

**McAllister v Transform SR Home Improvement Prod.
LLC**

2023 NY Slip Op 32190(U)

June 20, 2023

Civil Court of the City of New York, Richmond County

Docket Number: Index No. CV-005037-21/RI

Judge: Matthew P. Blum

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This opinion is uncorrected and not selected for official publication.

CIVIL COURT OF THE CITY OF NEW YORK
COUNTY OF RICHMOND

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JOSEPH McALLISTER
ROSE ANN McALLISTER,

Index No. CV-005037-21/RI

Plaintiffs,

DECISION AND ORDER

-against-

**HON. MATTHEW P. BLUM
JUDGE CIVIL COURT**

TRANSFORM SR HOME
IMPROVEMENT PRODUCT LLC,

Defendant,

-----x

Papers Numbered

Defendant’s Motion to Compel Discovery, Exhibits Attached.....	1
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Upon the foregoing cited papers and oral argument, the Decision/Order on the motions is as follows:

PROCEDURAL HISTORY

On or about October 19, 2021, Joseph McAllister and Roseann McAllister (hereinafter, “Plaintiffs”) filed a pro se Summons and Complaint against Transform SR Home Improvement Products LLC (hereinafter, “Defendant”) for breach of contract and failure to provide proper services for damage allegedly caused to the home as a result of faulty installation of a ductless AC system in the amount of \$25,000.00. Defendant, represented by counsel, interposed an answer on November 22, 2021. On or about January 9, 2023, Defendant served Plaintiff with a Demand for Discovery and Inspection, including a demand to inspect the Premises. It is alleged that an inspection was scheduled for March 31, 2023 but, was not completed due to the fact that Plaintiffs would not accept defense expert’s qualifications and permit the inspection of the system to take place.

As a result, Defendant brought the instant motion to compel discovery and inspection pursuant to CPLR §3124. Plaintiffs oppose this motion on the ground that Defendant's expert does not hold certain credentials needed to perform this type of work within New York City. This matter appeared before Your Honor on June 13, 2023 and after brief discussion on the record, the motions were taken on submission.

DISCUSSION

Defendant's Motion to Inspect the Property is Granted.

CPLR §3124 states that "if a person fails to respond to or comply with any request, notice, interrogatory, demand, question or order under this article, except notice to admit under Section 3123, the party seeking disclosure may move to compel compliance or a response". Here, Defendant brings a motion pursuant to CPLR §3124 to compel discovery and inspection based on that fact that Defendant had served a request to inspect the property, namely the ductless AC system installed in Plaintiffs' home, and Plaintiffs have refused to permit the inspection.

Pursuant to CPLR §3101, full disclosure is required of all matter that is material and necessary in the prosecution or defense of an action, regardless of the burden of proof. After the commencement of an action, any party may serve on any other party a notice or subpoena to permit entry upon designated land or other property or in the possession, custody or control of the party or person served for the purpose of inspecting, measuring, surveying, sampling, testing, photographing, or recording the property. CPLR §3120(1)(ii). The court may at any time on its own initiative, make a protective order denying, limiting, conditioning or regulating the use of any disclosure device in order to prevent unreasonable annoyance, expense, embarrassment, disadvantage, or other prejudice to any person or the courts. CPLR §3103(a).

The Second Department holds that where the central issue in a case involves the condition of the property, inspection of the property is required with certain conditions being integrated by the Court. Haddad v. Salzman, 173 A.D.2d 522 (2d. Dep't 1991); Bruno v. Dellwood Foods, Inc., 124 A.D.2d 773 (2d. Dep't 1986). In Haddad, the Court held that due to the broad nature of CPLR §3101(a) and §3120(a)(1)(ii), the plaintiff was permitted to inspect defendant's property despite the fact that plaintiff could actually see the defendant's property from their own property and that plaintiff may have made an informal pre-action inspection. In addition, the Court in Haddad held that while an inspection was permitted, because of tension between the parties, the plaintiff was not permitted to take part in the inspection pursuant to CPLR §3103(a).

Here, Defendant seeks access inside Plaintiffs' home for the purpose of inspecting the ductless AC system. Defendant seeks to enter the premises with their expert and a representative from Defendant's firm. Plaintiffs do not object to an inspection taking place. However, Plaintiffs oppose the motion on the basis that they do not believe that the expert has the proper credentials as the Defendant's proposed expert does not hold certain licenses to perform this type of work within New York City. As it is the basis of Plaintiffs' entire case, clearly, the condition of the ductless AC system is at issue. CPLR §3101 and §3120 give the Defendant the right to gain entry and inspect this system. Plaintiffs' objection that Defendant's expert does not maintain the proper license is inconsequential at this point and is an issue to be addressed at trial, if in fact, this same expert is called to testify on the Defendant's behalf. At that time, Plaintiffs are free to object to this individual's qualification as an expert before the Court, cross examine the individual as to any of their credentials, and make any argument it wishes to the Court in terms of the weight any prospective opinion should be given by the Court. Again, these are issues for trial, not for inspection. Thus, the Court hereby orders that Plaintiffs permit the inspection.

To ensure compliance with the Court's Order, the Court hereby orders that during the inspection, Defendant is required to have its attorney present. As an Officer of the Court, the attorney is expected to ensure their respective client behaves fairly and professionally so that this inspection can be done in an efficient and respectful manner. To mitigate any risk for possible issues, the Court will impose the following additional conditions:

- A) The inspection must be done within sixty (60) days of this Order at a date and time agreed to by the parties,
- B) The inspection is limited to the interior and exterior areas where the ductless AC units are installed,
- C) The attorney for Defendant must be present with their client or a representative of their client at all times and no entry into the home will be permitted without the presence of the attorneys,
- D) Nothing may be altered or removed from the property without leave of Court,
- E) Defendant is free to photograph and measure any part of the ductless AC system, and
- F) The inspection is limited to a one (1) day for a period of a maximum of two (2) hours. Time can be extended only with the signed consent of both parties submitted to the Court.

Failure to follow the Court's Order with respect to any of these matters should be brought to the Court's attention by the parties and the Court will address them accordingly. If Plaintiffs fail to adhere to these conditions, Plaintiffs may be precluded from presenting any evidence involving the subject ductless AC system. If Defendant fails to adhere to the above conditions, Defendant may waive its right to inspection of the ductless AC system.

Therefore, Defendant's motion is granted to the extent stated above.

CONCLUSION

Based on the forgoing, Defendant's motions are granted to the extent detailed above.

ORDERED: A) The inspection must be done within sixty (60) days of this Order at a date and time agreed to by the parties,

B) The inspection is limited to the interior and exterior areas where the ductless AC units are installed,

C) The attorney for Defendant must be present with their client or a representative of their client at all times and no entry into the home will be permitted without the presence of the attorneys,

D) Nothing may be altered or removed from the property without leave of Court,

E) Defendant is free to photograph and measure any part of the ductless AC system, and

F) The inspection is limited to a one (1) day for a period of a maximum of one (2) hours. Time can be extended only with the signed consent of both parties submitted to the Court.

This matter is hereby adjourned to Tuesday, August 29, 2023 at 9:30 AM for Final Conference in Part 34 of Richmond County Civil Court.

This constitutes the final Decision and Order of the Court.

Dated: Staten Island, New York
June 20, 2023



HON. MATTHEW P. BLUM JCC

**Hon. Matthew P. Blum
Judge, Civil Court**