

<b>SRN Realty, LLC v Scarano Architect, PLLC</b>
2011 NY Slip Op 33508(U)
December 23, 2011
Sup Ct, Richmond County
Docket Number: 100168/2010
Judge: Philip G. Minardo
Republished from New York State Unified Court System's E-Courts Service. Search E-Courts ( <a href="http://www.nycourts.gov/ecourts">http://www.nycourts.gov/ecourts</a> ) for any additional information on this case.
This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF RICHMOND

---

SRN REALTY, LLC,

Plaintiff(s),

-against-

SCARANO ARCHITECT, PLLC and ROBERT M.  
SCARANO, JR.,

Defendant(s).

---

DCM PART 6

HON. PHILIP G. MINARDO

DECISION AND ORDER

Index No.: 100168/2010

Motion No.: 3736-001

The following papers numbered 1 to 3 were fully submitted on the 20<sup>st</sup> day of October, 2011.

	Papers Numbered
Defendants’ Notice of Motion, dated October 5, 2011, with Supporting Papers and Exhibits _____	1
Plaintiff’s Affirmation, dated October 13, 2011, with Supporting Papers and Exhibits _____	2
Defendants’ Reply Affirmation, dated October 19, 2011 _____	3

---

This is an action commenced by plaintiff SRN REALTY, LLC (“SRN”) against defendants SCARANO ARCHITECT, PLLC and ROBERT M. SCARANO, JR. (collectively “SCARANO”) for damages resulting from SCARANO’s alleged architectural malpractice and breach of contract in connection with a construction project in Brooklyn, New York. SCARANO has asserted a counterclaim for unpaid fees.

SCARANO moves, pursuant to CPLR 3126, to dismiss SRN’s Complaint or to preclude

SRN from offering any evidence or testimony in support of its claims against SCARANO as a result of SRN's failure to properly and timely respond to SCARANO's Demand for Interrogatories and for SRN's non-compliance with several Orders of this Court including the conditional preclusion Order, dated August 3, 2011.

SRN alleges in its Complaint, dated March 8, 2010, that SCARANO failed to prepare plans in compliance with "all applicable laws, rules and regulations" and that SCARANO's drawings did not comply with the New York City Building Code, the New York City Zoning Resolution and/or the New York City Energy Conservation Code. In addition, SRN claims that SCARANO failed to comply with §29.3 of the Rules of the New York State Board of Regents and a Department of Buildings Issuance #637:OPPN #1/04.

On February 24, 2011, SCARANO served a "First Set of Interrogatories to Plaintiff". A number of the Interrogatories requested that SRN identify, with specificity, the "laws, rules, and regulations" (including the Building, Zoning, and Energy Conservation rules or regulations) that SRN claimed that SCARANO allegedly violated in the preparation of the architectural plans.

On February 25, 2011, a compliance conference was held in this matter wherein SRN was directed by this Court to respond to SCARANO's Interrogatories by March 18, 2011. SRN failed to respond to the Interrogatories and, after a compliance conference on June 1, 2011, SRN was again directed to respond to SCARANO's Interrogatories by July 1, 2011. The parties were also directed to complete discovery (including depositions) and attend a certification conference on August 3, 2011.

SRN failed to provide SCARANO with its Answers to the Interrogatories by July 1, 2011

and the depositions were not conducted. On August 2, 2011 (the day before the certification conference), SRN provided, via facsimile, its Answers to the Interrogatories to SCARANO. Notably, SRN provided the following objection to each of the Interrogatories that requested SCARANO to identify the specific rule, regulation, code, etc. that it contended that SCARANO had violated:

The Plaintiff objects to this Interrogatory on the grounds and to the extent that it improperly requests a legal conclusion and purports to seek disclosure of information that: (a) is protected by attorney-client; (b) constitutes attorney work product; (c) was prepared in anticipation of litigation; (d) is expert witness disclosure pursuant to CPLR; or (e) is otherwise privileged or exempt from disclosure. Any inadvertent identification or production of such documents or information shall not result in waiver of these privileges. The Plaintiff objects to this Interrogatory on the ground and to the extent that it purports to seek disclosure of information that is not confined to the relevant issues in this case, is beyond the scope of the pleadings, is palpably irrelevant to the subject matter of this action, or is not reasonably calculated to lead to discovery of relevant admissible evidence. Notwithstanding the aforementioned objections, expert disclosure will be done pursuant to the CPLR.

On August 3, 2011, a certification conference was held. Counsel for SCARANO advised the Court that he had only received the Answers to Interrogatories on the prior day and that he found the responses to be improper and inadequate, particularly as a result of SRN's failure to identify any specific rule, regulation, etc. that had been allegedly violated by SCARANO. The Court agreed with SCARANO and instructed SRN to identify with particularity the rules, regulations, that were referred to in plaintiff's Complaint. The Order of this Court, dated August 3, 2011, directed that all depositions were to be completed by September 15, 2011 or precluded; that all discovery responses were to be served by September 15, 2011 or precluded; and that a final certification conference was

to be held on September 20, 2011.

On August 25, 2011, pursuant to the part rules, SCARANO requested permission from the Court to file this motion as a result of plaintiff's noncompliance with the directives of the Court. Thereafter, by letter dated September 15, 2011, counsel for SRN advised SCARANO's attorney that a member of SRN would be available to be deposed on "September 19, 20 or the 21<sup>st</sup>, then October 3 on" and that counsel would be available to depose the defendant on September 27 and thereafter. All of the aforementioned dates for the depositions were beyond the date set forth in the conditional preclusion Order and plaintiff did not request that the Order be vacated or modified.

On September 20, 2011, counsel for both parties attended a conference and advised the Court that the depositions had not been conducted and discovery responses remained outstanding in contravention of the Order of August 3, 2011. The attorney for SCARANO was granted permission by the Court to file this present motion.

The Court finds that SRN's boilerplate objections to defendant's Interrogatories are baseless and improper. Certainly, SCARANO is entitled to have plaintiff identify the rules, regulations, etc. that were allegedly violated by SCARANO which form the basis of SRN's Complaint. Furthermore, plaintiff's objections are invalid as they were not interposed within the time prescribed by CPLR 3133.

It is unquestioned that SRN failed to comply with the preclusion Order of this Court, dated August 3, 2011. The Order became absolute upon plaintiff's noncompliance (*Callaghan v. Curtis*, 48 AD3d 501 [2008]). In order to avoid the adverse impact of the conditional order of preclusion, the plaintiff was required to demonstrate an excusable default for its failure to comply with the Order

and establish that it has a meritorious cause of action (*Gibbs v. St. Barnabus Hosp.*, 16 NY3d 74, *Wei Hung Hu v. Sadiqi*, 83 AD3d 820 [2011]).

In its opposition, SRN maintains that its Interrogatory responses were adequate. However, SRN provides no explanation (other than one of its attorneys was on paternity leave) for its failure to conduct the depositions prior to the Court imposed deadline or to move to vacate or modify the Order. Additionally, the Affidavit of a member of SRN which asserts that the “Plaintiff has meritorious claims against the Defendants as contained in its Verified Complaint” is insufficient to establish that it has a meritorious claim against SCARANO as it is conclusory and without foundation. As a result, SRN has not met its required burden and, as a result of the preclusion Order, will be unable to establish its prima facie case against SCARANO (*Lerner v. Ayervais*, 16 AD3d 382 [2005]).

Accordingly, it is

ORDERED that the motion of defendants SCARANO ARCHITECT, PLLC and ROBERT M. SCARANO, JR. to dismiss plaintiff SRN REALTY, LLC’s Complaint, pursuant to CPLR 3126), as a result of plaintiff’s failure to comply with the Order of this Court, dated August 3, 2011, is granted.

ORDERED that the Clerk enter Judgment accordingly.

This shall constitute the decision and order of the Court.

Dated: December 23, 2011

E N T E R,

---

HON. PHILIP G. MINARDO