

**147E117ST Corp. v NYC Partnership Hous. Dev.
Fund Co., Inc.**

2018 NY Slip Op 32881(U)

November 1, 2018

Supreme Court, New York County

Docket Number: 157337/2013

Judge: Alexander M. Tisch

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. ALEXANDER M. TISCH PART IAS MOTION 52EFM

Justice

147E117ST CORP.,
Plaintiff,
- v -

INDEX NO. 157337/2013
MOTION DATE N/A, N/A
MOTION SEQ. NO. 003,004

NYC PARTNERSHIP HOUSING DEVELOPMENT FUND
COMPANY, INC., BANTA HOMES CORP., THE BLUESTONE
ORGANIZATION, INC., CONSOLIDATED EDISON COMPANY OF
NEW YORK, INC.,

DECISION & ORDER

Defendant.

The following e-filed documents, listed by NYSCEF document number (Motion 003) 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 145, 156

were read on this motion to/for DISMISS

The following e-filed documents, listed by NYSCEF document number (Motion 004) 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 133, 134, 135, 136, 137, 138, 139, 140, 141, 157

were read on this motion to/for DISCOVERY

The cross motion made by defendants NYC PARTNERSHIP HOUSING DEVELOPMENT FUND COMPANY, INC., BANTA HOMES CORP., THE BLUESTONE ORGANIZATION, INC. (co-defendants) under motion sequence no. 3 is denied as moot as these co-defendants have settled and been dismissed from the action (NYSCEF Doc. No. 107).

That branch of ConEd's motion seeking discovery from plaintiff (with the exception of the expert report, discussed infra) is granted in part. This Court agrees with ConEd that it is entitled to certain information, as previously ordered by the Court, such as photographs of the damage. Plaintiff shall produce copies of the photographs to ConEd within 30 days. The Court also finds that the plaintiff's inability to attribute damages to individual defendants renders ConEd unable to defend its case; this cannot continue. Specific directives expanding upon this ruling, shall be made upon conference with the Court at the parties' next compliance conference.

With respect to ConEd's motion to compel the expert report, the motion is denied without prejudice. Additionally, that branch of plaintiff's motion to vacate or modify the prior court orders directing plaintiff to provide the report is denied.

In February of 2015, co-defendants moved to dismiss plaintiff's complaint for failing to provide discovery. That motion was denied without prejudice in light of the so-ordered stipulation dated April 24, 2015, wherein plaintiff agreed to provide responses and various other items (NYSCEF Doc. No. 45 [Mills, J.]). Page two of the so-ordered stipulation specifically directed plaintiff to provide "expert reports" "to all defendants within 30 days" (NYSCEF Doc. No. 38). Thereafter, co-defendants moved again to dismiss plaintiff's complaint for failing to provide the requisite discovery. ConEd joined in the motion but did not separately move. By order dated January 12, 2016, the Court (Mills, J.) directed plaintiff to provide, inter alia, the expert report or face preclusion. The Court noted that plaintiff did not dispute that the defendants would be entitled to the information and found that plaintiff's failure to provide the discovery at issue impeded the co-defendants ability to defend the action.

In or around March and May of 2017, plaintiff's counsel acknowledged that an expert report was supposed to be circulated to all parties, and he was waiting for the engineer to provide it (NYSCEF Doc. No. 138).

On or about August 17, 2017, ConEd made the instant motion to compel the expert report and other discovery from plaintiff (motion sequence no. 3).

As of September 27, 2017, in opposition to ConEd's motion, plaintiff claimed the reason it has not been able to provide the report is because it has not received it yet. The affirmation of counsel states, "Plaintiff has been unable to provide its expert's report, due to its engineer's poor health. There is no basis for preclusion Plaintiff intends to provide further material, including, inter alia, the engineer's report, as soon as it is available. Plaintiff's engineer continues to advise us that the report will be completed shortly" (Solomon aff, ¶ 19-20).

Then, on or about March 8, 2018, plaintiff moves to vacate and/or modify the prior orders directing disclosure of the expert report, claiming that it is not required to provide such report until trial. Plaintiff also tersely claims that it does not have an expert nor any report, or at least not one concerning ConEd.

Plaintiff's reliance on CPLR 3101(d)(1)(i) is misplaced. The circumstances presented here are entirely different than the one applicable in the statute. Here, plaintiff's expert is known, and has been known for quite some time. Nothing in the statute warrants vacating or modifying a prior decision and order (or, orders [plural]) of this Court directing plaintiff to provide its expert's report. While plaintiff claims that, under the provision, "Plaintiff is not obligated to provide an expert report at this stage of the instant litigation" (NYSCEF Doc. No. 116, p 10), plaintiff agreed to do so and was, in fact, directed by the Court to do so in 2015 and 2016, and even acknowledged, throughout most of 2017, that it was going to exchange it. Contrary to plaintiff's counsel's representation at the compliance conference on October 31, 2018, agreeing to produce the report was not just a simple mistake made by the attorney appearing in court one day. Rather, plaintiff agreed to produce it on multiple occasions, and was in fact directed to produce it in at least two court orders.

Counsel for plaintiff submits to the Court, in a footnote, that "Plaintiff retained an expert to survey the property and provide a written report concerning damages alleged against [the co- defendants who have settled out]. However, the expert failed to produce a report and has been terminated" (NYSCEF Doc. No. 109, ¶ 19, n 1). If no expert report exists, this Court cannot compel the same from plaintiff. Plaintiff continued to state, "When plaintiff retains such expert and is provided with a written report, it will provide the same to Defendant" (*id.*). As ConEd noted, since plaintiff agreed to provide a report when it has one, then there is no need to vacate or modify the prior orders. Plaintiff can comply with the orders when it obtains the report. Accordingly, that branch of plaintiff's motion is denied.

Although plaintiff's papers appear to infer that there is some difference between any written expert report as it concerns co-defendants versus ConEd, the Court does not read any such distinction in the prior 2015 stipulation, nor any other papers mentioning the expert report. In any event, this Court and all parties should be

entitled to rely on plaintiff's counsel's representation, made under the penalty of perjury pursuant to CPLR 2106, that no expert report exists (with respect to co-defendants or otherwise); therefore, that branch of ConEd's motion to compel is denied. However, if any expert report exists at all, it should be disclosed within 30 days or plaintiff's complaint will be dismissed upon motion with proof that an expert report exists and it was not provided pursuant to this directive.

Turning to the balance of plaintiff's motion (motion sequence no. 4), plaintiff's repeated claims of ConEd's willful and deliberate failures and delays with discovery are unsubstantiated. Thus, the Court denies that branch of the motion to issue such a conditional order to strike ConEd's answer without prejudice. Further, the Court agrees with ConEd that the plaintiff is not permitted to seek both interrogatories and depositions. Plaintiff is given thirty days to choose one of the two disclosure devices.

This constitutes the decision and order of the Court.



ALEXANDER M. TISCH
J.S.C.

11/1/2018
DATE

CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	<input type="checkbox"/>	OTHER
	<input type="checkbox"/>	GRANTED	<input type="checkbox"/>	DENIED	<input checked="" type="checkbox"/>	GRANTED IN PART
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>	SUBMIT ORDER	<input type="checkbox"/>	FIDUCIARY APPOINTMENT
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	REFERENCE	<input type="checkbox"/>	