

**CM & Assoc. Constr. Mgt. L.L.C. v
Admiral A.C. Corp.**

2022 NY Slip Op 34041(U)

November 28, 2022

Supreme Court, New York County

Docket Number: Index No. 651872/2020

Judge: Arlene P. 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
NEW YORK COUNTY**

PRESENT: HON. ARLENE P. BLUTH PART 14

Justice

-----X

CM AND ASSOCIATES CONSTRUCTION MANAGEMENT
LIMITED LIABILITY COMPANY

Plaintiff,

- v -

ADMIRAL AIR CONDITIONING CORP.,

Defendant.

-----X

INDEX NO. 651872/2020

MOTION DATE 11/28/2022

MOTION SEQ. NO. 001

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 001) 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67

were read on this motion to/for VACATE/STRIKE - NOTE OF ISSUE.

Defendant's motion to strike the note of issue is denied.

Background

In this matter, plaintiff, a general contractor, contends that it hired defendant to provide the labor, materials and equipment required to install an HVAC system at a construction project.

After years of discovery conferences, the parties uploaded a proposed stipulation on July 25, 2022. This stipulation required *inter alia* plaintiff to respond to certain post-deposition demands by August 31, 2022 (NYSCEF Doc. No. 40). The parties also included a vague provision that defendant "reserves the right to pursue further discovery including further depositions depending on the content of the discovery response" (*id.*). The Court issued a note of issue deadline of September 16, 2022 given that there were only a few items remaining.

Plaintiff complied with the directive that it respond to the post-deposition demands by serving a response on August 30, 2022 (NYSCEF Doc. No. 51). Nothing was subsequently

uploaded until plaintiff filed a note of issue on September 12, 2022 (NYSCEF Doc. No. 41). Defendant then made this motion on September 30, 2022 and claims that it demanded that plaintiff withdraw the note of issue and that plaintiff sit for an additional deposition. It claims that plaintiff's deposition was not productive because the witness produced only started working for plaintiff in 2019 and did not have any involvement in the subject project until 2020.

Defendant claims that there are issues relating to defendant's work in the building going back to 2013, including various emails and invoices as well as complaints about the quality of defendant's work. Defendant wants the deposition of the owner of plaintiff.

In opposition, plaintiff contends that the instant motion is baseless and points out that defendant did not raise timely objections to the August 30, 2022 post-deposition responses from plaintiff. Plaintiff emphasizes that the Court directed the completion of discovery by a date certain and defendant's efforts are untimely. It claims that defendant waived the right to seek another deposition.

In reply, defendant claims it would have been bad faith to seek another deposition immediately and that the responses at issue were only sent 13 days before the note of issue was filed.

Discussion

The Court denies the motion. As an initial matter, the deposition that defendant claims was wholly inadequate was completed on *April 14, 2022* (NYSCEF Doc. No. 48 [transcript]). Defendant's description of this deposition makes it clear that defendant should have demanded another deposition before the instant application (which was filed more than five months later). It is unclear what additional information included in the post-deposition demands could have prevented the instant motion where defendant claims that this witness lacked fundamental

knowledge about the case. This is not a situation where, at least according to defendant, the witness produced was unable to answer a few, isolated questions. Rather, defendant seems to say that this deposition was not productive at all.

But, for whatever reason, defendant decided to wait for plaintiff to respond to the post-deposition demands (which were initially dated April 26, 2022). Defendant stipulated to permit plaintiff to respond by August 31, 2022 and the Court then issued a note of issue deadline of September 16, 2022. These deadlines were from a stipulation uploaded on July 26, 2022. Therefore, defendant had more than adequate notice that a note of issue deadline was upcoming and that it would have to quickly decide what to do if plaintiff's responses were not satisfactory to defendant. There is no dispute that plaintiff timely responded. Then, for some reason, defendant (knowing that there was a note of issue deadline) decided not to do anything about either 1) its desire to take another deposition of plaintiff or 2) its apparent unhappiness with plaintiff's August 30 responses.

Instead, defendant waited until after plaintiff filed the note of issue to send a letter to plaintiff (a week later on September 19, 2022) and then to file the instant motion. Court-ordered deadlines must be accompanied by appropriate consequences. The Court set a clear and unambiguous schedule to complete discovery and defendant decided to follow its own timeline. That is not a reason to strike the note of issue. Defendant failed to seek a further discovery conference, failed to timely object to the allegedly objectionable post-deposition responses and failed to make a motion prior to the note of issue deadline.

That the parties included vague language in the July 2022 discovery stipulation about defendant reserving its rights to seek another deposition of plaintiff is of no moment. Plaintiff did not agree to submit to a further deposition; it merely acknowledged that defendant might do

something. And defendant decided not to seek this discovery before the note of issue was filed.

That means that defendant waived its right to seek another deposition.

Accordingly, it is hereby

ORDERED that defendant's motion to strike the note of issue is denied.

<u>11/28/2022</u> DATE		<u>ARLENE P. BLUTH, J.S.C.</u>
CHECK ONE:	<input type="checkbox"/> CASE DISPOSED	<input checked="" type="checkbox"/> NON-FINAL DISPOSITION
	<input type="checkbox"/> GRANTED	<input type="checkbox"/> GRANTED IN PART
APPLICATION:	<input checked="" type="checkbox"/> DENIED	<input type="checkbox"/> OTHER
	<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