

**CMS, Risk Mgt. Holdings, LLC v Skyline Eng'g,
L.L.C.**

2016 NY Slip Op 32304(U)

November 17, 2016

Supreme Court, New York County

Docket Number: 653112/2015

Judge: Manuel J. Mendez

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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: MANUEL J. MENDEZ
Justice

PART 13

CMS, RISK MANAGEMENT HOLDINGS, LLC and
COMPLETE PROPERTIES, INC.,
Plaintiffs,
-against-

INDEX NO. 653112/2015
MOTION DATE 10/05/2016
MOTION SEQ. NO. 001
MOTION CAL. NO. _____

SKYLINE ENGINEERING, L.L.C., RGB GROUP INC.,
EUROCRAFT CONTRACTING, LLC, DUBINSKY
CONSULTING ENGINEER, P.C., ELIEZER DUBINSKY,
P.C., AVISHAY I. MAZOR, P.E., JOHN C. BECKER, P.E.,
BECKER ENGINEERING, P.C., CARL STEIN, R.A.,
ELEMENTAL ARCHITECTURE, LLC, 132W26 OWNER LLC,
PARAMOUNT BUILDERS CONTRACTING CORP., AGL
INDUSTRIES INC., CPG CONSTRUCTION &
CEVELOPMENT LI CORP., and CPG CONSTRUCTION &
DEVELOPMENT, CORP.,
Defendants.

The following papers, numbered 1 to 8 were read on this motion to compel.

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	<u>1 - 4</u>
Answering Affidavits — Exhibits _____	<u>5 - 6</u>
Replying Affidavits _____	<u>7 - 8</u>

Cross-Motion: Yes No

Upon a reading of the foregoing cited papers, it is Ordered that Defendant 132W26 Owner LLC's (herein "Defendant 132W26" or "Movant") motion is granted to the extent stated herein.

Plaintiffs commenced this action for property damage alleged to have occurred to the building owned by Plaintiff Complete Properties, Inc., located at 128 W. 26th Street, New York, New York (herein "the premises"). The Complaint alleges negligence and violations of the New York City Building Code (herein "the Building Code") in construction work conducted at 132 W. 26th Street (herein "Lot 132"), which caused an already leaning building located at 130 W. 26th St. (herein "Building 130") to lose support and lean even further, causing damage to the premises. (Mot. Exh. A). Issue was joined and the parties have proceeded with some discovery.

Defendant 132W26 moved by Order to Show Cause on January 22, 2016, for an Order:

(a) pursuant to 3124, compelling Plaintiffs to respond to movant's Notice for Discovery and Inspection and Combined Demands dated October 26, 2015;

(b) providing movant with access to the premises for further inspection pursuant to 3124 and an Access Agreement entered into by the parties;

(c) pursuant to 3126 dismissing the Complaint for Plaintiff's refusal to completely respond/object to movant's October 26, 2015 Notice for Discovery and Inspection and Combined Demands, and for refusing movant access to the premises for further inspection;

(d) directing the parties to enter a protocol for destructive testing if deemed necessary by any party;

(e) prohibiting any entity and/or person, including Plaintiffs and Defendants, their attorneys, experts, consultants, agents, assigns, officer, subsidiaries, and affiliates, from inspecting, videotaping, photographing, examining, analyzing, removing, altering, destroying, or modifying the premises;

(f) permanently enjoining the foregoing mentioned in (e) without movant conducting the further testing and inspections it is entitled to under the Access Agreement and CPLR 3101, and 3120; and

(g) compelling the Plaintiffs, and any unnamed parties, their agents, assigns, officers, subsidiaries and affiliates to preserve the premises as it exists.

(NYSCEF Doc # 57-74).

In an Order dated March 2, 2016, this Court granted movant's Order to Show Cause to the extent that, pending the hearing of this motion, the parties and their attorneys, and all persons acting through them or on their behalf, would be stayed from removing, altering, destructing, or modifying the premises in any manner. (NYSECF Doc # 92).

Movant contends that Plaintiff and its experts already opened up walls, ceilings and other areas of the premises to conduct inspections but refused to allow Defendants the same access, that an initial inspection of the premises showed evidence of the building experiencing pre-occurrence damage and work performed prior to the occurrence which suggests that Plaintiff's damages were not caused by movant. That Plaintiffs' counsel eventually agreed to allow access but only under an Access Agreement entered into between the parties (NYSCEF Doc #64), that movant was granted access and under the Access Agreement is allowed further access to conduct further inspections (Id.), and that movant requested the further access on a number of occasions but Plaintiffs' counsel refused and demanded to know why the defendants needed further testing and inspections (NYSCEF Doc #65-69).

Movant also contends that Plaintiff refuses to respond completely or object to its Notice for Discovery and Inspection and Combined Demands dated October 26, 2015. (NYSCEF Doc #K & L). That Plaintiff did provide materials in response to the demand regarding work performed at the premises for the past five years, but that these responses fall short of what was requested. That the Court should issue an Order preventing the spoliation and requiring the preservation of all key evidence, that all parties and their affiliates, assigns, officers, and employees should be permanently enjoined from altering/destroying, modifying the premises without Plaintiffs responding to the demands and granting movant further access, and that Plaintiffs should be compelled to respond before the inspection takes place or before the premises is altered.

Plaintiffs oppose the motion arguing that the majority of the items argued for in this motion are either moot because they have been complied with, or they do not object. Plaintiff contends: (1) that it provided responses to the October 26, 2015 demand per the Preliminary Conference Order dated May 18, 2016, and that if Plaintiffs request further information they should advise as to what is missing; (2) that Plaintiffs have provided access to all Defendants on repeated occasions; (3) that Plaintiffs do not object to the parties entering into a protocol for destructive testing but maintain that they have already alerted all the parties that Plaintiffs expected to sell the premises within 45 days of September 13, 2016, and that any arrangements by Defense counsel inspections/testings should be made prior to closing; (4) that inspections, videotaping, photographing, examination, analyzation, removal, alterations, destruction and/or modifications were not anticipated, and that any permanent enjoining from modifications/alterations of any of the parties and/or compelling the Plaintiffs to preserve the premises would be moot upon the sale of the premises as far as is within Plaintiffs' control.

Movant argues that the stay entered by this Court in its March 2, 2016 Order is binding on not only the Plaintiff, but also its assigns, i.e. any purchaser of the premises, that movant has requested the name/contact information of the purchaser but has been refused such information, and that movant has provided Plaintiff with a destructive testing protocol multiple times but has been denied access to conduct the destructive testing. That Plaintiff has failed to respond to movant's Interrogatories which were due July 17, 2016 as per the May 18, 2016 Preliminary Conference order, and that Plaintiff has violated the Preliminary Conference Order by failing to produce records of work performed at the premises from 2005 to present, and any effective leases for the premises from 2001 to present. Movant also argues that if the premises should be modified either by Plaintiff or the purchaser, that Plaintiff's Complaint should be dismissed for spoliation and violation of this Court's March 2, 2016 Order.

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.

Plaintiff states that it responded to movant’s October 26, 2015 demands pursuant to this Court’s Preliminary Conference Order dated May 18, 2016, and has provided access to the Defendants on repeated occasions. Therefore, this requested relief is rendered moot.

Further, movant raises for the first time in its reply the issue of Plaintiff failing to comply with this Court’s Preliminary Conference Order dated May 18, 2016. Specifically, that Plaintiff has failed to respond to movant’s Interrogatories, failed to produce records of work performed at, and effective leases of, the premises. “The purpose of reply papers ‘is to address arguments made in opposition to the position taken by the movant and not to permit the movant to introduce new arguments in support of the motion...’” (Gumbs v. Flushing Town Center III, L.P., 114 A.D.3d 573 [1st Dept. 2014], citing Ambac Assur. Corp. v. DLJ Mtge. Capital, Inc., 92 A.D.3d 451, 452, 939 N.Y.S.2d 333 [1st Dept. 2012]). New arguments raised for the first time in reply papers, deprive the opposing party of an opportunity to respond, and are not properly made before the Court (Ambac Assur. Corp. v. DLJ Mtge. Capital Inc., 92 A.D. 3d 451, 939 N.y.S. 2d 333 [1st Dept.,2012] and Chavez v. Bancker Const. Corp., Inc., 272 A.D. 2d 429, 708 N.Y.S. 2d 325 [2nd Dept., 2000]). Also, the issues and relief requested in this motion, including the new arguments raised in movant’s Reply, were addressed in the subsequent Compliance Conference Order dated November 2, 2016 (NYSCEF Doc #300).

Additionally, the relief requesting that the Court order Plaintiff to provide movant with access to the premises for destructive testing protocol is an issue that was also resolved and rendered moot by the Compliance Conference Order dated November 2, 2016 (Id). As for the relief requesting any modification or destruction of the property be enjoined until the Defendants have been able to conduct their testing of the premises, the parties, their attorneys, and all persons acting through them or on their behalf, are stayed from removing, altering, destructing, or modifying the premises in any manner whatsoever, until thirty days from the date of the November 2, 2016 Compliance Conference Order.

Accordingly, it is ORDERED, that Defendant 132W26 Owner LLC's motion is granted to the extent of enjoining all parties, and all persons acting through them or on their behalf, from removing, altering, destructing, or modifying the premises located at 128 W. 26th Street, New York, New York, in any manner whatsoever until thirty days from the date of this Court's Compliance Conference Order dated November 2, 2016, and it is further,

ORDERED, that all parties, and all persons acting through them or on their behalf, are enjoined from removing, altering, destructing, or modifying the premises located at 128 W. 26th Street, New York, New York, in any manner whatsoever until December 2, 2016, which is thirty days from the date of this Court's Compliance Conference Order dated November 2, 2016, and it is further,

ORDERED, that the remainder of the relief sought is denied as moot.

ENTER:

Dated: November 17, 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