

Board of Mgrs. of Baychester Villas Condominium v Ely Dev., LLC.
2021 NY Slip Op 34307(U)
March 15, 2021
Supreme Court, Bronx County
Docket Number: Index No. 25544/2017
Judge: Wilma Guzman
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.
This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX, PART __07__

BOARD OF MANAGERS OF

Index No. 25544-2017E

-against-

Hon. WILMA GUZMAN

ELY DEVELOPMENT, LLC

Justice Supreme Court

The following papers numbered 1 to _____ were read on this motion (Seq. No. _E #001 -003_)
for _____ noticed on _____.

Notice of Motion - Order to Show Cause - Exhibits and Affidavits Annexed	No(s).
Answering Affidavit and Exhibits	No(s).
Replying Affidavit and Exhibits	No(s).

Upon the foregoing papers, it is ordered that this motion is

*The Court's decision
is Amended Sua Sponte in accordance
with the Decisions & Order annexed hereto*

Motion is Respectfully Referred to Justice:

Dated:

Dated: 3/15/21Hon. WILMA GUZMAN

J.S.C.

1. CHECK ONE..... ☐ CASE DISPOSED IN ITS ENTIRETY ☐ CASE STILL ACTIVE
2. MOTION IS..... ☐ GRANTED ☐ DENIED ☐ GRANTED IN PART ☐ OTHER
3. CHECK IF APPROPRIATE..... ☐ SETTLE ORDER ☐ SUBMIT ORDER ☐ SCHEDULE APPEARANCE
- ☐ FIDUCIARY APPOINTMENT ☐ REFEREE APPOINTMENT

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF THE BRONX

Index No.25544 / 2017

Motion Calendar No's. 6, 4, 5

Motion Date: 1/6/20

Motion Sequence No's. 1, 2,3

-----X
 The Board of Managers of Baychester Villas Condominium
 I&II and The Board of Directors of Baychester Villas Homeowners
 Association Inc. for Themselves and for The Individual Unit
 Owners of Baychester Villas Condominium I&II and Cynthia
 Daniels and Cheryl Weeks on Behalf of Themselves,
Plaintiff(s),

AMENDED
DECISION/ ORDER**Present:****Hon. Wilma Guzman***-against-*

Ely Development, LLC., Stellar Development, LLC.,
 Shelter Rock Builders, LLC., Gerald Caliendo Architects and
 Planners, Binesh Shavolian a/k/a Joe Shavolian, Behrooz
 Shavolian a/k/a Ben Shavolian, Nejat Shavolian and
 Taube Management Realty, LLC.,

Defendant(s).-----X
Shelter Rock Builders, LLC,*Third-Party Plaintiff(s)**-against-*

Desai Construction Inc., Tri-State Renovations
 Inc., Image Steel Supply, Inc., Valmar Electric Corp.,
 Alfons N LLC, Major Sewer & Water Contractors Inc.,
 Versa Contracting Co., Inc.,

Third-Party Defendant(s)

-----X
 Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motion to dismiss
 the plaintiff's complaint:

Papers**Numbered**

Notice of Motion, Affirmation and Affidavit in Support and Exhibits	
thereto.....	1
Affirmation in Opposition and Exhibits thereto.....	2
Affirmation in Opposition and Exhibits thereto.....	3
Reply Affirmation.....	4
Notice of Motion, Affirmation in Support and Exhibits thereto.....	5
Affirmation in Opposition and Exhibits thereto.....	6
Affirmation in Opposition and Exhibits thereto.....	7
Reply Affirmation.....	8
Notice of Motion, Affirmation in Good Faith, Affirmation in Support	
and Exhibits thereto.....	9
Affirmation in Opposition and Exhibits thereto.....	10

Reply Affirmation.....11

The Motions are consolidated and decided as follows: Upon deliberation of the application duly made by Defendant GERALD CALIENDO ARCHITECTS and PLANNERS (hereinafter referred to as "Caliendo"), herein, by **NOTICE OF MOTION**, and all the papers in connection therewith, for an Order, pursuant to CPLR Rules 3211(a)(1), (5) and (7), and Rule 3212 and issue an Order dismissing Plaintiff's claims asserted against Caliendo, is heretofore granted.

Upon deliberation of the application duly made by Defendants ELY DEVELOPMENT, LLC, STELLAR DEVELOPMENT, LLC, BINESH SHAVOLIAN, a/k/a JOE SHAVOLIAN, BEHROOZ SHAVOLIAN, a/k/a BEN SHAVOLIAN, and NEJAT SHAVOLIAN (hereinafter referred to jointly as "defendants"), herein, by **NOTICE OF MOTION**, and all the papers in connection therewith, for an Order, pursuant to CPLR 3215 (c) dismissing the claims against Defendants deeming them abandoned is heretofore denied.

Upon deliberation of the application duly made by Defendant SHELTER ROCK BUILDERS LLC, (hereinafter referred to as "Shelter rock") herein, by **NOTICE OF MOTION**, and all the papers in connection therewith, for an Order, pursuant to CPLR §2304 quashing the subpoena duces tecum served on non-party, The Community Preservation Corporation on the grounds that it seeks information that is irrelevant and immaterial to the prosecution of Plaintiffs' case and issuing a protective order pursuant to CPLR 3103(a) in favor of Defendant, is heretofore denied..

STATEMENT OF FACTS

The instant matters stem from an action commenced by plaintiffs THE BOARD OF MANAGERS OF BAYCHESTER VILLAS CONDOMINIUM I & II (hereinafter referred to as the "board of managers") and the BAYCHESTER HOMEOWNERS ASSOCIATION Inc., (hereinafter referred to as the "HOA") for themselves and for the individual united owners of the condos, and CYNTHIA DANIELS and CHERLY WEEKS for themselves, (hereinafter referred to jointly as "plaintiffs") seeking damages to repair the condominium's alleged design and construction defects and to reimburse plaintiffs for property damage caused by the alleged defects. The condominiums are located at Ely Avenue, Bronx NY (hereinafter referred to as "the premises"). The board of managers was responsible for operation of the condominiums, the HOA was responsible for the operation, management, maintenance and control of the shared land and components of the condominium complex. Cynthia Daniels and Cheryl Weeks each own an individual unit within the condominium complex. Defendant ELY DEVELOPMENT, LLC (hereinafter referred to as "Ely") was the sponsor of the condominiums, defendant STELLAR DEVELOPMENT, LLC (hereinafter referred to as "Stellar") was the Developer and Construction management company responsible for building the condominiums and defendants BINESH SHAVOLIAN, a/k/a JOE SHAVOLIAN, BEHROOZ SHAVOLIAN, a/k/a BEN SHAVOLIAN, and NEJAT SHAVOLIAN (hereinafter referred to as the "Shavolians") were principals of Stellar Development, LLC. Defendant Shelter Rock was the general contractor at the condominium. Defendant Caliendo was retained by Shelter Rock, via written agreement, to perform architectural services with respect to the building of the condominiums.

MOTION SEQUENCE 1

Defendant Caliendo moves this court for an order pursuant to CPLR § 3211 (a)(1), (5) and (7) seeking dismissal of all claims asserted by plaintiff against. Plaintiff has submitted an opposition and a reply has been submitted thereto. Upon due deliberation, the decision of this court is as follows.

Defendant Caliendo alleges that on or about January 10, 2006, Caliendo entered into a written agreement with Shelter Rock, which stated that Caliendo would perform architectural services to a new project constructing a series of condominium units at the premises in the Bronx. The written agreement stated that Caliendo would (1) prepare, file and obtain approval of any and all architectural plans for the construction of the condominiums, that they would (2) coordinate with the contractor to obtain work permits for the condominiums, (3) prepare and file a new Certificate of Occupancy Application and (4) follow up with the inspectors at the Department of Buildings to obtain sign offs for the new Certificate of Occupancy. An agreement was signed and dated again on September 10, 2008 which retained Caliendo by Shelter Rock to perform expediting services at the condominiums. Caliendo allegedly obtained the final of the twenty-two (22) necessary Certificated of Occupancy from the Department of Buildings on January 20, 2011. The final invoice was sent to Ben Shavolian at Shelter Rock, and was marked as "paid" on February 3, 2011. Defendant Caliendo explains that six and a half (6 ½) years after the final invoice on January 20, 2011, the plaintiffs filed suit the instant matter by a summons and complaint dated January 21, 2017 and filed it with the clerk of court on June 22, 2017. Defendant claim that four (4) of plaintiffs' ten (1) causes of action apply to Caliendo. The second cause of action asserts a claim of negligence against Caliendo; the third cause of action asserts false advertising and deceptive consumer practice claims against Caliendo; the fourth cause of action asserts a fraud claim against Caliendo; and the tenth cause of action asserts a breach of contract claim against Caliendo. Caliendo served a verified answer to plaintiffs' complaint on August 21, 2017.

Caliendo alleges that all four of plaintiffs' causes of action against them are barred by the time limits in the applicable statute of limitations and thereby should be dismissed. Caliendo explains that the second, third and tenth causes of action brought against them by plaintiff are time barred according to the statute of limitations set forth in CPLR § 214 (6) and that the fourth cause of action against them is time barred according to the statute of limitations set forth in CPLR § 213(8). Caliendo asserts that causes of action two, three and ten expired three years prior to the date upon which plaintiff commenced this action. Caliendo alleges that their services with Shelter Rock had ended, pursuant to their contract, on January 20, 2011. Plaintiffs had not filed their complaint with the clerk of court until June 22, 2017. This time frame, Caliendo alleges, clearly violated the three-year filing limitation outline in CPLR § 214 (6), which governs plaintiffs' claims to negligence, false advertising and deceptive consumer practice and breach of contract. Further, defendant Caliendo alleges that the claims of fraud in plaintiffs fourth cause of action, having been filed on the same aforementioned date, had expired six months prior. For these reasons, defendant Caliendo requests a dismissal of plaintiffs' claims against them.

In opposition, plaintiffs allege that defendant Caliendo has failed to establish that plaintiffs causes of action should be dismissed according to CPLR § 3211 (a) (1), that Caliendo had not established prima facie that plaintiffs' causes of action are time barred and that Caliendo had failed to establish that plaintiffs do not have a cause of action. Plaintiffs allege that each time they had notified defendants of the need to produce basic documentation for discovery,

defendants failed to provide anything of value and continue to explain the events leading to the eventual subpoena of Community Preservation Corporation, pursuant to motion sequence three (3). However, plaintiffs have failed to establish sufficient reason as to why their causes of action against defendant Caliendo had been filed past the time limits set forth in the statutes of limitation.

CPLR § 214 (6) states that “an action to recover damages for malpractice, other than medical, dental or podiatric malpractice, regardless of whether the underlying theory is based in contract or tort” must be commenced within three years. Although it had long been contended that breach of contract claims was entitled to a six-year statute of limitations, when CPLR § 214 (6) was revised in 1966, it made clear that “an action to recover damages for malpractice, other than medical, dental or podiatric malpractice, must be commenced within three years, regardless of whether the underlying theory is based in contract or tort.” Kliment, 3 A.D.3d 143, 770 N.Y.S.2d 329 (1st Department, 2004). Thereby, plaintiffs second, third and tenth causes of action, having been filed after the three-year statute of limitations are time barred. CPLR § 213 (8) states that “an action based upon fraud” must be commenced within six years. Thereby, plaintiffs fourth cause of action, having been filed six and a half years after the end of the contractual agreement between Caliendo and Shelter Rock, is time barred. Defendant Caliendo’s motion seeking an order dismissing all claims against them is hereby granted in its entirety.

MOTION SEQUENCE 2

Defendants Ely, Stellar and the Shavolians move this court for an order pursuant to CPLR § 3215 (c) dismissing all claims made against them by plaintiffs on the grounds that plaintiffs have failed to move for a default judgement to be entered within one (1) year after the default and have not provided sufficient cause for failing to do so. Plaintiffs have submitted an opposition and a reply has been submitted thereto. Upon due deliberation, the decision of this court is as follows.

In support of defendants’ motion, defendant Shelter Rock has submitted an affidavit. Shelter Rock claims that on June 22, 2017, Plaintiffs file a summons and complaint with the clerk of court against defendants, over six years after the final Certificate of Occupancy had been filed in relation to the condominiums project at the premises. Further, Shelter Rock asserts that defendants had been served the summons and complaint on July 13, 2017 and states, with evidentiary material, that Shelter Rock submitted an answer thereto denying Plaintiffs’ allegations and asserting appropriate defenses on October 27, 2017. Further, Shelter Rock alleges that defendants Ely, Stellar and the Shavolians failed to file an answer to Plaintiffs Summons and Complaint within the necessary sixty (60) day period following its service. However, Shelter Rock further asserts that plaintiffs never moved for default judgement to be entered against defendants. Defendant Shelter Rock asserts that CPLR § 3215 (c) states, “If the plaintiff fails to take proceedings for the entry of judgment within one year after the default, the court shall not enter judgment but shall dismiss the complaint as abandoned, without costs, upon its own initiative or on motion, unless sufficient cause is shown why the complaint should not be dismissed.” Shelter Rock argues that since it has been two (2) years since plaintiffs served defendants with their summons and complaint, and has been one (1) year since Defendants default, and plaintiff has allegedly failed to provide sufficient cause for not filing a default judgement, that, pursuant to CPLR § 3215 (c), plaintiffs’ claims should be dismissed in their entirety as having been “abandoned” by plaintiffs.

In opposition, plaintiffs allege that the defendants' motion to dismiss should be denied on the grounds that plaintiffs' claims are meritorious, that Shelter Rock, in their affidavit, failed to provide any intent on Plaintiffs' part to abandon their claims, and that Plaintiff had a reasonable excuse for not moving for default against the non-appearing defendants. In support, plaintiffs explain that on July 13, 2017, they served defendants Ely, and Stellar with plaintiffs summons and complaint and that, on the same day, plaintiffs served Defendants Shavolians with the same summons and complaint. Plaintiffs received an answer from defendant Caliendo on August 21, 2017. Between August 2, 2017 and October 27, 2017, upon being notified that the firm London Fisher, LLP. (hereinafter referred to as "Fisher") had been retained to represent Shelter Rock, Plaintiff received several email requests from Fisher requested an extension to file an answer on behalf of all defendants Ely, Stellar, Shelter Rock and the Shavolians., except for Caliendo. Plaintiffs' counsel agreed to these extension requests. On October 27, 2017, Fisher interposed an answer on behalf of Shelter Rock. Between November 15, 2017 and January 16, 2018 plaintiffs allege to having continued to receive extension requests from Fisher on behalf of defendants Ely, Stellar and the Shavolians, which Plaintiffs' counsel continued to grant. During this time, plaintiffs allege that it had been agreed between the parties that discovery would be stayed to allow for streamlined discovery process and to allow for the non-appearing defendants to be involved in discovery upon their appearance. Plaintiffs allege that, on January 29, 2018 and again on February 8, 2018, they received requests for thirty (30) day extensions to answer from counsel on behalf of Defendants Ely and Stellar. Plaintiffs agreed. Plaintiffs then begin to explain that, while waiting for a verified answer from the non-appearing defendants, they began to focus on the insufficient discovery produced by Shelter Rock, and the necessity for a subpoena of Community Preservation Corporation. Plaintiffs allege that, by granted defendants all of their requested extensions, they had not intended to file for default judgement within one year of defendants' default and had clearly not abandoned their original claims.

Plaintiffs have raised sufficient cause for not filing a default judgement in accordance with CPLR § 3215 (c). Defendants' motion for dismissal of Plaintiffs' claims is hereby denied in its entirety, and the defendants will be granted time to submit a verified answer to plaintiffs summons and complaint.

MOTION SEQUENCE 3

Defendant Shelter Rock moves this court for an Order pursuant to CPLR § 3204 quashing the subpoena *duces tecum* served by plaintiffs upon non-party Community Perseveration Corporation (hereinafter referred to as "CPC") and an Order pursuant to CPLR § 3103 granting a protective order in favor of defendant. Plaintiffs have submitted an opposition and a reply has been submitted thereto. Upon due deliberation, the decision of this court is as follows.

In support of their request for an Order quashing the subpoena of CPC, defendant Shelter Rock argues that the items requested in plaintiffs' subpoena of CPC are not material or relevant to any of the elements of plaintiffs causes of action. Shelter Rock alleges that plaintiffs subpoena of CPC requested loan commitment documents and any and all loans between the captioned defendants for the development and construction of the Baychester Villas Condominiums. However, the plaintiffs' causes of action against Shelter Rock include allegations of breach of contract, negligence, false advertising and deceptive practices, fraud, breach of fiduciary duty, aiding and abetting breach of fiduciary duties and conversion. Shelter Rock alleges that the documents requested in Plaintiffs subpoena of CPC do not show any negligent construction, nor do they display the necessary elements of a breach of contract or

fraud via false representations and omissions of material fact, nor do they display any evidence of a fiduciary relationship or the breach of said relationship. Therefore, Shelter Rock alleges that the documents requested by plaintiff are not material nor relevant to any of their causes of action against defendant. Shelter Rock alleges that they had sent plaintiffs a letter advising them that the subpoena of CPC was improper on September 19, 2019. Further, Shelter Rock alleges that plaintiffs' counsel refused to withdraw the subpoena, forcing Shelter Rock to request this motion to quash the subpoena.

In opposition, plaintiffs explain, with evidentiary support, that their subpoena of CPC requested more than simply loan documents between the captioned defendants, but also sought "plans and specifications, construction budgets, construction, schedules, income and expense projections, building permits and approvals, building inspections, construction agreements with design professionals, construction agreements with the builder or contractor in charge of the physical construction of the project, and organizational documents." Further, plaintiffs allege that the subpoena of CPC was necessitated by the failure of discovery by Shelter Rock to produce any documents of value to the plaintiffs, and the disregard of plaintiffs request for document production by Shelter Rock. Plaintiff alleges that, since CPC had been the construction lender for the condominium project, their own due diligence prior to the closing of the loan transaction would include an analysis of all proposed plans, and detailed logistics which would be necessary documents regarding the development and construction of the condominiums, all of which were necessary to plaintiffs causes of action. Plaintiffs, citing Allen v. Crowell Collier Publ. Co., 21 N.Y.2d 403, 406, 288 N.Y.S.2d 449 (1968), state that the "material and necessary standard must be interpreted liberally to require the disclosure of any facts bearing on the controversy which will assist preparation for trial" asserting that plaintiffs have raised significant need for the subpoenaed material, enough to deny defendant Shelter Rock's motion to quash.

Plaintiffs have raised a sufficient explanation of the necessity of the items requested in their subpoena of CPC so to prove that they are "material and necessary." One of plaintiffs' causes of action against Shelter Rock includes claims of breach of contract, and information contained in documents regarding any sort of construction agreement, as requested in the subpoena, are material to these claims. Further, one of plaintiffs causes of action against Shelter Rock includes claims of a breach of fiduciary relationship. The documents requested in plaintiffs subpoena that relate to loan agreements and income and expense projections clearly relate to the establishment of a fiduciary relationship and thus, are material to plaintiffs' claims. "Accordingly, so long as the information sought is "material and necessary" to the prosecution or defense of an action, it shall be disclosed." Matter of Kapon v Koch, 105 A.D.3d 650, 963 N.Y.S.2d 578 (1st Department, 2013). Further, "a person other than one to whom a subpoena is directed has standing to move to quash the subpoena where he or she has a proprietary interest in the subject documents." Hyatt v State of Cal. Franchise Tax Bd., 105 A.D.3d 186, 962 N.Y.S.2d 282 (2nd Department, 2013). In their motion, defendant Shelter Rock does not prove that they have a propriety interest in any of the documentation requested within plaintiffs' subpoena of CPC and only focuses on their allegation that the requested documents are immaterial to plaintiffs' claims and were only requested to "embarrass and harass" Shelter Rock. Therefore, defendant has not raised significant cause for this court to grant their motion to quash the subpoena, and it is subsequently denied in its entirety.

Accordingly, it is,

ORDERED and ADJUDGED that defendant GERALD CALIENDO ARCHITECTS and PLANNERS motion for an Order pursuant to CPLR 3211 (a)(1), (5) and (7) dismissing all claims against them made by plaintiffs is hereby granted. And it is further,

ORDERED and ADJUDGED that plaintiffs' claims against defendant GERALD CALIENDO ARCHITECTS and PLANNERS ONLY are hereby dismissed. And it is further,

ORDERED and ADJUDGED that defendants' ELY DEVELOPMENT, LLC, STELLAR DEVELOPMENT, LLC, BINESH SHAVOLIAN, a/k/a JOE SHAVOLIAN, BEHROOZ SHAVOLIAN, a/k/a BEN SHAVOLIAN, and NEJAT SHAVOLIAN motion seeking an Order pursuant to CPLR § 3215 (c) dismissing all claims made against them by Plaintiffs is hereby denied in its entirety. And it is further,

ORDERED and ADJUDGED that defendants' ELY DEVELOPMENT, LLC, STELLAR DEVELOPMENT, LLC, BINESH SHAVOLIAN, a/k/a JOE SHAVOLIAN, BEHROOZ SHAVOLIAN, a/k/a BEN SHAVOLIAN, and NEJAT SHAVOLIAN must serve and file a verified answer to plaintiffs' summons and complaint within twenty (20) days of the service of a copy of this Order with Notice of Entry. And it is further

ORDERED and ADJUDGED that defendant SHELTER ROCKS motion seeking an Order pursuant to CPLR § 3204 quashing the subpoena *duces tecum* served by plaintiffs upon non-party Community Perseveration and Order pursuant to CPLR § 3103 granting a protective order in favor of defendant is hereby denied in its entirety.

ORDERED AND ADJUDGED that Defendant, GERALD CALIENDO ARCHITECTS and PLANNERS, shall serve a copy of this Order with Notice of Entry within 30 days from the date of entry herein.

This constitutes the Decision and Order of the Court.

March 15, 2021

DATED



HON. WILMA GUZMAN
J.S.C.