

<b>Men of Steel Enters., LLC v Bespoke Harlem W., LLC</b>
2023 NY Slip Op 30404(U)
February 7, 2023
Supreme Court, New York County
Docket Number: Index No. 654537/2020
Judge: Joel M. Cohen
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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 03M

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MEN OF STEEL ENTERPRISES, LLC, EMPIRE STATE  
REBAR INSTALL, LLC,

Plaintiffs,

- v -

BESPOKE HARLEM WEST, LLC, HAPPY LIVING  
DEVELOPMENT, LLC, RISE DEVELOPMENT  
PARTNERS, LLC, PHILADELPHIA INDEMNITY  
INSURANCE COMPANY, CLEAN EARTH INC., GMS  
PILING PRODUCTS, LLC, PRIME MIX CORP., CAPITAL  
CONCRETE NY INC., CONNOLLY & SON  
CONSTRUCTION INC., AHERN RENTALS  
INC., FELDMAN LUMBER-US LBM LLC, VIKXS  
SERVICES, INC., US CONCRETE INC.- NYC DIVISION,  
UNITED RENTALS (NORTH AMERICA) INC., NEW YORK  
CONCRETE WASHOUT SYSTEMS, INC., S & E  
BUILDING MATERIALS CO. INC., HD SUPPLY  
CONSTRUCTION & INDUSTRIAL, COVA CONCRETE  
CORP., E&G CARPENTER CORP., RISE CONCRETE,  
LLC, OVER THE TOP LIFTING, LLC, TITAN FORMWORKS  
SYSTEMS, LLC, 1 SEAL USA, LLC,

Defendants.

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US CONCRETE INC.- NYC DIVISION

Plaintiff,

-against-

WESTCHESTER FIRE INSURANCE COMPANY

Defendant.

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INDEX NO. 654537/2020

MOTION DATE N/A

MOTION SEQ. NO. 003

**DECISION + ORDER ON  
MOTION**

Third-Party  
Index No. 595335/2021

HON. JOEL M. COHEN:

The following e-filed documents, listed by NYSCEF document number (Motion 003) 144, 145, 146, 147,  
148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167,  
168, 169

were read on this motion to COMPEL DISCOVERY.

Defendant Happy Living Development LLC (“Happy Living”) moves for an Order (i) pursuant to CPLR 3124 compelling plaintiffs Men of Steel Enterprises LLC and Empire State Rebar Install, LLC (“Plaintiffs”), to produce proper, full, and complete responses to the Happy Living’s first set of discovery demands and issuing a conditional order of dismissal of the complaint if such production is not made within twenty days of the order, and (ii) in the alternative, pursuant to CPLR § 3126(3) striking the complaint of Plaintiffs for willfully failing to produce disclosures in contravention of orders of this Court.

Happy Living’s motion is granted in part. “CPLR 3101(a) provides that there shall be full disclosure of all matter material and necessary in the prosecution of an action” (*Blair v Otto Brehm, Inc.*, 54 AD3d 702, 702 [2d Dept 2008]). Where discovery demands are relevant to the causes of action and are not unduly burdensome, a motion to compel should be properly granted (*see T.A. Ahern Contrs. Corp. v Dormitory Auth. of State of NY*, 24 Misc 3d 416 [Sup Ct, NY County 2009]).

As relevant here, Plaintiffs commenced this action seeking \$1,265,107.35 for amounts allegedly due to Plaintiffs under a contract for the fabrication and installation of steel reinforcing bar (“rebar”). Plaintiff alleges that Happy Living contracted with Defendant Rise Concrete, LLC (“Rise”) for Rise to provide and install concrete for the construction of a condominium on the Property, and that, in turn, Rise contracted with Plaintiffs for the fabrication and installation of the rebar at the Property for the sum of \$3,830,242.59 (*see* NYSCEF 11 [“Contract”]; NYSCEF 41 ¶¶67–68 [Second Amended Complaint (“SAC”)]). Plaintiffs allege that they substantially performed the terms of the contract, furnishing and installing the rebar at the Property as specified in the Contract (SAC ¶71). Plaintiffs further alleges that Happy Living paid Plaintiffs the sum of \$2,565,135.24, leaving the sum of \$1,265,107.35 due and owing under the contract

(SAC ¶¶77–83). In response to Plaintiffs’ allegations, Happy Living filed an Answer alleging, among other things, that it paid for the services which are the subject of this action (NYSCEF 126).

In this motion, Happy Living argues that Plaintiffs purport to be owed \$ 1,265,107.35 in this action, yet they have to date failed to substantiate their claim with documentary evidence establishing the delivery and installation of the steel at issue and the weight of said steel, among other deficiencies. In response to Plaintiffs’ submission that “they have produced all documents in their possession, custody, or control relating to the steel they delivered and installed on the Project” (*see* NYSCEF 164 ¶ 19 [“Deal Aff.”]), Happy Living argues that Plaintiffs have failed to produce: (i) signed change orders, constituting approval of rebar delivery; (ii) all signed foundational drawings; (iii) third-party contracts; and (iv) all signed bill of ladings. Happy Living further notes that it remains unclear whether these documents exist and are being withheld by Plaintiffs.

Contrary to Happy Living’s argument, Plaintiffs did not argue that the “records regarding the steel deliveries is a matter for the ultimate fact finder in this action, and it is not a proper discovery dispute.” (NYSCEF 170 at 3 [Affirm in Reply]). Happy Living omitted the beginning of Plaintiffs’ sentence, which states in full: “*the sufficiency of Plaintiffs’* records regarding the steel deliveries is a matter for the ultimate fact finder in this action, and it is not a proper discovery dispute” (NYSCEF 169 at 7 [emphasis added]).

In their Opposition, Plaintiffs submit that they produced Plaintiff’s purchase order on the Project, all change orders relating to Plaintiffs’ work on the Project, all invoices, all bills of lading, all time tickets, all shop drawings, all drawing logs, all weight logs, all communications relating to Plaintiffs’ work on the project including text messages, and all documents relating to

payments received by Plaintiffs for work on the Project. While Happy Living argues that discovery is incomplete because Plaintiffs have not produced certain types of records (*e.g.*, *signed* change order, *signed* bills of ladings, *signed* functional drawings, etc.), Plaintiffs appear to submit that they lack the type of records Happy Living is seeking.

To the extent Plaintiffs do have any of these documents in their possession, they are ordered to produce them. Either way, Plaintiff must submit amended responses pursuant to Commercial Division Rule 11-e(d), which provides that “the responding party shall state, for each individual request: (i) whether the production of documents in its possession, custody or control and that are responsive to the individual request, as propounded or modified, is complete; or (ii) that there are no documents in its possession, custody or control that are responsive to the individual request as propounded or modified.”

Further, to the extent Plaintiffs are claiming that certain documents are protected by attorney-client privilege and/or attorney work product doctrine (an issue not specifically raised in Happy Living’s opening brief), Plaintiffs should produce a privilege log outlining these documents.

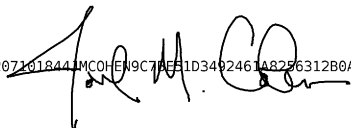
Finally, although Plaintiffs’ second production of documents was made after the deadline of March 18, 2022 (NYSCEF 139) in May 2022, the Court does not find, under these circumstances, that the alternative relief of striking the complaint for failure to comply with this Court’s discovery orders would be warranted.

Accordingly, it is

**ORDERED** that Happy Living’s motion is **GRANTED IN PART**, and Plaintiffs are directed to comply with the Court’s directions as outlined above within fourteen days of the date of this Order; it is further

**ORDERED** that the parties provide a joint letter within one week of the date of this Order regarding the status of any remaining outstanding discovery in this action.

This constitutes the decision and order of the Court.

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JOEL M. COHEN, J.S.C.

2/7/2023  
DATE

CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	
	<input type="checkbox"/>	GRANTED	<input type="checkbox"/>	GRANTED IN PART	<input type="checkbox"/>
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER		SUBMIT ORDER	
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN		FIDUCIARY APPOINTMENT	<input type="checkbox"/>
				REFERENCE	