470 4th Ave. Fee Owner, LLC v Adam Am., LLC
2020 NY Slip Op 33222(U)
September 30, 2020
Supreme Court, New York County
Docket Number: 656506/2018
Judge: Carol R. Edmead

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. CAROL R. EDMEAD **PART** IAS MOTION 35EFM

Justice

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470 4TH AVENUE FEE OWNER, LLC,

Plaintiff,

- v -

ADAM AMERICA LLC,470 4TH AVENUE INVESTORS LLC,DANYA CEBUS CONSTRUCTION, LLC,

Defendant.

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INDEX NO. 656506/2018

MOTION DATE 9/24/2020

MOTION SEQ. NO. 003 004

DECISION + ORDER ON MOTION

DANYA CEBUS CONSTRUCTION, LLC

Plaintiff,

-against-

BEST PLUMBING & HEATING INC., AMRA ELECTRICAL CORPORATION, ALL ABOUT AC CORP., MAR-SAL CONTRACTING INC., MILESTONE MASONRY CORPORATION, MEC GENERAL, INC., RED HOOK CONSTRUCTION GROUP-II, LLC, SUPREME FLOORING COVERINGS LIMITED LIABILITY COMPANY, K2 CONSTRUCTION, INC A/K/A K2 CONSTRUCTION LLC A/K/A K2 CONSTRUCTION AND DEVELOPMENTS, INC., RODNEY KATZ

Defendant.

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Third-Party
Index No. 595126/2020

The following e-filed documents, listed by NYSCEF document number (Motion 003) 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 103

were read on this motion to/for QUASH SUBPOENA, FIX CONDITIONS.

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, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 105

were read on this motion to/for QUASH SUBPOENA, FIX CONDITIONS.

Upon the foregoing documents, it is

ORDERED that the motion of defendants Adam America LLC and 470 4th Avenue Investors LLC (motion sequence number 003) is denied in all respects; and it is further

ORDERED that the motion of defendant Danya Cebus Construction LLC is denied in all respects (motion sequence number 004); and it is further

ORDERED that the Clerk of the Court shall enter judgment accordingly; and it is further

ORDERED that counsel for Defendants shall serve a copy of this order along with notice of entry on all parties within twenty (20) days.

MEMORANDUM DECISION

In this action, 470 4th Avenue Fee Owner, LLC (Plaintiff) alleges that Adam America LLC (Adam America), 470 4th Avenue Investors LLC (Seller) and Danya Cebus Construction LLC (Danya Cebus, along with Adam America and Seller, collectively, Defendants), defectively constructed a luxury residential building in Brooklyn, New York (Building), then concealed and misrepresented those defects to induce Plaintiff to purchase the Building for $81 million.

By the instant motions (sequence numbers 003 and 004; NYSCEF Doc. Nos. 48 and 60), Defendants seek (i) an order pursuant to CPLR 2304 quashing the subpoenas served by Plaintiff upon certain non-parties to this action; and (ii) a protective order pursuant to CPLR 3103 (a) restricting Plaintiff from obtaining the disclosure sought by the subpoenas. Plaintiff opposes the identical relief sought in these motions and seeks sanctions against Defendants. For the reasons stated herein, the relief requested in the motions is denied.

BACKGROUND FACTS

The statements below are derived primarily from Plaintiff's memorandum of law in opposition to these motions (Plf. Opp.; NYSCEF Doc. Nos. 77 and 90). In turn, the statements are based, in part, on Plaintiff's amended complaint of March 21, 2019 (NYSCEF Doc. No. 8).

Adam America and its affiliate, Seller, are real estate developers, and with their general contractor, Danya Cebus, developed and constructed the Building (Plf. Opp. at 1). In July 2014, Seller hired Danya Cebus to begin construction of the Building, and "with Seller's knowledge

and acquiescence, Danya Cebus cut corners to save money," which introduced many defects that were "concealed and undiscoverable without destructive investigation" (*id.* at 3). These shortcuts "ultimately failed and resulted in severe water infiltration" inside the Building (*id.*). In late 2014, Plaintiff entered into discussions with Adam America and Seller to purchase the Building, and throughout the process, they misrepresented the quality of construction to Plaintiff (*id.*). Although the sale and purchase agreement provides for purchase of the Building "as is," it contains representations and warranties by the Seller on which Plaintiff is entitled to rely on (*id.* at 4). After the closing of the transaction, Plaintiff discovered extensive water damage to the Building and, despite numerous requests, Seller failed to repair the defects and the "outstanding items on the punch list" (*id.*). Plaintiff commenced this action in December 2018 and filed the amended complaint in March 2019, asserting, among others, claims of breach of contract, fraudulent inducement, fraudulent concealment and misrepresentation (*id.* at 5).

Between September 24, 2019 and October 3, 2019, Plaintiff served eight subpoenas for the production of documents upon non-parties who are "in possession of information that is material and necessary to the resolution of this lawsuit" (*id.*; referencing Wolff affirmation dated November 1, 2019, and exhibits A-H annexed thereto). Seven of the subpoenas are addressed to those subcontractors who provided services and/or continue to provide services to the Building's HVAC systems (All About A/C Corp), its waterproofing (Milestone Masonry Corp.), its façade (Buro Happolding Consulting Engineers, PC), its fenestration (Schuco USA New York), its roofing (Marsal of NY Contracting, Inc.), its plumbing (Ariel Services, Inc.) and its architecture (Aufgang Architects); and the eighth subpoena is addressed to an affiliate of Adam America, 201 Water Street LLC (Water Street), which "owns a nearby building where similarly defective construction was performed by an affiliate of Danya Cebus" (*id.*). Thereafter, the respective

counsels for Plaintiff and Defendants entered into discussions regarding, among other things, the scope of information sought by the subpoenas (*id.* at 5-6).

Notwithstanding the prior discussions, on October 22, 2019, Adam America and Seller (hereinafter, collectively, AARE) filed a motion to quash all eight subpoenas (motion sequence number 003), "abandoning their initial argument that the subpoenas were objectionable because the documents could be obtained from [co-Defendant Danya Cebus], but continuing to assert that the subpoenas were overbroad/irrelevant, unduly burdensome," and in the case of Water Street, the subpoena "sought inadmissible evidence" (*id.* at 6). On October 24, 2019, Danya Cebus also filed a motion to quash all eight subpoenas (motion sequence number 004), asserting arguments that are "identical in substance to the motion filed by the co-Defendants" (*id.* at 7).

Previously, on October 7, 2019, Schuco USA LLP contacted Plaintiff stating that it was "in the process of preparing a production of documents to respond to the subpoena served on Schuco USA New York," and noting that "a different Schuco entity had been involved in the initial construction," but it was involved in the "remediation of the defectively constructed windows and had (and would produce) documentation pertaining to the same" (*id.*). Thereafter, on October 23, 2019, Aufgang Architects produced documents in response to the subpoena served upon it (*id.*). Plaintiff asserts that "[t]o date, none of the non-party Subpoena recipients have moved to quash any of the Subpoenas or have otherwise objected to the Subpoenas on any grounds" (*id.*). Notably, Plaintiff's assertion is not disputed by Defendants.

On October 22, 2019, AARE filed a brief in support of the motion (sequence number 003) to quash subpoenas and/or for a protective order (AARE Brief; NYSCEF Doc. No. 59). Two days later, Danya Cebus also filed a brief in support of its motion (sequence number 004) to

quash subpoenas and/or for a protective order (DC Brief; NYSCEF 62). Notably, the arguments raised in the AARE Brief and the DC Brief are substantially similar, as discussed below.

DISCUSSION

As an initial matter, while acknowledging that the CPLR disclosure provisions are to be "construed liberally," AARE asserts that the scope of discovery is not "entirely unlimited," and that the court has the "broad discretion to supervise discovery and to determine what is *material and necessary,* as that phrase is used in CPLR 3101 (a)" (AARE Brief at 4 [emphasis added], quoting *Auberbach v Klein*, 30 AD3d 451, 452 [2d Dept 2006]). Similarly, Danya Cebus asserts that a motion to quash a subpoena on a non-party must be granted if the party seeking disclosure fails to make the "requisite demonstration that the information sought from [the non-party] was *material and necessary"* (DC Brief at 4 [emphasis added], citing *IIas v Nihagen & Co.*, 303 AD2d 298 [1st Dept 2003]). AARE also asserts that subpoenas cannot be used for a "fishing expedition," because the law requires that disclosures may not be "overbroad, burdensome or lacking in specificity" (AARE Brief at 6, citing *Oak Beach Inn Corp. v Town of Babylon*, 239 AD2d 568 [2d Dept 1997]). Defendants further assert that protective orders are to be granted where the party seeking discovery fails to demonstrate that "the documents sought are *material and necessary* to the action" (AARE Brief at 5 [emphasis added], citing *Blittner v Berg & Dorf*, 138 AD2d 439, 440 [2d Dept 1988]); DC Brief at 5 [reciting same]).

Defendants argue that the subpoenas served by Plaintiff upon the non-parties should be quashed because they are "overbroad, unduly burdensome and unlikely to lead to the discovery of relevant evidence" (AARE Brief at 6-10; DC Brief at 5-8). Specifically, with respect to non-party Water Street, AARE asserts that Water Street has no involvement with the Building, was never its owner or performed any work on it, and has no contractual or other relationship with

Plaintiff or Seller; but was only engaged in a different project in which Danya Cebus was the general contractor, and Plaintiff had no involvement in that project (AARE Brief at 2). Thus, AARE argues that the subpoena served upon Water Street will not result in the disclosure of relevant evidence and, therefore, must be quashed (*id.* at 7). AARE also argues that information regarding the unrelated building that was allegedly "defectively constructed" by Danya Cebus is merely "propensity evidence," which is improper and inadmissible (*id.*; citing *Mazella v Beals*, 27 NY3d 694, 709 [2016] [it is generally improper to prove a person did an act on a particular occasion by showing that he did a similar act on a prior and unrelated occasion]). AARE further argues that Danya Cebus was not even the construction manager for the Water Street project, as the actual manager was a joint venture between Danya Cebus and Hudson Meridian Construction Corp. named "DCHM" (*id.* at 8). Hence, AARE asserts that the Water Street subpoena is "defective as a matter of law" (*id.* at 9). As to the remaining subpoenas, AARE argues that they are overbroad and burdensome because they seek "without limitation . . . all communications and documents" relating to the Building and the services provided by the subcontractors (*id.* at 9-10). In unison, Danya Cebus makes substantially similar arguments (DC Brief at 5-8).

In opposition, Plaintiff points out that the Court of Appeals has held that the words "material and necessary," as used in CLPR 3101 (a), "must be interpreted liberally to require disclosure . . . of any facts bearing on the controversy which will assist preparation for trial by sharpening the issues and reducing delay and prolixity," and that the standard a movant must meet to quash a subpoena or for a protective order is very high because the motion is granted "only where the futility of the process to uncover anything legitimate is inevitable or obvious or where the information sought is *utterly irrelevant* to any proper inquiry" (Plf. Opp. at 7-8 [emphasis added]; quoting *Kapon v Koch,* 23 NY3d 32, 38 [2014] [*Kapon*]; *Ledonne v Orsid*

Realty Corp., 83 AD3d 598 [1st Dept 2011] [movant bears the burden of showing that the information sought in the subpoena falls outside the scope of permissible discovery]). According to Plaintiff, "Defendants do not come close to meeting this high standard" (Plf. Opp. at 8).

With respect to the subcontractor subpoenas, Plaintiff contends that every one of the subpoenas seeks information that is "manifestly relevant to the claims [asserted] in the Amended Complaint and thus cannot be construed as overbroad," and that each subpoena is tied to the nature of the specific services provided by the subcontractor (*id.*). Plaintiff explains, in detail, how each subcontractor subpoena seeks information and documents specifically related to the alleged construction defects in and services to the Building's HVAC and plumbing systems, waterproofing, façade, fenestration, roofing and architecture (*id.* at 8-11; referencing each of the subpoenas and keying it to specific paragraphs of the amended complaint). Plaintiff also points out that two of the non-parties, Schuco USA LLP and Aufgang Architects, have agreed to produce and/or have already produced documents in response to their subpoenas, and that none of the non-parties have objected to the subpoenas (*id.* at 11, n 4 and 5). Plaintiff further points out that while Defendants complain that the subpoenas use the words "all communications and documents," they repeatedly invoked "the *same language* when making their own demands for documents [from Plaintiff] in this case" (*id.* at 12 [emphasis in original]; referencing Defendants' requests for production of documents filed in this action). Therefore, Plaintiff contends that Defendants have not come close to meeting their burden of showing that the information sought in the subcontractors' subpoenas is "utterly irrelevant" (*id.* at 13).

As to the subpoena served on Water Street, Plaintiff asserts that the information sought is "undisputedly relevant" and "cannot be construed as overbroad" (*id.* at 13). Plaintiff contends that the amended complaint specifically references the property owned by Water Street, and

alleges that AARE concealed from Plaintiff the fact that Danya Cebus, through a joint venture, performed defective construction work at that property, similar to those suffered by the Building (*id.*; referencing amended complaint, ¶¶ 80-81). Plaintiff points out that Adam America, in its own website, "confirms" that it was the developer of the Building and the Water Street property, and "brazenly boasts" that the Building is one of its "previous projects" equipped with exclusive finishes and fixtures similar to those used in Water Street (*id.* at 14; referencing exhibits J and K to Wolff affirmation). Plaintiff also contends that because Defendants do not deny that Danya Cebus was involved in the Water Street project, under New York's liberal discovery policy, it is entitled to know what role Danya Cebus had in constructing and installing the equipment in the Water Street property and what AARE knew about the construction and installation (*id.*; citing *Kapon*, 23 NY3d at 38 [New York law requires disclosure of facts bearing on the controversy which will sharpen the issues and reduce delay and prolixity]). Moreover, Plaintiff contends that the Water Street subpoena seeks "admissible evidence, including evidence of motive, opportunity, common scheme or plan," and it is settled-law in New York that the test for whether a subpoena may be quashed is "one of relevance, which is broadly construed, not admissibility" (*id.* at 15; citing, among other cases, *Matter of Brandon*, 55 NY2d 206, 211 [1982] [*Brandon*]; *Wiseman v America Motors Sales Corp.*, 103 AD2d 230, 237 [2d Dept 1984] [admissibility is no longer the test in determining a discovery motion and its determination is left to the trial court's discretion] [internal citations omitted]). Accordingly, Plaintiff asserts that the information sought in the Water Street subpoena is "relevant and discoverable" (Plf. Opp. at 16).

In their respective replies, Defendants again make substantially similar arguments (AARE Reply and DC Reply; NYSCEF Doc. Nos. 103 and 105). Notably, Defendants do not address the Court of Appeals' instructive decision in *Kapon*, which requires a movant for an

order quashing a subpoena or for a protective order to establish that the information sought in the subpoena is "utterly irrelevant." Their failure in such regard is telling, and their reliance on cases that pre-dated *Kapon* is misplaced. Also, Defendants do not argue that the subpoenas did not satisfy the notice requirements of CPLR 3101 (a) (4), nor do they challenge Plaintiff's assertion that none of the non-parties have objected to the subpoenas.

Moreover, AARE neither disputes that Adam America is the developer and part owner of Water Street, nor counter Plaintiff's assertion that Seller and Water Street are affiliates of Adam America (AARE Reply at 6, n 2). Instead, Defendants merely repeat their prior argument that the subject subpoenas are overbroad and irrelevant, pointing their fingers at the phrase "all communications and documents" in the subpoenas as demanding "far more" information than what is alleged in the amended complaint, but without referencing specific sections of the amended complaint to buttress their argument (AARE Reply at 3-6; DC Reply at 3-6). Indeed, in a case relied upon by Danya Cebus, the court noted that the use of "any and all" language in a subpoena was not overbroad because "the phrase modified a limited number of specific items" (DC Reply at 6; citing *Soho Generation of New York, Inc. v Tri-City Ins. Brokers, Inc.*, 236 AD2d 276, 277 [1st Dept 1997]). In this case, the subpoenas, among other things, reference the claims in the amended complaint, the role each non-party played in the construction or servicing of the Building, and limited the information sought in connection therewith.

Additionally, without citing caselaw or statutory support, Danya Cebus argues that it can use the same phrase in its discovery demands upon Plaintiff, but that Plaintiff cannot do the same in these subpoenas, because "the discovery rules are broad regarding discovery upon actual parties in this matter" (DC Reply at 6). The unsupported argument is unavailing. With respect to the Water Street subpoena, while adhering to their prior "propensity evidence" argument to

support their assertion that such evidence will not be admissible at trial, Defendants fail to address the holding in *Brandon* and *Wiseman* that admissibility is no longer the test to be applied in determining a motion for discovery, and that pre-CPLR court rulings that did not grant examinations to elicit inadmissible hearsay testimony would no longer apply (AARE Reply at 6-7; DC Reply at 7). Further, the self-serving statement of Danya Cebus that it is "a reputable construction manager," and that the services complained of in the amended complaint "are not actually performed by Danya Cebus but are rather contracted out to various subcontractors who actually performed the work" (DC Reply at 7), is irrelevant in determining the scope of discovery of Water Street and the subcontractors. Indeed, the statement tends to show that Defendants may not have standing to object to the subpoenas, as discussed below.

In its opposition, Plaintiff contend that Defendants lack standing to request the relief sought in their motions (Plf. Opp. at 16-17). Plaintiff relies on, among other cases, *Matter of Norkin v Hoey* (181 AD2d 248 [1st Dept 1992]). In *Norkin*, the First Department held that the petitioner lacked standing to quash the subpoena served upon a bank by the government, which requested the bank to produce documents relating to a loan made by the bank to the petitioner and disclosing the petitioner's personal financial information because, whatever expectations of confidentiality might exist in the relationship between the bank and its depositor customer, such expectations were lacking in a debtor-creditor relationship (*id.* at 251-253). The *Norkin* court also noted that, because the bank (Lloyd's Bank) itself did not raise any objections to complying with the subpoena, there was no basis upon which the petitioner could limit the production of information sought in the subpoena (*id.* at 255). Plaintiff further contends that because "Defendants have not asserted a proprietary interest or privilege in the subpoenaed documents," and the subpoenas seek documents maintained by the subcontractors in connection with their

services rendered to the Building, not documents maintained by them on behalf of Defendants, there is no legitimate claim of proprietary interest or privilege by Defendants (Plf. Opp. at 17; citing *38-14 Realty Corp. v New York City Dept of Consumer Affairs*, 103 AD2d 804 [2d Dept 1984] [Realty] [petitioner lacked standing to challenge the subpoena served upon non-party, even assuming that petitioner was a party to the documents required to be produced by the subpoena, because it has no proprietary interest in these documents]). With respect to Water Street, Plaintiff also asserts that if AARE concedes affiliation with Water Street, AARE "might then gain standing but would certainly lose any ability to assert that the information sought in the [Water Street] subpoena lacks relevance to this dispute" (Plf. Opp. at 17, n 6).

In reply, Defendants argue that they have standing because CPLR 3103 (a) states that the court may, "on motion of any party or of any person from whom *or about whom* discovery is sought, make a protective order denying, limiting . . . the use of any disclosure device" (AARE Reply at 7 [emphasis added]; DC Reply at 2). Thus, Defendants argue that they have standing to object to any subpoena served upon a non-party where the subpoena seeks discovery about and concerning them. Without addressing or challenging the *Norkin* and *Realty* cases recited by Plaintiff, Defendants cite to several appellate court cases in support of their position: *Hyatt v State of Cal. Franchise Tax Bd.*, 105 AD3d 186 (2d Dept 2013); *Velez v Hunts Point Multi-Serv. Ctr., Inc.*, 29 AD3d 104 (1st Dept 2006); and *Matter of Harris v Seneca Promotions, Inc.*, 149 AD3d 1508 (1st Dept 2017).

In *Hyatt*, the court held that a person other than the one to whom a subpoenas is directed has standing to move to quash the subpoena where the person has a "*proprietary interest in the subject documents or where they involved privileged communications*" (*Hyatt*, 105 AD3d at 194-195 [emphasis added]). Here, Defendants do not argue or claim that they have a proprietary

interest in the documents sought from the non-parties or that the documents involved privileged communications. In *Velez*, the court, while holding that a motion to quash would be granted if the materials sought were utterly irrelevant, also noted, in dicta, that "there apparently is nothing to prevent a *nonparty served with an excessively overbroad CPLR 3120 subpoena or a party affected by such subpoena* from moving for a protective order" (*Velez*, 29 AD3d at 111 [emphasis added]). Here, as discussed above, the non-party subpoenas are not "excessively overbroad," despite Defendants' allegation to the contrary. With respect to *Harris,* without analyzing the facts therein, Danya Cebus quoted the following sentence from that decision: "At the outset, we note that NWSC, as an entity 'about whom discovery is sought,' has standing to move for a protective order" (DC Reply at 2; quoting *Harris*, 149 AD3d at 1509). However, NWSC (Native Wholesale Supply Company) was a non-party that was served with the subpoena. Therefore, Harris is inapplicable and does not support Danya Cebus' argument.

Finally, Defendants argue that one of Plaintiff's cited cases (*People v Crispino,* 298 AD2d 220 [1st Dept 2002]) is not on point and is inapplicable because its holding arose in the context of a criminal prosecution, but this case involves a civil matter (AARE Reply at 9; DC Reply at 2-3). Assuming, without deciding, that the *Crispino* holding is inapplicable, Defendants have not addressed or challenged the holdings in *Norkin* and *Realty* (which are largely civil matters), nor have they claimed that they have a proprietary interest in the documents sought by Plaintiff from the non-parties.

Accordingly, based on all of the foregoing, the relief requested in Defendants' motions is denied. The remainder of this decision addresses whether Defendants should be sanctioned for filing frivolous motions, as requested in Plaintiff's opposition to these motions.

In its opposition, Plaintiff asserts that Defendants' motions are frivolous and Plaintiff is entitled to fees and costs incurred in opposing these motions (Plf. Opp. at 17-18). In support of its request for sanctions against Defendants, Plaintiff relies upon 22 NYCRR § 130-1.1 (Rule), which states, in relevant part, that the court, in its discretion, "may award to any party or attorney in any civil action . . . costs in the form of reimbursement of actual expenses reasonably and reasonable attorney's fees, resulting from frivolous conduct" (*id. a*t § 130-1.1 [a]). The Rule also provides that, in addition to or in lieu of awarding cost, the court may "impose financial sanctions upon any party or attorney in a civil action or proceeding who engages in frivolous conduct" (*id.*). The Rule defines "frivolous conduct" as conduct that is "completely without merit in law and cannot be supported by a reasonable argument for an extension, modification or reversal of existing law" or when it is "undertaken primarily to . . . harass or maliciously injure another" (*id.* at §139-1.1 [c] [1] & [2]). Here, Plaintiff asserts that Defendants "never articulated a legitimate basis on which they can claim standing or any substantive reason why the Subcontractors Subpoenas are overbroad," yet they pursued their course and filed these motions, "even when confronted with the glaring deficiencies in their positions" (Plf. Opp. at 18). Plaintiff further asserts that such frivolous motion practice should not be countenanced, and that Defendants should reimburse Plaintiff for the fees expended on opposing these motions (*id.*).

In reply, Defendants argue, among other things, that their motions are meritorious, but Plaintiff's subpoenas are overbroad, and Plaintiff's claim that they do not have standing is incorrect and not supported by New York law and, thus, Plaintiff's request for sanctions must be denied (AARE Reply at 10; DC Reply at 8-9). They also argue that the request for sanctions is procedurally defective because Plaintiff is required to file a cross motion to seek such relief (AARE Reply at 10, citing *Suares v 89 St. Nicholas Place Assn.*, 57 Misc 3d 1219-[A], 2017 NY

Slip Op 51552-[U] [Sup Ct, NY County 2017]); DC Reply at 8, citing *Suares* and *Myung Chun v North Am. Mtge. Co.*, 285 AD2d 42, 45 [1st Dept 2001] [in the absence of a cross motion, the trial court is without jurisdiction to grant, sua sponte, the summary judgment relief sought]).

As discussed above, Defendants' motions are without merit because their arguments in support thereof are unavailing. Under the Rule, sanctions may be imposed "either upon motion in compliance with CPLR 2214 or 2215 or upon the court's own initiative, after a reasonable opportunity to be heard. The form of the hearing shall depend upon the nature of the conduct and the circumstances of the case" (22 NYCRR § 130-1.1 [d]). Therefore, pursuant to the Rule, it is clear that this court, upon its own initiative or a party's motion, "and after a reasonable opportunity to be heard," may impose sanctions upon the party who exhibited frivolous conduct. In such regard, Plaintiff may not have to file a motion or a cross motion in order to seek sanctions upon Defendants, despite their argument to the contrary, so long as the parties are afforded a reasonable opportunity to be heard. Indeed, it has been held by an appellate court that the notice requirements of the Rule were satisfied when a plaintiff "request[ed] sanctions in its reply to the defendant's cross motion" (*First Deposit Natl. Bank v Van Allen*, 277 AD2d 858, 860-861 [3d Dept 2000] [finding no procedural error and citing cases in support]). It has also been held that a party may be sanctioned where its counsel was informed by opposing attorney that "sanctions might be forthcoming" if a particular course of action was pursued (*Yenom Corp. v 155 Wooster St. Inc.*, 33 AD3d 67, 73 [1st Dept 2006] ["a court considering sanctions against a party or attorney must consider whether the alleged frivolous conduct was continued when its lack of merit was or should have been apparent to the party or attorney").

In light of the record maintained in this action, including, without limitation, the instant motions filed by Defendants and the post-motion correspondences of the parties raising various

procedural issues and requesting Rule 14 conferences due to discovery disputes (NYSCEF Doc. Nos. 109 and 110), all parties and their counsel must follow established and applicable law in their prosecution or defense of this action, as well as heed what constitutes "frivolous conduct" under the Rule. Without deciding whether Defendants' motion practice constitutes frivolous conduct at this juncture, Plaintiff is afforded an opportunity to seek further relief from this court in the future, upon proper notice to the parties, to request sanctions and awards.

CONCLUSION

Accordingly, it is hereby

ORDERED that the motion of defendants Adam America LLC and 470 4th Avenue Investors LLC (motion sequence number 003) is denied in all respects; and it is further

ORDERED that the motion of defendant Danya Cebus Construction LLC is denied in all respects (motion sequence number 004); and it is further

ORDERED that the Clerk of the Court shall enter judgment accordingly; and it is further

ORDERED that counsel for Defendants shall serve a copy of this order along with notice of entry on all parties within twenty (20) days.

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9/30/2020
DATE

CAROL R. EDMEAD, J.S.C.

CHECK ONE:		CASE DISPOSED		x	NON-FINAL DISPOSITION		
		GRANTED	x DENIED		GRANTED IN PART		OTHER
APPLICATION:		SETTLE ORDER			SUBMIT ORDER		
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN			FIDUCIARY APPOINTMENT		REFERENCE