

**MFP Finishes Corp. v 12 E. 67th St. Owner LLC**

2020 NY Slip Op 32297(U)

July 10, 2020

Supreme Court, New York County

Docket Number: 651067/2018

Judge: Andrew Borrok

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(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
NEW YORK COUNTY

PRESENT: HON. ANDREW BORROK PART IAS MOTION 53EFM

Justice

-----X

MFP FINISHES CORP.,

Plaintiff,

- v -

12 EAST 67TH STREET OWNER LLC, BOBBY CAYRE,

Defendant.

-----X

12 EAST 67TH STREET OWNER LLC, BOBBY CAYRE

Plaintiff,

-against-

MJM ASSOCIATES CONSTRUCTION LLC

Defendant.

-----X

INDEX NO. 651067/2018
MOTION DATE 12/31/2019
MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

Third-Party
Index No. 595207/2018

The following e-filed documents, listed by NYSCEF document number (Motion 001) 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82

were read on this motion to/for DISCOVERY.

Upon the foregoing documents, 12 East 67th Street Owner LLC and Bobby Cayre's (the Defendants) motion to compel is granted solely to the extent that MFP Finishes Corp. (the Plaintiff) shall produce documents in response to Demands #1, 2, 4, 6, 7, 8, 10, 12, 14, 16, 17, 19, 23, and 24 in the Defendants' Post-EBT Demands (hereinafter defined) or provide an appropriate affirmation explaining why such documents cannot be produced within 30 days of this decision and order, otherwise the Defendants have leave to renew the portion of their motion for sanctions

### The Relevant Facts and Circumstances

Reference is made to a Standard Form of Agreement Between Owner and Contractor (the **Agreement**; NYSCEF Doc. No. 47), dated September 25, 2013, by and between 12 East 67<sup>th</sup> Street Owner LLC as “Owner” and MJM Associates Construction LLC (**MJM**) as “Contractor” pursuant to which MJM would execute certain work for the Defendants at 12 East 67<sup>th</sup> Street, New York, New York (the **Project**). Reference is also made to an agreement (NYSCEF Doc. No. 48), dated June 27, 2015, by and between 12 East 67<sup>th</sup> Street Owner LLC and Mims Family Painting LLC (**Mims**) regarding paintwork for the Project.

After the Defendants rejected invoices from Mims because they alleged that said invoices covered additional work that was outside the scope of the initial proposal, the Plaintiff filed a Mechanic’s Lien (the **Lien**; NYSCEF Doc. No. 2), dated January 2, 2018, for the sum of \$187,106.00. On March 6, 2018, the Plaintiff commenced this action for (i) breach of the Agreement, (ii) unjust enrichment, and (iii) foreclosure of the Lien.

On March 15, 2018, the Defendants filed their Answer. The Defendants then filed a Third-Party Complaint on March 15, 2018 and an Amended Third-Party Complaint on April 5, 2018 against general contractor, MJM, for its alleged failure to properly oversee and coordinate construction work of sub-contractors pursuant to the Agreement (NYSCEF Doc. Nos. 7, 11).

On September 16, 2019 Mr. David Mims Jr. was deposed on behalf of the Plaintiff and certain information and document requests were made during the deposition (NYSCEF Doc. No. 52). On October 4, 2019, the Defendants served the Plaintiff with their post-deposition demands (the

**Post-EBT Demands;** NYSCEF Doc. No. 46). By a so-ordered stipulation, dated October 7, 2019, the Plaintiff agreed to respond to the Post-EBT Demands by November 22, 2019 (NYSCEF Doc. No. 53). On December 4, 2019, the Plaintiff provided a response to the Post-EBT Demands and objected to certain demands (NYSCEF Doc. No. 54).

After the parties raised this discovery dispute at a status conference on December 5, 2019 and were unable to resolve this issue thereafter, the Defendants filed the instant motion: (i) to compel the Plaintiff to produce all documents and/or information in response to the Post-EBT Demand, (ii) to sanction the Plaintiff's counsel in the sum of \$2,500 pursuant to 22 NYCRR 130-1, and (iii) for an adverse inference and preclusion against the Plaintiff pursuant to CPLR § 3126.

### **Discussion**

CPLR § 3101 (a) requires the full disclosure of “all matter material and necessary in the prosecution or defense of an action,” and this provision is interpreted liberally to require disclosure of facts that assist a party's good faith preparation for trial (*Johnson v Natl. R.R. Passenger Corp.*, 83 AD2d 916 [1st Dept 1981]).

The Defendants argue that the demands issued in their Post-EBT Demands are relevant to their defenses in this action and the requested documents must be produced as a result. In its opposition papers, the Plaintiff argues that the demands are irrelevant and duplicative.

Demand #1 is for documentation that reflects when Mr. Mims Jr. became president of the Plaintiff. The Plaintiff now explains that Certificate of Incorporation, which lists David A. Mims

Jr. as the Plaintiff's agent is the document that Mr. Mims was referring to during his deposition. It does not however respond to the question. The Plaintiff shall provide an affirmation that there are no other documents reflecting when Mr. Mims, Jr. became President and such affirmation shall certify when Mr. Mims became President and had authority.

Demands # 2, 6, and 7 are for subcontractor agreements and a list of subcontractors that the Plaintiff used for the Project. As the Defendants allege that they were invoiced for additional work outside the scope of the initial proposal, which work was done by the subcontractors, the Defendants are entitled to disclosure regarding the Plaintiffs' subcontractors to compare the work actually performed by subcontractors against the work set forth in the initial proposal. In addition, to the extent that the Plaintiffs argue that the work of the defendants needed to be redone, the Defendants are entitled to his information to confirm the same.

Demands # 10, 16, 17, 23, and 24 are for daily worksheets, agreements and time records of subcontractors, invoices of subcontractors, and evidence of payment to subcontractors.

Inasmuch as the Plaintiff asserts that it provided invoices listing the extra work and labor charged, as well as receipts for materials purchased for the Project, the Defendants are entitled to the supporting documents that corroborate whether the Plaintiff's charges align with the work performed by subcontractors.

Demands # 4, 8, and 14 are for a digital copy of a June 29, 2015 email, digital copies of emails sent by the Plaintiff from MimsPainting@OptOnline.net for the Project, and digital copies of four photographs. The Defendants are entitled to this electronic disclosure as they should be able

to verify the proper attachments to emails, including when estimates and invoices were sent, and when photos were taken of certain damage that led to later repair work.

Demand #12 is for receipts of all materials the Plaintiff purchased for the Project. Although the Plaintiff produced an internal spreadsheet that listed materials purchased for the Project (NYSCEF Doc. No. 57), the Defendants are entitled to receipts that verify the same.

Demand # 19 is for an invoice dated September 11, 2015. As the Plaintiff's deposition indicated that it was unclear whether the September 11, 2015 invoice was produced, this document must be produced.

Demands # 9, 20, and 22 are for documents that the Plaintiff sent to third party defendant, MJM. Inasmuch as the Defendants asserted third party claims that MJM independently engaged Plaintiff for unauthorized work, these demands are not related to the first party claims between the Plaintiff and Defendants and in any event, the Defendants do not explain why they are unable to obtain these documents from MJM directly.

For the avoidance of doubt, the Plaintiff produced documents in response to Demands #5 and 13. The Plaintiff also asserts that Demand #18 is moot because it has already produced all text messages in its possession. The Plaintiff shall provide an affirmation that explains the type of search that was conducted and what additional efforts were made to discover and retrieve any such text messages, including without limitation what demands were made to the cellular

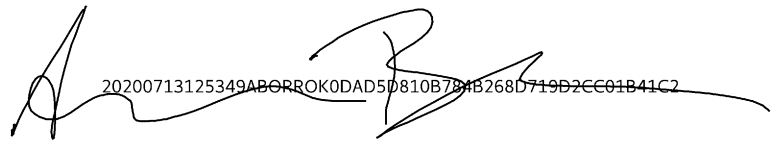
telephone carrier for such text messages and shall confirm that there are no further text messages within its possession.

To the extent that the Defendants move for sanctions against the Plaintiff's counsel, and for an adverse inference and preclusion, this portion of the motion is denied because the record does not indicate that the Plaintiff acted in a willful or contumacious manner during the discovery process (*c.f. Husovic v Structure Tone, Inc.*, 171 AD3d 559, 560 [1st Dept 2019] [preclusion appropriate where party failed to comply with three discovery orders, including one that laid out what documents needed to be provided and warned that failure to comply could result in sanctions]). The Plaintiff's request for sanctions against the Defendants' counsel is also denied.

Accordingly, it is

ORDERED that the Defendants' motion to compel is granted solely to the extent that the Plaintiff shall produce documents in response to Demands #1, 2, 4, 6, 7, 8, 10, 12, 14, 16, 17, 19, 23, and 24 in the Defendants' Post-EBT Demands or provide an appropriate affirmation explaining why such documents cannot be produced within 30 days of this decision and order, otherwise the Defendants have leave to renew the portion of their motion for sanctions; and it is further

ORDERED that the parties shall attend a status conference by Skype on September 10, 2020 at 11:30 am.



20200713125349ABORROKODAD50810B784B268D719D2CC01B41C2

7/10/2020

DATE

ANDREW BORROK, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE