Borough Constr. Group, LLC. v Red Hook 160 LLC
2022 NY Slip Op 31147(U)
April 5, 2022
Supreme Court, Kings County
Docket Number: Index No. 500308/19
Judge: Leon Ruchelsman
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS : CIVIL TERM: COMMERCIAL 8

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BOROUGH CONSTRUCTION GROUP, LLC.,

Plaintiff,

Decision and order

- against -

Index No. 500308/19

RED HOOK 160 LLC, PHILADELPHIA INDEMNITY INSURANCE COMPANY, ACREFI MORTGAGE LENDING, LLC, TRI STATE LUMBER, AF SUPPLY CORP, UNITED RENTALS(NORTH AMERICA), INC., WORLDWIDE PLUMBING SUPPLY, INC., CASTLE MASONRY, INC., WOODBURY CONSTRUCTION, INC., GO GREENER PLUMBING, INC., PREMIUM BUILDING MATERIALS, INC., UNIVERSAL MARBLE AND GRANITE OF QUEENS AND TPG CONTRACTING, CORP.,

Defendants,

April 5, 2022

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RED HOOK 160 LLC,

Third Party Plaintiff,

- against -

BOROUGH EQUITIES LLC, MICHAEL BAUER & EMANUEL KANARIS,

Third-Party Defendants,

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UNITED RENTALS (NORTH AMERICA) INC.,

Third Party Plaintiff,

- against -

ATLANTIC SPECIALTY INSURANCE COMPANY, a/k/a ATLANTIC SPECIALTY INSURANCE INC., D/b/a ASIC INSURANCE,

Third-Party Defendants,

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PRESENT: HON. LEON RUCHELSMAN

Red Hook 160 has moved seeking sanctions against the defendants on the grounds they have spoliated evidence. The defendants have cross-moved seeking to compel Red Hook 160 to

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provide sought after discovery. Papers were submitted by the parties and arguments held. After reviewing all the arguments this court now makes the following determination.

It is well settled that a party is under a duty to preserve evidence, even before litigation commences, once it reasonably anticipates litigation (Jacquety v. Baptista, 538 F.Supp3d 325 [S.N.D.Y. 2021]). That is an objective standard and requires whether a reasonable party would have expected litigation (Mastr Adjustable Rate Mortgages Trust 2006-OA2 v. UBS Real Estate Securities Inc., 295 F.R.D. 77 [S.D.N.Y. 2013]). Thus, correspondence threatening legal action surely is reasonable notice of the anticipation of litigation (Karsch v. Blink Health Ltd., 2019 WL 2708125 [S.D.N.Y. 2019]).

A review of the time line concerning the anticipation of litigation and the progression of the litigation is necessary. On September 15, 2016 Borough Construction Group LLC entered into a contract with Red Hook 160 LLC concerning the construction and renovation of a project located at 160 Imlay Street in Kings County. Further, on October 25, 2016 the parties entered into another side agreement which further formed conditions and obligations of the parties. Shortly thereafter the relationship deteriorated. Thus, on November 30, 2017 in response to complaints filed by Red Hook, Michael Bauer, a representative of Borough sent an email and noted that "I understand your email as

trying to lay foundation for a potential lawsuit down the road. Let me stop you right here. We can choose to keep moving together as a TEAM or we can start to play the blame game and point fingers. Since we came onto the job, we have been forced to work with unrealistic budgets and schedules despite our advice to the contrary while being asked to push the job as much as possible. If you want to attempt to place blame solely on us, there is PLENTY of blame and incompetence to go around from other people who are on this email...No one is perfect and in no way are we claiming to be, but we have continually worked with the team to save the job and make up for other's mistakes. Also, we are still finding and correcting work from the prior contractor/subcontractors" (see, Email from Michael Bauer, 1:03 PM, November 30, 2017). On August 10, 2018 Red Hook sent Borough a default notice which indicated that "over the course of the Project, you have been negligent by failing to supervise and manage the Project, or to provide the construction management services required by the Contract. There can be no dispute that the Project schedules and budgets that you have provided have consistently been underestimated, incorrect and/or disregarded and you have effectively held the Project hostage by purposely slowing down the work in violation of the Contract based upon your inflated position of monies due in the amount of $1.2MM. As you know, the Contract specifically provides that the

construction Manager will prosecute the Work, time being of the essence, and will not slow down the Work pending any dispute with the Owner. However, you have not properly planned or executed the Work and have not performed with any sense of concern or urgency with regard to timely performance. Instead, you have used your inflated claim for monies as a basis for purposely stalling the Project" (see, Letter sent from Red Hook dated August 10, 2018. The letter further highlighted that significant plumbing work had not been performed or had been performed so poorly that walls had to be reopened to correct the mistakes. The letter also criticized Borough's billing practices and hollow promises about completion dates and time lines and rejected Borough's request to complete the project for a sum certain. While the letter did request a meeting to gauge Borough's seriousness to complete the work, Red Hook specifically reserved all rights. Finally, on September 24, 2018 Red Hook terminated Borough from the work site.

First, there is no argument this motion is somehow barred either because of any time constraints or because of any prior order of the court.

It cannot be said as a matter of law that Borough reasonably anticipated litigation until September 24, 2018. However, from that date a reasonable party would have surely anticipated litigation and Borough's obligation to conduct a litigation hold

and preserve all documents commenced (Zubalake v. UBS Warburg LLC, 220 F.R.D. 212 [S.D.N.Y. 2003]). Indeed, Borough does not dispute that contention. However, Borough curiously argues that "any prejudice to RH 160 as a result of any deletion of text messages would be minimal. RH 160's counterclaims against the Borough Parties concern alleged defective work on the Project site and materials purportedly stolen from the Project site. Therefore, once the Borough Parties were no longer on the Project site, any text messages from the Borough Parties would have had little to no relevance regarding RH 160's claims, and the Borough Parties were under no legal obligation to preserve their text messages during any period of time when they were actually working on the Project" (see, The Borough Parties' Memorandum of Law in Support of Cross-Motion to Compel and in Opposition to Red Hook 160 LLC's Motion for Spoliation Sanctions, page 16). Those arguments are unsatisfactory for a number of reasons. First, there is no way that Borough can unilaterally declare that any text messages would have had little to no relevance to Red Hook's claims. To be sure, one of the very purposes of discovery is to examine the contemporaneous thoughts and beliefs of the parties. Second, it defies common sense that once Borough was terminated and fully anticipated litigation no text messages from the principals of Borough were relevant to the claims of Red Hook. Third, Borough also seeks text messages from Red Hook and in its

memorandum in opposition argues plainly that all such texts must be furnished without regard to relevancy, duplicity or any other basis for non-disclosure (see, supra, pages 7 and 8). Thus, it is improper to demand text messages from Red Hook's liaison, Richard Murdock without limitation but to deny the necessity of text messages between Kanaris and Bauer. Fourth, Borough inconsistently argues that Red Hook has failed to produce these texts and that those texts must be furnished but deflects Red Hook's spoliation claim by noting that "it is clear from RH 160's own submissions on its motion that it can obtain the same evidence from another source – namely, itself" (supra, page 17). Of course, Borough likewise has access to all of Murdoch's texts from "itself" namely Bauer and Kanaris. This inconsistency elides the real basis for spoliation, namely Borough's failure to produce texts sought between Kanaris and Bauer or between Kanaris, Bauer and others for which the plaintiff has no such easy access. Lastly, the final sentence of the above quoted argument, specifically, that Borough did not maintain any duty to preserve any texts while they were still working for Red Hook is a non-sequitur that cannot be seriously entertained.

In further reply Borough argues that based on Mr. Bauer's and Mr. Kanaris' deposition testimony it is clear that hardly any text messages between Bauer and Kanaris or between them and third parties even exists and in any event the innocent practice of

both of them was to routinely delete text messages to free up storage space on their phones.

However, there is simply insufficient explanation why the text messages were not preserved once the parties reasonably anticipated litigation and surely once a litigation hold was actually implemented. The innocent explanation offered about phone storage does not satisfactorily absolve the failure to somehow insure the preservation of relevant texts. This is particularly important because Richard Murdock has submitted an affidavit wherein he states that he received hundreds and perhaps thousands of texts from Mr. Kanaris as well as texts from Mr. Bauer. Further, Sweeny Lee the principal of a contractor hired at the project submitted an affidavit that he received a text message from Mr. Bauer on August 20, 2020, after the litigation hold was in place, discussing Red Hook and the project and the contents of that email have been included within the motion. Thus, not only is there concrete proof that Borough has failed to preserve texts but Bauer's assertion that text messaging was "not really a method that is useful to me" and that texting was not a "primary or normal communication method" (see, Deposition of Michael Bauer, pages 451,453) is simply not credible.

It is well settled that the party seeking spoliation has the burden of demonstrating a litigant negligently disposed of critical evidence which compromised its ability to pursue its

claims (Lentini v. Weschler, 120 AD3d 1200, 992 NYS2d 135 [2d Dept., 2014]). The court has broad discretion regarding whether, and to what extent, spoliation of physical evidence should give rise to sanctions (Iannucci v. Rose, 8 AD3d 437, 778 NYS2d 525 [2d Dept., 2004]). When considering an appropriate sanction, factors properly considered include the extent of the prejudice imposed on the party due to the missing evidence and the degree of willfulness of the spoliator (Mendez v. La Guacatala Inc., 95 AD3d 1084, 944 NYS2d 313 [2d Dept., 2012]).

The defendants have essentially admitted they did not maintain the text messages they were required to preserve. While the failure was negligent, the evidence of spoliation is apparent. Therefore, Red Hook's motion seeking sanctions is granted. Thus, a negative inference shall be presented to the jury against the defendants with respect to the unavailable text messages.

Turning to Borough's cross-motion, they seek a specific calculation of damages and they seek text messages and emails from Smith Murdock the liaison for Red Hook.

First, Smith Murdock is a non-party and any information sought from them must be directed toward them. Red Hook has represented they have provided all information they possess from Smith Murdock and there is no basis to question that representation.

Second, concerning the request for a calculation of damages, such request must await expert disclosure. It is premature at this juncture for Red Hook to provide such information and the request is therefore denied. Lastly, any request for sanctions against Red Hook is denied.

So ordered.

ENTER:

DATED: April 5, 2022
Brooklyn, NY

Hon. Leon Ruchelsman
JSC