

39 W. 23rd St., LLC v Pizzarotti, LLC

2022 NY Slip Op 33356(U)

October 4, 2022

Supreme Court, New York County

Docket Number: Index No. 652056/2020

Judge: Andrew S. Borrok

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 53

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39 WEST 23RD STREET, LLC,

Plaintiff,

- v -

PIZZAROTTI, LLC,

Defendant.

INDEX NO. 652056/2020

MOTION DATE 08/22/2022,
09/14/2022

MOTION SEQ. NO. 003 004

**DECISION + ORDER ON
MOTION**

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PIZZAROTTI, LLC

Plaintiff,

-against-

U.S. SPECIALTY INSURANCE COMPANY

Defendant.

Third-Party
Index No. 595090/2021

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HON. ANDREW S. BORROK:

The following e-filed documents, listed by NYSCEF document number (Motion 003) 43, 44, 45, 46, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65

were read on this motion to/for PRECLUDE.

The following e-filed documents, listed by NYSCEF document number (Motion 004) 48, 49, 50, 51

were read on this motion to/for PRECLUDE.

Upon the foregoing documents, Pizzarotti, LLC's (**Pizzarotti**) motions to preclude 39 West 23rd Street, LLC's (**39 West**) from relying on (i) documents produced on August 12 and August 18, 2022 (Mtn. Seq. No. 003) and (ii) documents produced on September 2 and September 5, 2022 (Mtn. Seq. No. 004) are granted to the extent that Steven Gorey, James Treacy, Stephen Glascock, and Carl Jaccarino must appear for additional depositions at 39 West's sole cost and expense.

By way of background, 39 West initially responded to Pizzarotti's discovery requests by providing a spreadsheet and analysis of their alleged damages (NYSCEF Doc. No. 53). Pizzarotti pointed out that certain of the damages categories were not recoverable and proceeded to take depositions of Mssrs. Steven Gorey, James Treacy, Stephen Glascock, and Carl Jaccarino. Subsequently, 39 West submitted a revised damage calculation in which they not only removed the damage categories that were not recoverable but also introduced new damages based on their contract with Ryder Construction (NYSCEF Doc. No. 45, at 339-342), including Requisition Request Number 40 which had over 400 change orders associated with it. Neither Requisition Request Number 40, nor any of the over 400 change orders had been produced prior to the time in which the depositions were taken. This Requisition Request No. 40 accounts for approximately \$10,000,000 in damages (NYSCEF Doc. No. 45, at 339-342).

Pizzarotti argues that they have been unfairly prejudiced in this lawsuit by the substantial change in 39 West's damages theory and calculation which took place after Pizzarotti took depositions for Mssrs. Gorey, Treacy, Glascock, and Jaccarino. Pizzarotti argues that as a result 39 West should be precluded from introducing into evidence those documents produced on August 12, August 18, September 2 and 5, 2022 with regards to damages calculation.

Pursuant to CPLR 3101(h), a party shall promptly amend or supplement a response when its response is incorrect or incomplete, or when circumstances are such that failure to amend or supplement the response would be materially misleading. Trial courts are vested with broad discretion "in making determinations concerning matters of disclosure" (*Schleger v Jurcsak*, 186

AD3d 771, 773 [2d Dept 2020]), and preclusion is justified when there is an untimely exchanged document of which the admission would constitute an unfair surprise to the opposing party (see *Ward v Mehar*, 264 AD2d 515, 516 [2d Dept 1999]). In this case, it can not be said that Pizzarotti is surprised by 39 West seeking damages based on 39 West's contract with Ryder Construction. Indeed, Pizzarotti's discovery requests underscore that this was anticipated. However, they have not yet had the opportunity to explore 39 West's revised damages calculation or to explore discovery based on 39 West's additional categories of damages not previously disclosed including the retaking of those depositions. To the extent Pizzarotti wishes to conduct further depositions of Mssrs. Gorey, James Treacy, Stephen Glascock, and Carl Jaccarino tailored to the documents produced after the depositions of those witnesses were taken, they are entitled to do so and 39 West must pay the cost incurred. The parties are directed to meet and confer as to the time allotted for each such deposition and, if they cannot reach agreement, they shall email Part 53 (SFC-part53@nycourts.gov) to request a conference pursuant to which this court may issue a supplemental order.

Accordingly, it is hereby ORDERED that the Defendant's motions to preclude (Mtn. Seq. Nos. 003, 004) are granted solely to the extent that 39 West is ordered to reproduce its witnesses Steven Gorey, James Treacy, Stephen Glascock, and Carl Jaccarino for Pizzarotti's depositions regarding documents produced by 39 West on August 12 and 18, 2022 and September 2 and 5, 2022; and it is further

ORDERED that Pizzarotti shall take depositions for all four witnesses by November 30, 2022; and it is further

ORDERED that 39 West must pay for all costs incurred by the foregoing depositions; and it is further

ORDERED that fact discovery shall be completed by December 15, 2022; and it is further

ORDERED that expert discovery shall be completed by February 28, 2023; and it is further

ORDERED that NOI date shall be March 13, 2023; dispositive motions shall be filed within 45 days following the NOI date; and it is further

ORDERED that the parties appear for a status conference on December 16, 2022 at 11:30 am.


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10/4/2022
DATE

ANDREW S. BORROK, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE