Integrated Project Delivery Partners, Inc. v Susan L. Schuman Family Trust
2020 NY Slip Op 34113(U)
December 14, 2020
Supreme Court, New York County
Docket Number: 160102/2016
Judge: Kathryn E. Freed
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. KATHRYN E. FREED** **PART** **IAS MOTION 2EFM**

Justice

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INTEGRATED PROJECT DELIVERY PARTNERS, INC.,

Plaintiff,

- v -

SUSAN L. SCHUMAN FAMILY TRUST, ILENE OSHEROW and SUSAN SCHUMAN,

Defendants.

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INDEX NO. 160102/2016

MOTION SEQ. NO. 002

DECISION AND ORDER

The following e-filed documents, listed by NYSCEF document number (Motion 002) 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 83, 86, 87

were read on this motion to/for VACATE/STRIKE - NOTE OF ISSUE/JURY.

In this action seeking, *inter alia*, damages for breach of contract, plaintiff INTEGRATED PROJECT DELIVERY PARTNERS, INC. moves, pursuant to 22 NYCRR 208.17(c), to vacate the Notice of Trial and Certificate of Readiness ("the note of issue") filed by defendants SUSAN L. SCHUMAN FAMILY TRUST, ILENE OSHEROW and SUSAN SCHUMAN on January 6, 2020 (Docs. 37-43, 86-87). Plaintiff also requests that, upon granting that branch of its motion vacating the note of issue, defendants be compelled, pursuant to CPLR 3124, to complete a deposition by a date certain (Docs. 37-43, 86-87).[1] After a review of the parties' contentions, as well as the relevant statutes and case law, the motion is decided as follows.

[1] Although it is unclear from its papers, it appears that plaintiff seeks to take one deposition on behalf of all defendants.

FACTUAL AND PROCEDURAL BACKGROUND:

The underlying facts of this case are set forth in detail in the decision and order of this Court entered September 18, 2018 ("the 9/18/18 order"), which dismissed the second (unjust enrichment) and third (foreclosure of a lien) causes of action asserted against defendants (Doc. 30). Any additional relevant facts are set forth below.

Plaintiff served defendants with a Notice of Deposition in February 2017 (Docs. 38 ¶ 5; 41). A preliminary conference was held in this matter in July 2017, at which time this Court directed the parties to complete all depositions "on or before January 30, 2018" (Doc. 12). The parties thereafter appeared for several discovery conferences, including a status conference on September 17, 2019 (Doc. 35). During said conference, only defendants' deposition remained outstanding and this Court ordered that it be completed on October 31, 2019 and that the note of issue be filed by January 21, 2020 ("the 9/17/19 order") (Doc. 35). Since discovery was almost complete, the parties were advised that they could file the note of issue sooner than January 21, 2020 (Doc. 35). A control date was set for a January 7, 2020 conference and the parties were directed to notify this Court if it became unnecessary (Doc. 35). Defendants filed the note of issue on January 6, 2020, representing that all discovery in this action was complete (Doc. 36).

Plaintiff argues that its motion, pursuant to 22 NYCRR 208.17(c), must be granted and the note of issue vacated because defendants' certificate of readiness contains the erroneous statement that all discovery was completed or waived (Doc. 38 ¶ 12). Plaintiff further asserts that it will be severely prejudiced if required to prosecute this action without the deposition of the defendants (Doc. 38 ¶ 10).

In an attorney affirmation submitted in opposition, defendants argue that the motion should be denied in its entirety because discovery is complete and plaintiff had ample time to complete

their deposition before the filing of the note of issue (Doc. 44 ¶ 2). Defendants also contend that, by failing to complete their deposition on October 31, 2019, plaintiff failed to comply with this Court's 9/17/19 order (Doc. 44 ¶ 2).

Defendants further represent that "[p]laintiff's counsel, Henry Chan, Esq. ("Chan"), indicated to [defendants at the end of the September 2019 status conference] that he did not intend to take defendants deposition" (Doc. 44 ¶ 10). By letter dated September 23, 2019, counsel for defendants asked plaintiff's counsel to confirm whether he wished to proceed with the scheduled deposition (Doc. 51). A follow up email requesting confirmation of the same was sent to plaintiff's counsel on October 10, 2019 (Doc. 52). That day, plaintiff's counsel responded, "I am awaiting confirmation [from] my client, will get back to you in a few days" (Doc. 52). In a subsequent email sent to plaintiff's counsel on October 24, 2019, defendants' counsel stated, "[y]ou have not provided us with confirmation of your intent to proceed with the deposition of Ms. Schuman and therefore shall deem that you do not intend to go forward with such deposition on October 31, 2019" (Doc. 52). Plaintiff's counsel responded, "[a]t this time, deposition on 10/31 is unlikely and awaiting confirmation for later date from client (and if we move forward, will allow for ample time for you to prep)" (Doc. 52).

In a reply memorandum of law, plaintiff contends, *inter alia*, that it did not waive its right to depose defendants (Doc. 86). Moreover, plaintiff maintains that it should not be deprived of an opportunity to complete this "critical part of discovery" and that vacating the note issue will in no way prejudice defendants because trials have been delayed by the Covid-19 pandemic (Doc. 86). Further, in a reply affidavit, Chan concedes that he only contacted defendants to reschedule the deposition *after* the note of issue was filed, at which time he proposed January 22 or 23, 2020 at

10 am to depose defendants and avoid motion practice (Doc. 87). However, defendants refused, claiming that plaintiff had waived its right to complete the deposition (Doc. 87).

LEGAL CONCLUSIONS:

As an initial matter, although plaintiff moves pursuant to 22 NYCRR 208.17(c) of the Uniform Rules For The New York City Civil Court, that section is not applicable herein. However, since 22 NYCRR 202.21(e), the counterpart rule for the Supreme Court, mirrors the standard set forth in 22 NYCRR 208.17(c), this technical error will be disregarded by this Court (*see* CPLR 2001).

"22 NYCRR § 202.21(e) provides, in pertinent part, that, within 20 days after service of a note of issue and certificate of readiness, a court may grant a party's motion to vacate the note of issue 'upon affidavit showing in what respects the case is not ready for trial and if the certificate of readiness fails to comply with the requirements of this section in some material respect'" (*Meighn v Suggs*, 2019 NY Slip Op 32986[U], 2019 NY Misc LEXIS 5444, *18-19 [Sup Ct, NY County 2019] [internal quotation marks and citation omitted]; *see Ruiz v Park Gramercy Owners Corp.*, 182 AD3d 471, 471 [1st Dept 2020]).

This Court's "Compliance Conference Additional Directives," which was attached to the September 2019 order, provides, in part, that:

> "[a]ny party having disclosure issues must contact the Part . . . to arrange for a telephone conference with Justice Freed or her Law Clerk before resorting to motion practice. Such a conference must be arranged *before the last day on which discovery is due. Failure to do so before the last day of discovery will result in the waiver of all further discovery absent a showing of good cause*" (emphasis added) (Doc. 35).

The email by plaintiff's counsel dated October 24, 2019 appears to suggest that plaintiff did not wish to proceed with the scheduled deposition and that, if plaintiff's position changed, adequate notice would be given to defendants with respect to any future scheduling. There is no proof that plaintiff attempted to contact defendants to reschedule the deposition before October 31, 2019, thus supporting defendants' argument that its right to do so was waived (*compare Gallo v DMHZ Corp.*, 2012 NY Slip Op 33970[U], 2012 NY Misc LEXIS 6959, *8-9 [Sup Ct, NY County 2012]). Even if the email fails to unequivocally establish plaintiff's waiver to proceed with the scheduled deposition, it is undisputed that the deposition was not completed as directed by the 9/17/19 order, which amounts to a presumptive waiver of its right to depose defendants (*Matter of City of NY*, 25 Misc 3d 1238[A], 2009 NY Slip Op 52480[U], 2009 NY Misc LEXIS 3305, *10-11 [Sup Ct, Kings County 2009]; *see generally Jones v Grand Opal Constr. Corp.*, 64 AD3d 543, 543-544 [2d Dept 2009]). Additionally, plaintiff does not claim that it contacted the Part to reschedule the deposition before October 31, 2019, and it proffers no reason for failing to comply with the additional directives. Thus, that branch of the motion seeking to vacate the note of issue is denied.

Despite the foregoing, however, it is well-established that "[t]rial courts are authorized, as a matter of discretion, to permit post-note of issue discovery without vacating the note of issue, so long as neither party will be prejudiced" (*Cabrera v Abaev*, 150 AD3d 588, 588 [1st Dept 2017]; *see Cuprill v Citywide Towing & Auto Repair Servs.*, 149 AD3d 442, 443 [1st Dept 2017]). This Court finds, in its discretion, that limited discovery is warranted under the circumstances herein. Defendants' deposition is a critical part of discovery and plaintiff has demonstrated its attempt to schedule new deposition dates, albeit after the note of issue was filed. Since it is unlikely that this case will proceed expeditiously to trial, given the backlog of trials due to the Covid-19 pandemic,

no prejudice will result to defendants in allowing plaintiff the opportunity to depose them pursuant to an expedited schedule (*see McMore v Constantinides*, 2020 NY Slip Op 31696[U], 2020 NY Misc LEXIS 2484, *6 [Sup Ct, NY County 2020]; *Lewitin v Manhattan Mini Stor.*, 2012 NY Slip Op 31557[U], 2012 NY Misc LEXIS 2807, *11 [Sup Ct, NY County 2012]).

The remaining arguments are either without merit or need not be addressed given the findings above.

Therefore, in accordance with the forgoing, it is hereby:

ORDERED that plaintiff's motion is granted to the extent of directing defendants to appear for a deposition and is otherwise denied; and it is further ordered

ORDERED that defendants' deposition shall be completed virtually (unless the parties agree otherwise) within 45 days after this order is uploaded to NYSCEF; and it is further

ORDERED that, within 20 days after this decision and order is uploaded to NYSCEF, plaintiff shall serve a copy of this decision and order, with notice of entry, upon defendants; and it is further

ORDERED that this constitutes the decision and order of this Court.

12/14/2020
DATE

KATHRYN E. FREED, J.S.C.

CHECK ONE:		CASE DISPOSED			X	NON-FINAL DISPOSITION	
		GRANTED		DENIED	X	GRANTED IN PART	OTHER
APPLICATION:		SETTLE ORDER				SUBMIT ORDER	
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN				FIDUCIARY APPOINTMENT	REFERENCE