

M.I.R. Constr. Group LLC v PCGNY Corp.
2019 NY Slip Op 33078(U)
October 15, 2019
Supreme Court, New York County
Docket Number: 653829/2016
Judge: Andrew Borrok
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. ANDREW BORROK PART IAS MOTION 53EFM

Justice

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M.I.R. CONSTRUCTION GROUP LLC,
Plaintiff,

- v -

PCGNY CORP., DARIUSZ CIACH
Defendant.

INDEX NO. 653829/2016
MOTION DATE N/A
MOTION SEQ. NO. 003

DECISION + ORDER ON MOTION

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The following e-filed documents, listed by NYSCEF document number (Motion 003) 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137

were read on this motion to/for RENEW/REARGUE/RESETTLE/RECONSIDER .

Upon the foregoing documents, M.I.R. Construction Group LLC (MIR) and Michael Rachlin (collectively, the Movants)'s motion to renew is granted solely to the extent that PCGNY Corp. (PCGNY) and Dariusz Ciach (collectively, the Defendants) shall produce documents related to its bank account at the Polish & Slavic Bank within 20 days of this decision and order.

The Relevant Facts and Circumstances

Reference is made to an agreement (the Agreement), entered in July 2013, by and between M.I.R. Construction Group LLC and PCGNY Corp., pursuant to which MIR solicited various construction projects to be performed by PCGNY as general contractor. MIR alleges that PCGNY improperly distributed net profits under the Agreement by inflating certain labor and material expense reports. In its answer, the Defendants asserted counterclaims on the basis that the Movants' business practices in soliciting projects resulted in a net loss for the Defendants.

On April 10, 2018, the Movants filed a motion to strike (Mtn. Seq. 002) the Defendants' amended answer with counterclaims because of the Defendants' failure to produce certain documents related to PCGNY's alleged failure to pay MIR net profits in accordance with the Agreement. In particular, the Movants sought documents concerning the Defendants' bank account at the Polish and Slavic Credit Union, which account was allegedly used in relation to the construction projects at issue. During oral argument on August 16, 2018, New York State Supreme Court Justice Charles Ramos granted the motion to strike conditionally:

The Court: Guys, we have a serious problem here. It's my practice in situations like this to require that the producing party produce the documents or an affidavit to explain that the documents never existed or the documents did exist but were destroyed, and how they were destroyed, or I looked for the documents, they don't exist and I can't. We need to have closure on this.

Mr. Cohen [Defendants' counsel]: Then I feel that we have no problem. If that's the Court's ruling, that's what I will take back to my client.

...

The Court: The motion is granted conditionally.

...

The Court: And the condition being that your client will supply the affidavit as we've described. And if he's not going to do it the counterclaim is going to go away.

...

The Court: The motion is granted unless your client supplies the affidavit that I have just described. (NYSCEF Doc. No. 112, 13:3-12, 13:14, 13:16-18, 15:2-3).

In an affidavit, dated September 13, 2018, Dariusx Ciach, principal and owner of PCGNY attested that:

As such, I submit this Affidavit memorializing that fact stating that PCGNY did not use its account at the Polish & Slavic Bank to transact any business relating to the Projects. Indeed, we are aware that a proposed Notice of Settlement was prepared providing that Plaintiff's pending motion would be withdrawn, with prejudice and in its totality, upon receipt of an affidavit stating that "PCGNY did not use its account at the Polish & Slavic Bank to transact any business relating to the Projects." (NYSCEF Doc. No. 114, ¶¶ 8-9, the **Ciach Affidavit**).

On November 13, 2018, Judge Ramos issued an order denying the motion to strike on the basis of Mr. Ciach's affidavit (NYSCEF Doc. No. 106, the **Final Decision**). Mr. Rachlin asserts that he subsequently discovered checks issued from the Defendants' Polish & Slavic bank account (the **Checks**) on November 27, 2018 when he conducted a detailed review of the Defendants' document production (NYSCEF Doc. No. 103, ¶ 15). The Checks consisted of four checks made payable by PGNY and signed by Mr. Ciach (*id.*, ¶ 16), which Checks were produced on September 21, 2017 as part of the Defendants' second supplemental response to the plaintiff's first and second notices for discovery and inspection (NYSCEF Doc. No. 133, ¶ 12; NYSCEF Doc. No. 134). Mr. Rachlin admits that he did not conduct an exhaustive search of the Defendants' documents before this time (*id.*, ¶ 13).

The Movants subsequently filed this motion to renew on May 1, 2019, to renew the Final Decision and instead, strike the Defendants' answer and counterclaims and impose costs and sanctions.

Discussion

The Movants argue that the motion to renew should be granted because the Checks are new facts, which prove that the Ciach Affidavit was false. In opposition, the Defendants assert that renewal is improper because the Movants were in possession of the Checks at the time that the original motion to strike was filed.

Pursuant to CPLR § 2221, a motion for leave to renew must be based on additional material facts which existed at the time the prior motion was made, but which were unknown to the party seeking leave to renew, and therefore, not made known to the court (*Foley v Roche*, 68 AD2d

558, 568 [1st Dept 1979]). Although motions to renew are addressed to the court's sound discretion (*William P. Pahl Equip. Corp. v Kassis*, 182 AD2d 22, 27 [1st Dept 1992]), such motions are "granted sparingly" and are not a second chance for parties who have not exercised due diligence submitting facts in the prior motion (*Beiny v Wynyard (In re Beiny)*, 132 AD2d 190, 209-210 [1st Dept 1987]).

The record indicates that the Movants were in possession of the Checks as early as September 21, 2017, after the Defendants served their second supplemental response. As a result, the Movants' discovery of the Checks over one year after they were received are not additional material facts that were unknown to the Movants at the time the motion to strike was filed (*see Korea First Bank NY Agency v World Bridge, Inc.*, 269 AD2d 233, 233 [1st Dept 2000] [affirming denial of plaintiff's motion to renew because the checks at issue were not material unknown facts, rather the checks were "always made available and could have been included on the original motion had plaintiff made sufficient effort to do so"]). Moreover, the Movants cannot treat this motion to renew as a second chance for relief when both parties did not exercise due diligence in reviewing the documents at issue in the prior motion to strike. Although the existence of the Checks may conflict with the representations made in the Ciach Affidavit, Mr. Ciach attests that he did not intentionally mislead the court in making his prior representation (NYSCEF Doc. No. 122, ¶ 5-8).

To the extent that the Defendants argue that the Checks were drafted and drawn due to fraudulent issues with TD Bank, the Movants are nevertheless entitled to all documents associated with the Defendants' Polish & Slavic bank account to assess whether there were non-fraudulent

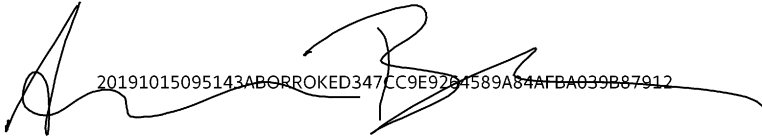
transactions conducted for any construction projects in this action. Accordingly, the motion to renew is granted solely to the extent that the Defendants shall produce documents related to its bank account at the Polish & Slavic Bank within 20 days of this decision and order.

The branch of the Movant’s motion for sanctions and costs is denied because the record indicates that the Defendants did not act in bad faith in failing to identify the Checks that formed part of their second supplemental response to the Movants; provided, however, should the Defendants fail to comply with the terms of this decision and order, the Movants may move by order to show cause to strike the Defendants’ answer and counterclaims seeking all appropriate relief.

Accordingly, it is

ORDERED that the motion for renewal is granted solely to the extent that the defendants shall produce documents related to its bank account at the Polish & Slavic Bank within 20 days of this decision and order.

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ANDREW BORROK, J.S.C.

10/15/2019
DATE

CHECK ONE: CASE DISPOSED DENIED NON-FINAL DISPOSITION

APPLICATION: GRANTED SETTLE ORDER GRANTED IN PART OTHER

CHECK IF APPROPRIATE: INCLUDES TRANSFER/REASSIGN SUBMIT ORDER FIDUCIARY APPOINTMENT REFERENCE