

Board of Mgrs. of the No. 5 Condominium v 44th St. Partners I, LLC
2016 NY Slip Op 30802(U)
April 28, 2016
Supreme Court, New York County
Docket Number: 153192/2012
Judge: Manuel J. Mendez
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: MANUEL J. MENDEZ
Justice

PART 13

BOARD OF MANAGERS OF THE NUMBER 5 CONDOMINIUM,

INDEX NO. 153192/2012

MOTION DATE 03-09-2016

MOTION SEQ. NO. 011

MOTION CAL. NO. _____

Plaintiff,

-against-

44TH STREET PARTNERS I, LLC, FIVE EAST 44TH LLC,
ISAMU SUZUKI, PATRICK THOMPSON, TWP CAPITAL
PARTNERS 1, LLC, PHILIP JOHNSON/ALAN RITCHIE
ARCHITECTS P.C., ALAN RITCHIE, MARKO T. DASIGENIS,
WILLIAM Q. BROTHERS III ARCHITECT, P.C., WILLIAM Q.
BROTHERS III, T.C. SIDERIS, P.E.P.C., SIDERIS KEFALAS
ENGINEERS P.C., TERRY SIDERIS P.E., CHRIS SIDERIS, P.E.,
FILOLAOS KEFALAS P.E., DeNARDIS ENGINEERING, LLC.,
JOSEPH A. De NARDIS, P.E., CORE GROUP MARKETING, LLC,
ANLAR LLC, HUDSON MERIDIAN CONSTRUCTION GROUP, LLC,
WILFORD & PASSEGGIO'S PLUMBING & HEATING, PASSEGGIO'S
PLUMBING & HEATING CORP., VIS INDUSTRIES, and
VISTA ARCHITECTURAL PRODUCTS, INC.,

Defendants.

44th STREET PARTNERS I, LLC, FIVE EAST 44TH LLC,
ISAMU SUZUKI, PATRICK THOMPSON, and TWP CAPITAL
PARTNERS I, LLC,

Third-Party Plaintiffs,

-against-

TAUBE PROPERTY MANAGEMENT, QUEST ELECTRICAL,
TRI-TECH ELECTRICAL, LYONS ROOFING, MARSAL ROOFING,
and APEX ARCHITECTURAL,

Third-Party Defendants.

VIS PLUMBING, HEATING, AND MECHANICAL CORP., d/b/a
VIS INDUSTRIES,

Second Third-Party Plaintiff,

-against-

CASCADE WATER SERVICES, INC.

Second Third-Party Defendant.

44th STREET PARTNERS I, LLC, FIVE EAST 44TH LLC,
ISAMU SUZUKI, PATRICK THOMPSON, and
TWP CAPITAL PARTNERS I, LLC,

Third Third-Party Plaintiffs,

-against-

HUDSON MERIDIAN CONSTRUCTION GROUP LLC,
WILFORD & PASSEGGIO'S PLUMBING & HEATING, CORP.,
PASSEGGIO'S PLUMBING & HEATING CORP.,
DE NARDIS ENGINEERING, LLC, JOSEPH A. DE NARDIS, P.E.,
ANLAR LLC, VIS INDUSTRIES and VISTA ARCHITECTURAL
PRODUCTS, INC.,

Third Third-Party Defendants.

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

The following papers, numbered 1 to 6 were read on this motion to strike the Answer, preclude and compel discovery.

	<u>PAPERS NUMBERED</u>
Notice of Motion/ Order to Show Cause – Affidavits – Exhibits ...	<u>1-4</u>
Answering Affidavits – Exhibits _____	<u>5-6</u>
Replying Affidavits _____	_____

Cross-Motion: Yes No

Upon a reading of the foregoing cited papers, it is Ordered that Defendant Hudson Meridian Construction Group, LLC’s (herein “Hudson”) motion to strike the Answer of Defendant Anlar LLC (herein “Anlar”), or to preclude Anlar, or to compel Anlar to provide the remaining outstanding discovery demands of Hudson, is granted to the extent stated herein.

Plaintiff commenced the instant action on January 15, 2013, seeking recovery for property damages against defendants. Hudson served an Answer with Cross-Claims on April 15, 2013. (Mot. Exh. C). Hudson has since served Anlar with a Notice for Discovery and Inspection (Mot. Exh. D), a Demand for Bill of Particulars as to Anlar’s Cross-Claims (Mot. Exh. E), and Combined Demands on all Defendants (Mot. Exh. F). This Court’s Conference Orders dated January 15, 2014, December 17, 2014, April 15, 2015, and September 30, 2015, directed all outstanding discovery be produced and responded to by certain dates. (Mot. Exhs. G, I, J, and K).

Hudson now moves for an Order pursuant to CPLR 3126 to strike Anlar’s Answer, or pursuant to CPLR 3124 to compel Anlar to respond to the outstanding discovery because Anlar has failed to produce the document discovery requested and Ordered by this Court. Anlar’s Opposition argues that Hudson’s motion is moot and must be denied in its entirety because Anlar has responded to Hudson’s discovery demands. (Aff. In Opp. Exh. 1).

Anlar’s responses are dated January 12, 2016. On January 27, 2016, a Status Conference Order directed the parties to respond to all outstanding discovery by February 29, 2016. On March 9, 2016, Hudson argued that Anlar did not provide all the documents requested and that it was requesting either the documents, or a search affidavit confirming the documents cannot be located and preclusion from testimony as to the missing documents at trial. Anlar states that it filed for bankruptcy in 2011 and all files were retained by the Bankruptcy Trustee. Further, Anlar had only located 10 documents, which were produced to Hudson, and it was still looking for the remaining documents requested. Anlar does not object to providing a search affidavit but argues against preclusion because its conduct was not willful or contumacious.

CPLR § 3101(a) allows for the “full disclosure of all evidence material and necessary in the prosecution or defense of an action regardless of the burden of proof.” CPLR § 3124 grants the court the power to compel a party to provide discovery demanded. CPLR § 3126 grants the court the power to sanction a party that

fails to comply with a court's discovery order.

The nature and degree of the penalty to be imposed for a party's failure to comply with an order is a matter within the sound discretion of the court (see CPLR § 3126; *Silberstein v. Maimonides Medical Center*, 109 A.D.3d 812, 971 N.Y.S.2d 167 [2nd Dept., 2013]). The striking of a pleading is a drastic remedy and is only warranted where a clear showing has been made that the noncompliance with an order was willful, contumacious or due to bad faith (*Mateo v. City of New York*, 274 A.D. 2d 337, 711 N.Y.S. 2d 396 [1st. Dept. 2000]).

When certain discovery is unavailable, the party ordered to produce the discovery may submit "[a]n affidavit regarding the unavailability of documents that are the subject of a discovery order," and that affidavit "must document a thorough search conducted in good faith." (*Henderson-Jones v. City of New York*, 87 A.D.3d 498, 505, 928 N.Y.S.2d 536, 542[1st Dept. 2011]). A court may also preclude a party from testifying at the time of trial or otherwise submitting evidence in support of, or in opposition to, the discovery sought. (*Id.*; see also *Yong Soon Oh v. Hua Jin*, 124 A.D.3d 639, 1 N.Y.S.3d 307 [2nd Dept., 2015]).

Anlar has not complied fully with Hudson's discovery demands or this Court's Conference Orders. To the extent Anlar completes a thorough search for the remaining documents, and these documents cannot be located and/or retrieved from the Bankruptcy Trustee, the proper remedy is for Anlar to provide Hudson with a detailed search affidavit which provides that a thorough search and/or request from the Bankruptcy Trustee for a return of these documents has been made. The affidavit is to detail the time, places, and manner in which the search was conducted, and/or request of the Bankruptcy Trustee was made. In the event, these documents cannot be located or retrieved, Anlar will be precluded from testifying at the time of trial as to these unretrievable documents.

Accordingly, it is ORDERED that Hudson Meridian Construction Group, LLC's motion to strike the Answer, to compel Anlar, LLC to comply with discovery demands, to preclude Anlar LLC from using documents not produced, or to compel Anlar LLC to provide a search affidavit that all documents have been searched for and produced after a thorough search, is granted, and it is further,

ORDERED, that Anlar, LLC provide a search affidavit detailing the time, places and manner that a search was conducted and/or a request to the Bankruptcy Trustee was made for the documents requested and that the documents cannot be located and/or retrieved within thirty (30) days of the service of this Order with Notice of Entry, and it is further,

ORDERED, that failure of Anlar LLC to produce any of the documents sought by Hudson Meridian Construction Group LLC, will result in preclusion from testifying as to those documents at the time of trial, and it is further,

ORDERED, that the parties appear for a Status Conference in IAS Part 13 located at 71 Thomas St., Room 210, N.Y., N.Y. on June 22, 2016 at 9:30AM.

ENTER:

Dated: April 28, 2016



MANUEL J. MENDEZ
J.S.C.

MANUEL J. MENDEZ
J.S.C.

Check one: FINAL DISPOSITION X NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE