

Koziol v 1625 DB Inc.
2022 NY Slip Op 33754(U)
November 1, 2022
Supreme Court, New York County
Docket Number: Index No. 652489/2020
Judge: Arlene P. Bluth
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. ARLENE P. BLUTH PART 14

Justice

-----X

JUSTIN KOZIOL, BENTO BROOKLYN LLC,

Plaintiff,

- v -

1625 DB INC., KBRNY INC., DANIEL MCFARLANE,

Defendant.

-----X

1625 DB INC.

Plaintiff,

-against-

PENG & SONS INC., JEFF LIM

Defendant.

-----X

INDEX NO. 652489/2020

MOTION DATE 10/31/2022

MOTION SEQ. NO. 002

**DECISION + ORDER ON
MOTION**

Third-Party
Index No. 595202/2021

The following e-filed documents, listed by NYSCEF document number (Motion 002) 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78

were read on this motion to/for STRIKE PLEADINGS.

The motion by defendants 1625 DB Inc. and KBRNY Inc. (collectively, "Movants") to strike the complaint and to strike the answer for third-party defendants' answer is denied. The cross-motion by plaintiffs to compel is denied.

Background

In this action about a failed design and build project, Movants seek to strike plaintiffs' complaint on the ground that they failed to comply with discovery obligations. Movants argue that plaintiffs failed to serve responses to their demand for a verified bill of particulars or otherwise respond to Movants' other outstanding discovery demands. They also claim that the

third-party defendants have not produced any documents except for service of responses/objections to a notice to produce.

In opposition, the third-party defendants observe that the moving papers do not specify what is outstanding but insist Movants want responses to a demand for expert witness information, a demand about prior lawsuits and a demand for witnesses. They claim that their counsel informally told counsel for Movants that they do not intend to call an expert witness at trial and provided the names of witnesses as well as information about a prior lawsuit. They argue that on October 10, 2022 (before the instant motion was filed), they served responses and objections and claimed they would send along responsive documents, which were eventually sent on October 14, 2022.

Plaintiffs cross-move to compel Movants to comply with a request for documents. They admit they delayed in producing a bill of particulars but sent one (albeit one that was initially unverified) the day before Movants filed the instant motion. They insist they responded to all outstanding discovery demands.

In reply, Movants argue that plaintiffs failed to cite a reasonable excuse for failing to timely serve a bill of particulars. They emphasize the bill of particulars they received was unverified and did not send a verification page until a week later. Movants also complain about the quality of the bill of particulars. They admit that plaintiffs finally served responses to defendants' demand for witnesses and prior lawsuits.

With respect to the cross-motion, Movants claim that plaintiffs' second request for documents is duplicative of its first request, that defendants responded to this second request and noted they would produce non-privileged documents if they had any but they do not have any more documents. Movants insist they produced a requested contract on June 15, 2022 and cite to

a bates-stamp range and insist they do not have copies of agreements with the expeditor, engineer, and architect because the third-party defendants retained those professionals. Movants also submit affidavits of two employees who insist that they have turned over all responsive documents.

In reply to the cross-motion, plaintiffs argue that the bill of particulars is sufficient and that the affidavits submitted by Movants are wholly insufficient. Plaintiffs demand that Movants provide a Jackson affidavit on the ground that Movants should have communications with various governmental organizations (the case involves, among other things, the interplay between the New York City Landmarks Preservation Commission and a construction project).

Discussion

Clearly, the Court's order dated June 15, 2022, directing that a note of issue be filed by August 22, 2022 based upon the parties' failure to update the Court or make any significant progress (NYSCEF Doc. No. 27), got the parties to pay attention to the case. That deadline was later extended to November 15, 2022 by the Court (NYSCEF Doc. No. 33).

On these papers, the Court finds that both the motion and the cross-motion are moot. The parties (Movants, plaintiffs, and third-party defendants) all represent that they have produced the documents they possess and have now responded to the outstanding discovery demands. Plaintiffs finally produced a verified bill of particulars and while Movants may not like it, the Court declines to strike the complaint because it is not detailed enough for Movants. There is no doubt that the parties know what this case is about- the verified complaint contains detailed allegations.

The Court observes that the parties' sudden focus on the case does not justify striking a pleading. The parties have had more than enough time—this case started in November 2020—to

complete significant discovery. For whatever reason, they have waited until now to move the case.

The Court adds, however, that any discovery not yet produced by November 15, 2022 cannot be used at trial or in subsequent motion practice. That way no party can claim unfair surprise or engage in any last-minute gamesmanship. The Court extends the note of issue deadline from November 15, 2022 to November 30, 2022. That should more than enough time to complete discovery, considering this is not the first time the Court has extended the note of issue deadline.

Accordingly, it is hereby

ORDERED that defendants' motion to strike the complaint is denied and plaintiff's cross-motion is also denied, and a note of issue shall be filed on or before November 30, 2022; and it is further

ORDERED that any documents not produced by November 15, 2022 cannot be used in subsequent motion practice or at trial.

11/1/2022
DATE


ARLENE P. BLUTH, 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