

New York Univ. v Turner Constr. Co.

2020 NY Slip Op 32953(U)

September 8, 2020

Supreme Court, New York County

Docket Number: 653535/2015

Judge: Andrew Borrok

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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

INDEX NO. 653535/2015

NEW YORK UNIVERSITY, NYU SCHOOL OF MEDICINE,
NYU HOSPITALS CENTER,

MOTION DATE 07/23/2020

Plaintiff,

MOTION SEQ. NO. 010

- v -

TURNER CONSTRUCTION COMPANY,

**DECISION + ORDER ON
MOTION**

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 010) 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310

were read on this motion to/for DISCOVERY.

Upon the foregoing documents, Turner Construction Company's (**Turner**) discovery motion, brought pursuant to CPLR § 3124, is granted in part as set forth below.

The Facts Relevant to the Instant Motion

By this motion, Turner seeks to compel discovery in three categories: (i) the balance of all of the actual vender invoices submitted by New York University, NYU School of Medicine and NYU Hospitals Center's (all plaintiffs, collectively, **NYU**) to the Federal Emergency Management Agency (**FEMA**) in connection with damages NYU sustained in Super Storm Sandy; (ii) authorization from NYU to obtain certain records from the New York City Department of Buildings (**DOB**); and (iii) certain requested communications and documents exchanged between NYU and FEMA.

As relevant to the instant motion, Turner served its First Notice for Discovery and Inspection on July 18, 2016, pursuant to which it requested that NYU, “in the event that repairs were actually performed in connection with the damages alleged in the Complaint, provide true and accurate copies of all invoices, bills and other statements evidencing or reflecting such repairs, and proof NYU paid for such repairs” (NYSCEF Doc. No. 296, ¶ 24). NYU responded on September 2, 2016 that, “[s]ubject to and without waiving its General and Specific Objections, and upon entry of a suitable protective order by the Court, NYU will produce ... any non-privileged documents responsive to this Request, which were compiled to support its FEMA and Factory Mutual claims, and which can be located based on a search of reasonable scope from centralized repositories maintained by NYU for tracking the Superstorm Sandy recovery effort (NYSCEF Doc. No. 297 at 23).

Turner also requested that NYU produce “[t]rue and accurate copies of any and all correspondence and communication between NYU or anyone on its behalf and FEMA” (NYSCEF Doc. No. 296, ¶ 16). On September 2, 2016, NYU agreed to commence production, “[s]ubject to and without waiving its General and Specific Objections, and upon entry of a suitable protective order,” of “its claims and supporting documentation submitted to FEMA in connection with the harm caused by Superstorm Sandy” (NYSCEF Doc. No. 297 at 18).

NYU began its production, on a rolling basis, on November 18, 2016 (NYSCEF Doc. No. 295, ¶ 4). In December 2018 and January 2019, NYU produced the claims and supporting documentation submitted to FEMA, as outlined in its response to Turner’s Notice for Discovery and Inspection, including non-privileged communications between NYU and FEMA and over

16,000 invoices that FEMA used to substantiate NYU's damages claim (*id.*, ¶ 9). For the avoidance of doubt, FEMA did not require NYU to produce all invoices in support of its applications, and, instead, permitted a sampling of invoices to be produced with respect to certain grants (*id.*, ¶ 19).

In March 2019, at Turner's request, NYU produced a spreadsheet for all Sandy-related expenses that it had submitted to FEMA (the **Expense Spreadsheet**). NYU also produced approximately 2,000 additional invoices as part of its expert disclosure, representing a random sampling from the Expense Spreadsheet that NYU's expert used to verify expenses submitted to FEMA (*id.*, ¶¶ 20-22). NYU asserts that the reliability of the Expense Spreadsheet has been confirmed by both FEMA and one of their experts through this sampling of invoices and is also subject to audit by FEMA's Office of the Inspector General (*id.*, ¶ 21). NYU has offered to produce an additional sampling of invoices, if Turner wishes, for its expert to review (*id.*, ¶ 20).

Pursuant to a So-Ordered Stipulation, dated May 15, 2019, the parties previously stipulated that each had "responded to outstanding doc[ument] requests as per prior order" (NYSCEF Doc. No. 301). Thereafter, in August 2019, at Turner's request, NYU also produced all of its correspondence with FEMA that was produced by NYU in another litigation against Factory Mutual (NYSCEF Doc. Nos. 302-303).

In September 2019 and February 2020, Turner filed two Orders to Show Cause to Compel Discovery (NYSCEF Doc. Nos. 119, 159). Neither of those discovery motions sought (or even mentioned) the additional invoices or FEMA communications Turner now seeks. However, in

response to a demand for all invoices from Turner in December of 2019, NYU reiterated that invoices for Sandy-related expenses could not simply be extracted from a database. NYU then created a special software code (the **Extraction Code**) to cross-reference the Expense Spreadsheet, which included invoice number, date, and amount, the vendor number and name and the date on which the invoices were paid, with the invoices stored on its databases (NYSCEF Doc. No. 295, ¶¶ 25-26). Using that Extraction Code, NYU extracted approximately 95,000 documents, which represented approximately 85% of the total number of Sandy-related invoices, and produced the same to Turner on February 27, 2020 (*id.*, ¶ 26). The Extraction Code did not produce approximately 10,000 additional documents with a total value of \$118 million for a variety of reasons, including typographical errors in the data entry of the invoice number (*id.*, ¶¶ 28-29). According to NYU, more than 5,000 of those invoices are valued at less than \$100 each and therefore it was not feasible or reasonable for NYU to manually search for them. NYU did manually search for those remaining invoices that had the highest value and manually extracted an additional 122 invoices with a total value of \$33 million and produced them to Turner on August 13, 2020 (*id.*, ¶ 29). In addition, NYU represents that approximately \$45 million of the expenses listed were for rental and lease costs for which there are no associated invoices (*id.*, ¶ 30). NYU claims that the total value of invoices it could not reasonably produce is approximately \$40 million or 3% of NYU's total damages claim (*id.*, ¶ 31).

Turner brought the instant motion to compel on July 24, 2020 (NYSCEF Doc. No. 252). On August 13, 2020, after the motion was filed, NYU produced an additional 1,659 documents in response to Turner's demand for additional correspondence with FEMA and a privilege log for any withheld communications (NYSCEF Doc. No. 295).

Discussion

I. Invoices

As noted, Turner seeks to compel production of all of the “actual vendor invoices” that support NYU’s property damage submissions to FEMA, which were listed in NYU’s Project Worksheet and Capped Grant, totaling more than \$400 million. NYU has already produced its FEMA grant application along with all the supporting documentation it submitted (NYSCEF Doc. No. 295, ¶ 9). This production included over 16,000 actual invoices that FEMA used to substantiate NYU’s damages claims, an additional 2,000 invoices were produced as part of NYU’s expert’s report, and a number of additional invoices were also produced after the filing of the instant motion (*id.*).

With respect to the 95,000 other documents that NYU has produced, Turner claims that 75% of those documents are simply screenshots of data entry lines in NYU’s Electronic Data Interchange accounting system (**EDIs**), and not the actual underlying invoices. Turner argues that these EDIs fail to provide sufficient detail to evaluate the \$400 million in property damage claims submitted by NYU (e.g., *compare* NYSCEF Doc. No. 261 [EDI] *with* NYSCEF Doc. No. 262 [Actual Invoice]).

In its opposition papers, and as discussed above, NYU points out that in many cases there are no other invoices. In addition, NYU submits an affidavit from William Chun, NYU’s Director of Finance (NYSCEF Doc. No. 307) who explains that NYU uses two databases in relation to its accounting, receipt and storage of invoices, and specifically that NYU “engages in Electronic Data Interchange (“EDI”) with the majority of its vendors” and invoices may be “provided

directly from a supplier's internal system" to NYU's system (*id.*, ¶¶ 1,11). Accordingly, Mr. Chun attests that NYU's vendors submit invoices directly to NYU's EDI System and they are stored there as EDI Invoices (i.e., what was produced to Turner); NYU does not require or prefer that any additional invoice be submitted by mail or email, and thus, "in most cases the EDI Invoice is the only invoice Plaintiffs have in their possession (and, hence, the only invoice produced to Defendant)" (*id.*, ¶¶ 11-12, Fig. 1-2).

Mr. Chun further explains that for some Sandy-related expenses, NYU produced both a non-EDI formatted invoice (i.e., a "paper invoice") and an EDI invoice because FEMA initially required NYU to submit paper invoices for certain expenses, but that this practice stopped when FEMA began to accept EDI invoices for more recent submissions (*id.*, ¶ 13). Critically, Mr. Chun attests that:

Plaintiffs' submissions to FEMA (which included Paper Invoices) were stored separately **and produced to Defendant in December 2018 and December 2019**. Plaintiffs do not, however, receive or maintain Paper Invoices as a matter of course, nor did they at the time of Superstorm Sandy.

(*id.* [emphasis added]).

As discussed above, Turner has not previously raised the issue of these allegedly critical errant invoices. In fact, as discussed above, Turner stipulated in May of 2019 that, the "***Parties have responded to outstanding doc[ument] requests as per prior order***" (NYSCEF Doc. No. 110 [emphasis added]). Turner has also not raised the issue of additional invoices in two recent prior discovery motions in this action.

NYU is not required now to produce additional invoices which amount to approximately 3% of their claim. Turner's demand that NYU produce invoices to support every single penny of the hundreds of millions of dollars in FEMA grants, years after the fact, is unduly burdensome and, in many cases, disproportionate to the specific invoices for which compensation is sought as more than 5,000 of the outstanding invoices are valued at less than \$100 each and their total value is approximately 3% of NYU's overall claim. Each of the unproduced invoices that do exist (which according to NYU total roughly 10,000), would need to be manually retrieved, one by one, in a process that would take a substantial amount of time to ensure that it is properly cross referenced to the previously produced spreadsheet. Inasmuch as NYU seeks to recover what it submitted to FEMA, it has produced all the supporting documentation that it produced to FEMA. As such, having received all of the documents that FEMA required as to the claim, Turner is not prejudiced by not receiving other documents and NYU is not required to produce more to Turner in support of its FEMA claims than it was required to produce to FEMA in the first instance. To the extent that Turner argues that damages cannot be justified based on what has been produced and that FEMA should not have granted relief to NYU based on the submission, or that the information relied upon by NYU's expert does not support the claim, or that 3% or some other percentage of the claimed damages cannot be supported, this very well may be a conclusion that Turner's expert reaches and an issue of fact for the factfinder, should there be a finding of liability. Accordingly, this branch of Turner's motion is denied.

II. DOB Records

Turner also seeks an authorization from NYU to access DOB records for the key building elements at issue in this case. It is entitled to such authorization. Compliance with this request

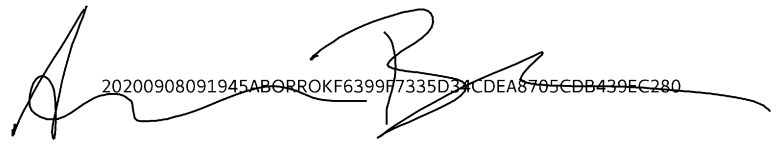
will impose no additional burden on NYU and to the extent that the building is designated “sensitive” under Freedom of Information Law, whatever concerns with respect to confidentiality NYU may have are amply covered by the parties’ confidentiality agreement.

III. FEMA Communications

Turner’s request for additional NYU communications with FEMA is, at minimum, premature. As noted, Turner first requested NYU’s communications with FEMA in July of 2016 pursuant to its First Notice for Discovery and Inspection (NYSCEF Doc. No. 294, Request No. 16), and NYU produced its grant application to FEMA along with supporting documentation, including non-privileged communications between NYU and FEMA and, as discussed above, over 16,000 invoices that FEMA used to substantiate NYU’s damages claim (NYSCEF Doc. No. 295, ¶ 9). Turner now seeks additional communications with FEMA about NYU’s claims and NYU has asserted that they are privileged pursuant to attorney client privilege, work product and common interest privilege. As Turner’s motion was filed prior to it being able to review NYU’s privilege log, the court declines to speculate on what documents may or may not be properly withheld on the basis of privilege.

Accordingly, it is

ORDERED that the defendant’s motion is granted solely to the extent that the plaintiffs are directed to sign the authorization(s) to allow defendant to access Department of Buildings records within seven (7) days of this decision and order.


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9/8/2020

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