SHORT FORM ORDER

INDEX NO. 22601/2010

SUPREME COURT - STATE OF NEW YORK
I.A.S. TERM, PART 37 - SUFFOLK COUNTY

PRESENT:

HON. JOSEPH FARNETI
Acting Justice Supreme Court

VINCENT KEAVENY and MICHELLE KEAVENY,

Plaintiffs,

-against-

WHITFORD DEVELOPMENT INC.,

Defendant.

ORIG. RETURN DATE: FEBRUARY 1, 2018
FINAL SUBMISSION DATE: JUNE 14, 2018
MTN. SEQ. #: 003
MOTION: MOT D

PLAINTIFFS' ATTORNEY:
ABRAMS, FENSTERMAN, FENSTERMAN, EISMAN, FORMATO, FERRARA, WOLF & CARONE, LLP
3 DAKOTA DRIVE - SUITE 300
LAKE SUCCESS, NEW YORK 11042
516-328-2300

DEFENDANT'S ATTORNEY:
PETER B. GIERER, ESQ.
50 RIVER CLUB DRIVE
HILTON HEAD, SOUTH CAROLINA 29926
516-578-6963

Upon the following papers numbered 1 to 6 read on this motion TO STRIKE COMPLAINT.
Notice of Motion and supporting papers 1-3; Affirmation in Opposition and supporting papers 4, 5; Reply Affirmation 6; it is,

ORDERED that this motion (seq. #003) by defendant WHITFORD DEVELOPMENT INC. ("Whitford") for an Order, pursuant to CPLR 3126: (1) striking the complaint of plaintiffs VINCENT KEAVENY and MICHELLE KEAVENY and dismissing plaintiffs' action, granting Whitford's counterclaim and setting the counterclaim down for an inquest; and (2) deeming the issues to which the discovery demanded in the action is relevant, resolved in favor of the claims/defenses of Whitford, is hereby **GRANTED** to the extent set forth hereinafter. The Court has received opposition hereto from plaintiffs.

Plaintiffs commenced this action on June 18, 2010, by summons and complaint, against Whitford to compel the return of a $30,000.00 down payment they made in connection with their purchase of the premises known as Job 1120,

Rosewood, Kings Park, New York ("Premises"). In addition, plaintiffs are seeking damages in the amount of $13,213.00 as a result of Whitford's alleged conversion of their personal property.

Plaintiffs inform the Court that on or about December 22, 2009, they entered into a contract of sale ("Contract") with Whitford for the purchase of the Premises and for the construction of a new house thereupon. The Contract provided that Whitford would sell the Premises to plaintiffs for the sum of $549,000.00. Upon the signing of the Contract, plaintiffs paid the down payment in the amount of $30,000.00 to Whitford's attorney, Michael Strauss, Esq., as escrow agent. Whitford alleges that Mr. Strauss is still holding such monies in escrow.

Plaintiffs allege that the Contract provided that Whitford was to deliver a final Certificate of Occupancy and close no later than May 1, 2010, but that Whitford failed to do so. As such, by correspondence dated May 4, 2010, plaintiffs' attorney indicated to Mr. Strauss that pursuant to paragraph 17 of the Contract, plaintiffs "will be exercising [their] right to cancel the [C]ontract. Please return the down-payment and any accrued interest to our office as soon as possible."

By Order dated June 22, 2015, this Court denied a motion by plaintiffs for summary judgment. The Court found that plaintiffs had made an initial *prima facie* showing of entitlement to judgment as a matter of law by establishing that Whitford failed to obtain a Certificate of Occupancy and close by May 1, 2010. However, in opposition, Whitford contended that plaintiffs acted in bad faith and were primarily responsible for the delay by, among other things, not timely obtaining a mortgage commitment; requesting changes to the specific layout of the house and ordering additional work at the Premises and refusing to pay for same; supplying their own appliances rather than ordering through Whitford's supplier, and then lacking the requisite knowledge about the installation thereof; and interfering with Whitford's ability to obtain a Certificate of Occupancy from the Town of Smithtown.

Whitford has filed the instant motion to strike plaintiffs' complaint, alleging that plaintiffs failed to timely and completely respond to Whitford's discovery demands, and failed to comply with the Preliminary Conference Order in this matter. In particular, Whitford indicates that plaintiffs failed to properly

respond to its Notice for Discovery and Inspection, Interrogatories, and Combined Demands, all of which were served upon plaintiffs on or about March 27, 2017. Whitford contends that plaintiffs failed to respond at all to its demands until November 2, 2017, whereupon they provided Whitford with a disc only containing their response to Whitford's Notice for Discovery and Inspection. Whitford argues that this response was inadequate and improper, as it was not categorized or organized in response to Whitford's demands. Further, Whitford alleges that there was no response to Whitford's Interrogatories or Combined Demands, and no disclosure pursuant to the Preliminary Conference Order.

In opposition, plaintiffs have submitted copies of plaintiffs' first and second production of documents, plaintiffs' first and second responses to Whitford's Combined Demands, and plaintiffs' privilege log with respect to six emails sent from plaintiff VINCENT KEAVENY to Michael Messi, Esq. As such, plaintiffs allege that their conduct herein has not been willful, contumacious or in bad faith. Therefore, plaintiffs argue that their complaint should not be stricken.

In reply, Whitford alleges that plaintiffs' discovery responses are "still, when not totally absent, utterly incomplete and non-compliant with the CPLR and this Court's Preliminary Conference Order." Whitford contends that plaintiffs still have wholly failed to respond to Whitford's Interrogatories, and have belatedly objected to and refused to respond to a third of Whitford's Combined Demands.

CPLR 3101 (a) provides for disclosure of "all matter material and necessary in the prosecution or defense of an action, regardless of the burden of proof" (CPLR 3101 [a]). Although CPLR 3101 favors liberal disclosure, such disclosure must be material and necessary to the prosecution or defense of the action (CPLR 3101; *Gill v Mancino*, 8 AD3d 340 [2004]; *DeStrange v Lind*, 277 AD2d 344 [2000]). "If there is any possibility that the information is sought in good faith for possible use as evidence-in-chief or in rebuttal or for cross-examination, it should be considered evidence material in the prosecution or defense" (*Allen v Crowell-Collier Publishing Co.*, 21 NY2d 403, 407 [1968]). "New York has long favored open and far-reaching pretrial discovery" (*DiMichel v South Buffalo Ry. Co.*, 80 NY2d 184 [1992], *cert denied sub nom Poole v Consolidated Rail Corp.*, 510 US 816 [1993]).

CPLR 3126 provides that a court may, in its discretion, impose a wide range of penalties upon a party which either: (a) refuses to obey an order for

disclosure; or (b) willfully fails to disclose information which the court finds ought to have been disclosed (CPLR 3126). The penalties proposed by the statute include: (1) deciding the disputed issue in favor of the prejudiced party; (2) precluding the disobedient party from producing evidence at trial on the disputed issue; or (3) either striking the pleadings of the disobedient party, or staying the proceedings until the ordered discovery is produced, or rendering a default judgment against the disobedient party (CPLR 3126). It is appropriate to strike a party's pleading where there is a clear showing that its failure to comply with discovery demands is wilful, contumacious, or in bad faith (*see Denoyelles v Gallagher*, 40 AD3d 1027 [2007]; *Fellin v Sahgal*, 268 AD2d 456 [2000]; *Harris v City of New York*, 211 AD2d 663 [1995]). Generally, "willfulness" is inferred from a party's repeated failure to respond to demands and/or to comply with disclosure orders, coupled with inadequate excuses for its defaults (*see Siegman v Rosen*, 270 AD2d 14 [2000]; *DiDomenico v C & S Aeromatik Supplies, Inc.*, 252 AD2d 41 [1998]; *Frias v Fortini*, 240 AD2d 467 [1997]).

It is undisputed herein that plaintiffs failed to timely respond to Whitford's discovery demands of March 27, 2017. The failure of plaintiffs to object or move for a protective Order, pursuant to CPLR 3122, within twenty (20) days after service of the demands forecloses all inquiry concerning the propriety of the demands, except as to demands seeking privileged matter under CPLR 3101, or demands that are palpably improper (*see* CPLR 3122, 3101; *Anonymous v High School for Envtl. Studies*, 32 AD3d 353 [2006]; *Holness v. Chrysler Corp.*, 220 AD2d 721 [1995]; *Alaten Co. Inc. v Solil Management Corp.*, 181 AD2d 466 [1992]). A disclosure request is palpably improper if it seeks information of a confidential and private nature that does not appear to be relevant to the issues on the case (*see Saratoga Harness Racing, Inc. v Roemer*, 274 AD2d 887 [2000]; *Titleserv, Inc. v Zenobio*, 210 AD2d 314 [1994]). Plaintiffs have not claimed privilege with respect to the demands, save the six emails referenced in the privilege log and the documents requested in Whitford's Discovery and Inspection Demand No. 7, and the Court does not find the demands to be palpably improper. While the emails referenced in the privilege log may be shielded by the attorney-client privilege, the Court finds that plaintiffs' response to Whitford's Discovery and Inspection Demand No. 7 to be improper, as internal memoranda and other documents relating to Vincent, Michelle and/or Whitford's involvement with work on the project and premises does not solely call for information protected by the attorney-client privilege and/or work product privilege.

Accordingly, this motion by Whitford is **GRANTED** to the extent that plaintiffs' complaint shall be stricken unless plaintiffs provide full and complete responses to Whitford's demands of March 27, 2017, as well as the disclosure required by the Preliminary Conference Order, within thirty (30) days of the date of service upon plaintiffs of the instant Order with notice of entry.

The foregoing constitutes the decision and Order of the Court.

Dated: November 1, 2019

HON. JOSEPH FARNETI
Acting Justice Supreme Court

____ **FINAL DISPOSITION**

__X__ **NON-FINAL DISPOSITION**