

WDF Inc. v Phoenix Mech. Piping, LLC

2021 NY Slip Op 30508(U)

February 22, 2021

Supreme Court, New York County

Docket Number: 650807/2017

Judge: O. Peter Sherwood

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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. O. PETER SHERWOOD PART IAS MOTION 49EFM

Justice

WDF INC.,

Plaintiff,

-against-

PHOENIX MECHANICAL PIPING, LLC, C&J MECHANICAL SERVICES LLC, WILLIAM MCMORROW, TIMOTHY MCMORROW, and JOHN DOES 1-10,

Defendants.

INDEX No.: 650807/2017

MOT. DATE: 11/19/2020

MOT. SEQ. No.: 005

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 005) 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 102, 103, 104, 105, 106, 107, 108, 109 were read on this motion to/for COMPEL

Defendants Phoenix Mechanical Piping, LLC, William McMorrow, and Timothy McMorrow move to compel post-EBT discovery regarding an increase in damages on plaintiff's breach of contract claim. "Pursuant to CPLR 3124, the court may compel compliance upon failure of a party to provide discovery. It is within the court's discretion to determine whether the materials sought are 'material and necessary' as legitimate subject of inquiry or are being used for purposes of harassment to ascertain the existence of evidence" (*The Bd. of Managers of the Residences at Worldwide Plaza v Fuchs*, 2015 WL 4877043, at *1 [Sup Ct New York County 2015]).

Current counsel for defendants entered this matter in the summer of 2019 and asked plaintiff to itemize their claims. As a result of the itemization, plaintiff's alleged damages amount doubled. In response, this court granted defendants' request to serve post-EBT discovery demands related to the higher in damages claim, referred to in the stipulation and by the parties as the "delays" (Stipulation [Doc. No. 64]; *see also* Def. Aff., Exs. B, C, D [Doc. Nos. 91-93]). Conferences were held with the court on April 28, 2020, May 13, 2020, July 2, 2020, July 8, 2020, August 19, 2020, September 15, 2020, October 2, 2020, November 2, 2020, and finally November 5, 2020 during which the court repeatedly directed the parties to meet and confer to

resolve any outstanding post-EBT discovery demands. During the October 2, 2020 court conference, the parties spent over an hour with the court's law clerk to address each then outstanding discovery demand. At that time, plaintiff's counsel repeatedly assured the court that he had either requested the outstanding documents of his client or would be doing so within the next two weeks. Plaintiff's counsel was admonished to take plaintiff's disclosure obligation seriously as many conferences had been held to encourage disclosure of these documents without the court's explicit intervention and an October 23, 2020 deadline was set for disclosure. During the November 2, 2020 conference, plaintiff's counsel had still not complied, newly arguing that production of some categories would be labor intensive and that a "delay claim" had never existed in the first place.

On this motion plaintiff continues to argue that no such "delay claim" exists. Regardless, the court has directed plaintiff to respond to defendants' disclosure requests. The issue is not a specific cause of action for "delay" but plaintiff's allegation that defendant Phoenix's breach of the contract arises from "its repeated failure to progress and complete the work in accordance with the project schedule" (Compl. ¶ 9). In other words, the basis for plaintiff's breach of contract claim is *literally* for defendant's alleged delay of the project schedule.

This court has repeatedly advised plaintiff's counsel that his client must comply with defendants' outstanding post-EBT demands. The court will continue to not countenance the conduct described above. Should plaintiff persist, it shall be foreclosed from pursuit of the additional damages alleged following the appearance of new counsel in 2019. Failure to produce *all* of the disclosure set forth below within the time specified will result in preclusion of any claim for the additional damages based on alleged "repeated failure to progress and complete the work . . .". No further adjournments will be given by this justice and in this regard, counsel are advised that I will be available after retirement in the capacity of Judicial Hearing Officer to the justice to whom the case is reassigned to address the discovery issues that continue to plague this case.

It is hereby

ORDERED that defendants' motion to compel is granted; and it is further

ORDERED that plaintiff shall produce to defendants on or before March 15, 2021 the following documents:

- (i) any changes or modifications to the original subcontract between plaintiff and defendant Phoenix;
- (ii) the original CPM and/or construction progress schedule first in effect after plaintiff entered its contract with Plaza;
- (iii) all documents relating to design changes to the project that were issued by either the Owner or by Plaza or by plaintiff;
- (iv) change orders issued by either the Owner or Plaza to the plaintiff during the course of the Project, relevant to Phoenix;
- (v) all correspondence and electronic mail between plaintiff and Phoenix;
- (vi) plaintiff's shop drawing log;
- (vii) minutes of pre-bid meetings;
- (viii) minutes of kickoff meetings;
- (ix) minutes of job meetings from the inception of the project through present day;
- (x) plaintiff's project manager's notes and logs from the inception of the project through present day;
- (xi) copies of project inspection reports from the inception of the project through present day;
- (xii) copies of the daily logs maintained by the plaintiff for project from the project inception through the project's completion;
- (xiii) copies of all invoices and time sheets for labor and materials furnished by the plaintiff to complete and/or remedy the defendant's allegedly defective work, including documents reflecting the costs incurred by plaintiff in remedying defendants' allegedly defective work;
- (xiv) copies of progress photographs of the project from inception through completion;
- (xv) all correspondence between plaintiff and Plaza concerning design changes or project deficiencies, delays in progress, and coordination issues;
- (xvi) all correspondence between plaintiff and the Owner concerning design changes or deficiencies to the project, delays in the progress of the project, and coordination issues;
- (xvii) plaintiff's payment requisitions to Plaza from the inception of the project through present day;
- (xviii) documents addressing the design or build design drawings for the project;

- (xix) copies of communications from plaintiff to any of its other subcontractors regarding project delays to the project;
- (xx) all change orders or notices of direction from Plaza to plaintiff;
- (xxi) all documents regarding extensions of time from Plaza to plaintiff;
- (xxii) copies of the bid solicitations or requests, and responses to any proposal that plaintiff issued to suppliers and/or subcontractors to furnish and install materials that were part of the subcontract between plaintiff and Phoenix;
- (xxiii) documents issued by the Owner and/or Plaza concerning the final acceptance of plaintiff's contract work or the refusal to accept plaintiff's contract work.

2/22/2021
DATE


O. PETER SHERWOOD, J.S.C.

CHECK ONE:

<input type="checkbox"/>	CASE DISPOSED	
<input checked="" type="checkbox"/>	GRANTED	<input type="checkbox"/> DENIED

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

APPLICATION:

<input type="checkbox"/>	SETTLE ORDER
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<input type="checkbox"/>	SUBMIT ORDER
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CHECK IF APPROPRIATE:

<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN
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<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/> REFERENCE
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