

Land & Sea Constr. Corp. v Graiff
2024 NY Slip Op 35633(U)
April 15, 2024
Supreme Court, Nassau County
Docket Number: Index No. 615575/2022
Judge: Lisa A. Cairo
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (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
COUNTY OF NASSAU

PRESENT: HON. LISA A. CAIRO, J.S.C.

-----X	TRIAL/IAS PART 25
LAND AND SEA CONSTRUCTION CORP.,	DECISION AND ORDER
Plaintiff(s),	ON MOTION
-against-	INDEX No. 615575/2022
CARLO GRAIFF,	Motion Seq. No. 2, 3
Defendant(s).	
-----X	
CARL GRAIFF,	
Plaintiff(s),	INDEX No. 615855/2022
-against-	
LAND AND SEA CONSTRUCTION CORP. and PETER	
HANCOCK,	
Defendant(s).	
-----X	

The following papers were read on this motion:

DOCS NUMBERED

Notice of Motion, Affidavits, Affirmations, Exhibits, Memos.....	36-44
Notice of Cross-Motion and Opposition Papers.....	56, 47-55
Opposition to Cross-Motion and Reply Papers.....	57-64

Carl Graiff as Defendant/Counter-Plaintiff moves by notice of motion for an order pursuant to CPLR 3126 striking the pleadings of Land and Sea Construction Corp. (Land and Sea) and Peter Hancock for their willful and repeated failure to comply with disclosure orders and specifically with the court's order dated November 3, 2023. In the alternative, movant seeks to preclude Land and Sea and Hancock from introducing evidence at trial in support of their claims. Land and Sea and Hancock oppose and cross-move for an order imposing sanctions on Graiff for frivolous litigation conduct.

BACKGROUND

This case is comprised of two joined actions. Land and Sea commenced the first action for breach of a construction contract related to a bulkhead project on real property located at 2961 Eastern Blvd, Baldwin, New York. Carl Graiff commenced a counter-suit alleging that he is the owner of the subject premises and on or about August 17, 2022, he contracted with Land and Sea through Hancock to remove and replace 200 feet of existing bulkhead at the premises for a total price of \$166,000.00. Payment under the contract was to be made as a 10% deposit, 40% upon arrival of materials, and 10% due at each of 4/8/12/16 days of the project with the balance due upon completion of the project. Upon signing, Graiff issued a check to Hancock in the amount of \$16,000 and following delivery of "generic construction/piling materials" on August 25, 2022, an additional \$64,000 was paid. At that time, Hancock gave Graiff a letter indicating that the work would commence "mid-month, next month." Graiff alleges that he "obtained all permits necessary for the work to be performed by Defendants" and "Defendants did not seek to obtain or obtain any permits for the work to be performed." Graiff further alleges that Land and Sea failed to timely start the job despite numerous attempts to contact them. On a few occasions, Hancock made excuses as to the delay and promised that the work would commence. On October 15, 2022, Graiff declared the Defendants in breach and demanded return of all funds advanced in the sum of \$80,000.

Graiff's complaint asserts, upon information and belief, that Land and Sea has engaged in a pattern and practice of deceiving consumers by taking large deposits, delivering a small pile of generic materials and then failing to start the job as promised. In addition, the complaint alleges that Hancock forged the name of corporate executive "Jodi Tarshis" on behalf of Land and Sea on the agreement in the presence of Graiff. The complaint asserts causes of action sounding in breach of contract, fraud, violations of NYS Lien Law Article 3-A, unjust enrichment, and seeks to pierce the corporate veil.

By its complaint, Land and Sea alleges the existence of a contract between the parties and payment of a "non-refundable" deposit by Graiff. The Land and Sea complaint asserts that the contract contains no completion date and after the agreement was executed, Land and Sea purchased the necessary materials, applied for permits, and started replacing and building the bulkhead. Thereafter, Plaintiff refused to permit Land and Sea to enter the premises while claiming that it breached the contract by not performing on time. Land and Sea brings causes of action sounding in breach of contract and breach of the implied covenant of good faith and fair dealing, seeking to recover the full amount under the contract.

As the result of a prior disclosure motion, the court ordered Land and Sea and Hancock to provide full responses to Graiff's disclosure demands dated May 30, 2023, except for demands 21 and 23, and to the extent that responsive documents did not exist or could not be located, Land and Sea and Hancock were directed to serve an affidavit in compliance with *Jackson v. City of New York*.

The requests sought communications and contracts between the parties related to the subject property, permit applications, plans, licensing documents, bills and invoices, prior complaints against the Defendants for failure to perform services, corporate records including

certificates of incorporation, by laws, and shareholder agreements, and documents demonstrating Peter Hancock's authority to act on behalf of Land and Sea, as well as documents in support of defenses raised in the answer.

By this motion, Graiff asserts that not only was "no full response" provided, no actual written response to Graiff's document demands was ever provided. Rather, on November 10, 2023, Jodi Tarshis submitted an affidavit wherein she states that she "conducted a search for documents responsive to plaintiff's demands pursuant to the search terms provided in plaintiff's counsel's correspondence dated July 11 and 31, 2023." She further indicates that she "searched electronically stored documents on [her] computer and cellular phone, as well as physically stored documents at the corporate defendant's office."

Later, on January 10, 2024, Hancock produced an affidavit where it is stated that does not maintain hard copy files of documentary business records of Land and Sea and any job related documents maintained by him are electronically stored on his i-Pad or cellphone. He searched those devices as well as physically stored documents at the corporate defendant's office and located that same items (lettered A-H) that Ms. Tarshis located.

Graiff states that the search terms used to conduct such searches were not identified thereby preventing any analysis as to whether a proper search was conducted. Nor is there any sworn statement attesting to where the requested records were likely to be kept, whether they were maintained by Land and Sea and if destroyed, under what circumstances. Significantly, Graiff points out that despite there being some 45 categories of documents requested in his demands, the search apparently failed to find any documents beyond the original 12 documents produced in this action and no documents concerning the corporate structure, licensing, or the agency of Peter Hancock on behalf of the company have been produced.

DISCUSSION

CPLR 3101(a) provides that "[t]here shall be full disclosure of all matter material and necessary in the prosecution or defense of an action, regardless of the burden of proof" by parties from whom disclosure may be properly sought. "Material and necessary" are liberally construed "to require disclosure, upon request, of any fact bearing the controversy which will assist preparation for trial by sharpening the issues and reducing delay and prolixity." (*Allen v. Crowell-Collier Publ. Co.*, 21 NY2d 403, 406 [1968]). Nonetheless, "[a] party is not entitled to unlimited, controlled, unfettered disclosure, and the supervision of disclosure is generally left to the trial court's broad discretion." (*Geffner v. Mercy Medical Center*, 83 AD3d 998 [2d Dept 2011]). As clearly explained in the court's prior order, where discoverable materials are not within a party's possession, the court may require an affidavit indicating whether such records exist, as well as "where the subject records were likely to be kept, what efforts, if any, were made to preserve them, whether such records were routinely destroyed, or whether a search had been conducted in every location where the records were likely to be found." (*Jackson v. City of New York*, 185 AD2d 768 [1st Dept 1992]; *Trade Expo Inc. v. Sterling Bancorp.*, 171 AD3d 634 [1st Dept 2019]).

The failure to comply with discovery deadlines or to provide meaningful responses to discovery demands impairs the efficient functioning of the courts and the adjudication of claims. (*Arpino v. F.J.F. & Sons Electric Co., Inc.*, 102 AD3d 201 [2d Dept 2012]). The nature and degree of the penalty to be imposed pursuant to CPLR 3126 lies within the sound discretion of the court (see CPLR 3126[3]; *HR Prince, Inc. v. Elite Environmental Sys., Inc.*, 107 AD3d 850 [2d Dept 2013] but before invoking the drastic remedy of striking a pleading, or even of precluding evidence, there must be a clear showing that the failure to comply was willful and contumacious (*Neenan v. Quinton*, 110 AD3d 967 [2d Dept 2013]). Willful conduct can be inferred from repeated failures to comply with court orders directing disclosure and inadequate excuses for the default. (*Edwards v. Prescott Cab Corp.*, 110 AD3d 671 [2d Dept 2013]). The court, when faced with a party's failure to disclose information sought by the opposing side in an action, may issue a conditional preclusion order, an order deeming the issues resolved in the movant's favor or grant judgment against the delinquent party. (*Gibbs v. St. Barnabas Hosp.*, 16 NY3d 74, 79 [2010]; see also *Hughes v. Brooklyn Skating, LLC*, 120 AD3d 758 [2d Dept 2014] ["A conditional order of preclusion requires a party to provide certain discovery by a date certain, or face the sanctions specified in the order."]).

In this case, the Tarshis and Hancock affidavits and supplemental affidavits are inadequate under *Jackson v. City of New York*. Both fail to describe in any level of detail where and how corporate and job-related files are maintained, whether the documents demanded exist or existed, where they would likely be kept, whether they have been destroyed, and the manner in which the search was conducted. Particularly questionable is the lack of permit applications related to the project, licensing documents, and corporate documents such as certificates or incorporation and/or shareholder agreements.

For the foregoing reasons, it is hereby

ORDERED, that the branch of Plaintiff's motion made pursuant to CPLR 3126 is **granted in part** to the extent that Land and Sea and Hancock shall be precluded from offering at trial any documentary evidence beyond that previously exchanged; and it is further

ORDERED, that Plaintiff's request for attorney's fees in bringing this motion is **denied**, without prejudice, in the discretion of the court; and it is further

ORDERED, that Defendants' cross-motion for an order granting sanctions is **denied**.

The foregoing constitutes the decision and order of this court. All applications not specifically addressed herein are denied.

Dated: Mineola, NY
April 15, 2024

ENTER:



HON. LISA A. CAIRO, J. S. C.

ENTERED

Apr 17 2024

NASSAU COUNTY
COUNTY CLERK'S OFFICE