

CallisonRTKL Inc. v Envirochrome Interiors, Inc.

2022 NY Slip Op 33786(U)

November 3, 2022

Supreme Court, New York County

Docket Number: Index No. 656981/2019

Judge: Arlene Bluth

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(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: PART 14

-----X

CALLISONRTKL INC., CALLISON RTKL ARCHITECTS
PC, ON-TRAC CONSTRUCTION ASSOCIATES, INC.,

INDEX NO. 656981/2019

Plaintiffs,

MOTION DATE 10/21/2022

- v -

MOTION SEQ. NO. 004 005

ENVIROCHROME INTERIORS, INC., BRIAN P.
ROTHSCHILD,

Defendants.

**DECISION + ORDER ON
MOTION**

-----X

HON. ARLENE P. BLUTH:

The following e-filed documents, listed by NYSCEF document number (Motion 004) 120, 121, 122, 123, 124, 125, 126, 127, 128, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 173, 177, 178

were read on this motion to/for DISCOVERY.

The following e-filed documents, listed by NYSCEF document number (Motion 005) 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 172, 174, 179, 180

were read on this motion to/for DISCOVERY.

Motion Sequence Numbers 004 and 005 are consolidated for disposition.

Defendants’ motion (Motion Sequence 004) to compel is denied as moot, Plaintiffs’ motion (Motion Sequence 005) to compel is granted and defendants’ cross motion to dismiss plaintiffs’ cause of action for trust fund diversion is granted and a protective order is granted.

Background

This action arises out of a commercial construction project. In or about June, 2018, plaintiff CallisonRTKL Inc. entered into an agreement with defendant Envirochrome, a general contractor, to build out offices located at 233 Broadway in Manhattan. Plaintiff On-Trac was a subcontractor hired by Envirochrome but has since been paid by Envirochrome. Plaintiffs contend that in connection with the final payment request from Envirochrome, defendants represented

that they had completed the work and had already paid all money owed to employees and subcontractors.

Plaintiffs claim that less than a year later, two subcontractors filed mechanic's liens totaling \$379,700.59 and a third subcontractor has threatened to file another lien.

The parties submitted a letter to this Court on July 28, 2022 detailing discovery disputes. Plaintiffs sought records pertaining to defendant Brian Rothschild; specifically, they wanted records on his new employment and records on the issue of possible trust fund diversion. The defendants sought records that would more accurately specify plaintiffs' alleged damages. The Court instructed the parties to submit these matters via motions.

Defendants filed this motion (Seq. 4) to compel discovery related to plaintiffs' claimed damages. Defendants allege that plaintiffs failed to produce documentary evidence of damages except for some invoices for bond premiums. Furthermore, since defendants initially served plaintiffs with discovery demands on September 27, 2021, defendants contend that the 20-day deadline to object or reply to defendants' interrogatories and requests for production of documents has passed.

Plaintiffs filed a separate motion to compel (Seq. 5), requesting all accounting books related to the building project and evidence of a "mysterious apparent cessation of Envirochrome's business after this suit was commenced," (NYSCEF Doc. No. 141 at 4). Plaintiffs believe these documents will shed light on defendants' fraudulent conduct. Plaintiffs further seek information related to defendant Rothschild's new employment with Ambassador Construction. Plaintiffs contend that, even though it was years later, Rothschild was hiring the subcontractors who worked on plaintiffs' project to work on projects because he still owed them money from plaintiff's project.

In opposition, defendants claim Rothschild's employment with Ambassador Construction is not relevant to the instant litigation and plaintiffs are engaging in a campaign of harassment with the goal of embarrassing Rothschild. Defendants filed a cross motion for partial summary judgment dismissing the claim for trust fund diversion based on lack of standing and seek a protective order with regard to the information plaintiffs seek. Defendant contends that plaintiffs are not beneficiaries for purposes of the claim for trust fund diversion because defendants already paid off any outstanding liens issued by the subcontractors, not plaintiffs.

In opposition to defendant's cross-motion and in reply, plaintiffs contend only the liens from subcontractors who sued were discharged, alleging it is possible subcontractors who did not sue were not paid in full. Plaintiffs further contend that because defendants have not shown what they did with the money plaintiff paid to Envirochrome, defendants are not entitled to summary judgment dismissing the cause of action for trust fund diversion.

Discussion

“Disclosure in civil actions is generally governed by CPLR 3101 (a), which directs: there shall be full disclosure of all matter material and necessary in the prosecution or defense of an action, regardless of the burden of proof. We have emphasized that the words, ‘material and necessary’, are . . . to be interpreted liberally to require disclosure, upon request, of any facts bearing on the controversy which will assist preparation for trial by sharpening the issues and reducing delay and prolixity. The test is one of usefulness and reason. A party seeking discovery must satisfy the threshold requirement that the request is reasonably calculated to yield information that is “material and necessary”—i.e., relevant—regardless of whether discovery is sought from another party or a non party” (*Forman v Henkin*, 30 NY3d 656, 661, 70 NYS3d 157 [2018] [internal quotations and citations omitted]).

Defendants' Motion to Compel (MS 004)

Defendants seek material related to plaintiffs' claim for damages. Information regarding a party's damages is unquestionably relevant. Plaintiffs' most recent production of legal invoices contained redactions, and while defendants allege the documents were unorganized, the Court did not find that the handful of redactions burdened defendants' ability to interpret the charges; however, given the presence of redactions, plaintiffs must provide a privilege log to defendants. As the Court noted, the small number of redactions does not make this an onerous task for plaintiffs.

The Court finds that plaintiffs produced the requested documents on August 24, 2022. However, in light of these motions, the Court will give plaintiffs one last chance to go through its files and produce any document not already provided (with privilege log, if applicable) to support their damages. The Court also determines that plaintiffs may not use or rely upon any documents not produced by November 30, 2022 at trial or in future motion practice, except for attorneys' fees incurred after the production (or, of course, if another subcontractor makes a claim for work on the subject project and plaintiffs pay it).

Plaintiffs' Motion to Compel (MS 005)

Plaintiffs seek information about accounting files and records that will demonstrate when certain subcontractors were paid. These documents are clearly relevant to the instant litigation as plaintiffs allege that defendants did not pay subcontractors according to the contract (if at all). Plaintiffs allege these documents are important to proving their second cause of action for unjust enrichment, third and fourth causes of action for breach of express warranty, sixth cause of action for fraud, and seventh cause of action for breach of fiduciary duty. The accounting books should be able to illustrate what defendants were paying, when they were paying it, and to whom

those payments were made—all of which are relevant to demonstrating fraudulent activity. The fact that many liens were paid or discharged does not absolve defendants of their duty to produce discoverable material.

The Court finds that defendants must produce the demanded accounting documents on or before November 30, 2022. The Court also finds that defendants may not use or rely upon any documents not produced by November 30, 2022 at trial or in future motion practice.

Defendants' Partial Summary Judgment Dismissing Trust Fund Diversion

To be entitled to the remedy of summary judgment, the moving party “must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact from the case” (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853, 487 NYS2d 316 [1985]). The failure to make such a prima facie showing requires denial of the motion, regardless of the sufficiency of any opposing papers (*id.*). When deciding a summary judgment motion, the court views the alleged facts in the light most favorable to the non-moving party (*Sosa v 46th St. Dev. LLC*, 101 AD3d 490, 492 [1st Dept 2012]).

“As the Lien Law makes clear, the purpose of the Lien Law was to ensure that *subcontractors* get paid for their work without necessarily having to resort to the filing of a mechanic's lien on the real property. Thus, beneficiaries of the Lien Law are primarily subcontractors who have not been paid by owners or general contractors for work done on real property” (*514 W. 24th Owner LLC v Pryor*, 2019 NY Misc Lexis 2272, 2019 NY Slip Op 31300 [U], *7 [Sup Ct, NY County 2019) “ Real property owners, such as Plaintiffs, that are not trust beneficiaries under the Lien Law, may nevertheless enforce trust provisions if they make

payments directly to a subcontractor on behalf of a general contractor to avoid the subcontractor filing a mechanic's lien on the owner's property" (*id.*).

Here, plaintiffs are neither subcontractors nor did they make direct payments to the subcontractors working on plaintiffs' building project. There were liens filed and plaintiffs posted bonds, but defendants eventually paid the subcontractors, not plaintiffs. Plaintiffs failed to raise a material issue of fact from which a factfinder could conclude they are trust fund beneficiaries. Therefore, this cause of action is severed and dismissed.

Defendant's Protective Order (MS 005)

"For a protective order to be issued, the party seeking such an order must make a factual showing of 'unreasonable annoyance, expense, embarrassment, disadvantage, or other prejudice. Trial courts are vested with broad discretion to issue appropriate protective orders to limit discovery.... This discretion is to be exercised with the competing interests of the parties and the truth-finding goal of the discovery process in mind" (*Cascardo v Cascardo*, 136 AD3d 729, 729-30, 24 NYS3d 742 [2d Dept 2016] [internal quotations and citations omitted]).

Plaintiffs seek Rothchild's compensation at Ambassador and any business opportunities that he may have presented to Ambassador while he was still employed at Envirochrome. Defendants specifically object to plaintiffs' requests numbered 9 and 10 on Plaintiffs' Demand for Discovery and Inspection (NYSCEF Doc. No. 148). Number 9 requests defendants turn over "[a]ll documents referring or related to business opportunities Brian Rothschild brought to or presented to Ambassador Construction that arose or came into being while Brian Rothschild maintain[ed] ownership interest in Envirochrome Interiors, Inc." (*id.* at 8). Similarly, number 10 requests "[a]ll documents referring or related to the compensation package between Brian Rothschild and Ambassador Construction arising out of or relating to the procurement of new

sales or construction renovation opportunities,” (*id.*). Rothschild began his employment with Ambassador more than two years after plaintiffs’ project ended. These documents are not a necessary part of plaintiffs’ claims given the passage of time from project completion to Rothschild’s new employment with Ambassador. Business opportunities years after plaintiffs’ project do not present relevant discoverable information. Plaintiffs speculate that this information may uncover some indication of fraud or bias of witnesses they might depose later.

If plaintiffs believe Rothschild committed fraud as they allege, such activity will show itself in the accounting books that this Court has ordered to be produced. Alternatively, plaintiffs can explore Rothschild’s role at a deposition and seek discovery based on his responses. But at this stage, the Court views these requests about Ambassador, Rothchild’s current employer, are too removed from the construction project at issue here. Plaintiffs cannot engage in a fishing expedition to discover “the lengths [defendant] is willing to go to prevent subcontractors from getting his assets,” (NYSCEF Doc. No. 179 at 13). There is no concrete goal in retrieving that information. Plaintiffs did not sufficiently explain how it relates to their case in chief. Therefore, the Court grants defendants’ protective order. If information is discovered that makes Rothchild’s relationship with Ambassador relevant, another motion may be made to vacate the protective order.

Accordingly, it is hereby

ORDERED that defendants’ motion (MS 004) to compel is denied as moot and plaintiffs must produce any additional documents they plan to use no later than November 30, 2022 and anything not produced by this date cannot be used at trial or in a future motion (except for damages that accrue after the November production); and it is further

ORDERED that plaintiffs' motion to compel (MS 005) is granted and defendants must produce any additional documents, including documents proving payments to all subcontractors on the project, no later than November 30, 2022 and any documents not produced by that date cannot be used at trial or in a future motion; and it is further


ORDERED that the cross-motion by defendants to dismiss plaintiffs' cause of action for trust fund diversion is granted and this cause of action is severed and dismissed; and it is further

ORDERED that defendants' protective order quashing plaintiffs' discovery requests 9 and 10 is granted at this time.

Due to the above deadlines, the conference already scheduled in this matter for November 14, 2022 is adjourned to December 14, 2022 at 12:00 pm (NYSCEF Doc. No. 176).

By December 7, 2022, the parties must upload 1) a discovery stipulation signed by all parties, 2) a stipulation of partial agreement and the respective parties' positions on the items to which they do not agree or 3) letters describing why no agreement about discovery could be reached.

The failure to upload something by December 7, 2022 may result in an adjournment of the conference or the Court may order that a note of issue be filed.

<u>11/3/2022</u> DATE			 ARLENE BLUTH, J.S.C.
CHECK ONE:	<input type="checkbox"/> CASE DISPOSED	<input checked="" type="checkbox"/> NON-FINAL DISPOSITION	
	<input type="checkbox"/> GRANTED	<input type="checkbox"/> DENIED	<input type="checkbox"/> OTHER
APPLICATION:	<input type="checkbox"/> SETTLE ORDER	<input type="checkbox"/> SUBMIT ORDER	
CHECK IF APPROPRIATE:	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/> FIDUCIARY APPOINTMENT	<input type="checkbox"/> REFERENCE