SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. ALEXANDER TISCH** **PART** **18**

Justice

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CAMPBELL DESIGN & CONSTRUCTION INC.,

Plaintiff,

- v -

49 PRINCE LLC, THE BESEN GROUP LLC, BRUCE SUPPLY CORP., THE CICERO GROUP LLC, WESTCHESTER FIRE INSURANCE COMPANY, JOHN DOE 1 THROUGH JOHN DOE 12,

Defendants.

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INDEX NO. 152381/2020

MOTION DATE 07/13/2021, 07/13/2021

MOTION SEQ. NO. 007 007

SECOND AMENDED DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 007) 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219

were read on this motion to/for ATTORNEY - FEES.

The following e-filed documents, listed by NYSCEF document number (Motion 007) 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219

were read on this motion to/for SANCTIONS.

Upon the foregoing documents, plaintiff moves for an order requiring defendants 49 Prince LLC and The Besen Group LLC (defendants) to reimburse plaintiff for the costs of hiring a forensic examiner and for attorneys' fees and costs in connection with the defendants' alleged violation of discovery orders pursuant to CPLR 3126 and/or due to frivolous conduct per 22 NYCRR § 130.1-1.

Plaintiff commenced the instant action on March 4, 2020 for breach of contract and to foreclose on a mechanic's lien related to construction renovation services plaintiff performed for defendants' apartment units. On or about June 18, 2020, plaintiff served a document demand upon defendants and request no. 20 specifically sought, inter alia, text messages and emails

between defendants' officers, owners, employees, or agents concerning the work performed at the premises from 1/1/2017 through the present. Defendants objected on the grounds that the demand was "overly broad, unduly burdensome, vague, ambiguous, evidentiary in nature, and/or beyond the scope of a notice for discovery and inspection" (NYSCEF Doc No 164). After a preliminary conference was held, the Court directed that defendant produce by 8/31/2020 "all documents called for in Request No. 20" and limited the demand in scope to 12/18/2017 through and including 12/18/2019 (NYSCEF Doc No 39, order of the Court dated 8/25/2020 [Feinman, J.], hereinafter the August 2020 Order). It appears that defendants made some sort of production in response to the demand (e.g., emails involving Nick Pagano and no other employee or agent); then plaintiff's counsel e-mailed defense counsel on 10/1/2020 and 10/6/2020 advising that there were no e-mails or text messages between, e.g., Nick Pagano and/or Michael Besen in defendants' production. Defense counsel replied, "I checked with the client again and confirmed that this was all that they were able to find" (NYSCEF Doc No 165).

Plaintiff then requested a pre-motion conference before the Court for permission to move for a forensic examiner to search for emails and texts. Defendants advised the Court "that the documents do not exist" (NYSCEF Doc No 166). After the conference, the Court directed plaintiff to ask Pagano under oath whether there were any emails or texts, as had been requested. Plaintiff asked in a follow up e-mail to ask defendants' counsel "whether or not a search was undertaken" of the e-mail accounts and text message history for Michael Besen, John Catalic and any other employee involved (NYSCEF Doc No 167). Defense counsel responded "My client has properly answered your demand after having reviewed their files as they were required to. The searches were done several times at your request. Please stop wasting everyone's time" (id.).

Pagano's deposition was held on 10/22/2020, and he testified that he personally witnessed Besen search his computer and phone for relevant e-mails and text messages (NYSCEF Doc No. 44 at 42-43). He also testified that he never emailed or texted Besen about the project because, as he claimed, there was no need to because they saw each other almost every day.

Plaintiff then served an interrogatory directed at the searches conducted for the emails and texts. Defendants certified in writing in their response dated 12/11/2020 that specific email accounts and mobile phones were searched by Pagano and Besen (NYSCEF Doc No 173).

Plaintiff moved to appoint a forensic examiner to search for the emails and texts, and to depose Besen. Defendants opposed, contending, inter alia, that no "internal emails" exist (NYSCEF Doc No 82 at ¶ 12). The Court granted the branch of the motion to depose Besen and denied the appointment of a forensic examiner as premature and could be reconsidered after Bensen's deposition (NYSCEF Doc No 100).

Besen was deposed on 2/10/2021, and he testified that he did not personally search for emails or texts himself, which contradicted Pagano's testimony. He also testified that he never discussed the results of any search for texts or emails with counsel (NYSCEF Doc No 104 at 34, 37, 38).

Plaintiff again requested permission for leave to move to appoint a forensic examiner to search for Besen's emails (NYSCEF Doc No 105) and, after a conference with the Court on 3/10/2021, the parties entered into a stipulation that was so-ordered by the Court directing the appointment of a forensic examiner to search Besen's emails and a final opportunity for defendants to search and provide texts responsive to the demand by 4/9/2021 (NYSCEF Doc No 109).

On 4/6/2021, 4/9/2021, and 4/14/2021, defendants finally produced text messages between Besen, Pagano, and Catalic (see NYSCEF Doc Nos 168-169).

After further conference with the Court, the parties' agreed to the procedure for the forensic examiner and ultimately defendants produced emails from and to Besen concerning the project, some of which involved Pagano (see NYSCEF Doc No 175).

Forensic Examiner

The Appellate Division, First Department clearly held that the producing party shall bear the cost of production of electronically stored information (ESI) and physical documents that have been requested as part of the discovery process (U.S. Bank, N.A. v GreenPoint Mtge. Funding, Inc., 94 AD3d 58, 59 [1st Dept 2012]). In opposition to this motion, defendants failed to point to any reason why the cost should shift to plaintiff (see generally id. at 63-64 [discussing factors to evaluate in deciding whether to shift the cost of production to the requesting party]). Contrary to the defendants' contentions, the information sought was not a "fishing expedition" and this Court repeatedly held at discovery conferences that the information requested was relevant to this litigation. Further, although counsel admits that the search results would differ between an expert and a layperson (see NYSCEF Doc No 178 at ¶¶ 49, 60), there is nothing in the record suggesting that an expert was necessary in the first place.[1]

Even if an expert was required, because of the purported numerous amount of false positives, the costs must still be borne by the producing party in accordance with U.S. Bank, N.A. (94 AD3d 58). Additionally, although defendants' claim that the examiner's results were mostly outside the scope of time set forth in the Court's August 2020 Order, there is no denial

[1] Except, perhaps, Pagano affidavit (NYSCEF Doc No 214 at ¶ 18), discussed *infra*.

that there were many results that fit within the scope of the August 2020 Order (see, e.g., NYSCEF Doc Nos 216-217).

Accordingly, that branch of the motion seeking reimbursement for the costs of hiring a forensic examiner is granted.

Attorneys' Fees

Plaintiff also moves for reasonable attorneys' fees and costs associated with defendants' failure to comply with its discovery demand and August 2020 Order pursuant to CPLR 3126 and/or pursuant to 22 NYCRR 130.1-1 for defendants false representations that no responsive emails or texts existed.

CPLR 3126 provides that "[i]f any party . . . refuses to obey an order for disclosure or willfully fails to disclose information which the court finds ought to have been disclosed pursuant to this article, the court may make such orders with regard to the failure or refusal as are just." "The nature and degree of a penalty to be imposed under CPLR 3126 for discovery violations is addressed to the court's discretion" and the sanction should be "commensurate with the particular disobedience it is designed to punish and go no further than that" (Crupi v Rashid, 157 AD3d 858, 858-59 [2d Dept 2018]).

"Although not expressly set forth as a sanction under CPLR 3126 . . . the imposition of a monetary sanction under CPLR 3126 may be appropriate to compensate counsel or a party for the time expended and costs incurred in connection with an offending party's failure to fully and timely comply with court-ordered disclosure" (Lucas v Stam, 147 AD3d 921, 926 [2d Dept 2017]; see Garcia v Defex, 59 AD3d 183, 183-84 [1st Dept 2009] ["the monetary sanction was appropriate to compensate the defense for the time plaintiff wasted"]; Postel v New York Univ. Hosp., 262 AD2d 40, 42 [1st Dept 1999] ["a monetary sanction is warranted by the repeated

delays and plaintiffs' counsel's repeated failure to comply with discovery orders"]; Elias v City of New York, 71 AD3d 506, 506-07 [1st Dept 2010] ["While mere lack of diligence in furnishing some of the requested materials may not be grounds for striking a pleading, monetary sanctions are warranted by defendant's repeated delays and repeated failure to comply with discovery orders"]).

Plaintiff takes issue with the defendants' and counsel's misrepresentations, which consequently lead plaintiff's counsel to expend time, effort, and costs to obtain the discovery.

The alleged misrepresentations included: that Pagano falsely testified that Besen personally conducted searches of his emails and texts; that Pagano falsely implied that he never texted or emailed Besen about the parties' project; that Besen testified that he never spoke to counsel about searches and the results, in contradiction to counsel's repeated representations that counsel confirmed with their clients that defendants performed searches and provided what they had.

It appears to the Court that the discovery, which did in fact exist, would not have been disclosed if plaintiff did not undertake such substantial time and effort to obtain it.

For example, with the text messages, the defendants do not dispute plaintiff's recitation of the facts. Nor can they claim that at least some of the texts produced in April of 2021 were responsive to the August 2020 Order with respect to scope of time (see NYSCEF Doc No 178 at ¶ 37 [defendants' counsel acknowledging that at least twenty pages of text messages were applicable to the two-year period]). Their opposition and the record itself are barren of any reason why the requested text messages were not provided when directed by the Court in the August 2020 order, nor after plaintiff's counsel followed up in early October of 2020. Instead, defense counsel certified in writing numerous times that the requested text messages did not

exist, and Pagano implied during his testimony that texts between him and Besen would not exist, and that anything they had was turned over. This was not true and resulted in unnecessary time and expense wasted by counsel to obtain the discovery from October 2020 through April 2021, e.g., preparing demands directly targeted to the search for text messages, a motion to compel, conducting the additional party deposition of Besen, and a conference with the Court, which resulted in giving defendants the final opportunity to disclose the text messages.

Accordingly, at least that portion of the motion for a monetary sanction should be granted with respect to the delayed exchange of text messages.

With respect to the e-mails, defendants broadly claim that they attempted to comply with all discovery obligations in good faith and did not demonstrate any pattern of willful or contumacious behavior, or bad faith conduct. Specifically, defendants submit, inter alia:

> "At each stage of discovery, the Defendants have tried in good faith to address differences with the Plaintiff as to the scope of discovery demands. Not only did the Defendants conduct searches for items requested in discovery, they subsequently hired a consultant to perform searches of emails, and, ultimately, acquiesced to the Plaintiff's request that a forensic consultant conduct the searches" (NYSCEF Doc No 212, Martins aff at ¶ 8).

Pagano's affidavit also states:

> "I confirm that I performed the search for discovery in this matter including emails and text messages. I was asked on several occasions to conduct searches and to redo and reconfirm that searches had been conducted. At all times, I did so to the best of my ability and with the intention of complying with discovery requests" (NYSCEF Doc No 214 at ¶ 26).

First, the Court notes that although counsel claims they hired a consultant,[2] which is also repeated in Pagano's affidavit, there is no elaboration as to what the additional search entailed and/or result revealed, if anything.

[2] See also NYSCEF Doc No 214, Pagano's affidavit at ¶ 19.

Second, although defendants claim that "even though they could not locate all of them at each procedural interval," defendants provided "supplemental responses as the information became available" (NYSCEF Doc No 213, defendants' memorandum of law in opposition at 16), that contention is unsupported by the record, as it is unclear how the responsive documents were available in 2021 but not available the year before.

Defendants also appear to infer that a reason they did not turn over responsive emails is because the search results conducted by a layperson versus an expert would yield different results. The Court finds the position as speculative and without any relevance without some proof supporting the contention that the search defendants claimed they did (e.g., NYSCEF Doc No 173, defendants' interrogatory responses related to ESI searches dated 12/11/2020) could not have produced any of the emails produced by the examiner.

Pagano's affidavit is not helpful in that regard, stating only that if he were to impose search terms that he deemed appropriate, it "**often** resulted in no responsive emails" (NYSCEF Doc No 214 at ¶ 18 [emphasis added]) — which says nothing about what the search entailed and what emails were responsive, albeit less "often." Even if the task was more burdensome that defendants had expected, it is no excuse for not complying with an order (see, e.g., Allstate Ins. Co. v Buziashvili, 71 AD3d 571, 573 [1st Dept 2010] ["Defendant's excuse that producing the documents was a drain on his time and that his energy and resources should be devoted to more important tasks is insufficient to justify violation of a court order"]).

Consequently, defendants have additionally shown that this motion itself (at least for the part for reimbursement for forensic examiner costs) would also not have been necessary.

Ultimately, the Court finds the defendants' conduct, including the representations made by both counsel the parties, forced plaintiff's counsel to have to endure additional time, effort,

and cost in obtaining discovery that it was rightfully entitled to and should have been provided without pre-motion letters, or motion practice, or multiple conferences with the Court. Neither would the other part of this motion, to be reimbursed for the costs of the forensic examiner, have been necessary.

In light of the foregoing, the Court declines to address whether an award of attorneys' fees should be issued pursuant to Rule 130.1-1(a) for the alleged false representations.

The Court has considered defendants' remaining contentions and finds them unavailing.[3]

Accordingly, it is hereby ORDERED that the branch of the motion seeking reimbursement for the cost of the forensic examiner is granted; and it is further

ORDERED that defendants shall pay plaintiff's counsel the amount of $14,274.99 (see NYSCEF Doc No 172) within 45 days after service of a copy of this order with notice of entry; and it is further

ORDERED that the branch of the motion pursuant to CPLR 3126 is granted in part to the extent that defendants shall pay plaintiff $12,500.00 within 45 days after service of a copy of this order with notice of entry; and it is further

ORDERED that the remainder of the motion is otherwise denied.

This constitutes the decision and order of the Court.

7/22/2022
DATE

ALEXANDER TISCH, J.S.C.

CHECK ONE:		CASE DISPOSED			X	NON-FINAL DISPOSITION	
		GRANTED		DENIED	X	GRANTED IN PART	OTHER
APPLICATION:		SETTLE ORDER				SUBMIT ORDER	
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN				FIDUCIARY APPOINTMENT	REFERENCE

[3] E.g., defendants' recitation of plaintiff's conduct in discovery is irrelevant and not at issue in this motion; and plaintiff is not seeking spoilation sanctions so it is unnecessary to address that as well.