

Orentreich v John B. Murray Architect, LLC
2020 NY Slip Op 32944(U)
September 8, 2020
Supreme Court, New York County
Docket Number: 650207/2019
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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DAVID ORENTREICH,

Plaintiff,

- v -

JOHN B. MURRAY ARCHITECT, LLC, JOHN MURRAY,
PHILIP LANZELOTTI

Defendant.

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INDEX NO. 650207/2019

MOTION DATE 09/08/2020

MOTION SEQ. NO. 001 002

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 001) 32, 33, 34, 35, 36, 37, 38, 39, 40, 57, 60, 62, 63, 64, 65, 66, 67, 68

were read on this motion to/for DISCOVERY.

The following e-filed documents, listed by NYSCEF document number (Motion 002) 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 58, 59, 61

were read on this motion to/for DISCOVERY.

Upon the foregoing documents, and for the reasons set forth below, (1) John B. Murray Architect, LLC (**JBM**), John Murray, and Philip Lanzelotti’s (collectively, the **Defendants**) motion (mtn. seq. no. 001) to compel David Orentreich (the **Plaintiff**) to (a) serve a bill of particulars, (b) permit inspection of the Property (hereinafter defined), and (c) respond to document demands regarding work performed by the Defendants is granted in part, and (2) the Plaintiff’s motion (mtn. seq. no. 002) to compel the Defendants to produce (a) time sheets, time slips, and other documents reflecting all time entries for all persons who worked on the renovation of the Property between 2013 and 2018, and (b) documents sufficient to show all clients to whom the Defendants held out Mr. Lanzelotti as a senior architect and Izumi Sheppard as an architect, is granted.

I. The Relevant Facts

This case involves an alleged scheme by the Defendants to defraud the Plaintiff out of approximately \$1 million in connection with a project (the **Project**) to re-design and renovate a property located at 855 Route 301, Cold Springs, New York (the **Property**) (Compl., ¶¶ 1, 5). The Plaintiff alleges that JBM overbilled him by hundreds of thousands of dollars for the services of people whom JBM held out as architects but were not actually licensed and charged over \$500,000 in inflated and fraudulent construction charges, of which the Defendants received a percentage. Specifically, the Plaintiff alleges that JBM billed for the services of Mr. Lanzelotti at the hourly rate of \$250 for a senior architect and billed for the services of Ms. Shepard at the hourly rate of \$200 for an architect, even though neither were in fact licensed architects (*id.*, ¶¶ 17, 20). After significant delays and runaway costs, the Plaintiff commenced this action alleging violations of 18 USC § 1962 (c) of the Racketeer Influenced and Corrupt Organizations Act, fraud, breach of contract, accounting malpractice, and negligent supervision.

The Plaintiff served the Plaintiff's First Set of Requests for the Production of Documents, dated April 29, 2019 (NYSCEF Doc. No. 48). The Defendants served (i) a Demand for a Verified Bill of Particulars (NYSCEF Doc. No. 34), (ii) a Demand for Site Inspection seeking access to the Property for the purposes of inspecting, measuring, surveying, sampling, testing, photographing, or recording the Property, or any specifically designated object or operation therein, pursuant to CPLR §§ 3101 and 3120 (NYSCEF Doc. No. 35), and (iii) the Defendants' First Notice of Discovery and Inspection (NYSCEF Doc. No. 36), each dated June 24, 2019.

Citing several alleged deficiencies in the Defendants' document production, the Plaintiff served a letter on the Defendants, dated November 18, 2019, requesting that the Defendants serve proper interrogatory responses and otherwise comply with their discovery obligations (NYSCEF Doc. No. 50). The Plaintiff served a Notice to Admit on the Defendants, dated January 20, 2020 (NYSCEF Doc. No. 52). Subsequently, the Plaintiff followed up with an email to the Defendants, dated March 17, 2020, citing continuing discovery deficiencies and requesting dates when the Defendants would be available for depositions (NYSCEF Doc. No. 53). The court held a status conference in this matter on June 16, 2020 and directed the parties to meet and confer in an effort to reach a compromise regarding their respective discovery demands. Ensuing conversations failed to resolve the parties' discovery disputes and both sides filed the instant motions to compel.

II. 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]).

a. The Defendants' Motion to Compel is Granted in Part.

The bill of particulars has been abolished in many jurisdictions, including in the federal courts, as broader disclosure statutes have rendered them superfluous (*Northway Engineering, Inc. v Felix Indus., Inc.*, 77 NY2d 332, 335-336 [1991]). In fact, although "[t]he drafters of the CPLR also recommended its abolishment in conjunction with the expansion of the disclosure statutes

now found in article 31[,] . . . the Legislature retained the bill of particulars, not as a disclosure device, but in its traditional and limited role as a means of amplifying a pleading” (*id.* at 336 [internal citations omitted]). In other words, the purpose of the bill of particulars is “to amplify the pleading, limit the proof, and prevent surprise at trial,” but it is not a vehicle to obtain evidentiary material (*Arroyo v Fourteen Estusia Corp.*, 194 AD2d 309, 309 [1st Dept 1993]). When a bill of particulars is replete with palpably improper evidentiary requests, the proper remedy is vacatur of the bill of particulars (*Franklin, Weinrib, Rudell & Vassallo, P.C. v Stellato*, 240 AD2d 301, 301 [1st Dept 1997]). In addition, the commercial division rules limit interrogatories to 25, including subparts, unless the court provides a different limit in the preliminary conference order (22 NYCRR § 202.70 [11-a] [a]). In this case, no such expansion was requested or provided.

Here, the Defendants’ Demand for a Verified Bill of Particulars, which contains 75 paragraphs, excluding subparts, “seeks details more appropriately developed at a deposition and not consonant with the purposes of a bill of particulars” (*Singer Warehouse & Trucking Corp. v Duskin*, 87 AD2d 770, 771 [1st Dept 1982]). To wit, the Defendants’ Demand for a Verified Bill of Particulars seeks the identification of witnesses with knowledge of relevant information (requests 1 and 2), and a computation of damages (request 11). Significantly, the majority of the requests vaguely ask the Plaintiff to “state the basis for the allegations” for nearly every paragraph of the 95 paragraph, highly detailed complaint (Requests 13-75). However, such requests are improper in a bill of particulars and must be sought in the form of interrogatories pursuant to Rule 11-a of the Commercial Division Rules or by another appropriate disclosure device. The Defendants may not avoid the limitation on the number of interrogatories by simply

calling it a demand for a bill of particulars. Accordingly, the Defendants' Demand for a Verified Bill of Particulars is vacated.

However, inasmuch as allegedly faulty measurements and misplaced design elements form part of the basis for the claims in this case, the Defendants are entitled to a site inspection to take photographs and measurements of the Property. The Plaintiff's argument that "the site inspection and as-built drawings are irrelevant because the re-designed Cold Spring Property may not look anything like the Defendants designed" fails. The Defendants do not have to simply take the Plaintiff's word for it. They are entitled to enter the premises and do fact discovery as it relates to the Plaintiff's allegations. For the avoidance of doubt, to the extent that the Plaintiff has certain Covid-19 related safety concerns regarding any such inspection, the parties shall within seven (7) days of this order schedule such site inspection, which site inspection shall take place within thirty (30) days of this order, and shall provide for an appropriate protocol for conducting such site inspection with appropriate personal protective equipment and otherwise limiting the number of people present to appropriately address the Plaintiff's COVID-19 concerns.

The Defendants are also entitled to all documents detailing any post-termination remedial work allegedly performed on the Property and such documents shall be produced within thirty (30) days of this order. Such documentation is material and necessary to defend against the claims in this action as it may reveal the extent, or lack thereof, of Plaintiff's damages. Among other things, this discovery may show whether the Defendants' original designs were used and what if any defective work ensued therefrom.

b. The Plaintiff's Motion to Compel is Granted.

The time slips, time sheets, and all other documents reflecting time entries for all persons who worked on the project at the Property between 2013 and 2018, including time that was billed to other clients, are material and necessary to the Plaintiff's fraud and breach of contract claims. Such information is relevant to whether the Defendants (i) devoted sufficient time and personnel to the project as required under the contract, (ii) timely prepared the required construction documents, and (iii) whether the time spent working on the Project, including the time spent preparing the construction documents, is accurately reflected in the invoices sent to the Plaintiff. Accordingly, the Defendants shall produce documents responsive to Request 12 within thirty (30) days of the date of this decision and order.

The defendants must all produce all documents showing all other clients to whom the Defendants held out Mr. Lanzelotti and Ms. Shepard as architects. This is relevant to the Plaintiff's allegation that the Defendants engaged in a pattern of fraudulent conduct of overbilling by holding employees out as architects and billing them as such when in fact they were not licensed architects. Therefore, the Defendants shall produce documents responsive to Requests 8-11 within 30 days of the date of this decision and order.

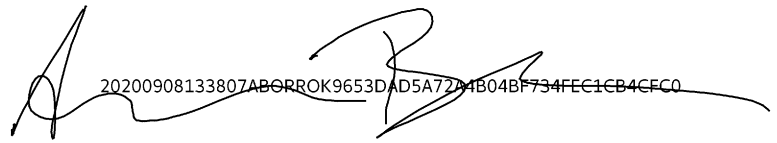
Accordingly, it is

ORDERED that the Defendants' motion to compel (mtn. seq. no. 001) is granted to the extent that (1) the Plaintiff shall permit the Defendants to conduct a site inspection to take photographs and measurements, and the the parties shall within seven (7) days of this order schedule such site

inspection, which site inspection shall take place within thirty (30) days of this order, and shall provide for an appropriate protocol for conducting such site inspection with appropriate personal protective equipment and otherwise limiting the number of people present to appropriately address the Plaintiff's COVID-19 concerns, (2) the Plaintiff shall produce all documents detailing any post-termination remedial work allegedly performed on the Property within 30 days of the date of this decision and order; and it is further

ORDERED that the Defendants' Demand for a Verified Bill of Particulars is vacated; and it is further

ORDERED that the Plaintiff's motion to compel (mtn. seq. no. 002) is granted, and the Defendants shall produce all (1) time sheets, time slips, and other documents reflecting all time entries for all persons who worked on the renovation of the Property between 2013 and 2018, and (2) documents sufficient to show all clients to whom the Defendants held out Mr. Lanzelotti as a senior architect and Ms. Sheppard as an architect, within 30 days of the date of this decision and order.



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9/08/2020
DATE

ANDREW BORROK, J.S.C.

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