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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HON. EILEEN A. RAKOWER Justice

PART 15

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

Index Number : 110446/2008
DANICA GROUP, LLC
vs.
CHELSEA LUXURY CONDOS, LLC
SEQUENCE NUMBER : 005
SUMMARY JUDGMENT

The following papers, numbered 1 to _____ were read on this motion to/for _____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1, 2
Answering Affidavits — Exhibits	3, 4
Replying Affidavits	5
	6

Cross-Motion: ☒ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion

FILED

MAR 28 2012

NEW YORK
COUNTY CLERK'S OFFICE

DECIDED IN ACCORDANCE WITH
ACCOMPANYING DECISION / ORDER

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Dated: 3/26/12

HON. EILEEN A. RAKOWER J.S.C.

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

☐ SUBMIT ORDER/JUDG. ☐ SETTLE ORDER /JUDG.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 15

----------X

DANICA GROUP, LLC,

Plaintiff,

- against -

CHELSEA LUXURY CONDOS, LLC, ASTORIA FEDERAL SAVINGS AND LOAN ASSOCIATION and WESTCHESTER FIRE INSURANCE COMPANY,

Defendants.

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HON. EILEEN A. RAKOWER, J.S.C.

Index No.
110446/08

DECISION and ORDER

Mot. Seq.
005

Danica Group, LLC ("Plaintiff") brings this action for foreclosure of its mechanic's lien, breach of contract, and quantum meruit. Plaintiff alleges that it performed plumbing, mechanical, HVAC and standpipe/sprinkler work pursuant to a contract between Plaintiff and defendant Chelsea Luxury Condos LLC ("Chelsea") for which it was not paid. Presently before the court is a motion by Plaintiff for summary judgment pursuant to CPLR §3212.

Plaintiff asserts that summary judgment is warranted because Chelsea's failure to comply with its discovery obligations precludes Chelsea from introducing evidence in support of its affirmative defenses and counterclaims (which allege, *inter alia*, that Plaintiff was fired from the project for substandard work). Plaintiff points to a May 24, 2011 Compliance Conference Order ("CCO"), which provides: "defendant Chelsea is to respond to [Plaintiff's] discovery demands by 6/24/11 or Chelsea will be precluded from testifying at trial." Plaintiff states that Chelsea "never responded to plaintiff's demands...."

Chelsea opposes the motion and cross-moves for an order dismissing Plaintiff's complaint or precluding Plaintiff from presenting evidence at trial based upon its own failure to comply with discovery orders. In the alternative, Chelsea seeks an order

compelling Plaintiff to appear for deposition and to provide responses to Chelsea's outstanding discovery demands. Chelsea further seeks leave to amend its answer to add a claim for rescission of contract; sanctions against Plaintiff; and dismissal of the complaint because Plaintiff was not licensed to perform the subject work.

With regard to May 24, 2011 CCO, Chelsea states that it complied with the order when, on May 31, 2011, counsel for Chelsea "emailed Danica's counsel ... preliminary documents supporting Chelsea's back-charge claim." These documents consisted of a "Spreadsheet identifying the amount of back-charges;" an "Engineering Report detailing Danica's Defective work;" and "Preliminary letters sent to Danica detailing deficient work product and confirming that Danica was fired from [the project]." Chelsea further states that, on September 6, 2011, it supplemented its response by sending Plaintiff "a cd-rom containing 2035 pages of documents, invoices, [and] correspondence."

Chelsea further claims that it is Plaintiff that has been dilatory in meeting its discovery obligations. Specifically, Chelsea states that "despite being ordered by this Court on May 31, 2011 to appear for deposition, despite requesting adjournment of depositions and agreeing to appear for deposition on October 12, 2011 and December 6, 2011, [and] despite 3 good faith letters," Plaintiff has failed to appear for depositions.

With respect to Chelsea's claim that Plaintiff is an unlicensed contractor, and thus barred from bringing a breach of contract action or asserting a mechanic's lien, Chelsea submits a 2005 Settlement Agreement between Danica and the New York City Department of Buildings ("DOB"). The Settlement Agreement provides, *inter alia*, that

> [Plaintiff] will no longer engage in business activities as a licensed plumbing company or as a licensed fire suppression piping company.

The Settlement Agreement further provided that

> Danica may subcontract its plumbing and fire suppression piping work on currently open permits and ARAs to any companies who properly meet the licensing requirements of the N.Y. Administrative Code, RCNY, any other Department of Buildings' rules or regulations, or any

> other rules, regulations or laws of New York City or its administrative agencies.

In reply, Plaintiff contends that the documents provided in the e-mail from Chelsea's counsel were insufficient and unresponsive to Plaintiff's demands, which sought "invoices, contracts, plans, correspondences, agreements, bills, schematics, [and] change orders." Plaintiff further states that these documents were provided in furtherance of settlement negotiations, and not for purposes of responding to Plaintiff's prior demands.

With respect to Chelsea's claim that Plaintiff performed work for which it was not licensed, Plaintiff submits the affidavit of Thomas Andreadakis, Plaintiff's president. Andreadakis states that

> Danica entered into a subcontracting agreement with Copper Plumbing and Heating LLC ... to perform that portion of the work requiring a licensed plumber.

The proponent of a motion for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law. That party must produce sufficient evidence in admissible form to eliminate any material issue of fact from the case. Where the proponent makes such a showing, the burden shifts to the party opposing the motion to demonstrate by admissible evidence that a factual issue remains requiring the trier of fact to determine the issue. The affirmation of counsel alone is not sufficient to satisfy this requirement. (*Zuckerman v. City of New York*, 49 N.Y.2d 557 [1980]). In addition, bald, conclusory allegations, even if believable, are not enough. *(Ehrlich v. American Moninger Greenhouse Mfg. Corp.*, 26 N.Y.2d 255 [1970]). (*Edison Stone Corp. v. 42nd Street Development Corp.*,145 A.D.2d 249, 251-252 [1st Dept. 1989]). "[I]f it is reasonable to disagree about the material facts or about what may be inferred from undisputed facts, summary judgment may not be granted. Moreover, in deciding whether there is a material triable issue of fact, 'the facts must be viewed in the light most favorable to the nonmoving party'" (*Ferluckaj v. Goldman Sachs & Co.*, 2009 NY Slip Op 2483 [2009]).

As previously noted, Plaintiff's motion for summary judgment is predicated upon the assertion that Chelsea is precluded from presenting evidence that Plaintiff's work was substandard and/or that it was fired by Chelsea, based upon Chelsea's

failure to provide court-order discovery. Chelsea similarly seeks dismissal of the action based upon Plaintiff's failure to comply with its discovery obligations by failing to appear for depositions.

Pursuant to CPLR §3126, a court may impose sanctions when a party willfully fails to disclose information which the court finds ought to have been disclosed. The moving party must show "conclusively that failure to disclose was willful, contumacious or due to bad faith." (*Dauria v. City of New York*, 127 AD2d 416[1st Dept. 1987]). Here, the court finds that the drastic sanction of preclusion is inappropriate. Even assuming *arguendo* that Chelsea's May 31, 2011 document production failed to supply Plaintiff with all responsive documents, that production, along with its subsequent production in September 2011 support the conclusion that Chelsea has substantially complied with its discovery obligations and that any failure to provide responsive discovery was not willful, contumacious, or in bad faith (*see McGlone v. Porth Auth. of N.Y. & N.J.*, 90 A.D.3d 479 [1st Dept. 2011]). Moreover, in light of the fact that Plaintiff has failed to provide a copy of the demands underpinning the prior discovery orders and the instant motion, the court is in no position to hold that Chelsea's production was inadequate. To the extent that Chelsea seeks dismissal of Plaintiff's complaint based upon Plaintiff's failure to appear for depositions, such relief is likewise denied, as Chelsea fails to show willful and contumacious conduct on the part of Plaintiff.

However, the court finds that Chelsea is entitled to dismissal of the complaint because Plaintiff was not licensed to perform plumbing and fire suppression work. "It is undisputed that it is unlawful for any entity to either perform plumbing work or engage in the business of plumbing in New York City without a license" (*Fisher Mech. Corp. v. Gateway Demolition Corp.*, 247 A.D.2d 579 [2nd Dept. 1998]; *see also Voo Doo Contracting Corp. v. L & J Plumbing & Heating Corp.*, 264 A.D.2d 361 [1st Dept. 1999]). Moreover, it is immaterial whether, as here, the unlicensed contractor subcontracts the work to an entity that is licensed (*see Vitanza v. City of New York*, 48 A.D.2d 41, 44 [1st Dept. 1975]); *JME Enters. v. Kostynick Plumbing and Heating, Inc.*, 273 A.D.2d 201, 203 [2nd Dept. 2000]).

Nor was Plaintiff permitted to subcontract the work under the Settlement Agreement with DOB. That Agreement only allowed Plaintiff to subcontract work to licensed entities on "currently open permits and ARAs." Here, the contract, dated April 10, 2006 post-dates the Settlement Agreement by more than six months.

Accordingly, Chelsea is entitled to dismissal of Plaintiff's complaint.

Lastly, Chelsea's motion for leave to file an amended answer with counterclaims is denied without prejudice, as Chelsea has failed to annex a copy of its proposed amended pleading.

Wherefore it is hereby

ORDERED that Plaintiff's motion for summary judgment is denied; and it is further

ORDERED that Chelsea's cross-motion is granted to the extent that Plaintiff's mechanic's lien is vacated and the complaint is dismissed with costs and disbursements to defendant as taxed by the Clerk upon the submission of an appropriate bill of costs.

This constitutes the decision and order of the court. All other relief requested is denied.

DATED: March 26, 2012

EILEEN A. RAKOWER, J.S.C.