

150 Broadway NY Assoc., L.P. v Pratt Constr. & Restoration, Inc.

2024 NY Slip Op 34058(U)

November 15, 2024

Supreme Court, New York County

Docket Number: Index No. 656562/2022

Judge: Andrea Masley

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 48

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150 BROADWAY NY ASSOCIATES, L.P.,

Plaintiff,

- v -

PRATT CONSTRUCTION & RESTORATION, INC., and
DIAZ ARCHITECT & ASSOCIATES, P.C.,

Defendant.

INDEX NO. 656562/2022

MOTION DATE _____

MOTION SEQ. NO. 002

**DECISION + ORDER ON
MOTION**

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HON. ANDREA MASLEY:

The following e-filed documents, listed by NYSCEF document number (Motion 002) 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 85, 86, 87, 88, 89, 90

were read on this motion to/for STRIKE PLEADINGS.

Plaintiff 150 Broadway NY Associates, L.P. (Owner) moves pursuant to CPLR 3126 to strike defendant’s answer and affirmative defenses or issue an adverse inference for failure to respond to discovery demands and comply with this court’s prior order directing such production. Owner also seeks attorneys’ fees and costs for making this motion and motion sequence 001.

Owner initiated this action on May 31, 2022 for breach of contract against defendant Pratt Construction & Restoration, Inc. (Pratt).¹ Owner engaged Pratt to do Local Law 11 work on Owner’s 24-story commercial office building located at 150 Broadway in Manhattan (Project). (NYSCEF Doc. No. [NYSCEF] 2, Complaint ¶1; NYSCEF 74, August 8, 2018 Construction Contract.) “The Repair Work was originally scheduled to commence on July 16, 2018 and be completed by November 4, 2019,

¹ The architect Diaz Architect & Associates, P.C. is also a defendant, but it is not at issue on this motion.

contingent upon the occurrence of inclement weather.” (NYSCEF 2, Complaint ¶¶32.)

On August 21, 2020, when Pratt and the architect certified that the work was completed as required by the contract, Owner paid Pratt the remaining balance on the \$1,267,652 owed. (*Id.* ¶¶33, 35.) For the next inspection cycle, Owner engaged a different architect which inspected the building in December 2021. (*Id.* ¶39.) The architect determined that unsafe conditions existed at the building and notified the NYC Department of Buildings on January 3, 2022. (*Id.* ¶40.) The alleged deficiencies include:

1. “Skyward facing cross-joints were improperly repaired,”
2. “Sealants were improperly installed around windowsills and ledges and are now failing,”
3. “Mortar was improperly installed and is shrinking and separating. Further, the depth of the mortar is not in accordance with the Construction Documents,”
4. “Pieces of limestone and terra cotta recently installed are failing on lower areas and limestone and terra cotta patches were improperly installed,”
5. “There is no record of requisite inspections by the DOB of certain anchors,” and
6. “Scope of work items in various locations were not entirely completed or performed. Including, for example, replacement of certain brick and masonry on the 21st floor and scraping, priming, and painting of cast iron window frames, which were submitted as complete for payment by Pratt and certified to have been completed by Diaz, but were only partially replaced or repaired, or not replaced at all.” (*Id.* ¶42.)

Owner served Pratt with discovery demands on August 12, 2022. (NYSCEF 21, Matthew J. Aaronson² aff ¶2; NYSCEF 22, Owner’s First Set of Request for Production to Pratt.) After a conference on December 9, 2022, the court directed Pratt’s compliance. (NYSCEF 18, December 19, 2022 Discovery Order.) On January 31,

² Aaronson is Owner’s counsel. (NYSCEF 21, Aaronson aff ¶1.)
 656562/2022 150 BROADWAY NY ASSOCIATES, L.P. vs. PRATT CONSTRUCTION &
 RESTORATION, INC. ET AL
 Motion No. 002

2023, Owner moved for discovery sanctions. (NYSCEF 20, Proposed OSC [mot. seq. no. 001].) The court directed compliance by March 10, 2023 ordering Pratt to respond to Owner's document request and to submit a *Jackson* affidavit specifically identifying whose computers Pratt checked and what terms were used to conduct the search. (NYSCEF 41, Decision and Order [mot. seq. no. 001].) On December 15, 2023, Owner filed this motion.

This motion is primarily based on information that Owner obtained from the August 29, 2023 deposition of Lukasz B. Maksymowicz, Pratt's project manager who worked on the Project. Maksymowicz testified to: (1) keeping time records showing the names, dates, and hours worked of all of Pratt's employees; (2) whether masonry work was performed in sub-40-degree temperatures; (3) maintaining his own calendars; (4) Pratt's employment of welders; and (5) lost days when Maksymowicz would email workers instructing maintenance work only, not scaffold work, due to weather conditions. (NYSCEF 60, tr at 58:18-59:11; 60:21-66:9; 275:19-276:15 [Maksymowicz depo].) Maksymowicz testified to Pratt's procedure to call in and record the names and hours for each laborer, which were then stored on Pratt's office computer. (*Id.* at 58:24-60:6.)

The court rejects Pratt's objections to Owner's efforts to get discovery. Owner is entitled to discovery; Owner's efforts are not solely a strategy to get summary judgment without making a motion. One of Owner's theories is that Pratt conducted masonry work at a time that it should not have been conducted because the temperature was below that required to do cement work. (NYSCEF 79, January 26, 2024 Aaronson tr

5:9-6:8.) Contrary to Pratt's objection, this is not a new theory raised for the first time at argument, but in the contract and the complaint. (See NYSCEF 2, Complaint ¶¶2.)

On January 26, 2024, the court found Pratt's document production deficient and directed Pratt to (1) supplement ¶¶33 of the January 12, 2024 affidavit of Martyna Gaitan, Pratt's "Contracts and Insurance Claims Coordinator" (NYSCEF 71, Gaitan aff ¶¶1) by listing the names of the employees for whom she searched in the computer and describing what she searched for; (2) produce ADP or Paychecks payroll records for the period from 2018 to 2021; (3) Pratt's document retention policy; (4) identify Pratt's information technology professional and whether they checked the email server for deleted emails; (5) describe how Pratt keeps its records including a description of their computer system and programs used e.g. Gmail, Office 365; (6) detail Pratt's litigation hold letter, instructions and compliance; and (7) identify the welders. (NYSCEF 79, January 26, 2024 tr 15:22-24; 18:3-5; 18:8-11; 18:13-18; 20:19-20; 22:9; 23:7-9; 23:25-24:5; 24:21-23; 25:14-20; 26:10-20; 27:18-28:3; 28:6-10; NYSCEF 76, January 26, 2024 Order – Interim.)

On February 14, 2024, the court learned that Pratt found some employee time information and produced it, which Pratt's counsel decided was sufficient and thus Pratt did not to comply with this court's order. The court rejected counsel's justification. Again, the court directed Pratt to comply with this court's January 26, 2024 order. (NYSCEF 78, February 14, 2024 tr at 12:7-12.)

Pratt submitted yet another affidavit from Gaitan which was more responsive, but still insufficient. (See *generally* NYSCEF 82, Gaitan February 28, 2024 aff.) Pratt cannot find the box of documents for the Project from 2018 to 2021 which would contain

the actual employee time sheets for the Project which Owner is seeking. (*Id.* ¶¶45-46.) Instead, Gaitan created a new Excel sheet using the information she found in a now former accountant's computer: employees' names and hours worked per project. (*Id.* ¶52.) Pratt's attorney issued a litigation hold letter in February 2022, but it is unclear whether it was followed because the office manager has not submitted an affidavit and has not been deposed. (*Id.* ¶56.) Pratt's document retention policy is to hold records for six years and Pratt has hundreds of project boxes in storage, yet the Project's box, which is within the six-year period, is missing. (*Id.* ¶57.)

Pratt's response, relying solely on Gaitan's February 2024 affidavit, is insufficient because Gaitan cannot speak to all of the directives of the court. First, Pratt failed to produce the ADT payroll records as directed by the court. The newly found accountant's computer data is not a substitute for the ADT payroll records because the newly found data may or may not be complete and its source is unknown, possibly based on Maksymowicz's daily phone call. Second, Pratt failed to detail its searches for documents. Initially, Gaitan explained that boxes of paper records are stored at the New Jersey property of Pratt's President Sylvester Serafin. (*Id.* ¶11.) However, Pratt fails to explain whether a search was conducted, in response to Gaitan's failure to find the Project's box of time sheets, of Serafin's New Jersey property, who conducted the search, and their search instructions. It is unclear to the court whether the New Jersey property is the same place that Gaitan referred to as a "warehouse" with hundreds of boxes of documents. (NYSCEF 71, January 12, 2024 Gaitan aff ¶7.) Third, Pratt admittedly has an IT consultant, but failed to submit an affidavit from this professional detailing Pratt's computer systems. (NYSCEF 82, Gaitan February 28, 2024 aff ¶¶22,

37-38.) For example, the IT professional would be expected to speak to the changes to Pratt's IT system during the relevant period e.g. when Pratt began digitally storing time records. (NYSCEF 71, January 12, 2024 Gaitan aff ¶¶34-35.) That the IT professional does not speak English does not excuse this failure; it can be translated. (NYSCEF 82, Gaitan February 28, 2024 aff ¶ 39.) Fourth, Gaitan states that her manager told her that Pratt's e-mails "purge as storage gets full," but Pratt fails to explain when such purges occurred and whether such purges occurred after counsel's litigation hold. (*Id.* ¶ 23.) While Gaitan's three affidavits³ are progressively more informative, Pratt has failed to comply with this court's orders.

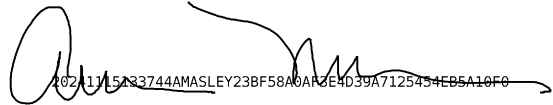
Gaitan responds to some of these deficiencies in her March 14, 2024 affidavit. For example, we finally learned the name of the welder for the Project, information the court had ordered on January 26, 2024 and Owner had requested long before. (NYSCEF 86, Gaitan March 14, 2024 aff ¶h.) While Gaitan lists her hours, she fails to delineate hours per task e.g. how many hours she spent at the warehouse in New Jersey inspecting hundreds of boxes and whether she looked inside the hundreds of boxes.

This is no way to conduct discovery. First, Pratt should have responded fully and completely when the court ordered it to do so. Second, had Owner taken the depositions of Gaitan and the office manager, much of this could have been avoided. Finally, Pratt has been less than forthcoming. Any further lack of cooperation will be sanctioned. At this point, Pratt's obstinance has caused excessive legal fees to Owner.

³ Pratt submitted the following Gaitan affidavits: NYSCEF 33, February 14, 2023; NYSCEF 88, March 21, 2023; NYSCEF 71, January 12, 2024; NYSCEF 82, February 28, 2024; NYSCEF 86, March 14, 2024.

Accordingly, it is

ORDERED that the motion is granted, in part, to the extent that Pratt shall reimburse Owner for the cost of Owner’s two discovery motions. By November 25, 2024, Owner shall submit an affirmation of services with bios or resumes for all those who have worked on the case. Pratt may object by December 6, 2024. The court will determine whether a hearing is necessary.



11/15/2024
DATE

ANDREA MASLEY, 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