

<b>Sindrome Constr. LLC v Loyalty Daycare, LLC</b>
2016 NY Slip Op 33184(U)
December 20, 2016
Supreme Court, Bronx County
Docket Number: Index No. 21982/2012E
Judge: Ben Barbato
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SUPREME COURT OF THE STATE OF NEW YORK

COUNTY OF BRONX - PART IA-21

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SINDROME CONSTRUCTION LLC,

Plaintiff(s),

- against -

INDEX NO: 21982/2012E

LOYALTY DAYCARE, LLC, as successor to  
ONE SMALL STEP DAY CARE CENTER, INC.

DECISION/ORDER

Defendant(s).

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**HON. BEN BARBATO**

Defendant Loyalty Daycare, LLC's motion to strike the complaint or alternative relief under CPLR 3126 is granted to the extent indicated below.

Plaintiff commenced this breach of contract action against defendant Loyalty Daycare, LLC ("Loyalty"), "as successor to One Small Step Day Care Center, Inc." ("One Small Step") Plaintiff alleged that it entered into a contract to provide materials to and perform labor for One Small Step Day Care. The latter paid some but not all of the amounts due under the contract; a balance of \$80,652 remains owing under the contract.<sup>1</sup> Notably, plaintiff alleges that defendant "Loyalty is and was an alter ego and/or a successor in interest to One Small Step." Defendant Loyalty interposed an answer containing numerous affirmative defenses, including that Loyalty has no privity with plaintiff; that Loyalty is a separate legal entity from

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<sup>1</sup>Plaintiff claims too that it is owed \$15,700 in "liquidate damages."

One Small Step; that plaintiff and One Small Step are alter egos and the contract between plaintiff and One Small Step was not therefore an arms length transaction; and that the contract between plaintiff and One Small Step is tainted with fraud.

The parties engaged discovery, with the court issuing several discovery orders.

By a notice for discovery and inspection, dated April 6, 2015, defendant Loyalty sought the following documents and information from plaintiff:

1. all documents related to the action;
2. all release of liens from subcontractors;
3. all agreements with subcontractors;
4. copies of all documents pertaining to any lawsuits commenced by any subcontractors against plaintiff;
5. plaintiff's 2010 tax return;
6. plaintiff's bank statements for the year 2010 reflecting (a) deposits made of payments by defendant Loyalty, and (b) payments made by plaintiff to subcontractors on or for materials for the project underlying the contract;
7. all agreements that plaintiff (or Irwin Sinderland, plaintiff's principal) had with Tony Vitale (or an entity with which Vitale is associated) from 2005 to the present; and,
8. a list of all business ventures plaintiff (or Sinderland) had with Vitale from 1990 to the present.

Plaintiff responded by letter dated August 24, 2015. Plaintiff offered the following responses. As to defendant Loyalty's first demand, plaintiff stated that all documents related to the action were provided previously. With respect to the second demand, plaintiff stated that it had no copies of release of liens. On the third demand, plaintiff provided contracts with Elmhardt Construction Corp., a document relating to DeMonte Plumbing & Heating Corp., as well as invoices from Allers Lumber Company and Handlesets.com. Regarding the fourth demand, plaintiff identified one lawsuit commenced against it by a subcontractor on the project: Elmhardt Construction Corp., Bronx Supreme Court, index number 300914/2011. Plaintiff noted that all documents related to the lawsuit were public information. With respect to the remaining demands (numbers five through eight), plaintiff stated they sought "documents and information which are irrelevant and made solely to harass."

Defendant Loyalty wrote to plaintiff's counsel, complaining that plaintiff's responses were inadequate. Defendant Loyalty particularized its objections to plaintiff's responses, although Loyalty took no exception with plaintiff's response to demand number two.

Defendant Loyalty seeks relief under CPLR 3126, asking the court to strike the complaint or alternative relief. Plaintiff opposes the motion.<sup>2</sup>

CPLR 3101(a) requires "full disclosure of all matter material and necessary in the prosecution or defense of an action." "The words, 'material and necessary,' are... to be interpreted liberally to require disclosure... of any facts bearing on the

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<sup>2</sup>By virtue of plaintiff's opposition to the motion, <sup>it</sup> ~~by~~ provided its 2010 tax return.

controversy which will assist preparation for trial by sharpening the issues and reducing delay and prolixity. The test is one of usefulness and reason” (Allen v Crowell-Collier Publication Co., 21 NY2d 403, 406-407 [1968]).

With these principles in mind, the court finds that defendant Loyalty’s demands were proper and deserve meaningful responses. In an effort to both reach a merits-based determination in this matter and ensure that Loyalty receives necessary disclosure to mount an informed defense, the court directs plaintiff to provide the disclosure listed below within 30 days of service upon it of a copy of this order with notice of entry thereof. Defendant Loyalty may move anew for CPLR 3126 remedies if plaintiff’s response to this order is deficient. Should Loyalty move anew, it should articulate the manner in which it has been prejudiced by plaintiff’s conduct in the discovery process and suggest the specific remedy (or remedies) that is commensurate with plaintiff’s particular disobedience of the court’s order.

Accordingly, it is hereby ordered that plaintiff, within 30 days of service upon it of a copy of this order with notice of entry thereof, is directed to provide defendant Loyalty Daycare, LLC, with: (1) copies of any subcontractor waivers of liens, copies of any progress reports from the project, and copies of any W-9 forms prepared for subcontractors; (2) a copy of the rider referenced in 16.1.4 of the agreement between plaintiff and Elmhardt Construction Corp., and a copy of the agreement or proposal between plaintiff and DeMonte Plumbing & Heating Corp.; (3) copies of all filings in the lawsuit to which plaintiff was a named defendant (Elmhardt Construction Corp., index no. 300914/2011), as well as a copy of any

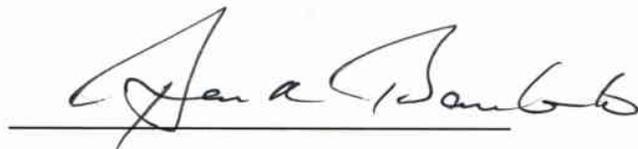
settlement agreement between plaintiff and Elmhardt Construction Corp.; (4) copies of any bank statements reflecting any payments made by plaintiff to any individual or entity for labor, services or materials on the project underlying the contract between plaintiff and One Small Step Day Care Center, Inc.; (5) copies of all agreements that plaintiff, Irwin Sindeland or both has with Tony Vitale, individually or with any entity with which Vitale is associated, from January 1, 2005 through April 6, 2015; and (6) a list of all business ventures, including the name and address of each venture, between plaintiff, Sinderland or both, on the one hand, and Vitale, on the other, from January 1, 2005 through April 6, 2015. If plaintiff cannot provide one or more aspects of the information it is directed to produce, plaintiff is to provide a detailed affidavit explaining why it is unable to do so; and it is further,

ORDERED that plaintiff is directed to pay defendant Loyalty Daycare, LLC's, counsel \$300 to compensate defendant Loyalty for the expenses incurred in making this motion; and it is further,

ORDERED that defendant Loyalty DayCare, LLC's, motion is otherwise denied without prejudice to a new motion under CPLR 3126.

This constitutes the decision and order of the court.

Dated: 12/20/16

A handwritten signature in black ink, appearing to read "Ben Barbato", is written over a horizontal line.

Ben Barbato, J.S.C.