

Dinallo Constr. Corp. v Phoenix RMA Constr. Servs. LLC
2022 NY Slip Op 30994(U)
March 28, 2022
Supreme Court, New York County
Docket Number: Index No. 652491/2017
Judge: Sabrina Kraus
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. SABRINA KRAUS PART 57TR

Justice

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DINALLO CONSTRUCTION CORPORATION,

Plaintiff,

- v -

PHOENIX RMA CONSTRUCTION SERVICES
LLC, MICHAEL LEINEEK, LIBERTY MUTUAL INSURANCE
COMPANY

Defendant.

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INDEX NO. 652491/2017

MOTION DATE 3/28/2022

MOTION SEQ. NO. 003

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 003) 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109

were read on this motion to/for DISCOVERY.

BACKGROUND

This case is based on breach of contract claims related to construction between a contractor and a subcontractor.

PENDING MOTION

On January 12, 2022, defendants moved for an order compelling plaintiff to produce documents in response to defendants' first notice to produce. The motion was fully briefed and on March 28, 2022, the court heard oral argument, conducted a status conference and reserved decision on the motion.

The motion is granted to the extent of requiring plaintiff to comply with all outstanding document requests within 30 days as further set forth below.

DISCUSSION

On or about February 16, 2018, defendants served plaintiff and Liberty Mutual Insurance Company with its First Notice to Produce Documents. Defendants' demands fall into two main categories: (1) documents relating to plaintiff's allegations contained in its Complaint, and (2) documents concerning Phoenix's work on the subject project relating both to plaintiff's claims.

On April 12, 2018, plaintiff served its Responses to Defendants' Request for Documents but produced no documents. Thereafter, on or about November 13, 2018, discovery was stayed pending motion practice, and a subsequently scheduled status conference was adjourned without date due to the pandemic.

On August 12, 2020, defendants sent counsel for plaintiff correspondence to try and resolve the outstanding discovery dispute. Between September 2020 and October 2021, the parties communicated further and continued to attempt to resolve the outstanding discovery issues. However, plaintiff still failed to produce the documents sought by defendants' demand, although plaintiff has provided a "Project Files Index."

Defendants are entitled to the documents requested in their demands. The demands are timely and proper, and the documents sought are relevant. Plaintiff does not argue that the documents sought are not relevant, nor has Plaintiff moved for a protective order.

A party is entitled to full disclosure of all evidence "material and necessary in the prosecution or defense of an action" (CPLR §3101[a]). CPLR §3101 is to be liberally construed to require disclosure where the matter sought will assist in trial preparation by sharpening the issues (*Kavanagh v. Ogden Allied Maint. Corp.*, 92 N.Y.2d 952, 954, 683 [1998]). "The words material and necessary' are 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” (*Allen v. Crowell–Collier Pub. Co.*, 21 N.Y.2d 403, 406 [1968]).

CPLR § 3124 provides in relevant part that if a person “fails to respond or comply with any request, notice, interrogatory, demand, question or an order under this article . . . the party seeking disclosure may move to compel compliance or a response.” (See CPLR § 3124).

At oral argument plaintiff’s counsel stated he had resolved some internal issues as pertains to the production of electronic discovery and he would be able to respond to the demands for electronic discovery within 30 days.

Plaintiff’s counsel did not want to respond to demand for documents consisting of his clients’ project files. Instead, plaintiff sought to require defendants to go to his client’s offices to inspect said files and further demanded defendants bear the cost for copying said files or producing them as PDFs. The court does not find these requests to be reasonable.

Plaintiff shall produce the project files as pdfs or in other electronic format and shall bear the cost of said production. The general rule is that each party should bear the expense incurred in responding to discovery requests (*Clarendon Nat. Ins. Co. v Atlantic Risk Management, Inc.* 59 AD3d 284). While the court has discretion to shift those costs in certain circumstances, there is no basis in the case at bar for the court to do so. As held by the Appellate Division, First Department “(w)e disagree with the motion court's conclusion that the requesting party bears the cost of discovery that is responsive to its document requests. Rather, it is the producing party that is to bear the cost of the searching for, retrieving, and producing documents, including electronically stored information.” *U.S. Bank Nat. Ass'n v. GreenPoint Mortg. Funding, Inc.*, 94 A.D.3d 58, 62 (2012).

CONCLUSION

WHEREFORE it is hereby:

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

ORDERED that plaintiff will produce all electronic discovery and project files within 30 days and will bear the cost of such production; and it is further

ORDERED that plaintiff shall produce to defendants on or before April 28, 2022, all the documents requested in defendants' initial demand except items requested in demand numbers 12, 31, 33, 34, and 35; and it is further

ORDERED that the documents to be produced are:

Any and all documents concerning written and or agreements between Dinallo and the Owner for the performance of Work at the Project, including documents concerning any and all amendments, modifications, riders and change orders to any and all written agreements; and

Any and all documents concerning written and or agreements between Dinallo and the Phoenix RMA for the performance of Work at the Project, including documents concerning any and all amendments, modifications, riders and change orders to any and all written agreements; and

Any and all documents concerning written and or agreements between Dinallo and any Subcontractor for the performance of Work under Phoenix RMA's Subcontract, including documents concerning any and all amendments, modifications, riders and change orders to any and all written agreements; and

Any and all documents concerning Phoenix RMA's contractual responsibilities and/or performance of Work on the Project; and

Any and all documents concerning communications by and among one or more of the following entities Dinallo, Dinallo's Project Manager(s) on the Project, Liberty, Phoenix RMA, any Subcontractor, and/or any other entity concerning Work at the Projects; and

Any and all documents concerning communications between Dinallo and Liberty with respect to Phoenix RMA's Work performed at the Projects and/or Phoenix RMA's Notice of Mechanic's Lien; and

Documents concerning internal communications between or among Dinallo's personnel concerning the Project including, but not limited to, those regarding Phoenix RMA's Work, payments from the Owner, change orders, or delays to the Project; and

Any and all documents concerning the progress and/or timeliness of Phoenix RMA's Work and any Subcontractor's Work at the Project including, but not limited to, correspondence, meeting minutes, e-mails, field reports and progress schedules; and

Any and all documents concerning records or reports kept daily, weekly, monthly or otherwise prepared and/or maintained by Dinallo reflecting the nature of the Work performed, manpower levels, and/or concerning subcontractors or suppliers who performed Work on the Project; and

Any and all documents concerning requests for change orders and/or extra work claims made by Phoenix RMA including, but not limited to, any responses thereto and payment records; and

Any and all documents concerning requests for change orders and/or extra work claims made by any other Subcontractor, organized by Subcontractor, including but not limited to any responses thereto and payment records; and

Any and all documents concerning all notices and/or directives issued by the Owner to Dinallo concerning the Project; and

Any and all documents concerning all notices, determinations, and/or directives issued by Dinallo concerning the Projects;

Any and all documents concerning all notices, determinations, and/or directives issued by Dinallo to Phoenix RMA concerning the Projects; and

Any and all documents concerning payments requested by Phoenix RMA to Dinallo for work performed at the Project including, but not limited to, payment requisitions, responses to payment requisitions, payment records, and correspondence; and

Any and all documents concerning payments requested by Subcontractors to Dinallo for work performed at the Project including, but not limited to, payment requisitions, responses to payment requisitions, payment records, and correspondence, organized by each Subcontractor; and

Any and all documents concerning any costs associated with the Work performed by Phoenix RMA on the Project including, but not limited to, invoices, statements, certified payrolls, subcontracts, purchase orders, change order cost breakdowns, claims and notices; and

Any and all documents concerning any back charges or prospective back charges asserted by Dinallo or which may be asserted by Dinallo associated with the Work performed by Phoenix RMA and Subcontractors on the Project, including but not limited to any outcome or determination made by the Owner; and

Any and all documents concerning any back charges or prospective back charges asserted by the Owner or which may be asserted against Dinallo associated with the Work performed by Phoenix RMA and Subcontractors on the Project, including but not limited to any outcome or determination made by the Owner; and

Any and all documents concerning the completion and/or remediation of any Subcontract Work to be performed or actually performed by Phoenix RMA at the Project including, but not limited to, assumptions, invoices, requisitions and payments to entities who completed and/or corrected Phoenix RMA's Work, as alleged in Dinallo's Complaint; and

Any and all documents concerning payment requests submitted by Phoenix RMA and Subcontractors to Dinallo, and all documents relating to approvals or disapprovals of those requests by Dinallo or the Owner; and

Any and all documents concerning payment requests from Dinallo to the Owner, and all approvals or disapprovals of those requests by the Owner in connection with the Project; and

Any and all documents concerning payments made by the Owner or any other party to Dinallo with respect to the Project; and

Any and all documents concerning shop drawing submittal logs relating to Work at the Project; and

Any and all documents concerning the schedules on the Project, including without limitation the initial schedule, all revisions thereto, any updates thereto, and any as-built thereof, in whatever format; and

To the extent not already provided, any and all documents concerning communications pertaining to the Project schedules including without limitation those communications by or between Dinallo, the Owner, Phoenix RMA, Subcontractors, and/or any other party; and

Any and all documents concerning meeting minutes or notes taken at meetings concerning Work at the Project; and

Any and all photographs, films, videotapes or other visual representations of Work at the Project; and

Any and all documents concerning changes in the substantial completion date and/or final completion date for Work at the Project, including, but not limited to, any documents related to any of delay or inefficiency claims against Phoenix RMA and Subcontractors; and

Any and all documents concerning written or verbal directives or instruction of Dinallo, including its Project Manager, referenced in the Complaint; and

Any and all documents concerning any requests for extensions of time submitted by Dinallo to the Owner in connection with the Project and any and all responses thereto;

Any and all documents concerning Phoenix RMA's alleged failure to perform its Work on the Project in accordance with the Subcontract's terms and conditions, as alleged in the Complaint; and

Any and all documents concerning the approval, acceptance and/or rejection of Phoenix RMA's work at the Project; and

Any and all claims or Notices of Mechanic's Liens received by Dinallo in connection with Work at the Project; and

Any and all documents including, but not limited to, pleadings, discovery demands and responses, and deposition transcripts, concerning any lawsuits and/or arbitration proceedings by and between Dinallo and any other person or entity which involves claims for Work furnished at the Projects; and

Any and all documents or communications concerning the allegation that Leineek made representations to Dinallo that were false as alleged in Dinallo's Complaint; and

Any and all documents reviewed in preparing Dinallo's Complaint.

To the extent not produced in response to the foregoing requests and without limitation thereof, all of Dinallo's internal documents regarding any claim or defense in this lawsuit, including but not limited to, all internal e-mails, memoranda, estimates, analyses, logs, spreadsheets and minutes of internal meetings; and

To the extent not produced in response to the foregoing requests, all documents that contain or reflect any and all communications between Dinallo, its consultants, and any other third-party, regarding any claim or defense in this lawsuit; and it is further


ORDERED that counsel are directed to appear for a virtual status conference on June 3, 2022, at 11 AM; and it is further

ORDERED that, within 20 days from entry of this order, defendants shall serve a copy of this order with notice of entry on the Clerk of the General Clerk’s Office; and it is further

ORDERED that such service upon the Clerk shall be made in accordance with the procedures set forth in the *Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases* (accessible at the “E-Filing” page on the court’s website at the address www.nycourts.gov/supctmanh); and it is further

ORDERED that any relief not expressly addressed has nonetheless been considered and is hereby denied; and it is further

ORDERED that this constitutes the decision and order of this court.


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3/28/2022
DATE

SABRINA KRAUS, J.S.C.

CHECK ONE:

<input type="checkbox"/>	CASE DISPOSED	
<input type="checkbox"/>	GRANTED	<input type="checkbox"/> DENIED
<input type="checkbox"/>	SETTLE ORDER	
<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	

<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	
<input checked="" type="checkbox"/>	GRANTED IN PART	<input type="checkbox"/> OTHER
<input type="checkbox"/>	SUBMIT ORDER	
<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/> REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: