

Board of Mgrs. of the Porter House Condominium v Delshah 60 Ninth LLC
2022 NY Slip Op 33913(U)
November 18, 2022
Supreme Court, New York County
Docket Number: Index No. 157034/2018
Judge: Arlene P. Bluth
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
NEW YORK COUNTY

PRESENT: HON. ARLENE P. BLUTH PART 14

Justice

-----X

BOARD OF MANAGERS OF THE PORTER HOUSE
CONDOMINIUM,

Plaintiff,

- v -

DELSHAH 60 NINTH LLC,

Defendant.

-----X

DELSHAH 60 NINTH LLC

Plaintiff,

-against-

ANTONIO DI ORONZO, BLUARCH LLC

Defendant.

-----X

INDEX NO. 157034/2018

MOTION DATE 11/14/2022

MOTION SEQ. NO. 009

DECISION + ORDER ON MOTION

Third-Party
Index No. 595236/2020

The following e-filed documents, listed by NYSCEF document number (Motion 009) 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329

were read on this motion to/for DISCOVERY.

Defendant's motion to compel plaintiff to permit access the affected units and to compel third-party defendants to respond to a document request is granted in part and denied in part. The cross-motion by the third-party defendants for access to plaintiff's premises is granted

Background

Plaintiff owns a ten-story condo located at 66 Ninth Avenue. It claims that its predecessor entered into an agreement with the owner of the building next door (defendant Delshah's predecessor) which imposed a perpetual easement of light and air and restricted

elevations on the upper and lower roofs of Delshah's building. Plaintiff claims that defendant breached the easement agreement during renovations in 2016 and that some of its unit owners had their views obstructed. Delshah obtained a final certificate of occupancy for its building in May 2018.

Plaintiff argues that structures on the roof allegedly added by Delshah in 2016, including a stair bulkhead and an elevator bulkhead on the upper portion of the roof, exceed a height restriction contained in the easement agreement. Plaintiff also complains about an HVAC unit installed on the lower portion of the roof which allegedly also exceeded the elevation permitted under the agreement and is noisy; Delshah claims that a 2005 agreement (the "Smog Hog Agreement") expressly allows an HVAC unit on this portion of the roof. Also at issue are two sky lights added to the lower roof top.

Defendant seeks access to the affected units (the units that have their views obstructed) so that its appraisal expert can prepare a report. It also seeks to compel third-party defendants to respond to an outstanding document demand. Defendant points out that it served a notice for this access on February 28, 2019 and admit that an inspection took place on November 8, 2019. It observes that at the 2019 inspection, it had not yet determined whether it would use an expert. Defendant contends that it hired an expert on July 26, 2022 and sought permission to access the building, but plaintiff refused.

In opposition, plaintiff argues that defendant had ample opportunity to inspect the units at the November 2019 inspection and, for whatever reason, defendant decided not to bring an expert to that inspection. Plaintiff questions why defendant waited three years to now suddenly demand another inspection. It also observes that defendant did not serve a demand for the requested discovery and so it cannot make a motion to compel. Plaintiff points to the fact that

defendant moved for summary judgment and utilized photographs and affidavits from other experts, but that the Court ultimately denied that effort. Plaintiff emphasizes it would utterly inconvenience the owners.

The third-party defendants contend that they have now responded to the subject demands cited by defendant as part of the instant motion. They also cross-move for access to the affected units to the extent that the Court grants access to defendants.

Plaintiff points out in opposition to the third-party defendants' cross-motion that these parties were also afforded an opportunity to inspect the premises and did so in November 2019.

In reply, defendant claims that the unit owners themselves have not yet been deposed and party discovery is not completed. While defendant acknowledges that a previous court order (issued by the judge previously assigned to this case) directed that inspections be completed by November 30, 2019, defendant points out all the ways in which this case has been delayed.

Discussion

The Court grants the motion. While plaintiff is understandably frustrated with defendant's sudden decision, three years after doing an inspection, to hire an expert and demand another inspection, the fact is that there is little prejudice to the unit owners outside of inconvenience. Moreover, the prejudice to defendant's expert will likely be significant. That expert, if he does not actually visit the units, will likely face numerous questions at trial about how he could make an appraisal without actually visiting the apartments in question. Those credibility questions cannot be summarily overlooked. And plaintiff does not point to a discovery deadline that has passed requiring defendant to identify its experts. Defendant's decision to hire an expert this late in a litigation is not the most efficient strategy but the Court is unable to find that plaintiff has stated a valid basis to deny defendant's requested relief.


That defendant allegedly did not send over a formal notice for this discovery is besides the point. Rather than deny the motion on a technicality and drag this dispute along even longer, the Court finds that the most efficient route is to grant the motion and the cross-motion to the extent that defendant and the third-party defendants are entitled to another inspection of the units to be done by December 31, 2022. The failure to complete the inspection by this date without good cause shown will result in a waiver of the inspection (assuming, of course, that defendant or the third-party defendants delayed the inspection rather the unit owners or plaintiff).

The Court also finds that the branch of defendant’s motion to compel discovery from the third-party defendants is denied as moot as the requested discovery was purportedly produced in opposition and defendant withdrew this branch of the motion in reply.

Accordingly, it is hereby

ORDERED that defendant’s motion and third-party defendants’ cross-motion are granted to the extent that they are entitled to another inspection of the affected units (the same inspection provided in November 2019) and this inspection must take place on or before December 31, 2022 or it is waived absent good cause shown.

Next Conference: January 12, 2023 at 12 p.m. (*see* NYSCEF Doc. No. 330).

<u>11/18/2022</u> DATE	 ARLENE P. BLUTH, J.S.C.			
CHECK ONE: APPLICATION: CHECK IF APPROPRIATE:	<input type="checkbox"/> CASE DISPOSED <input type="checkbox"/> GRANTED <input type="checkbox"/> SETTLE ORDER <input type="checkbox"/> INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/> DENIED	<input checked="" type="checkbox"/> NON-FINAL DISPOSITION <input type="checkbox"/> GRANTED IN PART <input type="checkbox"/> SUBMIT ORDER <input type="checkbox"/> FIDUCIARY APPOINTMENT	<input checked="" type="checkbox"/> OTHER <input type="checkbox"/> REFERENCE