d 675 (1st Dept. 2012); Figiel v Met Food, 48 AD3d 330 (1st Dept. 2008); Ciao Europa, Inc. v Silver Autumn Hotel Corp., Ltd., 270 AD2d 2 (1st Dept. 2000). Furthermore, CPLR 3101(a) provides that "there shall be full disclosure of all matter material and necessary in the prosecution or defense of an action" and this language is "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.” Osowski v AMEC Constr. Mgt., Inc., 69 AD3d 99, 106 (1st Dept. 2009) quoting Allen v Crowell-Collier Publ. Co., 21 NY2d 403, 406-407 (1968).

Upon considering this authority and the facts and circumstances of this case, the defendant’s motion is denied.

In support of the motion, the defendant argues that it should not be precluded from offering evidence because it provided some documentary discovery in connection with the failed mediation in early 2018, that although it provided the demanded document discovery late, it was provided prior to the next status conference date, that it did not discard or destroy evidence, that the plaintiff also did not provide timely discovery and could not have been prejudiced by the defendant’s delay, and that public policy favors determinations on the merits.

The document discovery provided in early 2018 in connection with the ADR, filed with the motion papers, limited as represented by the plaintiff, does not suffice to replace the defendant’s obligations under CPLR 3101(a) and falls far short of complying with the court’s subsequent orders. Although the plaintiff was tardy in providing some of its own document discovery, it was in compliance prior to the September 2019, conference. The defendant was not. Contrary to the defendant’s further contention, evidence need not be spoliated before a sanction under CPLR 3126 can be imposed. Nor is the defendant’s contention that it eventually provided documents persuasive. As noted above, the defendant’s eventual response to the demand and court order, a year after the demand was served, was again untimely, and incomplete. Further, even in these motion papers, the defendant still proffers no excuse as to why it did not timely and fully respond to the plaintiff’s December 4, 2018, demand, even after several conferences were held and several court orders were issued, but waited until December 2019, in opposing the plaintiff’s motion, to do so, and only did so partially. Furthermore, although, as the defendant accurately recites, there is a strong public policy favoring resolution

of disputes on the merits (see Wimbledon Financing Master Fund, Ltd. v Weston capital Mgmt. LLC, 150 AD3d 427 [1st Dept. 2017]; Artcorp Inc. v Citirich Realty Corp., 140 AD3d 417 [1st Dept. 2016]), the policy is not meant to excuse any party's discovery obligations, particularly where, as here, it causes rather than reduces "delay and prolixity." Osowski v AMEC Constr. Mgt., Inc., supra at 106. Finally, inexplicably, the defendant also includes the COVID-19 health crisis and the temporary court closure in its arguments for vacatur, even though the defendant's non-compliance and the preclusion order pre-dated the start of the pandemic by months.

Accordingly, it is

ORDERED that the motion of defendant Superior Steel & Sons, Inc. to vacate the order dated January 16, 2020, is denied, and it is further,

ORDERED that the parties shall confer and complete any outstanding discovery directed in the status conference order dated January 16, 2020, in a cooperative fashion, employing remote technology whenever possible (see Administrative Order of the Chief Administrative Judge of the Courts AO/129/20), and (2) contact the court on or before October 30, 2020, to schedule a final status conference, if necessary, and it is further

ORDERED that the final Note of Issue deadline is extended to November 30, 2020, and it is further

ORDERED that the Clerk shall mark the file accordingly.

This constitutes the Decision and Order of the court.



 NANCY M. BANNON, J.S.C.
 HON. NANCY M. BANNON

8/31/2020
 DATE

CHECK ONE:

CASE DISPOSED

GRANTED

DENIED

NON-FINAL DISPOSITION

GRANTED IN PART

OTHER