

MD CBD 180 Franklin LLC v Adam Am. LLC
2022 NY Slip Op 32420(U)
July 21, 2022
Supreme Court, New York County
Docket Number: Index No. 651332/2019
Judge: Arlene Bluth
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. ARLENE BLUTH

PART

14

Justice

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MD CBD 180 FRANKLIN LLC,

Plaintiff,

- v -

ADAM AMERICA LLC D/B/A ADAM AMERICA REAL ESTATE, OMRI SACHS, HORIZON AT RIDGE HILL LLC D/B/A THE HORIZON GROUP, HORIZON AT FOREST HILL LLC, D/B/A THE HORIZON GROUP, HORIZON AT ROSLYN LLC, D/B/A THE HORIZON GROUP, HORIZON AT WESTBURY LLC, D/B/A THE HORIZON GROUP, HORIZON AT JERICHO LLC, D/B/A THE HORIZON GROUP, BRITT REALTY LLC, D/B/A THE HORIZON GROUP, BRITT REALTY CONSTRUCTION, LLC D/B/A THE HORIZON GROUP, 168 FRANKLIN HOLDINGS, LLC, ISSAC & STERN ARCHITECTS, P.C., MEC GENERAL CONSTRUCTION, NETT PROJECT LLC, P & B HEATING & AIR CONDITIONING CORP., MAR-SAL CONTRACTING INC., MAG BUILDERS INC.,

Defendant.

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168 FRANKLIN HOLDINGS, LLC, BRITT REALTY LLC, D/B/A THE HORIZON GROUP

Plaintiff,

-against-

MAG BUILDERS, INC, MEC GENERAL CONSTRUCTION, NETT PROJECT, LLC, TRIED N' TRUE PLUMBING AND HEATING CO.

Defendant.

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ADAM AMERICA LLC D/B/A ADAM AMERICA REAL ESTATE, OMRI SACHS, 168 FRANKLIN HOLDINGS, LLC

Plaintiff,

-against-

MAG BUILDERS INC, NETT PROJECT LLC, TRIED N' TRUE

INDEX NO.

651332/2019

MOTION DATE

07/20/2022

MOTION SEQ. NO.

014

**DECISION + ORDER ON
MOTION**

Third-Party

Index No. 595201/2021

Second Third-Party

Index No. 595201/2021

PLUMBING AND HEATING CO., HORIZON AT RIDGE HILL
 LLC THE HORIZON GROUP, HORIZON AT FOREST HILL
 LLC D/B/A THE HORIZON GROUP, HORIZON AT ROSLYN
 LLC D/B/A THE HORIZON GROUP, HORIZON AT
 WESTBURY LLC D/B/A THE HORIZON GROUP, HORIZON
 AT JERICHO LLC D/B/A THE HORIZON GROUP, BRITT
 REALTY, LLC D/B/A THE HORIZON GROUP, BRITT REALTY
 CONSTRUCTION LLC D/B/A THE HORIZON GROUP, 168
 FRANKLIN HOLDINGS, LLC, BRITT REALTY, LLC

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 014) 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 517, 518, 522, 523, 524, 525, 526, 527 were read on this motion to/for RENEW/REARGUE/RESETTLE/RECONSIDER.

The motion by defendants Adam America LLC d/b/a Adam America Real Estate and Omri Sachs (collectively, “Movants”) to renew this Court’s order dated June 1, 2022 is decided as described below.

Background

This dispute arises out of alleged defects in a large residential real estate project in Brooklyn. On June 1, 2022, this Court issued a discovery order after considering various letters from the parties (NYSCEF Doc. No. 495). That order noted that the parties had initially agreed to a stipulation submitted by Movants and then counsel for Movants suddenly backed out of the agreement the next day because of a dispute about the order of depositions (*id.*).

Movants seek to renew that order and claim that they should have the right to take plaintiff’s deposition before plaintiff is permitted to take the depositions of Movants. They claim they are entitled to priority under CPLR 3106(a). Counsel for Movants contends that it was substituted in as Movants’ new attorneys on the day the discovery order was issued and they assumed they would have the chance to discuss the issue at a conference scheduled for June 7, 2022 (despite the fact that the previous discovery order stated otherwise). Movants contend they will suffer great prejudice if they have to be deposed before they get a chance to depose plaintiff.

In opposition, plaintiff claims that Movants are not entitled to deposition priority because they did not serve a deposition notice with their answer to the amended complaint or at any time whatsoever. Plaintiff argues that it has now served a deposition notice to Movants and so it is entitled to priority. It also points out that it has already been deposed and so the Court was entitled to set a schedule to facilitate the completion of the outstanding depositions (Movants were recently added to the case as new defendants).

In reply, Movants claim that they served a notice for deposition on June 7, 2022 while plaintiff did not serve a notice of deposition until July 7, 2022.

Discussion

As an initial matter, the Court observes that Movants should have moved to vacate the Court's discovery order. Renewal is not the appropriate relief. However, the Court declines to deny the motion on that basis and will instead consider the merits.

The Court issued the June 1, 2022 order based on the letters submitted by counsel. There was no mention in these letters about whether notices of deposition were issued and when. Moreover, it made little sense why counsel for Movants would send in a stipulation for the Court to sign (on behalf of all of the parties) and then the very next day claim it could no longer agree to what it had already agreed. This case will not progress if the parties need to engage in motion practice about the priority of depositions.

In any event, this Court must follow the applicable caselaw. "As a general rule, in the absence of 'special circumstances', priority of examination belongs to the defendant if a notice therefor is served within the time to answer; otherwise, priority belongs to the party who first serves a notice of examination" (*Bucci v Lydon*, 116 AD2d 520, 521, 497 NYS2d 669 [1st Dept 1986]). The record before this Court shows that Movants served a notice of deposition for all

parties on June 7, 2022 (NYSCEF Doc. No. 524) while plaintiff's notices of depositions were served until July 7, 2022 (NYSCEF Doc. Nos. 519, 520). Clearly, Movants have priority and are entitled to take plaintiff's deposition before plaintiff is entitled to take Movants' deposition.

Accordingly, it is hereby

ORDERED that the motion by Adam America LLC dba Adam America Real Estate and Omri Sachs is granted to the extent that these defendants shall have deposition priority over plaintiff and are entitled to take plaintiff's deposition first and the Court's order dated June 1, 2022 is modified to include this decision.

Next conference: Already Scheduled for October 27, 2022 at 10 a.m. The parties must upload a discovery update by October 20, 2022 as directed in NYSCEF Doc. No. 495. The Court expects that sufficient progress will be made before the next conference. Otherwise, the Court may explore ways to move this case, including ordering an expedited deposition schedule for any remaining depositions.

<u>7/21/2022</u> DATE	 ARLENE BLUTH, J.S.C.			
CHECK ONE: APPLICATION: CHECK IF APPROPRIATE:	☐ CASE DISPOSED ☐ GRANTED ☐ SETTLE ORDER ☐ INCLUDES TRANSFER/REASSIGN	☐ DENIED	☒ NON-FINAL DISPOSITION ☒ GRANTED IN PART ☐ SUBMIT ORDER ☐ FIDUCIARY APPOINTMENT	☐ OTHER ☐ REFERENCE