Murphy Kennedy Group LLC v Board of Mgrs. of the St. Tropez Condominium
2023 NY Slip Op 34254(U)
November 28, 2023
Supreme Court, New York County
Docket Number: Index No. 652913/2019
Judge: Arlene P. Bluth

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. ARLENE P. BLUTH** **PART** **14**

Justice

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MURPHY KENNEDY GROUP LLC,

Plaintiff,

- v -

BOARD OF MANAGERS OF THE ST. TROPEZ CONDOMINIUM, SYLVIE DURHAM, IN HER CAPACITY AS PRESIDENT OF THE BOARD OF MANAGERS OF THE ST. TROPEZ CONDOMINIUM

Defendant.

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INDEX NO. 652913/2019

MOTION DATE N/A, N/A

MOTION SEQ. NO. 004 006

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 004) 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 142, 158, 162, 170, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 191, 193

were read on this motion to/for SANCTIONS.

The following e-filed documents, listed by NYSCEF document number (Motion 006) 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 155, 156, 159, 163, 171

were read on this motion to/for AMEND/MODIFY DECISION/ORDER/JUDGMENT.

Motion Sequence Numbers 004 and 006 are consolidated for disposition. Plaintiff's motion (MS004) for sanctions and to compel discovery is denied and defendant's cross-motion to compel is denied. Defendants' motion (MS006) to modify a prior order of this Court is denied.

Background

This action concerns a dispute about whether defendants failed to pay plaintiff for construction work that plaintiff contends it performed at defendants' condominium building.

MS004

In this motion (MS004), plaintiff seeks to compel discovery responses from defendants as well as costs and sanctions incurred as part of bringing this application. Defendants cross-move

to compel plaintiff to produce discovery. This Court issued an interim order dated February 7, 2023 with respect to this motion (NYSCEF Doc. No. 132). In it, the Court observed that although defendant Durham had signed a *Jackson* affidavit insisting that no other documents were located, a relevant report was suddenly produced a few months later (*id*.). The Court ordered that defendants had to produce documents (*id*. at 2). At the next appearance, the Court ordered an additional production of documents and directed that defendants arrange for the depositions of board members (NYSCEF Doc. No. 158).

In the intervening months, defendants cycled through multiple law firms which delayed the resolution of the instant motion. At the oral argument held today, November 28, 2023, counsel for plaintiff acknowledged that all of the items subject to the motion and subsequent interim orders were completed. That is, depositions of defendants were held and documents were produced. Although there are still some outstanding post-deposition demands, they were not part of the motion and plaintiff's counsel was hopeful the parties would work together toward completion of that discovery.

Plaintiff insists that despite these actions, defendants should be sanctioned because defendants only began to adequately participate in the discovery process once plaintiff made the instant motion. Plaintiff points out that it only received about five thousand pages of documents prior to the instant motion practice but, in the intervening months, it has now received sixteen thousand pages of relevant documents.

Plaintiff's frustration is well taken. But its demand that defendants' answer be stricken or that they be forced to pay legal fees as a sanction is denied. "While it is true that the imposition of sanctions for discovery misfeasance is a matter within the motion court's discretion, the extreme sanction of dismissal is warranted only where a clear showing has been made that non-

compliance with a discovery order was willful, contumacious, or due to bad faith" (*Rosario v New York City Hous. Auth.*, 272 AD2d 105, 105-06, 707 NYS2d 421 [1st Dept 2000]).

Here, the Court views the interim orders (NYSCEF Doc. Nos. 132 and 158) as defendants' final chance to comply with their discovery obligations. And, by all accounts, they have done so. These circumstances do not merit the imposition of sanctions or striking defendants' pleading. It makes little sense to require defendants to participate in discovery and then strike their pleading after they comply with Court directives. And while plaintiff also seeks legal fees, the Court denies that request as well. Sanctions are appropriate where the conduct is contumacious or willful. The Court finds defendants' conduct to be disorganized but not so egregious as to constitute sanctionable acts. Sanctions are often considered a drastic remedy and the Court finds that defendant's conduct does not rise to that level, especially because they eventually did what they had to do.

The Court makes no findings about defendants' attempt to blame prior attorneys for their delays in discovery. The fact is that, sometimes, active Court intervention is required in the discovery process to ensure that parties take their obligations seriously.

The Court also denies defendants' cross-motion for discovery. Much of the discussion about plaintiff's purported deficiencies at the oral argument centered on plaintiff's alleged failure to turn over emails. Defendants pointed to various examples of emails between board members and plaintiff that plaintiff did not produce in discovery. They suspect plaintiff had not produced all of the documents in its possession.

Plaintiff contends that it has produced all documents in its custody, control, and possession.

The Court observes that, unfortunately, it cannot compel plaintiff to produce documents it says it does not have. Therefore, the Court finds that the best course of action is to go forward with the deposition of plaintiff. Depending on the outcome of that deposition, an additional deposition (or depositions) of plaintiff may be necessary. For instance, if plaintiff produces additional documents after the deposition that should have been produced earlier, then defendants might be entitled to take another deposition. This is just one scenario in which the court might entertain ordering an additional deposition of plaintiff. The Court emphasizes that defendants must make a motion for such relief.

Rather than delay this matter even longer, taking the deposition of plaintiff is the most efficient way to move this case and identify how plaintiff retained documents that defendants believe plaintiff should possess.

MS006

In this motion, defendants move to *inter alia* modify and renew the Court's February interim order. The branch of the motion that sought to clarify the names of board members is moot as the correct individuals were identified.

The remaining portion of the motion asks the Court to delete the Court's characterization of the belated production of a relevant audit report as "miraculous." The Court declines to modify this portion of the interim order. The fact is that defendant Durham, an accomplished and highly successful attorney, swore under oath in a *Jackson* affidavit that all documents were produced only to turn over a relevant report months later.

Certainly, Durham raises substantive arguments for why the production of this report (from a forensic auditor) was not miraculous. She blames her prior attorneys, claims the report

was subject to the attorney client privilege or work product doctrine and that plaintiff knew that defendants had hired the forensic auditor. However, Durham insists that she "was uncomfortable" with not producing the report because it was going to be sent to all of the condo's unit owners, including former board members who had interests adverse to defendant in this litigation.

While parties are entitled to change their minds about producing a document, the fact is that a *Jackson* affidavit is an important and solemn document. Characterizing the belated production of a key document *after* the submission of a *Jackson* affidavit as "miraculous" is merely a rhetorical flourish utilized to highlight the undisputedly curious circumstances surrounding the production of the report. In fact, this description is quite sanguine given that this discussion arose in the middle of a sanctions motion. There is no reason to change it.

Accordingly, it is hereby

ORDERED that the branch of plaintiff's motion (MS004) to compel is denied as moot and the branch of that motion for sanctions is denied; and it is further

ORDERED that defendants' cross-motion to compel is denied; and it is further

ORDERED that defendants' motion to modify the Court's prior interim order is denied.

See NYSCEF Doc. No. 192 concerning the next conference.

11/28/2023
DATE

ARLENE P. BLUTH, J.S.C.

CHECK ONE:		**CASE DISPOSED**			[X]	**NON-FINAL DISPOSITION**	
	[ ]	**GRANTED**	[X]	**DENIED**	[ ]	**GRANTED IN PART**	[ ] **OTHER**
APPLICATION:	[ ]	**SETTLE ORDER**			[ ]	**SUBMIT ORDER**	
CHECK IF APPROPRIATE:	[ ]	**INCLUDES TRANSFER/REASSIGN**			[ ]	**FIDUCIARY APPOINTMENT**	[ ] **REFERENCE**