

O'Keeffe's Inc. v 400 Times Sq. Assoc., LLC
2022 NY Slip Op 33528(U)
October 17, 2022
Supreme Court, New York County
Docket Number: Index No. 150702/2019
Judge: Joel M. Cohen
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.
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 03M

-----X

O'KEEFFE'S INC. D/B/A SAFTI FIRST,

Plaintiff,

INDEX NO. 150702/2019

MOTION DATE 07/14/2022

- v -

MOTION SEQ. NO. 005

400 TIMES SQUARE ASSOCIATES, LLC, BR
CONSTRUCTION CORP., SCOTT 42 DEVELOPMENT,
LTD, CACTUS ON NINTH, LLC, NEW YORK CITY
ENVIRONMENTAL CONTROL BOARD, NES
EQUIPMENT SERVICES CORPORATION D/B/A NES
RENTALS, KENSEAL CONSTRUCTION PRODUCTS OF
MARYLAND INC. N/K/A HD SUPPLY CONSTRUCTION
SUPPLY, LTD., TANNER BOLT & NUT INC., FENSTE INC.

**DECISION + ORDER ON
MOTION**

Defendant.

-----X

HON. JOEL M. COHEN:

The following e-filed documents, listed by NYSCEF document number (Motion 005) 177, 178, 179, 180, 181, 182, 183, 184, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200 were read on this motion to COMPEL DISCOVERY.

Defendant 400 Times Square Associates, LLC (“400 Times Square” or “Defendant”) moves pursuant to CPLR 3124, to compel Plaintiff O’Keeffe’s Inc. d/b/a Safti First (“O’Keeffe’s” or “Plaintiff”) to respond fully and completely to the supplemental discovery requests of 400 Times Square dated April 26, 2022, and to produce William O’Keeffe for a deposition in compliance with the Notice to Take Deposition upon Oral Examination dated April 26, 2022, that was served by defendant 400 Times Square, or, in the alternative, to preclude (NYSCEF 177). The motion is GRANTED in part to the limited extent that Plaintiff shall conduct a search for the documents identified in Paragraph 23 of the Affidavit of Victor A. Worms and is otherwise DENIED.

According to 400 Times Square, “the remaining discovery in this action is narrowly confined to whether the plaintiff has evidence to demonstrate that it invoiced Crowne Architecture for labor expended to install the fire-rated glass in the defendant's building” (Worms Aff. ¶22 [NYSCEF 178]). Counsel for 400 Times Square references three important categories of documents it has requested (Worms Aff. ¶23) :

Copies of all invoices, bills or any other documents sent to Crowne by Plaintiff reflecting all charges or expenses for labor rendered to 400 Times Square for the preparation of the Building for the installation of the fire-rated glass in the Building;

Copies of all invoices, bills or any other documents sent to Crowne by Plaintiff reflecting all charges or expenses for labor rendered to 400 Times Square for the installation of the fire-rated glass in the Building; and

Copies of all invoices, bills or any other documents sent to Crowne by Plaintiff reflecting all charges or expenses for the manufacturing of the fire-rated glass that was installed in the Building.

Counsel for 400 Times Square also requested a *Jackson* Affidavit concerning Plaintiff's searches (NYSCEF 200).

Plaintiff has submitted an affidavit of Catherine Masuda, Plaintiff's Vice President, Contracts Administration (NYSCEF 186) stating that Plaintiff did not supply labor on the project and that she “is not aware of the existence of any such documents” sought by 400 Times Square. Additionally, Plaintiff has produced sworn interrogatory responses of 400 Times Square indicating that co-defendant BRF Construction Corp. – not Plaintiff – performed labor on the project supporting Plaintiff's claim that it does not have the documents 400 Times Square seeks (NYSCEF 193). On this record, Plaintiff is directed to conduct a thorough search for the documents identified in Paragraph 23 of the Worms Affidavit and produce those documents or a supplemental *Jackson* Affidavit detailing its searches and certifying that no documents were

located within thirty (30) days (*Agius v Gray Line Corp.*, 75 Misc 3d 1219(A) [Sup Ct New York County 2022]).

The motion to depose William O’Keeffe in lieu of Catherine Masuda is denied. Plaintiff timely filed a CPLR 3106(d) notice indicating that it would produce Ms. Masuda as a corporate representative (NYSCEF 194). CPLR 3106(d) is expressly referenced in Rule 11-f of the Commercial Division Rules and permits an entity, like Plaintiff, to designate a deponent on at least ten days’ notice (22 NYCRR 202.70). Plaintiff’s offer to produce Masuda was proper and the motion to depose Mr. O’Keeffe in her stead is denied (*Barnwell v Emigrant Sav. Bank*, 81 AD3d 518, 518 [1st Dept 2011]). The time for taking party depositions has otherwise expired (NYSCEF 174).

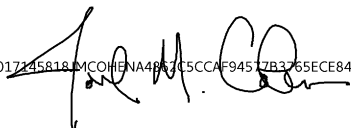
* * * *

Accordingly, it is

ORDERED that Defendants’ motion to compel the production of documents is **GRANTED** to the limited extent that Plaintiff shall conduct a thorough search for the documents identified in Paragraph 23 of the Worms Affidavit and produce those documents or a supplemental *Jackson* Affidavit within thirty (30) days and is otherwise **DENIED**; it is further

ORDERED that Defendants’ motion to compel the deposition of William O’Keeffe is **DENIED**.

This constitutes the Decision and Order of the Court.

20221017245818 J M COHEN A488745CCAF9457B3765ECE8410556B


JOEL M. COHEN, J.S.C.

10/17/2022

DATE

CHECK ONE:

CASE DISPOSED

GRANTED

DENIED

SETTLE ORDER

INCLUDES TRANSFER/REASSIGN

NON-FINAL DISPOSITION

GRANTED IN PART

SUBMIT ORDER

FIDUCIARY APPOINTMENT

OTHER

REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: