E-J Elec. Installation Co. v IBEX Contr., LLC
2011 NY Slip Op 33883(U)
April 14, 2011
Supreme Court, New York County
Docket Number: 603840/2009
Judge: O. Peter Sherwood

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: O. PETER SHERWOOD Justice PART 49

E-J ELECTRIC INSTALLATION COMPANY,

Plaintiff,

-against-

IBEX CONSTRUCTION, LLC,

Defendant.

INDEX NO. 603840/2009

MOTION DATE Mar. 29, 2011

MOTION SEQ. NO. 002

MOTION CAL. NO. ____

The following papers, numbered 1 to 7 were read on this motion to compel

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1-3
Answering Affidavits — Exhibits	4-6
Replying Affidavits	7

Cross-Motion: ☑ Yes ☐ No

Upon the foregoing papers, plaintiff's motion for an order, *inter alia,* compelling defendant to comply fully with its court-ordered discovery and defendant's cross motion for an order, *inter alia,* compelling plaintiff to provide supplemental responses to its demand for discovery and inspection are decided in accordance with the accompanying decision and order.

Dated: April 14, 2011

O. PETER SHERWOOD, J.S.C.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Check one: ☐ FINAL DISPOSITION ☑ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

☐ SUBMIT ORDER/ JUDG. ☐ SETTLE ORDER/ JUDG.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 61

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E-J ELECTRIC INSTALLATION COMPANY,

Plaintiff,

-against-

IBEX CONSTRUCTION, LLC,

Defendant.

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DECISION AND ORDER
Index No. 603840/2009
Motion Seq. No. 002

O. PETER SHERWOOD, J.:

Gallet Dreyer & Berkey, New York, N.Y. (Randy J. Heller and Jerry A. Weiss, of counsel) for plaintiff.

Cole, Schotz, Meisel, Foreman & Leonard, P.A., New York, N.Y. (Cameron A. Welch, of counsel) for defendant.

This is an action to recover monies alleged to be due and owing pursuant to a subcontract with the general contractor, defendant IBEX Construction, LLC ("IBEX" or "defendant"), for electrical work and additional work performed and equipment provided in connection with a project known as Jet Blue Terminal 5 Food Court at JFK International Airport. By notice of motion dated March 3, 2011, plaintiff E-J Electrical Installation Company ("E-J' or "plaintiff) moves for an order: (1) pursuant to CPLR § 3124, compelling IBEX to comply with a so-ordered stipulation, dated January 11, 2011, by producing all documents and correspondence as directed therein, or, alternatively, striking defendant's answer or precluding defendant from offering at trial any evidence with respect to the documents and correspondence demanded and not produced; and (2) awarding plaintiff costs, including attorneys' fees, and disbursements incurred in connection with making the instant motion.

IBEX opposes the motion and cross moves for an order: (1) pursuant to CPLR § 3124, compelling plaintiff to comply fully with its First Notice for Discovery and Inspection, dated August 12, 2010, or, alternatively striking the complaint or precluding plaintiff from offering evidence at trial any documents which were demanded and not produced; and (2) awarding defendant costs, including attorneys' fees, and disbursements incurred in making this cross motion.

The action was commenced by filing the summons and complaint on April 19, 2010, asserting three causes of action for breach of contract, account stated and quantum meruit. Issue was joined on February 15, 2010, by service of defendant's answer. On July 15, 2010, the parties' attorneys convened before the court for a preliminary conference resulting in a preliminary conference order fixing specific dates for service of discovery demands and responses and for the conduct of depositions, with discovery to be completed and the Note of Issue filed by December 12, 2010. Both plaintiff and defendant served their respective demands for discovery and inspection of documents by the date set in the preliminary conference order. Responses thereto were to be made by September 15, 2010.

In opposition to the motion, defendant contends that it served its responses to plaintiff's document demand and raised objections therein to the scope of the demands as overly broad. However, conspicuously absent from the documents in support of the cross motion or in opposition to the motion is defendant's alleged September 15, 2010 response. In addition, plaintiff contends that defendant failed to meet the time schedule set forth in the preliminary conference order. By so-ordered stipulation dated October 27, 2010, the parties agreed that defendant would "produce its documents responsive to plaintiff's D&I demand, subject to the objections set forth in [defendant's] response" on November 3, 2010 at IBEX's office, the discovery end date was extended to January 30, 2011 and the Note of Issue filing date to February 18, 2011.

It is undisputed that on November 3, 2010, counsel for the parties met at IBEX's offices where defendant made available for inspection and copying documents pursuant to E-J's demand and the October 27, 2010 so-ordered stipulation. Plaintiff claims that such production was only partially responsive and did not include critical financial documents showing "up and down" billing, payment streams, requisitions for payments, approval of payments, or ledgers reflecting receipt of payments with respect to the project and payments IBEX made to its subcontractors or any e-mail or basic correspondence with respect to the project, a correspondence log, a shop drawing log, or other relevant documents.

Plaintiff's counsel followed up this meeting with a letter dated November 5, 2011, which provided a list identifying the categories of documents demanded which had not been produced and requesting that the documents be made available for inspection and review within two weeks. On

or about November 17, 2010 (according to defendant) or November 19, 2011 (according to plaintiff), defendant supplemented its initial production. Defendant contends that such supplemental production was the result of "considerable man hours combing IBEX's records to locate any documents which may have been inadvertently misfiled or omitted from production" (Affirmation of Cameron A. Welch in opposition to motion and in support of cross motion [Welch Affirm.], ¶ 12). Conversely, plaintiff's counsel avers that "[d]efendant supplemented its initial production * * * with, essentially, additional copies of documents it had previously produced (on November 3)." (Affirmation of Randy Heller in support of motion [Heller Affirm.], ¶ 15). Plaintiff's counsel reiterated its position in e-mail correspondence of December 6 and 14, 2010, advising that it had yet to receive any documents evidencing payment history on the project or the e-mail correspondence disc defendant had promised (*id.* ¶ 16, Ex. "F"). Defendant's attorney responded only to the December 6th e-mail by stating that he would be in touch with his client so as to give plaintiff's counsel "a better idea" of when the remaining documents demanded would be produced (*id.*).

Counsel for the respective parties appeared before the court at a status conference on January 11, 2011, at which a so-ordered stipulation, signed by the respective parties' counsel, was entered providing, as follows: "Defendant shall provide all outstanding documentary discovery set forth on the accompanying list (from plaintiff's counsel's letter of 11/5/10) by 1/28/11, except for emails [sic] which shall be provided to plaintiff on a CD on or before 2/11/11" (*id.* Ex. "A"). The discovery end date was again extended to April 15, 2011 and the Note of Issue to May 15, 2011. There is no indication therein that defendant sought compliance with any of its demands.

Defendant did not produce any additional documents or the CD of e-mail correspondence by the dates set forth in the January 11, 2011 stipulation. By letter dated February 14, 2011, plaintiff's counsel indicated that plaintiff still had not received the subject documentary discovery or e-mail correspondence. Defendant's counsel contends that during this period the parties were engaged in settlement negotiations and when such negotiations broke down defendant again searched its records to locate additional documents and resumed its review of email correspondence (Welch Affirm. ¶¶ 15-18).

Under cover of letter dated March 18, 2011, after plaintiff filed the instant motion, defendant's counsel sent an additional production of documents consisting of 139 pages of

documents which it contends "represent the last 'paper' documents IBEX has in its files which may not have been produced" (*id.* ¶ 19, Ex. "C"). In this letter, defense counsel challenges, apparently for the first time, plaintiff's responses to defendant's August 12, 2010 demand for discovery and inspection, contending that plaintiff asserted "inappropriate blanket objections" and "misrepresented that it simply was not in possession and control of any responsive documents" (*id.*) and setting forth a list of documents it was demanding as supplements to plaintiff's response.

In reply, plaintiff submits copies of the eight requisitions that defendant produced with its March 18, 2011 letter, from which defendant redacted all information pertaining to the original contract sum, the net change by change order, contract sum to date, the amounts earned to date, the previous certificates for payments, and the total current payment due, as well as information from the requisitions continuation sheets which break out the individual trades' work, the scheduled value, a summary of work completed, the material stored to date and the balance to finish, and information on the application for payment sheet and the change order summary.

As an initial matter, the court notes that this motion was filed in violation of the rules of this Part 49 which provide, in pertinent part, as follows: "If after good faith efforts, counsel are unable to resolve or narrow the issues involving discovery, the aggrieved party shall contact the court by letter or telephone to arrange a conference." In a telephone conference on April 6, 2011, initiated by the court's Principal Law Clerk to encourage counsel to meet and confer in an effort to resolve the outstanding discovery issues, the parties' counsel essentially agreed that further consultation would not be productive and requested that the court resolve the dispute.

Failure to comply with court-ordered time frames must be taken seriously and cannot be ignored. Indeed, the Court of Appeals has recently again addressed this issue in the case of *Gibbs v St. Barnabas Hospital* (16 NY3d 74, 81 [2010]) stating:

> [O]ur court system is dependent on all parties engaged in litigation abiding by the rules of proper practice [internal citations omitted]. The failure to comply with deadlines not only impairs the efficient functioning of the courts and the adjudication of claims, but it places jurists unnecessarily in the position of having to order enforcement remedies to respond to delinquent conduct of members of the bar, often to the detriment of the litigants they represent. Chronic noncompliance with deadlines breeds disrespect for the dictates of the Civil Practice Law and Rules and a culture in

> which cases can linger for years without resolution. Furthermore, those lawyers who engage their best efforts to comply with practice rules are also effectively penalized because they must somehow explain to their clients why they cannot secure timely responses from recalcitrant adversaries, which leads to the erosion of their attorney-client relationships as well. For these reasons, it is important to adhere to the position we declared a decade ago that '[i]f the credibility of court orders and the integrity of our judicial system are to be maintained, a litigant cannot ignore court orders with impunity' (quoting *Kihl v Pfeffer,* 94 NY2d 118, 123 [1999]).

Thus, defendant's conduct must be considered against the backdrop of the Court of Appeals' consistent position. It is well settled that in order to strike a pleading as a sanction for failure to respond fully to court-ordered pursuant to CPLR § 3126 there must be a showing that the non-responding party's failure to comply is willful, contumacious or in bad faith (*see e.g. Reidel v Ryder TRS, Inc.,* 13 AD3d 170 [1st Dept 2004]). It is undisputed that defendant has yet to produce the CD of e-mail correspondence in compliance with time frames set forth in several court orders, the latest of which was the so-ordered stipulation of January 11, 2011. As the foregoing history of the discovery stage of this litigation clearly demonstrates, defendant's document production has been proceeding fitfully, not in compliance with court-ordered deadlines, and seemingly only in response to repeated efforts by plaintiff's counsel to obtain compliance. Moreover, the supplemental documents, produced belatedly and only after the filing of plaintiff's motion, have been so significantly redacted by defendant as to diminish their probative value, if any, and have been furnished without defendant providing any reason for the redactions. Regardless of whether defendant's failure to timely and fully comply with plaintiff's document demands may be characterized as willful, it has clearly disregarded the court's January 11, 2011 order obligating it to serve responses with respect to the enumerated list annexed to the November 5, 2010 letter of plaintiff's counsel. "[C]ompliance with a disclosure order requires both a timely response and one that evinces a good faith effort to address the requests meaningfully" (*Kihl,* 94 NY2d at 123). In this regard, defendant must engage in a pro-active approach in searching its records and produce in compliance with Rule 3101 (a) of Article 31 of the CPLR "***full*** disclosure of all matter material and necessary in the prosecution" of this matter. The court is not satisfied that defendant has done so.

While dismissal of a pleading is within the court's discretion where a party by its conduct frustrates the disclosure scheme provided by the CPLR (*see Zletz v Wetanson,* 67 NY2d 711 [1986]), the court finds that the requisite level of wilfulness has not been demonstrated sufficient to warrant the harsh penalty of striking defendant's answer. Thus, at this stage, the court will issue a conditional order requiring that defendant produce within 30 days a supplemental response in full compliance with the January 11, 2011 so-ordered stipulation, including unredacted copies of the documents previously submitted under cover of letter dated March 18, 2011, and the CD of relevant e-mail and other correspondence. In addition, defendant shall bear the cost of this avoidable motion, including plaintiff's reasonable attorney fees. Failure to comply within the specified time period or to provide an affidavit of a person with knowledge detailing the efforts made to comply with the court's directive and the reasons for any non-compliance will result in additional monetary sanctions and dismissal of its answer.

With respect to defendant's cross motion, defendants failed through multiple appearances at court conferences to raise any objections or concerns with respect to plaintiff's response to its demand for discovery and inspection or to engage in any documented serious good faith efforts to obtain a response from plaintiff that was more satisfactory. Indeed, the extent of defendant's demonstration that it engaged in good faith efforts to resolve any issues related to plaintiff's response was an e-mail it sent Friday, March 18, 2011, just prior to its filing the instant cross motion dated March 21, 2011. This falls significantly short of the requisite good faith effort required by section 202.7 (a) of the Uniform Rules for Trial Courts and by this Part's rules. Nor has defendant demonstrated that any failure on plaintiff's part to fully comply with its demand was willful and contumacious so as to warrant the sanction of preclusion or dismissal of the complaint. Thus, at this juncture, the cross motion must be denied without addressing whether the information sought or plaintiff's responses thereto are reasonable.

Accordingly, it is

ORDERED that plaintiff's motion is granted to the extent that defendant is directed to provide responses, including a CD of e-mail and other correspondence, in compliance with the so-ordered stipulation, dated January 11, 2011, within 30 days of the date of this decision and order. Its failure to comply with this directive within the designated time frame or to furnish an affidavit

of a person with knowledge detailing its search for responsive records will result in the imposition of additional monetary sanctions and dismissal of defendant's answer; and it is further

ORDERED that within 15 days of the date of this decision, counsel for plaintiff shall serve an affirmation setting forth the time devoted to this motion, including time required to prepare the fees request, together with the hourly rate, other necessary costs and the total amount demanded. Payment shall be made within 14 days thereafter; and it is further

ORDERED that the cross motion is denied.

The foregoing constitutes the decision and order of the Court.

DATED: April 14, 2011

E N T E R,

O. PETER SHERWOOD
J.S.C.

O. PETER SHERWOOD