

**RSB Bedford Assoc., LLC v Rickys Williamsburg,
Inc.**

2010 NY Slip Op 33748(U)

November 1, 2010

Sup Ct, NY County

Docket Number: 602303/2009

Judge: Bernard J. Fried

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PRESENT: BERNARD J. FRIED **E-FILE** PART 60

HON. BERNARD J. FRIED Justice

RSB BEDFORD ASSOCIATES LLC,

Plaintiff,

- v -

RICKYS WILLIAMSBURG INC, et al.,

Defendants.

INDEX NO. 602303/2009

MOTION DATE _____

MOTION SEQ. NO. 005

MOTION CAL. NO. _____

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

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

Cross-Motion: Yes No

By Motion Sequence Nos. 005 and 008,¹ Defendants, Rickys Williamsburg Inc. and Ricky's Holdings, Inc. (collectively, "Ricky's"), seek to compel compliance with a subpoena served upon a non-party. By Motion Sequence No. 006, Plaintiff, RSB Bedford Associates LLC ("RSB") seeks to quash the same subpoena, and also seeks the entry of a protective order and sanctions against Defendants. By Motion Sequence No. 009, Defendants seek an order imposing sanctions upon Plaintiff, pursuant to CPLR § 3126, for failure to comply with a discovery order. Finally, by Motion Sequence No. 010, Plaintiff seeks an order imposing sanctions upon Defendants, and barring Defendants from introducing certain evidence at the as-yet-unscheduled damages hearing. All of these Motions are consolidated for disposition.

By Order dated April 12, 2010, I granted Plaintiff's motion for partial summary judgment as to liability and referred the issue of damages to a Special Referee to hear and report with recommendations.² In advance of the damages

¹ At the September 17, 2010 appearance, I refused to sign Defendants' order to show cause for sanctions, and I directed counsel to re-file it as an ordinary motion. (Hr'g Tr. 5-6, September 17, 2010.) This became Motion Sequence No. 009. Defense counsel apparently understood that I was also directing him to re-file his motion to compel, and Motion Sequence No. 008 is thus a duplicate of Motion Sequence No. 005.

² Plaintiff's motion for partial summary judgment sought attorneys' fees from both Defendants, Rickys Williamsburg, Inc. and Ricky's Holdings, Inc. My April 12, 2010 Order granted the request for attorneys' fees only as to Ricky's Holdings, Inc. Upon Defendants' subsequent motion, and Plaintiff's

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

hearing, I issued an Order, dated August 5, 2010, which set forth a circumscribed discovery schedule (the “August 5 Order”). The August 5 Order provided that, by August 31, 2010, the parties were to have exchanged all documents to be used at the damages hearing, the Plaintiff was to have provided all documents concerning a \$400,000 deposit and the return thereof, and the Plaintiff was to provide all documents related to damages, that were requested in the August 12, 2009 document demand. The August 5 Order did not provide for any non-party discovery.

Notwithstanding this omission, Defendants served a subpoena duces tecum on non-party 191 Bedford Avenue Corporation (“191 Bedford”), seeking documents relating to the sale of certain real property (the “Property”). Defendants contend that the information sought by this subpoena will show that Plaintiff has not suffered damages due to Defendants’ breach, and is thus necessary for the damages hearing.

Upon review of the papers submitted, it is clear not only that this non-party discovery was not authorized by the August 5 Order, but also that the information sought goes to the issue of liability, which has already been decided by my Order of April 12, 2010. Moreover, Ricky’s served the subpoena upon counsel to 191 Bedford on August 6, 2010, but did not serve it upon counsel to Plaintiff until August 12, 2010 (*see* Gallagher Aff. Ex. A), in violation of CPLR § 3120(3). Therefore, Plaintiff’s motion to quash the subpoena is granted, and Defendants’ motion to compel compliance therewith is denied.

Plaintiff also seeks the issuance of a protective order, pursuant to CPLR § 3101, preventing Ricky’s from issuing any additional discovery notices, subpoenas, or other forms of discovery requests, without prior express leave of the Court. This portion of Plaintiff’s motion is also granted, but the request for sanctions in connection with the non-party subpoena is denied.

I turn, next, to Defendants’ motion for an order striking portions of Plaintiff’s complaint and resolving certain issues in favor of Defendants. The basis for this motion is Plaintiff’s failure to produce documents “evidencing its being ready, willing and able to purchase the Property on the date of Ricky’s breach in June of 2009” and documents “relating to the disposition of the contract deposit or purchase of the Property.” (Weiss Affirm. ¶¶ 8-9.) Defendants contend that these documents relate to damages, and the failure to produce them amounts to a violation of the August 5 Order. It is clear, however, that the information sought goes not to the question of damages, but rather, to liability. I note, again, that the issue of liability has already been determined in accordance with my Order of April 12, 2010, and Plaintiff’s failure to produce these documents thus does not amount to a violation of the August 5 Order. Since I am satisfied that Plaintiff has complied with the balance of its discovery obligations, Defendants’ CPLR § 3126 motion is denied.

cross-motion to reargue, I amended my April 12, 2010 Order to include the issue of costs and expenses as to Ricky’s Williamsburg, Inc., d/b/a Ricky’s NYC. (See Order of June 9, 2010.)

Finally, Plaintiff seeks to sanction Defendants by directing the immediate payment of the attorneys' fees Plaintiff has incurred in connection with the motion practice necessitated by Defendants' allegedly frivolous conduct, and for an order preventing Defendants from delaying the damages hearing any further, and barring the introduction of any evidence or argument relating to the issue of liability.

In opposing this motion, Defendants argue that information relating to the question of whether Plaintiff was ready, willing and able to perform at the time Defendants repudiated the agreement, is "not only relevant to the question of damages, [but] it is crucial to Ricky's defense." (Opp. Mem.³ 3.) Defendants assert that any party seeking damages for anticipatory breach of a contract must show that it was in a position to perform at the time of the repudiation in order to recover damages.

As previously stated, my Order of April 12, 2010 granted Plaintiff's motion for summary judgment on the Complaint with respect to Defendants' liability. The issue of Plaintiff's readiness, willingness, and ability to perform is contained within this finding of liability, and Defendants are prohibited from raising this issue again for the purposes of the damages hearing. Defendants are further prohibited from making any additional arguments, or presenting any additional evidence, that is offered for the purpose of refuting the determination of their liability on the Complaint.

Accordingly, based on the papers submitted in connection with these motions and the proceedings held on October 28, 2010, it is

ORDERED that Defendant's Motions to Compel (Motion Sequence Nos. 005 and 008) are DENIED; and it is further

ORDERED that Defendant's Motion to Strike (Motion Sequence No. 009) is DENIED; and it is further

ORDERED that Plaintiff's Motion to Quash and for a Protective Order (Motion Sequence No. 006) is GRANTED insofar as Defendants are prohibited from issuing any further discovery notices, subpoenas or other discovery requests, without prior, express leave of the Court, and the Motion is DENIED in all other respects; and it is further


ORDERED that Plaintiff's Motion for Sanctions (Motion Sequence No. 010) is GRANTED insofar as Defendants shall be prohibited from presenting any arguments or evidence on the issue of liability, and it is DENIED in all other respects; and it is further

ORDERED that the issue of damages, including reasonable attorneys' fees and costs, is again referred to the Hon. John A. K. Bradley, J.H.O.,⁴ to hear and report with recommendations, except that, in the event of and upon the filing of a stipulation by the parties, as permitted by CPLR § 4317, the Special Referee, or another person designated by the parties to serve as referee, shall determine the aforesaid issue; and it is further

ORDERED that a copy of this Order with notice of entry shall be served on the Special Referee Clerk (Room 119) to arrange a date for the reference to Judge Bradley; and it is further

ORDERED that, once scheduled, the appearance before Judge Bradley may not be adjourned without prior approval of this Court, and that any such adjournment without prior approval shall result in the issuance of sanctions.

Dated: 11/1/2010



J.s.c.

HON. BERNARD J. FRIED

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

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During the October 28 proceedings, Plaintiff requested that I withdraw the reference to the Special Referee. I am declining this request.