

Onekey, LLC v Knight Harte Constr., Inc.
2018 NY Slip Op 31882(U)
August 3, 2018
Supreme Court, New York County
Docket Number: 656740/16
Judge: Kathryn E. Freed
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.
This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IAS PART 2

DECISION AND ORDER

-----x
ONEKEY, LLC,

Index No. 656740/16

Plaintiff,

Mot Seq. No. 005

- against -

KNIGHT HARTE CONSTRUCTION, INC.,

Defendant.

-----x
KNIGHT HARTE CONSTRUCTION, INC.,

Third-Party Plaintiff,

- against -

TERENCE CARROLL, ALLIED WORLD
INSURANCE COMPANY, JOHN DOES 1-10,
(being fictitious and unknown to the
third-party plaintiff, the owners,
officers and/or directors of
Onekey, LLC), XYZ CORPORATION
1-10 and/or JOHN DOES 11-20
(Mortgage and Lien holders),

Third-Party Defendants.

-----x

HON. KATHRYN E. FREED, J.S.C.:

The following e-filed documents, listed by NYSCEF document numbers 84, 85, 86, 87, 91, 92, 94, 95, and 98 were read on the motion to/for DISCOVERY SANCTIONS, PROTECTIVE ORDER, DECLARATION REGARDING DISCOVERY. Upon the foregoing documents, it is ordered that the motions are decided as follows.

Plaintiff, Onekey, LLC ("Onekey") and its president, third-party defendant Terrence Carroll ("Carroll"), move, pursuant to CPLR 3126, for an order (a) declaring the issues involving the

subcontract between plaintiff and defendant/third-party plaintiff, Knight Harte Construction, Inc. ("Knight Harte"), resolved; (b) striking the pleadings of Knight Harte; (c) prohibiting Knight Harte from offering any evidence at trial; (d) dismissing Knight Harte's third-party claims against Onekey and Carroll; (e) granting judgment against Knight Harte; or (f) compelling Knight Harte to comply with disclosure requests.

Onekey and Carroll also move for a protective order enjoining Knight Harte or its agents from (a) further defaming Onekey or its agents, and (b) tortiously interfering with Onekey's contracts with others or Onekey's prospective economic advantage.

Onekey and Carroll further move for an order declaring that Onekey and Carroll do not have to respond to categories numbered 2, 3, 12, 17, 18, 24, and 35 in Knight Harte's Notice of Inspection.

FACTUAL AND PROCEDURAL BACKGROUND

This action arises from a construction project located at 301 East 61st Street, New York, New York (the "Project"). Knight Harte was the subcontractor to Onekey, the general contractor on the Project, pursuant to a written agreement between the parties. Knight Harte seeks to recover damages in excess of \$235,082.99 based on the alleged breach of the parties' agreement by Onekey.

The Complaint includes the following factual allegations. In June 2016, pursuant to a written prime contract, nonparty 61st & 2nd NYC LLC (the "Owner"), the owner of the real property located at 301 East 61st Street, New York, New York (the "premises"), retained Onekey to serve as general contractor for the Project. Onekey hired several contractors, including Knight Harte, to work on the Project. The written subcontract, dated June 23, 2016, required Knight Harte to provide certain labor and materials for the Project in exchange for Onekey's payment of \$253,050.00. During the course of the Project, however, Onekey approved certain change orders, which increased the value of the subcontract. Throughout the Project, the Owner provided Onekey, as trustee, with trust funds that were to be paid to the subcontractors, as the funds became due, for labor and materials provided by the subcontractors for the Project.

A dispute arose between the parties when Knight Harte claimed that it had completed the work contemplated by the subcontract and was owed in excess of \$235,082.99. Onekey contended that Knight Harte abandoned the Project on October 3, 2016, having completed less than 56% of its obligations under the subcontract, including those set forth in the change orders, and that Onekey had already paid Knight Harte more than the value of the work it had completed under the subcontract.

On October 24, 2016, Knight Harte filed a mechanic's lien against the premises claiming, in part, that the agreed value of the labor and materials for the subcontract totaled \$474,696.29, and that the amount claimed under the lien was \$235,082.99. On November 22, 2016, Onekey sought to discharge the mechanic's lien by filing a lien bond with New York County Clerk. Allied World Insurance Company ("Allied") issued and filed a discharge of lien bond, described as Bond No. S001-3025 (the "Bond"), in the amount of \$258,591.29.

Thereafter, Knight Harte served Onekey with a Demand for a Verified Statement "setting forth the entries contained in Onekey, LLC's books and records" with respect to the Project. In response, Onekey sent Knight Harte a document entitled "Knight Harte-Verified Statement for 301 E 61st Street, NYC" listing, among other things, the total amount owed to Knight Harte for work performed on the Project as \$235,551.45, and the amount actually paid to Knight Harte as \$237,863.00.

On December 27, 2016, Onekey commenced the captioned action seeking to recover damages from Knight Harte for, among other things, breach of the subcontract. Specifically, the Complaint alleges causes of action for breach of the subcontract (first cause of action); unjust enrichment (second cause of action); vacatur of the mechanic's lien (third cause of action); and

tortious interference with contract and prospective economic advantage (fourth cause of action).

Knight Harte answered, generally denying the allegations in the Complaint, asserting multiple affirmative defenses, and alleging numerous counterclaims.

Knight Harte also filed a third-party Complaint against Carroll; Allied; John Does 1-10, purportedly owners, officers, or directors of Onekey; and XYZ Corporation 1-10 and John Does 11-20, which reportedly claimed to have an interest in, or lien against, the premises. The third-party Complaint alleges, in essence, that the third-party defendants diverted trust fund assets, in violation of article 3-A of the Lien Law, by failing to pay Knight Harte the full amount due and owing for labor performed and materials furnished for the Project. The third-party Complaint seeks judgment against Allied for the sum of the discharge of lien bond, plus costs, fees, and expenses (first cause of action); and against Carroll and John Does 1-10 for diversion of trust fund assets (second cause of action).

Thereafter, Knight Harte filed a motion to foreclose on its mechanic's lien, as well as for compensatory and consequential damages. Knight Harte also sought to compel Onekey to furnish a verified statement, and to recover attorneys' fees and costs associated with making the motion. By order, dated July 17, 2017, this Court granted only so much of the motion as sought an

order directing Onekey to serve a further verified statement in compliance with Lien Law §§ 75 and 76 (Dec & Order, dated July 17, 2017).

In addition, by order dated October 16, 2017, this Court denied motions (1) to dismiss the third-party Complaint as against Carroll; (2) to compel Knight Harte to produce certain books and records, pursuant to Lien Law §76(1); and (3) to quash the subpoena duces tecum served on Owner and for a protective order (Dec & Order, October 16, 2017). Knight Harte submitted 227 pages of documents, including invoices, but objected to the production of certain documents as requiring the disclosure of privileged information or being overly broad (Not of Mot, Exh B).

Onekey and Carroll now seek to impose sanctions on Knight Harte for failing to comply with disclosure requests. They also seek a protective order and a declaration regarding discovery.

LEGAL CONCLUSIONS

Sanctions

CPLR 3126, which governs discovery penalties, applies when a party "refuses to obey an order for disclosure or wilfully fails to disclose information which the court finds ought to have been disclosed" CPLR 3126 authorizes the court to impose any of the sanctions listed in the statute or make any other orders "as are just"

Onekey and Carroll argue that Knight Harte has refused to comply with plaintiff's discovery request. Specifically, Onekey and Carroll contend that, instead of producing all of the documents responsive to the discovery request, Knight Harte produced only self-serving documents that it had created, which may include inflated labor rates.

Onekey and Carroll dispute Knight Harte's claim that parties agreed that Knight Harte would be compensated for the extra work it performed under the subcontract on a "time and materials" basis rather than on the terms of the parties' subcontract. Onekey and Carroll further assert that compensation based on a "time and materials" basis would require, among other things, an agreement as to the hourly rates to be paid for the labor, the costs of materials, and the allowable markup for overhead and profit. Onekey and Carroll maintain that the parties did not make any such agreement, and that Knight Harte cannot unilaterally set its rates.

Onekey and Carroll also contend that, even if Knight Harte could assert a claim for compensation on a "time and materials" basis, it would have to submit evidence sufficient to establish the fair value of those services and materials. Onekey and Carroll argue that they seek discovery regarding the actual and fair value of any extra work that Knight Harte may have performed on the Project, including documents that Knight Harte submitted

to governmental entities that show the actual labor rates for Knight Harte's actual payments to its workers. Onekey and Carroll also assert that they cannot properly prosecute the claims in the Complaint or defend against the counterclaims without the requested documents.

Knight Harte opposes the request for additional documents, asserting that the extra work it performed on the Project could only be completed on a "time and materials" basis; that it regularly provided Onekey with weekly time and other billing records that showed that it was billing on a "time and materials" basis; and that Onekey never objected to the records. Knight Harte also maintains that it provided Onekey with detailed records of all of the hours spent and the costs of materials, including more than 200 pages of invoices and time sheets, in response to previous discovery requests and to support its claim for compensation. Knight Harte insists that it has already produced the labor rates agreed to as part of the "time and materials" billing, and states that it is willing to provide additional proof establishing the costs it incurred for materials. Knight Harte further argues that most of Onekey's document demands, including tax returns and other information for time periods when Knight Harte was not performing work on the Project, are irrelevant to this action, and were served solely to harass it.

Plaintiff's request for sanctions is denied. The disclosure dispute between these parties is not new. Both parties have previously sought relief from this Court regarding discovery. While Knight Harte acknowledges that it has produced only some of the documents requested by plaintiff, this Court determines that it did not act "wilfully" in deciding to withhold certain documents. See CPLR 3126. Knight Harte asserts its belief that the remaining documents are not relevant to this action. Therefore, the harsh sanctions requested by Onekey are unwarranted (see *Wilensky v JRB Mktg. & Opinion Research*, 161 AD2d 761, 763 [2d Dept 1990]). Further, this Court is not persuaded that, at this time, the discovery dispute can or should be resolved against Knight Harte. Moreover, Onekey may be entitled to appropriate evidentiary rulings at trial (*id.*).

Protective Order

Onekey and Carroll also seek a protective order from Knight Harte, asserting that Knight Harte's principal, Patrick Hartigan, has consistently defamed Onekey and its personnel, and tortiously interfered with Onekey's contracts with others and its prospective economic advantage. Onekey and Carroll essentially argue that Hartigan uses the pseudonym "D Clare" to send emails as part of a scheme to harass and defame Onekey. Plaintiff also asserts that Onekey received emails from Hartigan from a computer

with the same IP address as the computer that sent the "D Clare" emails.

In response, Hartigan submits an affidavit adamantly denying that he ever created the "D Clare" email address, or that he ever sent harassing emails to Onekey using the "D Clare" pseudonym (Hartigan Affid.). He also asserts that many other subcontractors on the Project have not received payment and, thus, many different people could have created the "D Clare" email account.

A protective order prevents abuse during discovery by "denying, limiting, conditioning or regulating the use of any disclosure device." CPLR 3103(a). Here, the parties offer conflicting assertions regarding Hartigan's conduct. Given this discrepancy, this Court, in its discretion, denies the motion for a protective order. See *Gliklad v Chernoi*, 138 AD3d 585 (1st Dept 2016).

Declaration Regarding Knight Harte's Notice of Inspection

Onekey and Carroll further argue that they need not respond to categories of documents numbered 2, 3, 12, 17, 18, 24, and 35 in Knight Harte's Notice of Inspection.

CPLR 3101(a) states, in part, that "[t]here shall be full disclosure of all matters material and necessary in the prosecution or defense of an action" The phrase "material

and necessary" has been interpreted 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 Cromwell-Collier Publ. Co.*, 21 NY2d 403, 406 [1968]). "The test is one of usefulness and reason" (*id.*). Thus, so long as the disclosure sought is relevant to the prosecution or defense of an action, it must be provided (*Matter of Kapon v Koch, supra*, at 38).

Here, the categories of documents numbered 2, 3, 12, 17, 18, 24, and 35 include copies of all of Onekey's agreements and amendments, invoices, and other documents regarding work on the Project; all documents pertaining to work performed by Onekey or its subcontractors on the Project; all invoices submitted by any subcontractor to Onekey on the Project; all payments made by Onekey to any subcontractor on the Project; all documents related to any claims asserted by any subcontractors to Onekey on the Project; and all mechanic's liens that were filed against the Project.

The categories of documents numbered 2, 3, 12, 17, 18, 24, and 35 are excessively broad since they relate to all of Onekey's business relationships on the Project. They are not limited to Onekey's business relationship with Knight Harte, from which the claims in this action arose. As such, the categories of documents numbered 2, 3, 12, 17, 18, 24, and 35 cannot be said to

be relevant to the prosecution or defense of this action. Thus, this Court concludes that plaintiff does not have to respond to categories of documents numbered 2, 3, 12, 17, 18, 24, and 35 in Knight Harte's Notice of Inspection.

Therefore, in light of the foregoing, it is hereby:

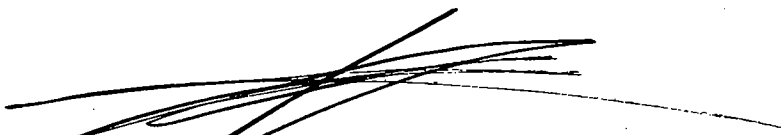
ORDERED that the motion is granted to the extent that this Court directs that Onekey and Carroll are not required to respond to the categories of documents numbered 2, 3, 12, 17, 18, 24, and 35 in Knight Harte's Notice of Inspection, and it is otherwise denied; and it is further

ORDERED that the parties are to appear for a compliance conference on October 30, 2018 at 2:15 p.m. at 80 Centre Street, Room 280; and it is further

ORDERED that this constitutes the decision and order of the court.

Dated: August 3, 2018

ENTER:



Hon. Kathryn E. Freed, J.S.C.