

23-50 Water Edge, LLC v Fedele

2011 NY Slip Op 30428(U)

February 17, 2011

Supreme Court, Queens County

Docket Number: 23437/2008

Judge: Janice A. Taylor

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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE JANICE A. TAYLOR
Justice

IA Part 15

23-50 WATER EDGE, LLC.,

x

Plaintiff,

-against-

RUSSELL FEDELE, WALTER C. MAFFEI, AT
ONE DESIGN, INC., JOHNNY'S PLUMBING
AND HEATING CONTRACTOR, INC., and
TRI-STATE INDUSTRIAL SYSTEMS, INC.,

Defendants.

_____x

Index
Number 23437 2008

Motion
Date October 18, 2010

Motion
Cal. Number N/A

Motion Seq. No. 2

The following papers numbered 1 to 15 read on this motion by Tri-State Industrial Systems, Inc. (Tri-State), to dismiss the complaint insofar as asserted against it for failure to comply with discovery orders; and cross motion by Maffei to dismiss the complaint insofar as asserted against him for failure to comply with discovery orders.

	<u>Papers</u> <u>Numbered</u>
Notice of Motion/Petition - Affidavits - Exhibits.....	1-4
Notice of Cross Motion - Affidavits - Exhibits	5-7
Answering Affidavits - Exhibits.....	8-11
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Upon the foregoing papers it is ordered that the court, sua sponte, hereby vacates its prior order dated December 14, 2010, and decides the motion and cross motion as follows:

This is a property damage action wherein plaintiff seeks to hold defendants liable for alleged damage to plaintiff's property during the course of an adjacent construction project. Plaintiff is the owner of a 120-unit residential building in Bayside, New York. Plaintiff

claims that water flowing from or being pumped from an adjoining property owned by co-defendant Russell Fedele damaged plaintiff's property. The Fedele property underwent a renovation which included constructing an extension and new water drainage from the property. The renovations were performed by Tri-State based upon plans prepared by defendant Walter Maffei, an architect. Tri-State moves to dismiss the complaint on the grounds that plaintiff has repeatedly failed to respond to court-ordered discovery demands. Plaintiff opposes the motion.

On or about September 12, 2008, plaintiff served Tri-State with a summons and complaint. A stipulation was entered into between plaintiff and Tri-State on or about October 14, 2008, extending Tri-State's time to respond to the summons and complaint. Tri-State served its answer on November 5, 2008, along with a notice for depositions. Walter C. Maffei joined issue with service of an answer dated October 2, 2008, and At One Design, Inc. joined issue with service of an answer dated January 27, 2009. Tri-State alleges that, to date, it has not been provided with a copy of the answer served on behalf of Russell Fedele.

On or about December 10, 2009, Tri-State served combined demands on the plaintiff. On or about December 18, 2008, Tri-State served plaintiff with a demand for a verified bill of particulars. On February 5, 2009, Tri-State wrote a letter to plaintiff setting forth plaintiff's failure to furnish a bill of particulars and a response to the combined demands served by Tri-State. On or about February 27, 2009, Tri-State served plaintiff with a notice for discovery and inspection and demand for authorizations.

A preliminary conference was scheduled for July 7, 2009. Tri-State was the only party to appear. The court adjourned the preliminary conference to July 21, 2009, at which time the court issued a preliminary conference order (PCO), ordering, inter alia, that plaintiff serve a bill of particulars and furnish duly executed written authorizations within thirty (30) days and that all parties respond to Tri-State's combined demands and notice for discovery and inspection within thirty (30) days.

Tri-State submits that on September 16, 2009 and on October 20, 2009, they spoke with plaintiff's counsel regarding outstanding discovery demands; and on November 13, 2009, Tri-State sent a good faith letter to plaintiff's counsel demanding that it provide responses to Tri-State's demands within ten (10) days to avoid motion practice. Tri-State submits that on December 15, 2009, they sent all parties another good faith letter regarding outstanding discovery.

On or about January 20, 2010, Tri-State moved to dismiss the instant action on the ground that plaintiff failed to respond to Tri-State's combined demands dated December 10,

2008; demand for a verified bill of particulars dated December 18, 2009; demand for authorizations dated February 27, 2009; and notice for discovery and inspection dated February 27, 2009. The motion was resolved by a so-ordered stipulation on March 9, 2010, which directed that plaintiff's *complete* responses were to be received in hand by Tri-State by April 30, 2010, or the complaint would be dismissed against Tri-State with no further action by Tri-State required. Tri-State forwarded a copy of the so-ordered stipulation to all parties on March 16, 2010.

Plaintiff furnished responses to Tri-State's demand for a verified bill of particulars and combined demands on or about April 29, 2010. Tri-State contends, however, that the responses were "woefully incomplete and did not enter the realm of sufficiency." For example, with respect to Tri-State's demand for a verified bill of particulars, plaintiff's response was as follows:

- a. Item 4 of the demand demanded that plaintiff state the acts constituting trespass on its property. The response referred Tri-State to its answer to item 3 - a different demand entirely, having nothing to do with trespass.
- b. Items 3, 4 and 5 of the demand demanded that plaintiff state the acts of omission or commission constituting a nuisance, trespass on its property or negligent or reckless contact. Instead of responding to each inquiry with a responsive statement, plaintiff merely recited the language of the New York Administrative Code section 27-207; did not identify what Tri-State is alleged to have done or not done to cause the damage; and did not identify how Tri-State is alleged to have violated that section.

Tri-State goes on to recite how plaintiff's responses are "unresponsive" to approximately 15 other demands ranging from items 7 through 30. In short, plaintiff repeatedly refers Tri-State to a set of documents or the Administrative Code without identifying which documents were meant to respond to a particular demand.

The record reveals that plaintiff has been served with various discovery demands since November 5, 2008. This court ordered plaintiff to provide a verified bill of particulars and responses to these demands by way of a preliminary conference order as well as a so-ordered stipulation, which followed a prior motion to dismiss by Tri-State. The so-ordered stipulation required plaintiff to submit "complete" responses or else the action would be deemed dismissed as against Tri-State with no further action required. Plaintiff voluntarily submitted to the so-ordered stipulation containing additional dismissal language and then

submitted responses which were incomplete. In effect, plaintiff appears to have willfully refused to provide the majority of the discovery demanded.

Pursuant to CPLR 3126(3), the Supreme Court possesses the discretion, inter alia, to dismiss an action as a sanction for willful discovery defaults (*see Zletz v Wetanson*, 67 NY2d 711 [1986]; *DeJulio v Wulf*, 260 AD2d 425 [1999]; *Brady v County of Nassau*, 234 AD2d 408 [1996]). “While the nature and degree of the penalty to be imposed on a motion pursuant to CPLR 3126 is a matter of the Supreme Court’s discretion * * * striking a pleading is appropriate where there is a clear showing that the failure to comply with discovery demands is willful, contumacious or in bad faith” (*Birch Hill Farm v Reed*, 272 AD2d 282 [2000]; *see Polanco v Duran*, 278 AD2d 397 [2000]; *Martignetti v Ricevuto*, 271 AD2d 508 [2000]). Here, plaintiff’s willful and contumacious conduct may be inferred from its repeated failure to comply with the court-ordered discovery schedule (*Nowak v Veira*, 289 AD2d 383 [2001]; *see Birch Hill Farm v Reed, supra*; *Ranfort v Peak Tours*, 250 AD2d 747 [1998]). The record supports the determination that plaintiff, through delays and other strategies, engaged in a course of conduct designed to yield one-sided disclosure in its favor, culminating in its disregard of an order compelling disclosure. Where a party in these circumstances disobeys a court order and by his conduct frustrates the disclosure scheme provided by the CPLR, dismissal of the pleading is within the broad discretion of the trial court (*see Zletz v Wetanson, supra*).

Upon plaintiff’s failure to comply with the conditional order of dismissal, that order became absolute (*see Echevarria v Pathmark Stores, Inc.*, 7 AD3d 750 [2004]), providing the court with a basis upon which to enter judgment against the plaintiff dismissing the complaint with prejudice (*Ragubir v 44 Court Street, LLC*, 60 AD3d 833 [2009]). To avoid the adverse impact of that order and the judgment entered thereon, the plaintiff is required to demonstrate a reasonable excuse for its default in providing the records and the existence of a meritorious claim (*see Echevarria v Pathmark Stores, Inc., supra*; *Cenzano v Cenzano*, 250 AD2d 568 [1998]). However, plaintiff failed to proffer a reasonable excuse for its failure to comply with the conditional order of dismissal, or for its repeated failure to comply with other court orders directing discovery (*see Clarke v United Parcel Serv.*, 300 AD2d 614 [2002]; *Ranfort v Peak Tours, supra*; *Cenzano v Cenzano, supra*; *Unity Mfg. Corp. v St. Paul Fire & Mar. Ins. Co.*, 97 AD2d 462 [1983]). Moreover, plaintiff failed to establish a meritorious cause of action. Accordingly, the motion to dismiss the complaint insofar as asserted against Tri-State is granted.

Cross Motion by Maffei

On October 2, 2008, issue was joined with the service of an answer on Maffei’s behalf. Along with service of his answer, Maffei served various discovery demands,

including but not limited to a notice for discovery and inspection, demand for a verified bill of particulars and combined demands dated October 2, 2008, respectively. Despite Maffei's efforts, including several alleged unreturned telephone messages, plaintiff failed to provide any responses to the aforementioned discovery demands.

On July 21, 2009, the parties appeared for a court-mandated conference at which time the court issued an order directing, inter alia, plaintiff to provide responses to Maffei's discovery demands within thirty (30) days of the court conference. Despite the court's directives as well as Maffei's efforts to obtain responses, plaintiff failed to provide any discovery responses. Maffei then served the instant cross motion seeking, inter alia, dismissal of plaintiff's complaint.

On March 9, 2010, in an effort to resolve the issues set forth in Maffei's cross motion, a so-ordered stipulation was executed by this court directing plaintiff to provide complete responses to Maffei's discovery demand in hand on or before April 30, 2010, or plaintiff's complaint would be deemed dismissed against Maffei with no further action by Maffei required. Maffei submits that on April 30, 2010, plaintiff furnished responses to Maffei's demand which were "woefully incomplete and insufficient." Maffei then issued a good faith letter to plaintiff on May 20, 2010, setting forth Maffei's specific objections to plaintiff's discovery responses. Specifically, Maffei requested that plaintiff respond to Maffei's notice for discovery and inspection as well as provide responses to the following:

"With respect to plaintiff's bill of particulars, plaintiff fails to respond to the following items: No. 4 regarding the specific part or portions of the premises where plaintiff alleges damage occurred; No. 5 regarding a specific statement of each and every act and/or omission allegedly constituting the negligence, recklessness and or carelessness of Maffei; No. 6 regarding a specific statement as to how plaintiff alleges the damage incident occurred; No. 7 specifically identifying each and every defective and unsafe condition identified in plaintiff's complaint; Items 8, 9, 10, 11 & 13 regarding providing complete and detailed statement of damages and items allegedly destroyed, as well as the basis for each claim."

Maffei submits also that not only is he entitled to a statement of the damages and the basis for plaintiff's allegations, but plaintiff's referral to documents for a purported response to the demand for identification of what damages are alleged is wholly insufficient as Maffei should not be made to guess from the documents provided what plaintiff actually claims constitutes damage.

The cross motion to dismiss is granted as unopposed and otherwise on the merits. Upon plaintiff's failure to comply with the conditional order of dismissal, that order became absolute (*see Echevarria v Pathmark Stores, Inc., supra*), providing the court with a basis upon which to enter judgment against the plaintiff dismissing the complaint with prejudice (*Ragubir v 44 Court Street, LLC, supra*). To avoid the adverse impact of that order and the judgment entered thereon, the plaintiff is required to demonstrate a reasonable excuse for his default in providing the records and the existence of a meritorious claim (*see Echevarria v Pathmark Stores, Inc., supra; Cenzano v Cenzano, supra*). However, plaintiff failed to proffer a reasonable excuse for his failure to comply with the conditional order of dismissal, or for his repeated failure to comply with other court orders directing discovery (*see Clarke v United Parcel Serv., supra; Ranfort v Peak Tours, supra; Cenzano v Cenzano, supra; Unity Mfg. Corp. v St. Paul Fire & Mar. Ins. Co., supra*). Moreover, plaintiff failed to establish a meritorious cause of action. Accordingly, the motion to dismiss the complaint insofar as asserted against Maffei is granted.

Conclusion

The motion to dismiss the complaint insofar as asserted against Tri-State is granted. The motion to dismiss the complaint insofar as asserted against Maffei is granted.

The County Clerk is hereby directed to place a copy of this order in Index jacket numbered 23437/2008 and 9526/2010.

Dated: February 17, 2011

J.S.C.