

**Murphy Kennedy Group LLC v Board of Mgrs. of the
St. Tropez Condominium**

2024 NY Slip Op 32805(U)

August 8, 2024

Supreme Court, New York County

Docket Number: Index No. 652913/2019

Judge: Arlene P. Bluth

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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

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MURPHY KENNEDY GROUP LLC,

Plaintiff,

INDEX NO. 652913/2019

MOTION DATE 08/07/2024

MOTION SEQ. NO. 007

- 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,

**DECISION + ORDER ON
MOTION**

Defendant.

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BOARD OF MANAGERS OF THE ST. TROPEZ
CONDOMINIUM

Third-Party
Index No. 595117/2024

Plaintiff,

-against-

FIRSTSERVICE RESIDENTIAL NEW YORK, INC., FS
PROJECT MANAGEMENT, INC. D/B/A FS PROJECT
MANAGEMENT, LLC

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 007) 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 245, 246, 247, 248, 249, 252, 253, 254, 255, 256, 257, 258, 260

were read on this motion to/for DISCOVERY.

Defendants’ motion to compel and the cross-motion by plaintiff to renew and impose sanctions are both denied.

Background

This action involves a dispute about whether or not defendants paid plaintiff for construction work that plaintiff contends it performed at defendants’ condominium building.

In this motion, defendants contend that plaintiff has not produced basic project documents and emails. Defendants' counsel claims that he was recently substituted as co-counsel for defendants and realized that plaintiff has not satisfied its production obligations. He points to a letter he sent to counsel for plaintiff in which he detailed the allegedly outstanding discovery including, for example, subcontracts, billings and payments to subcontractors and plaintiff's communications with those contractors (NYSCEF Doc. No. 233).

Defendants contend that the lack of discovery makes it impossible to evaluate the change orders they have received from plaintiff. They also complain that the documents they have received were a document dump. Defendants demand this Court to order plaintiff to produce its project documents and that this production be made in a single-page TIFF format with load files containing metadata fields as detailed in a prior request from defendants.

Plaintiff argues that the instant motion is simply another attempt by a new defense lawyer to rehash a prior discovery dispute. It insists that it has represented for years that it has produced all of the documents it has in its possession, custody, and control. Plaintiff argues that defendants' insistence that plaintiff must have more documents is not a basis to grant the instant motion. It also argues that defendants only recently produced an email chain for the first time with members of the board during a deposition.

Plaintiff points out that defendants requested these documents in a 2019 demand and that plaintiff long ago represented it had nothing else to produce. It insists that this motion is another complaint about the 48,000 pages of plaintiff's document production. Plaintiff emphasizes that defendants cross-moved to compel back in 2022 about these same issues and this Court denied that motion.

With respect to the format of the documents, plaintiff contends that it has worked for years to reformat its records. It insists that it separated its documents into categories by Bates range, it made a reproduction of its prior document production as well as an overlay file of its prior production. Plaintiff maintains that in response to defendants' new counsel's requests, it reproduced subsets of its prior productions containing subcontractor related documents and organized these documents by subcontractor. Plaintiff emphasizes that these records were produced in the same format in which they were maintained by plaintiff.

In reply and in opposition to the cross-motion, defendants point out that the email chain about which plaintiff complaints was discovered from a single root email. They argue that these six emails that were apparently not Bates stamped out of thousands of emails is not a basis for sanctions. Defendants argue that the depositions of plaintiff included discussions about documents that are not part of the document productions they have received from plaintiff.

Discussion

As an initial matter, the Court denies plaintiff's cross-motion for sanctions. That defendants belatedly produced six emails is not a basis to impose sanctions. The Court recognizes the extensive history of the voluminous document disputes in this case but a few emails, out of the thousands produced, is not a reason to sanction defendants.

With respect to defendants' motion, the Court denies it in its entirety. In this Court's view, plaintiff's observations appear to be correct: that this is an attempt by a new lawyer for defendants to rehash an old discovery dispute. Defendants' moving papers make clear they are demanding documents that have allegedly been outstanding since 2019 and, therefore, were part of the Court's decision in NYSCEF Doc. No. 195 in which the Court denied defendants' cross-motion to compel discovery from plaintiff.

Plaintiff has constantly emphasized that it has produced all the records in its possession. As this Court noted in that prior discovery decision, “The Court observes that, unfortunately, it cannot compel plaintiff to produce documents it says it does not have” (NYSCEF Doc. No. 195). As is the case in any action, plaintiff will have to prove its claims. If plaintiff lacks certain backup documentation (which is what defendants appear to be largely complaining about), then plaintiff might struggle to convince a fact finder that it is entitled to recover the amounts it seeks. But the Court cannot compel a party to produce records where it has represented over and over again that it does not have any more records.

The Court also denies the request to make plaintiff reproduce its document production with requested metadata and other formatting demands as untimely. The subject document demands were made in 2019; to demand five years later that plaintiff reproduce it in a completely different format is without merit. Plaintiff sufficiently explained that it has responded to defendants’ requests about identifying certain categories of documents (such as the subcontractor materials). And plaintiff insists it has produced the documents in the way in which they are maintained. Defendants’ reliance upon federal rules, commercial division rules or Nassau County rules regarding ESI discovery is not basis for this Court to grant this requested relief.

To the extent that defendants complain about the failure to schedule depositions for certain former employees (apparently, plaintiff’s counsel has agreed to represent these individuals), plaintiff says it is in the process of scheduling these depositions. The Court therefore finds that this branch of the motion is moot, for now. These depositions must take place on or before September 30, 2024.

Accordingly, it is hereby

ORDERED that defendants' motion and plaintiff's cross-motion are denied; and it is further

ORDERED that the outstanding depositions of the former employees for plaintiff must take place on or before September 30, 2024.

See NYSCEF Doc. No. 259 regarding the next conference.

<u>8/8/2024</u>			<u>ARLENE P. BLUTH, J.S.C.</u>
DATE			
CHECK ONE:	<input type="checkbox"/> CASE DISPOSED	<input checked="" type="checkbox"/> DENIED	<input checked="" type="checkbox"/> NON-FINAL DISPOSITION
	<input type="checkbox"/> GRANTED		<input type="checkbox"/> GRANTED IN PART
APPLICATION:	<input type="checkbox"/> SETTLE ORDER		<input type="checkbox"/> OTHER
CHECK IF APPROPRIATE:	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN		<input type="checkbox"/> FIDUCIARY APPOINTMENT
			<input type="checkbox"/> REFERENCE