

**Simoni v Fifth on the Park Condo, LLC**

2017 NY Slip Op 30157(U)

January 25, 2017

Supreme Court, New York County

Docket Number: 150839/2013

Judge: Arlene P. Bluth

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**SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 32**

----- X  
**JOHN B. SIMONI, JR.**

**Plaintiff,**

**-against-**

**FIFTH ON THE PARK CONDO, LLC,**

**Defendant.**  
----- X

**Index No. 150839/2013**

**Motion Seq: 002**

**DECISION & ORDER**

**HON. ARLENE P. BLUTH**

Plaintiff's motion to strike defendant's answer or, in the alternative, for a conditional order to compel disclosure, is denied. Defendant's cross-motion for leave to amend its answer and for a protective order is granted.

**Background**

This case arises out of a dispute regarding plaintiff's purchase of an apartment located at 1485 Fifth Avenue, New York, NY. Plaintiff argues that the apartment he purchased contains numerous defects that contravene the purchase agreement he entered into with the sponsor (the defendant).

In a decision dated October 8, 2013, Justice Rakower dismissed plaintiff's fraud claim and dismissed the action in its entirety against defendant Artimus Construction, Inc. Only defendant Fifth on the Park Condo, LLC remains in this action.

Plaintiff now moves to strike defendant's answer and insists that defendant has failed to comply with its discovery obligations. Plaintiff claims that he served interrogatories and

document requests on defendant on July 17, 2016. Plaintiff argues that defendant failed to serve interrogatory responses under oath and failed to provide responsive documents. Plaintiff claims he detailed his objections to defendant's lack of discovery responses in a letter dated August 31, 2016. Plaintiff insists that defendant, in a letter dated September 7, 2016, refused to provide records or further responses. Plaintiff filed the instant motion on September 8, 2016.

In opposition and in support of its cross-motion, defendant insists that plaintiff's motion is moot given the discovery responses filed along with its opposition. Defendant claims that plaintiff filed the instant motion despite defendant's insistence that it would update the interrogatories by the date demanded by plaintiff. Defendant also moves to amend its answer to include an affirmative defense of settlement and release. Defendant claims that since the time it filed its original answer in 2014, it settled a separate dispute regarding the building and defendant claims that many of the alleged defects were the subject of that settlement agreement. Defendant insists that the agreement, signed by the Condominium's Board, was made on behalf of all unit owners.

Defendant further moves for a protective order to limit discovery to matters material and necessary to the action and cites examples of what defendant considers to be overbroad interrogatories from plaintiff. Defendant wants discovery limited to the information relating to plaintiff's unit.

In opposition to defendant's cross-motion and in reply, plaintiff insists that his claims relate solely to his unit and that he never signed any document assigning his claims to the Condo's Board. Plaintiff claims the proposed affirmative defense is totally devoid of merit and the request to amend should be rejected. Plaintiff argues that striking the answer is appropriate

because defendant has not set forth proper objections to plaintiff's interrogatories and there has been no supplemental production of records by defendant since the filing of the motion.

### Striking the Answer

"While the nature and degree of the penalty to be imposed on a motion pursuant to CPLR 3126 is a matter of discretion with the court, striking an answer is inappropriate absent a clear showing that the failure to comply is willful, contumacious or in bad faith which must be affirmatively established by the moving party" (*Palmenta v Columbia Univ.*, 266 AD2d 90, 91, 698 NYS2d 657 [1st Dept 1999]). A single instance of non compliance and the failure to establish willfulness or bad faith prevents the Court from striking a defendant's answer (*id.*).

Here, the circumstances do not warrant the striking of defendant's answer. There was a **single order** that forms the basis for plaintiff's motion. Plaintiff did not make a motion simply to compel or seek a further conference (as required in this Part's Rules) to resolve the instant dispute. Instead, plaintiff wants this Court to strike defendant's answer based on alleged non-compliance with a single order.

Further, defendant rectified the problems with the interrogatory responses and has agreed to provide some documents in response to plaintiff's request for documents. Defendant acknowledged its mistake in failing to verify the interrogatory responses and submitted a verified set of interrogatory responses attached to its opposition. The Court also reviewed defendant's responses to plaintiff's document requests and finds that these responses do not constitute grounds for striking the answer.

### Protective Order

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.” “The words material and necessary are, in our view, to be interpreted liberally to require disclosure, upon request, of any facts bearing on the controversy which will assist preparation for trial by sharpening the issues and reducing delay and prolixity” (*Allen v Crowell-Collier Pub. Co.*, 21 NY2d 403, 406, 288 NYS2d 449 [1968]). “The test is one of usefulness and reason. CPLR 3101[a] should be construed . . . to permit discovery of testimony which is sufficiently related to the issues in litigation to make the effort to obtain it in preparation for trial reasonable” (*id.* at 406-07 [internal quotations and citation omitted]). “Discovery demands are improper if they are based upon hypothetical speculations calculated to justify a fishing expedition” (*Forman v Henkin*, 134 AD3d 529, 530, 22 NYS3d 178 [1st Dept 2015] [internal quotations and citation omitted]).

CPLR 3101(a) provides that the “court may . . . on motion of any party or of any person from whom or about whom discovery is sought, make a protective order denying, limiting, conditioning or regulating the use of any disclosure device. Such order shall be designed to prevent unreasonable annoyance, expense, embarrassment, disadvantage, or other prejudice to any person or the courts.”

Defendant’s motion for a protective order limiting discovery to plaintiff’s unit is granted. As plaintiff stated in his reply affirmation, he has claims relating to his unit rather than the common element conditions (affirmation of plaintiff in reply ¶ 5). Therefore, discovery should relate only to his unit.

A review of plaintiff's requested discovery (interrogatories and document requests) indicates that many of plaintiff's requests are overbroad. For example, plaintiff's document request No. 5 asks for "All contracts, subcontracts, construction management agreements, professional service agreements, trade contracts, purchase orders or other forms of agreements entered into by you with whomever and which concern the matters pleaded in this action, including without limit each of the Home Defects." Plaintiff's allegations are that his unit was not delivered to him in accordance with the purchase agreement. Asking defendant to supply every agreement associated with the construction of a massive apartment project is unlikely to lead to the discovery of relevant evidence about whether his unit was properly constructed in accordance with the purchase agreement.

Plaintiff's interrogatories are also not tailored to the allegations in this lawsuit. For example, interrogatories numbered 5, 6, 21 and 22 all seek information about the entire complex rather than plaintiff's individual unit. Interrogatory number 21 requests the "gross sales revenue from the sale of all Units, residential and commercial, for the Project." The Court can think of no relevant purpose for this request that relates to plaintiff's allegations.

Therefore, the Court orders that plaintiff limit his future interrogatories and document requests to issues relating to his unit. Information about the building as a whole is not relevant to this matter.

### **Amending the Answer**

"It is well established that leave to amend a pleading is freely given absent prejudice or surprise resulting directly from the delay. Prejudice arises when a party incurs a change in

position, or is hindered in the preparation of its case, or has been prevented from taking some measure in support of its position” (*Anoun v City of New York*, 85 AD3d 694, 694, 926 NYS2d 98 [1st Dept 2011] [internal quotations and citations omitted]). “On such a motion, the court considers the sufficiency of the merits of the proposed amendment” (*id.* at 695).

Here, defendant is entitled to amend its answer. Plaintiff will suffer little or no prejudice because at this stage of the litigation, there has only been one preliminary conference order. There have been no depositions taken and plaintiff will be entitled to seek all relevant discovery relating to this affirmative defense. Further, defendant reached the purported settlement with the Condo’s Board after the original answer was filed in 2014, meaning that it could not have been included this affirmative defense in the original answer.

Although plaintiff disputes the merits of the suggested affirmative defense – settlement and release– that, by itself, does not prevent this Court from granting defendant’s cross-motion for leave to amend its answer. The settlement reached with the Condo’s Board may not ultimately apply to any of plaintiff’s causes of action. Obviously, the burden will rest on defendant to prove that it applies to some or all of plaintiff’s claims. But at this early stage of discovery, defendant need not prove its affirmative defense as a matter of law.

### **Conclusion**

The instant motion and cross-motion evidence an increasingly acrimonious discovery process. The parties are encouraged to work together to resolve disputes before filing future discovery motions.

Accordingly, it is hereby

ORDERED that plaintiff's motion to strike defendant's answer is denied; and it is further

ORDERED that defendant's cross-motion for a protective order and for leave to amend its answer is granted, and the amended answer in the form proposed as annexed to the cross-moving papers shall be deemed served upon service of a copy of this order with notice of entry. Defendant is directed to upload a copy on NYSCEF and label it Amended Answer.

This is the decision and order of the Court.

**Dated: January 25, 2017**  
**New York, New York**

**ARLENE P. BLUTH**  
*Arlene P. Bluth*

**ARLENE P. BLUTH, JSC**

*Next Conference: March 7, 2017*