SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. FRANK P. NERVO** **PART** **IAS MOTION 4**

Justice

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WONDER WORKS CONSTRUCTION CORP.,

Plaintiff,

- v -

BRIDGETON AMIRIAN 13TH STREET, LLC,BRIDGETON AMIRIAN 436 LLC,BRIDGETON AMIRIAN 442 LLC,436 AND 442 EAST 13TH STREET OWNER LLC,DAVID AMIRIAN, COD MECHANICAL CORP., G.A. WINDOWS, INC.,D/B/A ADLER WINDOWS, INC.,NCC360 LLC,NSI STONE TRADING INC.,HEIBERG ENGINEERING AND FORENSIC SERVICES, ATLANTIC SPECIALTY INSURANCE COMPANY, JOHN DOE 1 THROUGH JOHN DOE 10

Defendant.

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INDEX NO. 654926/2019

MOTION DATE 03/29/2021

MOTION SEQ. NO. 006

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 006) 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 181, 182, 183

were read on this motion to/for DISMISSAL.

The motion and cross-motion are decided in accordance with the annexed decision and order of even date.

Any requested relief not addressed therein has nevertheless been considered and is hereby denied. In lieu of scheduling a further conference, the parties shall submit a proposed discovery order as directed.

7/29/2021
DATE

FRANK P. NERVO, 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**

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

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WONDER WORKS CONSTRUCTION CORP.,

Plaintiff,

-against-

BRIDGETON AMIRIAN 13TH STREET, LLC, et al,

Defendants.

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DECISION AND ORDER

Index Number

654926/2019

Mot. Seqs. 005 & 006

FRANK P. NERVO, J.S.C.

This matter was recently transferred to Part IV. Motion sequences 005 and 006 are addressed in the instant combined decision and order. For purposes of this motion, "defendants" are Bridgeton Amirian 13th Street, Bridgeton Amirian 436 LLC, Bridgeton Amirian 442 LLC and David Amirian.

MOTION SEQUENCE 005

This class-action mechanic's lien matter arises out of a failed condominium construction project in Manhattan. The details of the project and facts giving rise to this action will not be repeated here; however, the interested reader is referred to the decision and order of Justice Chan for a thorough recitation of same (*see* NYSCEF Doc. No. 110). The parties, by motion and cross-motion under sequence 005, each allege the other has failed to provide required discovery and, accordingly, seek discovery sanctions.

The Court finds those portions of defendants' papers dedicated to ad hominem remarks of plaintiff, questions posed to this Court, and other boisterous off-the-cuff comments irrelevant, unprofessional, and unhelpful to the issues at bar; they have been summarily disregarded (*see e.g.* NYSCEF Doc. No. 171 ¶ 8, 21, 22, 24, 25, 29). Insults, unsupported accusations, and mischaracterizations of the records may all properly form the basis for sanctions, and additional notice by the Court that sanctions may be imposed for such conduct in not required (*Nachbaur v. American. Transit Ins. Co.*, 300 AD2d 74 [1st Dept 2002]; *see also Benefield v. New York City Hous. Auth.*, 260 AD2d [1st Dept 1999] "There is no requirement that the dictates of [22 NYCRR] § 130-1.2 be followed in any rigid fashion, the court's decision was sufficient to set forth the conduct on which the [sanctions] award was based, the reasons why it found this conduct to be frivolous and the amount to be appropriate"). Counsel are directed to guide themselves accordingly.

CPLR § 3101(a) directs that there "shall be full disclosure of all matter material and necessary to the prosecution or defense of an action, regardless of the burden of proof" (*Forman v. Henkin*, 30 NY3d 656, 661 [2018]). The test utilized is "one of usefulness and reason" (*id.*). The Court may compel disclosure pursuant to CPLR § 3124.

CPLR § 3126 subsection three provides that the Court may strike a pleading when it finds, inter alia, that a party has refused to obey an order for disclosure or willfully fails to disclose information that ought to have been disclosed. This remedy is drastic and should only be imposed when the movant has "clearly shown that its opponent's nondisclosure was willful, contumacious or due to bad faith" (*Commerce & Indus. Ins. Co. v. Lib-Com Ltd.*, 266 AD2d 142 [1st Dept 1999]). A pattern of default, lateness, and failure to comply with court orders can give rise to an inference of willful and contumacious conduct (*see Merchants T & F, Inc. v. Kase & Druker*, 19 AD3d 134 [1st Dept 2005]); *see also Shah v. Oral Cancer Prevention Intl., Inc.*, 138 AD3d 722 [2d Dept 2016]). "A party that permits discovery to 'trickl[e] in [with a] cavalier attitude should not escape adverse consequence'" (*Henderson-Jones v. City of New York*, 87 AD3d 498, 504 [1st Dept 2011] quoting *Figdor v. City of New York*, 33 AD3d 560, 561 [1st Dept 2006]).

Defendants contend the requested financial material is overly burdensome, broad, or not reasonably calculated to lead to discoverable evidence. However, defendants are required to maintain these requested records under Lien Law §§ 75 and 76 and furnish same to beneficiaries of the trust created pursuant to the Lien Law. Accordingly, defendants' arguments

against disclosure of same in this class-action suit by trust beneficiaries must fail, and their cross-motion for a protective order against disclosure must be denied. As the Court has not previously compelled this disclosure, and it does not otherwise perceive willful or contumacious nondisclosure, it will not strike defendants' answer at this time. It does, however, compel disclosure.

To the extent that defendants contend a blanket discovery stay precludes further discovery in this matter until their motion to dismiss is decided, pursuant to CPLR § 3214, they are mistaken. Following the service of a motion to dismiss or for summary judgment, disclosure is stayed "until determination of the motion unless the court orders otherwise" (CPLR § 3214[b]). In any event, the Court, in rendering a decision on defendants' dismissal motion, below, has vacated any stay enjoyed by a party under CPLR § 3214. Furthermore, the Court finds that discovery in this matter, filed in 2017, has progressed slowly, and therefore any further stay of discovery in this matter shall be by Court order only, except where contrary to law.

Defendants' cross-motion seeks to compel disclosure of material purportedly referenced in a February 3, 2021 letter response to plaintiff's deficiency letter (NYSCEF Doc. No. 175). Such letter is, expectedly, dedicated

to explaining defendants' position for withholding the disclosure sought by plaintiff. The letter does not identify the allegedly outstanding discovery owed by plaintiff to defendants. Defendants, having failed to identify what requested material has not been served by plaintiff, are not entitled to an order compelling unnamed discovery.

MOTION SEQUENCE 006

Defendants move to dismiss the complaint and crossclaims of COD Mechanical and GA Windows, pursuant to CPLR §§ 3211[a][1] and [7]. Plaintiff opposes.

As with all motions to dismiss under CPLR § 3211, the complaint should be liberally construed, the facts presumed to be true, and the pleading accorded the benefit of every possible favorable inference (*see e.g. Leon v. Martinez*, 84 NY2d 83 [1994]). "Under CPLR § 3211(a)(1), a dismissal is warranted only if the documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law" (*id.*; citing *Heaney v. Purdy*, 29 NY2d 157 [1971]).

To the extent that the motion seeks dismissal under § 3211(a)(7), it is likewise afforded the benefits of liberal construction, a presumption of truth,

and any favorable inference (*id.*; *Anderson v. Edmiston & Co.*, 131 AD3d 416, 417 [1st Dept 2015]; *Askin v. Department of Educ. of City of* N.Y., 110 AD3d 621, 622 [1st Dept 2013]). The motion must be denied if from the four corners of the pleadings "factual allegations are discerned which taken together manifest any cause of action cognizable at law" (*Polonetsky v. Better Homes Depot*, 97 NY2d 46, 54 [2001]). A complaint should not be dismissed so long as, "when the plaintiff's allegations are given the benefit of every possible inference, a cause of action exists," and a plaintiff may cure potential deficiencies in its pleading through affidavits and other evidence (*R.H. Sanbar Proj., Inc. v. Gruzen Partnership*, 148 AD2d 316, 318 [1st Dept 1989]). However, bare legal conclusions and factual allegations which are inherently incredible or contradicted by documentary evidence are not presumed to be true (*Mark Hampton, Inc. v. Bergreen*, 173 AD2d 220 [1st Dept 1991]).

In essence, defendants argue that plaintiff failed to properly supervise its subcontractors resulting in damage to the subject and neighboring buildings, such failures caused significant delays and cost overruns, and therefore plaintiff is not entitled to the additional payments alleged in this action, as it did not perform its duties under the contract.

Here, plaintiff has alleged that the parties entered into a contract in November 2015 to construct the subject building, that the contract provided a maximum price of $12,229,036, and that a balance of $286,293.28 remains due from defendants for plaintiff's completed work. Assuming these allegations are true, and providing the complaint every favorable inference, plaintiff has adequately stated a cause of action for breach of contract. That a defendant, as here, believes a plaintiff's claim is without merit is as unsurprising as it is irrelevant on a motion to dismiss.

As to the causes of action sounding in Lien Law, plaintiff has adequately asserted, for dismissal purposes, that the financing of the subject project created trust funds, defendants are trustees of said trust, plaintiff is a beneficiary of the trust, and defendants improperly converted trust funds or otherwise disbursed same in an unauthorized manner. Assuming these allegations to be true, and providing every favorable inference, plaintiff has adequately pled its Lien Law trust causes of action.

To the extent defendants' motion seeks dismissal of plaintiff's complaint based upon documentary evidence, the evidence submitted does not

conclusively establish their entitlement to judgment as a matter of law. The parties' contract does not establish plaintiff is not entitled to further payment, as a matter of law. Stated differently this Court cannot resolve a question of fact related to the contract on this dismissal motion i.e., whether the parties complied with the contract terms.

The crossclaims asserted against defendants based upon liens filed by COD Mechanical and GA Windows were dismissed by the Court's combined decision and order in Mot. Seqs. 001, 002, 003 (NYSCEF Doc. No. 110). Additionally, as COD Mechanical and GA Windows have failed to oppose defendants' motion seeking dismissal of their crossclaims, and plaintiff has likewise failed to oppose that portion of the motion seeking dismissal of its lien foreclosure claim, and as the Court previously dismissed these liens, plaintiff's third cause of action is dismissed, as are the crossclaims of COD Mechanical and GA Windows (*Raia v. Potoschnig*, 170 AD3d 433 [1st Dept 2019] failure to raise an argument in opposition constitutes waiver; *Wilmington Trust v. Sukhu*, 155 AD3d 591 [1st Dept 2017]).

Punitive damages are not recoverable for an ordinary breach of contract (*Soviero v. Carroll Group Intern., Inc.*, 27 AD3d 276 [1st Dept 2006]). As plaintiff

has failed to assert "a high degree of moral turpitude" "demonstrating 'such wanton dishonesty as to imply criminal indifference to civil obligations' ... [or that the] conduct was aimed at the public generally," punitive damages are not available (*Rocanova v. Equitable Life Assur. Soc. of U.S.*, 83 NY2d 603, 613 [1994] quoting *Walker v. Sheldon*, 10 NY2d 401, 404-05 [1961]). Furthermore, plaintiff has failed to oppose defendants motion seeking dismissal of same, and therefore has waived such claim (*see e.g. Raia v. Potoschnig*, 170 AD3d 433, *supra*).

Accordingly, it is

ORDERED that defendants shall serve the requested financial discovery, as outlined in plaintiff's motion, on plaintiff within 60 days and shall contemporaneously upload an affidavit of service of same to NYSCEF; and it is further

ORDERED that defendants' cross-motion for a protective order is denied; and it is further

ORDERED that defendants' cross-motion seeking to compel disclosure or strike plaintiff's pleading for nondisclosure is denied for failure to adequately

identify the material sought or basis for same, without prejudice to further application seeking same; and it is further

ORDERED that any further stay of discovery in this matter shall be by Court order, upon further application, except where contrary to law; and it is further

ORDERED that defendants motion to dismiss is granted to the extent of dismissing plaintiff's third cause of action, the crossclaims of COD Mechanical and GA Windows, and plaintiff's claim for punitive damages, and otherwise denied; and it is further

ORDERED that plaintiff, as movant, shall file notice of entry of this decision and order within 10 days under motion sequence 005; and it is further

ORDERED that Amirian defendants, as movants, shall file notice of entry of this decision and order within 10 days under motion sequence 006; and it is further

ORDERED that the parties shall confer and file a single joint proposed discovery order to NYSCEF addressing all outstanding discovery within 30 days of notice of entry of this order; where agreement cannot be reached, the parties shall file a single joint letter outlining the dispute contemporaneously with the proposed discovery order. Courtesy copies of the joint proposed discovery order and joint letter, if applicable, shall be sent to chambers by mail or email (SFC-Part4-Clerk@nycourts.gov). Failure to timely provide a proposed order may result in sanctions, including striking of pleadings, in the Court's discretion without further application.

THIS CONSTITUTES THE DECISION AND ORDER OF THE COURT.

Dated: July 29, 2021

ENTER:

Hon. Frank P. Nervo, J.S.C.