Seymour v Hovnanian
2022 NY Slip Op 31864(U)
June 13, 2022
Supreme Court, New York County
Docket Number: Index No. 154579/2016
Judge: Melissa Crane

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. MELISSA CRANE **PART** 60M

Justice

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WHITNEY SEYMOUR, CATRYNA TEN EYCK SEYMOUR,

Plaintiff,

- v -

ARA HOVNANIAN, RACHEL LEE HOVNANIAN,

Defendant.

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INDEX NO. 154579/2016

MOTION DATE 11/13/2020, 06/24/2021

MOTION SEQ. NO. 014 015

AMENDED
DECISION + ORDER ON MOTION

ARA HOVNANIAN, RACHEL LEE HOVNANIAN

Plaintiff,

-against-

AUTUN CONTRACTORS, WILLIAM F. O'NEILL ARCHITECTS, GILSANZ MURRY STEFICEK LLP, PILLORI ASSOCIATES, PA, SIGNATURE INTERIOR DEMOLITION, INC., JG CONSTRUCTION OF QUEENS, INC., SUPER JC CONSTRUCTION CORPORATION, MITCHELL IRON WORKS, INC.

Defendant.

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Third-Party
Index No. 595896/2016

The following e-filed documents, listed by NYSCEF document number (Motion 014) 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 914, 915, 916, 917, 918, 919, 920, 921, 922, 923, 924, 925, 926, 927, 928, 929, 931, 934, 935, 936, 937, 938, 939, 940, 941, 942, 943, 944, 945, 946, 947, 952, 953, 954, 955, 956, 957, 958, 959, 960, 961, 962, 963, 964

were read on this motion to/for CONTEMPT.

The following e-filed documents, listed by NYSCEF document number (Motion 015) 968, 969, 970, 971, 972, 973, 974, 975, 976, 977, 978, 979, 980, 981, 982, 983, 984, 985, 986, 987, 988, 989, 990, 991, 992, 993, 994, 995, 996, 997, 998, 999, 1000, 1001, 1002, 1003, 1004, 1005, 1006, 1007, 1008, 1009, 1010, 1011, 1012, 1013, 1014, 1015, 1016, 1017, 1018, 1019, 1020, 1021, 1022, 1023, 1024, 1025, 1026, 1027, 1028, 1029, 1030, 1031, 1032, 1033, 1034, 1035, 1036, 1037, 1038, 1039, 1040, 1041, 1042, 1043, 1044, 1045, 1046, 1047, 1048, 1049, 1050, 1051, 1052, 1053, 1054, 1055, 1056, 1057, 1058, 1059, 1060, 1061, 1062, 1063, 1073, 1074, 1075, 1076, 1077, 1078, 1079, 1080, 1081, 1082, 1083, 1084

were read on this motion to/for SANCTIONS.

Upon the foregoing documents, it is

The court consolidates motion sequence numbers 014 and 015, along with the cross motions, for disposition.

This is an action, *inter alia*, to recover damages for breach of a license agreement and a third-party action seeking, *inter alia*, indemnification and contribution. In motion sequence number 014, plaintiffs Gabriel North Seymour and Tryntje Van Ness Seymour, as co-executors of the estates of Whitney Seymour Jr. and Catryna Ten Eyck Seymour, move for an order:

> (1) holding Defendants Ara Hovnanian and Rachel Lee Hovnanian in civil contempt pursuant to Judiciary Law § 753 for disobeying the Court order entered on July 10, 2020 (the "Court Order");
>
> (2) imposing a fine, pursuant to Judiciary Law § 773, of $250 for each violation of the Court Order, against Ara Hovnanian totaling $1,000 for disobeying paragraphs 3(a), 3(b), 3(c) and 3(d) of the Court Order;
>
> (3) imposing a fine, pursuant to Judiciary Law § 773, of $250 for each violation of the Court Order, against Rachel Lee Hovnanian totaling $1,000 for disobeying paragraphs 3(a), 3(b), 3(c) and 3(d) of the Court Order;
>
> (4) awarding plaintiffs their costs and expenses, including attorneys' fees, to obtain the Hovnanians' compliance with the Court Order, including legal fees for the instant motion; and
>
> (5) requiring the Hovnanians to comply with the specific performance mandates of the Court Order by no later than a date set by the Court or agreed to by the parties, or face imprisonment pursuant to Judiciary Law § 774.

Defendants cross-move, pursuant to 22 N.Y.C.R.R. § 130-1.1, for an order imposing sanctions against plaintiffs and their counsel for their conduct in obstructing compliance with this Court's July 10, 2020 order and making an unwarranted motion for sanctions.

In motion sequence number 015, plaintiffs move for an order:

(1) granting spoliation sanctions against defendants for defendants' failure to create and produce the reports ordered by the court on November 9, 2020;

(2) precluding defendants from offering any evidence challenging plaintiffs' proof of the damages caused to their property by defendants' excavation and underpinning work;

(3) precluding defendants from contesting the fact that they exceeded the scope of the License Agreement and violated applicable laws and regulations by deviating from the excavation and underpinning plans approved by plaintiffs and the Landmarks Preservation Commission;

(4) providing adverse inferences charges at trial to ensure defendants are unable to benefit in any way their spoliation of evidence.

Defendants cross-move to strike the February 8, 2019 affidavit of Whitney North Seymour, Jr. (NYSCEF Doc. No. 1017) and paragraphs 55 through 59 of the June 23, 2021 affidavit Gabriel North Seymour (NYSCEF Doc. No. 991), and for sanctions.

I. BACKGROUND

The background of this litigation was set forth at length in the court's order of November 9, 2020 (*Seymour v Hovnanian*, 2020 WL 6564734 [Sup Ct, NY Co 2020]) (NYSCEF Doc. No. 884) and will not be repeated here except as relevant to this decision. The paragraphs of the July 10, 2020 order (NYSCEF Doc. No. 853) upon which the contempt motion is based provides as follows:

3. By August 15, 2020 or such other date agreed to by the parties, Defendants Ara Hovnanian and Rachel Lee Hovnanian are further ordered to obtain at their own expense and in accordance with the parties' License Agreement:

a. the removal of all temporary protections installed to control dust and debris from entering the Plaintiffs' property, along with the removal of the toxic lead dust and debris from the Plaintiffs' property using-EPA compliant remediation procedures for lead dust abatement as set forth in NYSECF Doc. No. 825, using contractors and a project supervisor designated by the Plaintiffs;

b. once lead dust abatement to the chimneys on Plaintiffs' property has been completed, an inspection for damage to the chimneys on Plaintiffs' property,

> along with conducting chimney smoke tests and preparing related reports, using contractors and a project supervisor designated by the Plaintiffs;
>
> c. the removal of the Verizon splicebox from Plaintiffs' property and, using contractors and a project supervisor designated by the Plaintiffs, the repair and restoration of the rear façade to its condition prior to the damage caused by the drilling and mounting of the Verizon splicebox to the rear façade of Plaintiffs' property; and,
>
> d. the installation and maintenance of effective flashing on the roof of the Plaintiffs' property and the repair of the underlying water infiltration damage to Plaintiffs' property, using contractors and a project supervisor designated by the Plaintiffs. (See Court Proceeding Transcript of May 28, 2020 at pp. 62-64).

(*id.*, p. 2-3). As specifically permitted by the order, the parties extended defendants' time to comply from August 15, 2020 to October 15, 2020 (NYSCEF Doc. No. 904).

As relevant to plaintiff's motion for spoliation sanctions, the November 9, 2020 order stated:

> Paragraph 9.B of the license agreement obligates the Hovnanians to have a special inspection engineer for the underpinning work "submit a final inspection report and completion or sign-off report," "including a statement that the work complies with" the plans annexed to the agreement and with "all applicable laws and regulations". Paragraph 9.B further requires [defendants] to retain the services of a "support excavation engineer" to perform special inspections of the excavation work and upon completion of such work, to submit a "final structural stability report, field report and completion or sign-off report, including a statement that the Support Excavation Work complies with" the plans and specifications annexed to the agreement and "applicable laws and regulations". Plaintiffs presented evidence establishing that they never received these reports from the Hovnanians.
>
> In opposition, the Hovnanians do not contest that they must supply plaintiffs with these reports. Nor do they argue that they have already done so. Therefore, the Hovnanians are ordered, at their own expense and in accordance with the license agreement, to obtain and provide plaintiffs with copies of the aforementioned reports.

(*Seymour v Hovnanian*, 2020 WL 6564734, at 9-10) (citations to the record omitted). The order required defendants to provide the reports within 20 days of the efiled date of the order.

II. DISCUSSION

A. Plaintiffs' Motion for Contempt / Defendants' Cross Motion for Sanctions (Mot. Seq. No. 14)

Plaintiffs assert that defendants have disobeyed all four of the directives set forth in paragraph 3 of the July 10, 2020 order. As discussed below, they claim that defendants have failed to remedy the problems relating to the toxic dust and debris affecting plaintiff's property (Order, ¶ 3[a]); failed to address the lead dust contamination of plaintiffs'' chimneys ¶ 3[b]); failed to remove the Verizon splicebox installed on the rear façade of plaintiffs' property and repair the damage caused by its installation; ¶ 3[c]); and failed to install and maintain effective flashing on the roof of the Plaintiffs' property and repair the resulting water damage ¶ 3[d]) (*see* Affidavit and Reply Affidavit of Gabriel Seymour, NYSCEF Doc. Nos. 952 and 961; Affirmation of Pablo Quinones, Esq., NYSCEF Doc. No. 901). Defendants attribute any failures to comply to plaintiffs' own dilatory and unreasonable conduct (*see* Affirmation and Reply Affirmation of Thomas B. Coppola, Esq., NYSCEF Doc. Nos. 934 and 962).

Toxic Dust and Debris Abatement (Order ¶ 3[a])

Plaintiffs contend that defendants employed delaying tactics and imposed unilateral conditions to impede the abatement of the toxic dust and debris. They claim that defendants failed to make timely payments to plaintiffs' designated project supervisor or contractors; unreasonably insisted that defendants' engineer, John Cocca, P.E., coordinate the work of plaintiffs' contractors; refused to sign as "payors" to any of the proposed work contracts presented to them and rejected a reasonable alternative escrow arrangement that would not require them to become payors; withheld payment to pressure plaintiffs into accepted a fixed, limited amount; and only made partial payments after the October 15 deadline had passed. Defendants counter that plaintiffs did not designate its contractor (United Restoration Services) (URS) to perform the lead dust abatement work until August 11, 2020, four days before the original deadline; that URS did not submit its actual proposal until September 11, 2020; that the

proposals from other toxic dust abatement contractors were not sent until September 18, 2020; that plaintiffs' demand that defendants sign a contract with URS and other contractors was improper, and that plaintiffs sought payment for work outside the scope of the July 10, 2020 order.

Chimney Inspection and Tests (Order ¶ 3[b])

With respect to the chimney inspection and tests, plaintiffs maintain that defendants employed the same alleged delaying tactics they did in connection with the toxic dust and debris abatement work. They also contend that defendants' proposal to complete the chimney work before the abatement work was unreasonable. In response, defendants note that plaintiffs' chimney inspection contractor (Flue Tech) did not submit its proposal until September 18, 2020, and again object to plaintiffs' requirement that defendant enter into a contract with Flue Tech. Additionally, they argue that because a chimney inspection might spread dust, it was more reasonable to perform it before the abatement work rather than risk a second clean-up.

Removal of the Verizon Splicebox (Order ¶ 3[c])

Plaintiffs assert that they were required to do all the work to remove the Verizon splicebox, and defendants did nothing except secure payment for the work from their insurer, Chubb. They also claim that defendants delayed the restoration and repair work on the rear façade. Defendants assert that they hired SAB Integrated Solutions to advise plaintiffs how to facilitate the removal of the splicebox and paid SAB, Verizon and Quality Restoration Works (QRW), the contractor that performed the façade work, in full.

Roof Flashing /Repair of Water Damage (Order ¶ 3[d])

Plaintiffs allege that defendant delayed the installation of roof flashing and the repair of water infiltration damage by refusing to pay Jablonski Building Conservation, Inc. (JBC), the

project manager for all of the work except the lead-dust abatement work, an initial deposit of $10,000 to start locating contractors and perform other preliminary services. In response, defendants state that the Jablonski proposal was not submitted until August 14, 2020, did not provide a cost estimate or name any contractors.

The motion is denied. "In order to find a party in civil contempt, it must be determined that a lawful order of the court, clearly expressing an unequivocal mandate, was in effect, that the party charged with contempt had notice of the order and disobeyed it, and that the failure to comply with the order prejudiced the rights of a party to the litigation" (*Gallagher v Old Guard of City of New York*, 172 AD3d 609, 610 [1st Dept 2019]). The showing must be made upon clear and convincing evidence (*60 E. 9th St. Owners Corp. v Zihenni*, 200 AD3d 587 [1st Dept 2021]). Although the July 10, 2020 order set a date for compliance, it did not specifically dictate the mechanism for payment of the contractors, establish an escrow procedure or require that defendants sign contracts with the contractors as payors. The record reflects that plaintiffs were unable to procure proposals from any contractors for over two months, and that the parties had bona fide disagreements over the cost, sequence and coordination of the proposed work. The delays were additionally compounded by the necessity of engaging the cooperation of the insurer and Verizon.

Defendants' cross motion for sanctions was denied at oral argument (NYSCEF Doc. No. 1050, 37:23-38:7).

B. Plaintiffs' Motion for Spoliation Sanctions / Defendants' Cross Motion to Strike (Mot. Seq. No. 14)

Plaintiffs' motion for spoliation sanction is premised upon defendants' failure to create and preserve various reports as required by paragraph 9.B of the license agreement. As noted above, this court's November 9, 2020 order directed that defendants produce final inspection and

sign-off reports by a special inspection engineer and a support excavation engineer. Plaintiffs contend that defendants have not produced those reports, and never even created them. They also assert that they have never received the other reports required by paragraph 9.B, including weekly work schedules, weekly reports on crack gauges, monitors and temporary protections, and reports on chimney smoke, vibration and environmental tests. Plaintiffs further contend that the special inspection reports (TR-1s) that defendants have attempted to submit merely certify that the work "substantially conforms" with the design drawings filed with the New York City Department of Buildings (DOB), but do not guarantee full compliance with the parties' license agreement or applicable laws and regulations.

Plaintiffs additionally contend that defendants' failure to comply with their contractual reporting obligations allowed them to conceal certain changes to the design plans that resulted in unauthorized excavation and underpinning work. Specifically, they point to revised plans filed on July 1, 2015 by defendants' underpinning engineer, Gregory Pillori that plaintiffs received in response to FOIL requests (NYSCEF Doc. Nos 86-90). Those plans allowed for deeper excavation, a new ejector pit, the addition of jacking and jacking pockets, and changes to excavation, shoring and underpinning in the rear yard, but were filed after the work was already completed. Plaintiffs argue that the reports would have apprised them of these changes and allowed them to avert the damage. They also argue that the alleged concealment may demonstrate that defendants' breach of their contractual obligations was willful and provide a basis for punitive damages (*see* Affidavit and Reply Affidavit of Donald Friedman, NYSCEF Doc. Nos. 980 and 1055; Affidavit and Reply Affidavit Gabriel Seymour, NYSCEF Doc. Nos. 991 and 1056; Affidavit and Reply Affidavit of Donald Friedman, NYSCEF Doc. Nos. 970 and 1049).

In opposition, defendants first raise a couple of procedural challenges. They assert that the spoliation motion is actually disguised discovery motion made two years after plaintiffs certified that discovery was complete, based upon information they already had or could have easily obtained, and that the motion was made without the required affirmation that the parties have conferred in good faith. They also assert that it is a premature motion *in limine*. On the merits, defendants contend that the TR-1s and the new report from their professional engineer satisfy the requirements of the license agreement, and that plaintiffs have demonstrated no harm from the alleged spoliation arising from the failure to create all of the reports specified by the license agreement. They also note that plaintiffs never requested to see any of the reports while the construction was ongoing, or exercised their contractual right to suspend the work (*see* Affidavit and Reply Affidavit of John Cocca, P.E., NYSCEF Doc. Nos. 1033 and 1078; Affirmation and Reply Affirmation of Thomas B. Coppola, Esq., NYSCEF Doc. Nos. 1022 and 1073).

Insofar as the court's November 9, 2020 order directing defendants to produce the reports was issued after the filing of the note issue, the motion is timely made. It is not a discovery motion, but rather a motion made in response to defendants' alleged non-compliance with that order. And even if construed as a motion *in limine*, it is not premature because such motions can be made at any time (*see Sadek v Wesley*, 117 AD3d 193, 203 [1st Dept 2014], *aff'd* 27 NY3d 982 [2016]).

Nevertheless, the motion is denied. "[A] party seeking sanctions for spoliation 'must establish that the non-moving party had an obligation to preserve the item in question, that the item was destroyed with a culpable state of mind, and that the destroyed item was relevant to the party's claim or defense'" (*Gilliam v Uni Holdings*, 201 AD3d 83, 86 [1st Department 2021],

quoting Rossi v Doka USA, Ltd., 181 AD3d 523, 525 [1st Dept. 2020]). Although a finding of spoliation may be based not only upon the destruction of evidence but also, as here, a failure to create contractually-required documents (*see CB by Suarez v Howard Sec.*, 158 AD3d 157, 168 [1st Dept 2018]), the documents must still be relevant to the party's case.

Plaintiffs have not made a showing of relevance. Plaintiffs' claim that a timely production of the reports might have enabled them to discover the design changes and stop the work relates to, at most, the question of liability – which was already resolved in plaintiffs' favor on the summary judgment motion. Plaintiffs have not meaningfully addressed what probative value the reports would have regarding the extent of their damages. They argue only that the failure to create the reports appears to have been willful, and as such, might support an award of punitive damages. However, the claims for punitive damages have been dismissed as a matter of law (see *Seymour v Hovnanian*, 2020 WL 6564734, at 11-13) , and plaintiffs' additional arguments regarding the nature of the breach of the license would not change the court's analysis.

In view of the discussion above, the parties' debate over whether the defendants' submission of the TR-1 documents and the new engineer's report comply or substantially comply with the license agreement is academic. Defendants' breach of the agreement was established on the summary judgment motion. Evidence of additional breaches, even willful ones, is not relevant to the question of damages. At trial, the parties will have ample opportunity to present evidence regarding damages through the testimony of their engineering expert witnesses.

The cross motion to strike the February 8, 2019 affidavit of the late Whitney North Seymour, Jr. is granted. By order dated May 9, 2019 (NYSCEF Doc. No. 266), this court ruled

that he was "precluded from testifying at trial as he was unavailable for deposition. For the same reason, plaintiff Seymour is also precluded from offering any further evidence in this case, including affidavits." Nevertheless, plaintiffs contend that the affidavit should be considered "in the interests of justice" as it would "reviv[e] Seymour's sworn testimony to recapture the impressions of the person to whom the Hovnanians owed a duty to disclose the willfully spoliated evidence: Whitney Seymour" (NYSCEF Doc. No. 969 [Pls' Mem. of Law in Opp.], p. 29, n. 12). This is an insufficient reason to disregard they court's prior ruling, and in any event, the motion for spoliation sanctions has been denied. Defendants' additional motion for sanctions is denied in the discretion of the court.

Accordingly, it is

ORDERED that motion sequence number 014 by plaintiffs for civil contempt is denied, and defendants' cross motion for sanctions is denied, and it is further

ORDERED that motion number 015 by plaintiffs for spoliation sanctions is denied, and defendants' cross motion to strike and sanctions is granted to the extent of striking the February 8, 2019 affidavit of Whitney North Seymour, Jr. (NYSCEF Doc. No. 1017) and paragraphs 55 through 59 of the June 23, 2021 affidavit Gabriel North Seymour (NYSCEF Doc. No. 991), and is otherwise denied.

6-13-2022

DATE

MELISSA CRANE, 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