Onekey, L.L.C. v Byron Place Assoc., L.L.C.

2017 NY Slip Op 33461(U)

January 30, 2017

Supreme Court, Westchester County

Docket Number: Index No. 52144/2015

Judge: Joan B. Lefkowitz

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This opinion is uncorrected and not selected for official publication.

To commence the statutory time period for appeals as of right [CPLR 5513(a)], you are advised to serve a copy of this order, with notice of entry upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER-COMPLIANCE PART
---x
ONEKEY, L.L.C.,

Plaintiff,

-against-

DECISION and ORDER
Index No. 52144/2015
Motion Date: Jan. 30, 2017
Seq. No. 5

BYRON PLACE ASSOCIATES, L.L.C.
FIRST NIAGARA BANK, N.A., and
TITAN CONCRETE CORPORATION,

Defendants.
---x
LEFKOWITZ, J.

The following papers were read on plaintiff's motion for an order: (1) resolving the issue of plaintiff's termination by defendant Byron Place Associates, L.L.C. (hereinafter "Byron") in accordance with plaintiff's claims; or (2) striking Byron's pleadings; or (3) precluding Byron from offering evidence at trial of this action in support of Byron's defenses or in support of its counterclaim; or, in the alternative to: (1) compel Byron to produce Seamus Neville for a deposition; (2) compel Byron to produce additional discovery documents; and (3) compel Byron to furnish more specific answers to certain interrogatories; and for attorneys costs and fees incurred on this motion and for such other and further relief as this court deems just and proper.

Order to Show Cause dated December 19, 2016; Affirmation in Support; Exhibits A-I
Affidavit in Support
Memorandum of Law in Support
Affirmation in Opposition
Affidavit in Opposition; Exhibits A-L
Memorandum of Law in Opposition
Affidaivt of Service on Defendant Titan Concrete Corporation

Upon the foregoing papers and proceedings held on January 30, 2017, this motion is determined as follows:

This breach of contract action arises from a construction project for an eight story residential building, with 149 residential condominium units and a three story underground parking structure (hereinafter "project"), on real property owned by Byron in Larchmont, New

York. Byron hired plaintiff to serve as the construction manager for the project. Plaintiff and Byron executed a contract (AIA Document A133-2009) in regards thereto in July, 2011. The guaranteed maximum price (hereinafter "GMP") for the entire project was set at $45,900,309.00. The GMP included costs of the design of the systems for mechanical, electrical and plumbing work (hereinafter "MEP").

According to Byron, in March, 2013 plaintiff and it agreed that although the MEP work was to remain part of plaintiff's scope of work, the MEP pricing would be removed and then added back into the GMP after further development of the MEP drawings. On March 19, 2013 plaintiff and Byron amended the contract. Plaintiff states that the costs of the MEP were no longer included in the contract price and that its scope of work changed.

In April, 2014 plaintiff submitted to Byron proposed change order forms regarding the MEP work claiming that the MEP work was now additional to plaintiff's scope of work as per the March, 2013 modification. Plaintiff now states that in its proposed change order forms it included, in addition to the prices proposed by subcontractors for the MEP work, an additional 10% for overhead and an additional 5% fee for its profit. Both Byron and plaintiff now agree that Byron directed that the MEP work be performed with a 3% markup.

By letter dated May 5, 2014, Byron (by John Myers, hereinafter "Myers") wrote to Ray Sullivan (of the Sullivan Architectural Group which provided architectural design and construction documents as well as construction oversight on the project) to detail the background of the situation that he believed led Byron to seek plaintiff's termination for cause. On May 5, 2014, Byron (by Myers) provided plaintiff with a termination for cause letter based on plaintiff's alleged refusal to properly award the MEP contracts and for delaying the project.

Plaintiff commenced this action on or about July 27, 2015. Byron filed an answer, affirmative defenses and a counterclaim on May 2, 2016. On or about July 8, 2016, plaintiff served Byron with its first set of interrogatories. Interrogatory 2 asked Byron to identify its officers, members, employees, agents and representatives with knowledge of the matters relating to the project or set forth in the counterclaim and provide a brief summary of the facts known to each of them. In its response dated September 29, 2016, Byron stated that Myers was familiar with all facts relating to the project, including but not limited to, negotiations and dealings with plaintiff, progress of construction, financing and negotiations of contract with substitute CM and/or subcontractors and that Seamus Neville (hereinafter "Neville") was familiar with the financing of the project and payment to the subcontractors, consultants, professionals, etc. Interrogatory 5 asked Byron to identify the person or persons responsible for making decisions for Byron regarding the project. Byron responded Myers and Neville. Interrogatory 36 asked Byron to identify all persons with knowledge of the relevant facts supporting the counterclaim and affirmative defenses. Byron responded that Myers, Neville and Ray Sullivan had knowledge of the project, plaintiff's termination and the facts surrounding the termination.

Furthermore, in interrogatory 27 asked Byron to "describe in detail all business ventures

of any nature in which Byron is involved." Byron stated that this interrogatory was irrelevant and it would not respond thereto. Interrogatory 31 asked Byron to "describe in detail the basis for Byron's termination for cause of Onekey and attach all supporting documents." Byron responded that documents responsive to interrogatory 31 were annexed as Exhibit C and that additional documents responsive to this request were also contained within Byron's project file which would be made available for inspection at a mutually convenient time and location at Byron's office.

On July 8, 2016, plaintiff also served Byron with a notice for discovery and production of documents.

Myers was deposed on November 10, 2016 (portions of the deposition transcript are attached as Exhibit F to plaintiff's moving papers). Myers testified that he was one of two members of Byron. WNBP, L.L.C., owned by Neville, was the other member (36-37). Referring to certain emails, Myers testified that at one point he wrote that perhaps Neville should talk to plaintiff regarding how it should proceed with hiring the MEP subcontractors perhaps because a massive amount of money was at stake (219-21). At his deposition he identified the termination letter he wrote to plaintiff (249-50) and referenced the subarticles of the AIA 201 document pursuant to which the termination was made (250-51). Myers testified that plaintiff refused to hire MEP subcontractors unless, he presumed, Byron signed change orders (253). When counsel asked Myers to point to a specific provision in the parties' contract that showed plaintiff was guilty of a substantial breach, he responded that he couldn't but that it was somewhere in the entire contract, taken as a whole (253-54). Myers further testified that through the architect's efforts, Byron attempted to negotiate the issue of the overhead fee markup (254-57).

Myers further testified that Byron provided every electronic file maintained by Byron that was responsive to plaintiff's notice for discovery and inspection (199). He stated again that "in response to the D & I notice, all of the files were provided"(200). Myers testified that "emails that were of relevance were printed out and went into files" (201).

By letter dated November 15, 2016, plaintiff's counsel wrote to Byron's counsel asking it to produce Neville for a deposition. Plaintiff's counsel requested the deposition be done in person. By email dated that same day, Byron's counsel responded that plaintiff had no right to seek Neville's deposition.

Plaintiff asserts that the sole pivotal issue in this case is whether Byron wrongfully terminated plaintiff. Plaintiff asserts that it is entitled to depose Neville. It alleges that Byron's responses to certain of its interrogatories show that Neville has knowledge of the project and plaintiff's termination. It further alleges that during his deposition Myers was at times evasive and confrontational (80) and that Myers failed/refused to identify contract provisions of which plaintiff was in substantial breach (249-266). Plaintiff asserts that it should be permitted to depose Neville regarding Byron's "termination for cause," the pivotal issue of this case partly because Myers did not have sufficient knowledge about this issue and it cannot properly

prosecute its claims and defend against the counterclaim without information and testimony from Neville.

Plaintiff also seeks an order compelling Byron to supplement its response to plaintiff's notice for discovery and inspection. Plaintiff asserts that Myers' deposition revealed, or at least suggested, that Byron failed to produce all responsive documents. Plaintiff also seeks more specific answers to two of its interrogatories, 27 and 31.

In his affidavit dated December 16, 2016, submitted in support of plaintiff's motion, Terence Carroll, plaintiff's president avers that he personally served as the plaintiff's project manager with respect to the project. He further avers that regarding the project, he interacted directly with Byron through both Myers and Neville. He stated that he dealt with Myers on the typical issues that are ordinary to every construction project as well as with regard to more substantial issues. He further averred that he interacted directly with Neville on more significant aspects of the project including change orders and other issues affecting the project budget.

Byron opposes the motion. It contends that it has fully complied with all discovery demands and all court orders. Byron asserts that plaintiff is not entitled to depose Neville since it has not demonstrated that Myers, the representative deposed already, had insufficient knowledge nor has it shown that there is a substantial likelihood that the person sought to be deposed possesses information that is material and necessary to the prosecution of the case. Byron asserts that at his deposition Myers answered all questions (other than testifying about specific clauses of the contract, a legal issue). Byron asserts that plaintiff simply seeks to inconvenience Neville who resides in Ireland.

Regarding the issue of Byron's alleged unresponsiveness to certain interrogatories posed to it by plaintiff, Byron claims that in response to 31 thereto it provided the notice of termination and stated that additional documents were in the project file which was made available for discovery and which, in fact, has been inspected.

In his affidavit dated January 11, 2017, Myers states that at his deposition he testified that plaintiff was terminated because it breached the contract. He states that when plaintiff's counsel asked him to pinpoint the specific contract provisions that were breached in a document that is more than 60 pages long, he could not do so (at that time) since it had been more than two years since the termination. Myers claims that plaintiff should have asked the court reporter to leave blanks and then permitted him the opportunity to review the transcript and fill in the blanks later. Myers states that his letter to plaintiff dated May 5, 2014, was in accordance with article 14.2.1.4 of the AIA Document A201-2007 and so stated therein and the letter further stated that the termination was due to plaintiff's refusal to award MEP contracts and due to its delaying the project. This letter was provided to plaintiff in response to its interrogatory 31. Myers now states that Byron alleges that plaintiff substantially breached article 2.3.2.1 of AIA133-209 by failing to enter into contracts with MEP contractors and article 8.2.3 of the general conditions of the contract for jeopardizing the project schedule. He further states that plaintiff breached article

15.1.3 by failing to continue to perform its work despite a dispute. Myers further asserts that Byron has provided access to plaintiff to inspect, and to request for copying, all documents responsive to its discovery requests. Myers asserts that all responsive documents have been provided. He states that "there are no other documents maintained by Byron, whether in hard copy or electronic format that are responsive to plaintiff's document requests that have not been provided already or made available for inspection and copying."

CPLR 3101(a) requires "full disclosure of all matter material and necessary in the prosecution or defense of an action, regardless of the burden of proof." The phrase "material and necessary" is "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. The test is one of usefulness and reason" (*Allen v Crowell-Collier Publishing Co.*, 21 NY2d 403, 406 [1968]; *Foster v Herbert Slepoy Corp.*, 74 AD3d 1139 [2d Dept 2010]). The court has broad discretion to supervise discovery and to determine whether information sought is material and necessary in light of the issues in the matter (*Mironer v City of New York*, 79 AD3d 1106, 1108 [2d Dept 2010]; *Auerbach v Klein*, 30 AD3d 451, 452 [2d Dept 2006]).

For the purposes of a deposition, a corporate entity has the right to designate, in the first instance, the employee who shall be examined (*Schiavone v Keyspan Energy Delivery NYC*, 89 AD3d 916 [2d Dept 2011]). The moving party that is seeking additional depositions has the burden of demonstrating that (1) the representatives already deposed had insufficient knowledge or were otherwise inadequate and (2) there is a substantial likelihood that the persons sought for depositions possess information which is material and necessary to the prosecution of the case (*Cea v Zimmerman,* 142 AD3d 941 [2d Dept 2016]; *Gomez v State of New York,* 106 AD3d 870 [2d Dept 2013]; *Schiavone v Keyspan Energy Delivery NYC*, 89 AD3d 916 [2d Dept 2011]).

Plaintiff has not sustained its burden. Firstly, it failed to append to its moving papers a copy of the complete transcript of Byron's witness, Myers, but rather only appended excerpts thereof. Notwithstanding, even on this record it is clear that Myers had sufficient knowledge about the issues and facts of this case. Regarding what plaintiff contends is the pivotal issue of why plaintiff was terminated from the project, Myers testified that plaintiff refused to hire MEP subcontractors unless, he presumed, Byron signed change orders. Plaintiff is correct in noting that when its counsel asked Myers to point to a specific provision in the parties' contract that showed plaintiff was guilty of a substantial breach, he responded that he couldn't. However, in his affidavit Myers answered this concern by stating the parties' contract is more than 60 pages long and at the time of his deposition it had been more than two years since the termination. Although plaintiff did not give him the chance to supplement his deposition transcript, Myers has now provided for plaintiff the contract provisions plaintiff allegedly violated. In response to plaintiff's interrogatories 2, 5 and 36, Byron identified both Myers and Neville as persons with relevant knowledge regarding the present matter. However, just because Neville has knowledge too doesn't mean that Myers was an insufficient witness and/or that Neville also should be deposed.

Although plaintiff claims that Byron has failed to produce all responsive documents, Byron has now submitted Myer's affidavit stating that there are no other documents maintained by Byron that are responsive to plaintiff's document requests that have not been provided already or made available for inspection and copying. Byron may not be compelled to provide further documents that do not exist (*Orzech v Smith*, 12 AD3d 1150 [4th Dept 2004]; *Lauro v Top of the Class Caterers Inc.*, 169 AD2d 708 [2d Dept 1991]). Lastly, the court finds that Byron's responses to plaintiff's interrogatories 27 and 31 were sufficient.

In light of the foregoing it is:

ORDERED that plaintiff's motion is denied in its entirety; and it is further,

ORDERED that the parties are directed to appear in the Compliance Conference Part, Room 800, on February ~~15~~ 8 2017, at 9:30 a.m.; and it is further,

ORDERED that plaintiff's counsel serve a copy of this decision and order, with notice of entry, upon all parties within five days of entry.

The foregoing constitutes the decision and order of this court.

Dated: White Plains, New York
January 30, 2017

HON. JOAN B. LEFKOWITZ, J.S.C.

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