

**Board of Mgrs. of 165 E. 62nd St. Condominium v
Churchill E 62nd LLC**

2024 NY Slip Op 34132(U)

November 15, 2024

Supreme Court, New York County

Docket Number: Index No. 656401/2022

Judge: Emily Morales-Minerva

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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. EMILY MORALES-MINERVA PART 42M

Justice

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INDEX NO. 656401/2022

BOARD OF MANAGERS OF 165 E. 62ND STREET
CONDOMINIUM,

MOTION DATE 06/12/2024

Plaintiff,

MOTION SEQ. NO. 003

- v -

CHURCHILL E 62ND LLC,JUSTIN EHRLICH, SORABH
MAHESHWARI, COUNTRYWIDE BUILDERS INC.,JOHN
DOE NOS. 1 THROUGH 10, AND JANE DOE NOS. 1
THROUGH 10, SAID NAMES BEING FICTITIOUS AND
UNKNOWN TO PLAINTIFF BUT INTENDING TO BE THE
RECIPIENTS OF ANY VOIDABLE TRANSFERS MADE BY
CHURCHILL E 62ND LLC,JUSTIN EHRLICH OR SORABH
MAHESHWARI,

DECISION + ORDER ON
MOTION

Defendants.

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The following e-filed documents, listed by NYSCEF document number (Motion 003) 50, 51, 52, 53, 54,
55, 56, 57, 58, 59, 60, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 74

were read on this motion to/for DISCOVERY

APPEARANCES:

Schwartz, Sladkus, Reich, Greenberg & Atlas LLP, New York,
NY (Jared E. Paioff, Esq., of counsel) for plaintiff.

Landman, Corsi, Ballaine & Ford P.C., New York, NY (Daniel
S. Moretti, Esq., of counsel) for defendants Churchill E
62nd LLC, Justin Ehrlich, and Sorabh Maheshwari.

HON. EMILY MORALES-MINERVA:

In this action, for among other things, breach of contract,
plaintiff BOARD OF MANAGERS OF 165 E. 62ND STREET CONDOMINIUM
moves, pursuant to CPLR § 3124, for an order compelling
defendants CHURCHILL E. 62ND LLC, JUSTIN EHRLICH, and SORABH

MAHESHWARI, to produce outstanding discovery (see NYSCEF Doc. No. 44, notice of discovery and inspection). In the alternative, plaintiff moves, pursuant to CPLR § 3126, for an order, striking these defendants' answer and/or precluding these defendants from offering any evidence in support of their defenses at trial. The subject defendants CHURCHILL E. 62ND LLC, JUSTIN EHRLICH, and SORABH MAHESHWARI oppose the motion.

For the reasons set forth below, the court denies the motion in its entirety.

BACKGROUND

Plaintiff BOARD OF MANAGERS OF 165 E. 62ND STREET CONDOMINIUM (condominium) represents the residential building located at 165 East 62nd Street, New York, New York (building) (see NYSCEF Doc. No. 001, Complaint). Defendant CHURCHILL E. 62ND LLC is the sponsor of condominium development (sponsor) that oversaw the initial construction/conversion of condominium, and defendants JUSTIN EHRLICH and SORABH MAHESHWARI are principals of CHURCHILL E. 62ND LLC (sponsor's principals).

Alleging that the building suffers from construction defects in violation of several building codes, condominium filed the instant action against, among others, the sponsor, and

the sponsor's principals, for breach of contract, fraud in the inducement, and negligence.

Following preliminary motion practice and a preliminary conference, the court (N. Bannon, J.S.C.) set a time frame for completion of discovery (see NYSCEF Doc. No. 47, Preliminary Conference Order, dated September 14, 2023). Several months later, the same court extended the deadline for completion of document production to April 8, 2024, and the deadline for the completion of all discovery to September 15, 2024 (see NYSCEF Doc. No. 49, Compliance Conference Order, dated February 15, 2024). In making this determination, the court (N. Bannon, J.S.C.) considered both "the volume of discovery" needed and the subject defendants "initial and supplemental production of documents" that was "continuing on a rolling" basis (id.).

Thereafter, on or about April 12, 2024, condominium sent a self-described "Good Faith Letter" to counsel for sponsor and sponsor's principals, detailing the discovery documents and materials plaintiff believed to be outstanding (see NYSCEF Doc. No. 57, letter, dated April 12, 2024). Said letter also demanded a Jackson affidavit from the subject defendants "[i]f after a diligent search of [their] files, the documents are deemed not to exist" (see Jackson v City of New York, 185 AD2d 768 [1st Dept 1992]).

The sponsor and sponsor's principals responded to said letter with an incomplete production of the documents listed in the demand and without a Jackson affidavit explaining the shortcoming.

Thereafter, on or about April 22, 2024, condominium e-mailed the subject defendants, again listing outstanding demands (see NYSCEF Doc. No. 58, condominium's e-mail, dated April 22, 2024). However, counsel for sponsor and sponsor's principals provided no additional documents and, again, no Jackson affidavit.

Consequently, on or around June 14, 2024, condominium filed the instant motion (seq. no. 003), seeking an order, pursuant to CPLR § 3124, to compel the subject defendants to produce the outstanding written and documentary responses to the notice of discovery and inspection, dated September 01, 2023. In the alternative, condominium seeks an order, pursuant to CPLR § 3126, (1) dismissing and/or striking the answer of the sponsor and the sponsor's principals; and/or (2) precluding these defendants from offering any evidence in support of their defenses at trial (see NYSCEF Doc. No. 50, Plaintiff's Notice of Motion, dated June 12, 2024).

Sponsor and sponsor's principals oppose the motion on mootness grounds, asserting that they have complied with plaintiff's document demands and have acted in good faith

throughout this action to address the volume of discovery requested. The subject defendants contend that they have produced over 17,000 pages of documents throughout the pendency of this proceeding, including 10,000 pages of documents since the filing of the instant motion (seq. no. 003) to compel (see NYSCEF Doc. No. 62, Affirmation in Opposition, p 3). Sponsor and sponsor's principals appear to simply not believe that a Jackson affidavit is required in these circumstances.

In reply, condominium argues that providing voluminous responses does not in itself negate discovery that remains incomplete without excuse. It is undisputed that the subject defendants have yet to produce requested documents concerning (1) repairs and/or remedial work to the building; (2) the temporary certificate of occupancy and/or the permanent certificate of occupancy; and (3) correspondence by, among or between any, one or more of the subject defendants about the project and/or building (see NYSCEF Doc No. 74, Affirmation in Reply, ¶ 10). It is also undisputed that sponsor and sponsor's principals have not provided a Jackson affidavit regarding these materials.

ANALYSIS

While the court commends condominium in its efforts to demand discovery and to demand a Jackson affidavit where diligent search for such documents has been unavailing, compliance with the Uniform Civil Rules for the Supreme Court and County Court [22 NYCRR] § 202.7 is first required before the court formally intervenes. Section 202.7, dispositive here, provides:

"[N]o motion relating to disclosure shall be filed with the court unless there have been served and filed with the motion papers . . . an affirmation that counsel has conferred with counsel for the opposing party in good faith effort to resolve the issues raised by the motion . . ."

(emphasis added). Subdivision (c) further provides that "[t]he affirmation of the good faith effort . . . shall indicate the time, place and nature of the consultation and the issues discussed and any resolutions, or shall indicate good cause why no such conferral with counsel for opposing parties was held (see 22 NYCRR § 202.7 [c] [emphasis added]).¹

¹ see also 22 NYCRR § 202.20-f (b), providing: "Absent exigent circumstances, prior to contacting the court regarding a disclosure dispute, counsel must first consult with one another in a good faith effort to resolve all disputes about disclosure. Such consultation must take place by an in-person or telephonic conference. [If] a discovery dispute cannot be resolved other than through motion practice, each such discovery motion shall be supported by an affidavit or affirmation from counsel attesting to counsel having conducted an in-person or telephonic conference, setting forth the date and time of

There is no such affirmation attached to the subject motion. Further, condominium's letter and follow-up e-mail to counsel for the subject defendants demanding outstanding discovery cannot be a substitute for such affirmation (see 241 Fifth Ave. Hotel, LLC v GSY Corp., 110 AD3d 470, 472 [holding the good faith affirmation must provide a substantive description of the efforts undertaken to confer and avoid motion practice]).

By virtue of this court's denial of condominium's motion to compel, condominium's motion to strike pleadings and/or preclude evidence, pursuant to CPLR § 3126, is also denied (see W&W Glass, LLC v 1113 York Ave. Realty Co. LLC, 83 AD3d 438 [1st Dept 2011] [holding that because there are no prior motions by plaintiff to compel disclosure, any motion to strike the answer is premature]).

Accordingly, it is hereby

ORDERED that the plaintiff BOARD OF MANAGERS OF 165 E. 62ND STREET CONDOMINIUM's motion (seq. no. 003) is denied in its entirety without prejudice.

such conference, persons participating, and the length of time of the conference. The unreasonable failure or refusal of counsel to participate in a conference requested by another party may relieve the requesting party of the obligation to comply with this paragraph and may be addressed by the imposition of sanctions pursuant to Part 130. If the moving party was unable to conduct a conference due to the unreasonable failure or refusal of an adverse party to participate, then such moving party shall, in an affidavit or affirmation, detail the efforts made by the moving party to obtain such a conference and set forth the responses received (emphasis added).

THIS CONSTITUTES THE DECISION AND ORDER OF THE COURT.

11/15/2024
DATE

Emily Morales-Minerva
EMILY MORALES-MINERVA, J.S.C.

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