Hansen Realty Dev. Corp. v Sapphire Realty Group LLC
2020 NY Slip Op 33166(U)
September 25, 2020
Supreme Court, New York County
Docket Number: 656737/2017
Judge: Andrew Borrok
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. ANDREW BORROK **PART** IAS MOTION 53EFM

Justice

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HANSEN REALTY DEVELOPMENT CORPORATION,

Plaintiff,

- v -

SAPPHIRE REALTY GROUP LLC,YAN PO ZHU, IRIS PLAZA REALTY LLC,NY BEST HOMES REALTY LLC,ALPHA BEST SERVICE, INC.,TRIPLE STAR REALTY LLC,

Defendant.

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INDEX NO. 656737/2017

MOTION DATE 02/27/2020, 07/10/2020

MOTION SEQ. NO. 005 006

DECISION + ORDER ON MOTION

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SAPPHIRE REALTY GROUP LLC

Plaintiff,

-against-

HANSEN REALTY DEVELOPMENT CORPORATION, WEIMING YIN, SHU SEN JIA

Defendant.

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Third-Party
Index No. 595991/2017

The following e-filed documents, listed by NYSCEF document number (Motion 005) 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 193, 194, 195, 199, 200, 201

were read on this motion to/for DISCOVERY.

The following e-filed documents, listed by NYSCEF document number (Motion 006) 196, 197, 198, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251

were read on this motion to/for DISCONTINUE.

Upon the foregoing documents, it is Upon the foregoing documents, (i) Sapphire Realty Group LLC and Yan Po Zhu's (collectively, the **Zhu Defendants**) motion (Seq. No. 005) to compel and

(ii) Hansen's motion (Seq. No. 006) for a voluntary discontinuance with prejudice of the First-Party Action (hereinafter defined) as against all defendants are granted.

The Relevant Facts and Circumstances

This action concerns a real estate development project located at 131-01 39th Avenue, Flushing, New York (the **Property**) that was overseen by the nominal defendant, Triple Star Realty LLC (**Triple Star**). Pursuant to an Amended and Restated Limited Liability Company Agreement of Triple Star (the **LLC Agreement**; NYSCEF Doc. No. 216), dated September 19, 2014, by and between Hansen Realty Development Corporation (**Hansen**) and Sapphire Realty Group LLC (**Sapphire**), Hansen holds a 75% interest and Sapphire holds a 25% interest in Triple Star. Mr. Zhu is the sole member of Sapphire and the Chief Executive Officer of Triple Star.

As discussed below, The LLC Agreement contains a prevailing party clause as follows:

> 15.13. Remedies Cumulative; Dispute Costs. … (b) In the event of any dispute between the parties hereto, the prevailing party shall be entitled to recover from the other party reasonable attorney's fees and costs incurred in connection therewith.

(*id.* at 34).

Non-party Outlet Plaza LLC (**Outlet Plaza**) initially purchased the Property with the intent of immediately flipping it for a profit (NYSCEF Doc. No. 2, ¶ 22). Mr. Zhu was initially in talks to purchase the Property from Outlet Plaza in August of 2014, but those efforts did not succeed at that time due to certain financing issues (*id.*, ¶¶ 23-24). In September 2014, Outlet Plaza then entered into a purchase and sale agreement with Ranger Sagmore Flushing LLC (**Ranger**), pursuant to which Ranger agreed to purchase the Property for $75 million, with the transaction

scheduled to close in October of that year (*id.*, ¶ 25). At or about the same time, Triple Star agreed to extend to Outlet Plaza a $14 million loan in exchange for an option to purchase the Property in the event that the sale to Ranger was not consummated (*id.*, ¶ 26, 29-30). Pursuant to the terms of a Promissory Note dated September 19, 2014, in the event that Triple Star exercised its option to purchase the Property, the $14 million loan would be converted into a deposit for the purchase price and no interest on the loan would be due (*id.*).

When Ranger did not to purchase the Property, Triple Star exercised its option to purchase the Property (*id.*, ¶ 31) and Triple Star and Outlet Plaza entered into an Agreement of Purchase and Sale (the **2014 PSA**; NYSCEF Doc. No. 131), dated October 21, 2014, pursuant to which Triple Star agreed to purchase the Property for $70 million, and the $14 million loan was deemed a deposit which was returnable to Triple Star if it terminated the 2014 PSA within a certain timeframe (*id.* at §§ 1, 3.2, 4.1). Hansen alleges that Mr. Zhu and Triple Star colluded to include terms that would financially benefit Mr. Zhu at the expense of Triple Star, including the requirement that Triple Star pay a broker's fee of $1.8 million, on behalf of Outlet Plaza, to the defendant entities that Mr. Zhu had a financial interest in: NY Best Homes Realty LLC (**NY Best Homes**) and Iris Plaza Realty LLC (**Iris Plaza**) (NYSCEF Doc. No. 2, ¶¶ 32-37).

Ultimately, Triple Star was unable to obtain financing to close on the Property and terminated the 2014 PSA with a request for return of its $14 million deposit (NYSCEF Doc. No. 2, ¶¶ 41-42). Outlet Plaza refused to return the deposit and Triple Star sued Outlet Plaza in February 2015, which action was settled when the parties agreed to the sale of the Property for an additional $6 million (*id.*, ¶¶ 43-46). The Property was then sold to Triple Star for

approximately $91 million in July 2015, including closing costs and a $1.8 million commission to NY Best Homes and Iris Plaza (*id.*, ¶¶ 50-56). After Triple Star was unable to move past pre-construction activity on the Property and failed to meet other loan obligations, the parties abandoned development of the Property and sold it in July 2017 (*id.*, ¶¶ 57-98).

On November 6, 2017, Hansen commenced this derivative action (the **First-Party Action**) on behalf of Triple Star alleging, in sum and substance, that the Zhu Defendants breached their legal duties towards Triple Star in regard to the initial acquisition of the Property and through subsequent mismanagement of the Property's development. Hansen also alleges, inter alia, that Mr. Zhu misappropriated Triple Star's account for personal use.

On December 1, 2017, the Zhu Defendants filed their answer with counterclaims, alleging three counterclaims for a declaratory judgment that a certain commission agreement is valid and enforceable as against Triple Star with respect to (i) Mr. Zhu (the first counterclaim), (ii) NY Best Homes (the second counterclaim), and (iii) Iris Plaza (the third counterclaim) (NYSCEF Doc. No. 9, ¶¶ 44-66).

On December 1, 2017, Sapphire also commenced a third-party derivative action (the **Third-Party Action**) on behalf of Triple Star against Hansen, Weiming Yin (Triple Star's Chief Operating Officer), and Shu Sen Jia (the sole shareholder of Hansen's parent company, Beijing Tianren Land Group) (NYSCEF Doc. No. 9). On March 27, 2018, Sapphire filed an amended third-party complaint alleging, among other things, that Hansen's failure to obtain financing resulted in the cancellation of the 2014 PSA, that Hansen and Mr. Yin grossly mismanaged

Triple Star, and that Mr. Yin and Mr. Jia wrongfully caused Triple Star to pay for their personal expenses (NYSCEF Doc. No. 43). Sapphire asserted the following third-party claims: (i) breach of contract by Hansen, (ii) breach of fiduciary duty by Mr. Yin, (iii) gross mismanagement and corporate waste by Hansen and Mr. Yin, (iv) setting aside a void salary contract, (v) setting aside a void loan agreement, (vi) unjust enrichment, (vii) an accounting, (viii) unjust enrichment against Mr. Jia, and (ix) money had and received against Mr. Jia (NYSCEF Doc. No. 43).

On September 15, 2018, Sapphire filed a motion (Seq. No. 004) to compel the production of certain documents. Pursuant to an order, dated January 25, 2019, Hansen was directed to produce communications between itself and Mr. Yin concerning development and management of the Property (NYSCEF Doc. No. 152). In response, Hansen produced WeChat messages that Mr. Yin exchanged with multiple individuals, a significant number of which were redacted (the **WeChat Messages;** NYSCEF Doc. Nos. 180-186; NYSCEF Doc. No. 172, ¶¶ 18-19).

These WeChat Messages were never downloaded into a database for preservation nor searched pursuant to any agreed upon search terms or protocol. Instead, at the request of Hansen's counsel, BDO USA, LLP (**BDO USA**) provided a Memo, dated June 14, 2019, explaining the forensic collection and processing it undertook of WeChat Messages from Hansen's custodians (the **Memo**; NYSCEF Doc. No. 194). In sum and substance, BDO's Shanghai office used a mobile forensics application to extract WeChat messages that were provided in Excel format to Hansen's counsel in China (*id.*; NYSCEF Doc. No. 195 at 4). After the WeChat Messages were reviewed for personal and privileged information, certain messages were redacted and the

spreadsheet was returned to BDO Shanghai, who then exported responsive messages to BDO USA for production (*id.*).

On July 10, 2019, Hansen's counsel produced a redaction log listing the redacted WeChat Messages on the basis that they were either not relevant, subject to attorney-client privilege, or redacted according to the laws of the People's Republic of China (NYSCEF Doc. No. 178). Pursuant to two So-Ordered Stipulations, dated September 9, 2019 and October 17, 2019 respectively, Hansen was to provide Sapphire with a revised redaction log (NYSCEF Doc. Nos. 167, 168). On January 12, 2020, Hansen produced a revised redaction log that again listed redactions on the basis that they were not relevant, subject to privilege, and in accordance with the laws of the People's Republic of China (NYSCEF Doc. No. 172 at ¶ 24; NYSCEF Doc. No. 179).

Pursuant to a So-Ordered Stipulation, dated January 13, 2020, Hansen was to provide Sapphire with a further revised redaction log identifying the subject matter of the redactions, along with other non-privileged data or information on or before February 13, 2020 (NYSCEF Doc. No. 169). However, after the parties were unable to resolve disputes over the propriety of the redactions on the basis of relevance, the court permitted the Zhu Defendants to file the instant motion to compel production of the redacted WeChat Messages.

Thereafter, Hansen sought to discontinue the First-Party Action and all defendants other than the Zhu Defendants stipulated to such discontinuance pursuant to a Stipulation, dated March 26, 2020 (NYSCEF Doc. No. 198). The Zhu Defendants, however, refused to agree to the

discontinuance unless Hansen agreed to pay their legal fees and costs incurred in defending this action, and Hansen brought this motion for a voluntary discontinuance with prejudice.

Discussion

A. Motion Sequence 006 (Hansen's Motion for a Voluntary Discontinuance with Prejudice)

Hansen argues that the instant motion to discontinue should be granted because the Zhu Defendants will not suffer any prejudice as a result. Hansen also argues that any discontinuance should not be conditioned on the payment of attorneys' fees because (i) its claims were not frivolous or brought in bad faith, (ii) the action did not result in additional expenses by the Zhu Defendants that would have otherwise been incurred due to the counterclaim and third-party claims, and (iii) the discontinuance is not an attempt to avoid this court's jurisdiction.

In their opposition papers, the Zhu Defendants argue that a discontinuance should be conditioned on the payment of their attorneys' fees and costs because (i) the action was brought in bad faith, (ii) the Zhu Defendants incurred extensive pre-trial costs, and (iii) they will be deprived of their opportunity to vindicate themselves at court.

It is in the court's sound discretion to determine whether an action should be discontinued pursuant to CPLR § 3127(b) (*Tucker v Tucker*, 55 NY2d 378, 383-384 [1982]). A party cannot generally be compelled to litigate and, therefore, a discontinuance should be granted absent special circumstances, such as prejudice to the defendant or some other improper

consequence (*id.*). CPLR § 3127(b) also allows the court to discontinue an action "upon terms and conditions, as the court deems proper."

Here, the Zhu Defendants fail to establish that they will suffer prejudice if Hansen is granted a discontinuance with prejudice. It is well settled that mere delay, frustration, and expense in preparing a contemplated defense do not constitute prejudice warranting the denial of a motion for a voluntary discontinuance (*Eugenia VI Venture Holdings, Ltd. v MapleWood Equity Partners, L.P.*, 38 AD3d 264, 265 [1st Dept 2007]). Moreover, the Zhu Defendants' pending motion to compel will not be rendered moot by the discontinuance, as the Zhu Defendants argue, because the WeChat Messages that are sought in connection with that motion relate to the counterclaims or third-party claims that will remain in this action. Finally, inasmuch as the Zhu Defendants maintain that they would succeed in their defense of the action, there is simply no evidence that Hansen's motion for a discontinuance was made solely to avoid an adverse decision before this court (*c.f. Baltia Air Lines, Inc. v CIBC Oppenheimer Corp.*, 273 AD2d 55, 57 [1st Dept 2000] [motion for discontinuance denied because relief was sought only to avoid adverse decision on the merits]).

In addition, Hansen's discontinuance need not be conditioned on the Zhu Defendants' attorneys' fees or costs because the record does not indicate that Hansen's claims were frivolous or asserted with a preconceived intention of discontinuing the action once the Zhu Defendants incurred defense costs (*see Matter of Lawrence*, 79 AD3d 417, 417 [1st Dept 2010] [affirming Surrogate Court's discontinuance of petitioner's claim without conditioning payment of attorney's fees where claim was not frivolous]).

To the extent that the Zhu Defendants argue that they are contractually entitled to an award of costs and reasonable attorneys' fees as the prevailing party pursuant to Section 15.13(b) of the LLC Agreement, a voluntarily discontinuance does not render the Zhu Defendants the prevailing party (*see DKR Mtge. Asset Trust 1 v Rivera*, 130 AD3d 774 [2d Dept 2015]). Moreover, although the First-Party Action will be discontinued with prejudice, a substantial portion of the parties' dispute remains unresolved vis-à-vis the Zhu Defendants' counterclaims and third-party claims, and the court cannot determine who the prevailing party will be with respect to those claims at this time. Therefore, Hansen's motion for a discontinuance with prejudice is granted.

B. Motion Sequence 005 (the Defendants' Motion to Compel)

In their moving papers, the Zhu Defendants argue Hansen does not have a basis to unilaterally redact documents solely for lack of relevance. Hansen, in turn, argues that the redacted WeChat Messages should be treated no differently than other documents that are not produced for lack of relevance. However, the WeChat Messages are not separate documents that can simply be withheld as non-responsive as they comprise an entire conversation, some parts of which counsel now seeks to redact on the basis of what it deems relevant or not.

CPLR § 3101 (a) requires the full disclosure of "all matter material and necessary in the prosecution or defense of an action," and this provision is interpreted liberally to require disclosure of facts that assist a party's good faith preparation for trial (*Johnson v Natl. R.R. Passenger Corp.*, 83 AD2d 916 [1st Dept 1981]). However, materials that are properly covered

by privilege, attorney work product, and certain trial preparation materials are not subject to disclosure (CPLR § 3101[b]-[d]).

Although Part 202 of the Uniform Civil Rules for NY State Trial Courts, Section 202.5(e) provides rules for the omission or redaction of confidential personal information, there is no guidance as to whether parties are permitted to redact materials on the basis of relevance alone.

Hansen relies on *Ohnmacht v New York*, 2009 NY Slip Op 51100[U] [Ct Cl 2009] to argue that a producing party is permitted to redact non-relevant information. There, the court conducted an *in camera* review, after which it determined that limited redactions were appropriate to protect sensitive information that was ***also*** irrelevant to the claim (*id.* at *3). Accordingly, *Ohnmacht* simply does not stand for the proposition that a party is entitled to redact material that is irrelevant *per se* because, in that case, the court determined that the materials should remain redacted because they could reveal sensitive information of the producing party; the fact that this redacted information was also irrelevant was not the basis for the court's decision (*see also Calcados Samello, S. A. v Intershoe, Inc.*, 78 AD2d 796, 796 [1st Dept 1980] [remanding portion of discovery motion concerning four redacted documents to Special Term for *in camera* review because if documents relevant, redactions would be overruled, and if documents immaterial, redactions would be sustained where defendants asserted that disclosure of redacted materials would seriously prejudice its business relationships with non-parties]).

Hansen also relies on two cases from the United States District Court for the Southern District of New York for the proposition that courts permit parties to redact portions of documents that are

not relevant: *Schiller v City of New York,* 2006 WL 3592547 [SD NY 2006] and *Kingsway Fin. Servs., Inc. v Pricewaterhouse-Coopers LLP*, 2007 WL 473726 [SD NY 2007]. In *Schiller*, the City of New York moved to compel certain parties to produce unredacted meeting minutes of an anti-war organization that had organized a protest in connection with the Republican National Convention. The motion was denied because internal political discussions and discussions on other courses of action considered and rejected were deemed irrelevant to whether the plaintiffs had intended to engage in civil disobedience (*Schiller*, *supra* at *7). The court further noted that the unredacted portions of minutes produced reflected materials relevant to whether the NYPD had probable cause to arrest protestors (*id.*). In *Kingsway*, the defendants' motion to compel the production of redacted document was denied because the defendants were unable to establish that the redacted portions were responsive to their discovery requests (*Kingsway*, *supra.* at *3).

However, authorities from the same court have also held that redactions are impermissible unless based upon a recognized legal privilege. For example, in *In re State St. Bank & Trust Co, Fixed Income Funds Invs. Litig.*, 2009 US Dist LEXIS 34967 [SD NY 2009], the court determined that redaction of any portion of a document on the ground that it was non-responsive and irrelevant was not warranted, and remarked that "redactions are generally unwise. They breed suspicions, and they may deprive the reader of context" (*id.* at *5-6). Although the *In re State. St. Bank* court noted that *Schiller* permitted careful redactions based on relevance, the court distinguished *Schiller* because the redactions permitted therein involved free speech rights against government attorneys, which is an area of speech generally entitled to special protection (*id.*).

A survey of recent case law indicates that both the United States District Court for the Southern and Eastern District of New York have now adopted the approach from *In re State St. Bank*, namely that redactions are improper when based on a party's unilateral assertion of relevancy (*see New Falls Corp. v Soni,* 2020 US Dist LEXIS 94747 at *43 [ED NY 2020] [collecting cases and ordering that redactions made for relevance be unredacted]; *Durling v Papa John's Intl., Inc.*, 2018 US Dist LEXIS 11584 at *25 [SD NY 2018] ["redactions on grounds of non-responsiveness or irrelevance are generally impermissible, especially where, as here, a confidentiality stipulation and order [exists]"]). Most recently, in a case with similar facts to this one, the United States District Court for the Central District of California ordered the production of redacted text messages that purported to exclude irrelevant information, while citing to *In re State St. Bank* and other New York case law (*see Laub v Horbaczewski*, 331 FRD 516, 524 [CD Cal 2019]).

Here, the Zhu Defendants identify seven groups of redacted WeChat Messages that they argue should be revealed in their entirety (NYSCEF Doc. Nos. 180-186). Significantly, these redacted WeChat Messages were sent in 2016 and 2017, encompassing a critical period relevant to the disputed events in the third-party action. The WeChat Messages include group messages sent or received by Mr. Yin or Mr. Jia, the two defendants in the third-party action. There is also one group of messages that were sent directly between the two third-party defendants (*id.* at 12-13). Hansen does not provide any information about the redacted WeChat Messages, such as their general subject matter, but simply claims in a conclusory fashion that more than 90% of the redactions were of non-relevant conversations exchanged between the aforementioned individuals (NYSCEF Doc. No. 195 at 7). Furthermore, inasmuch as Hansen attempts to explain

its methodology for the collection and redaction of WeChat messages by relying on BDO's Memo, this information is simply irrelevant to the instant motion because Hansen nevertheless fails to provide a compelling reason why its unilateral relevance redactions should be accepted, given the existence of substantial authority to the contrary and given its repeated failure to set forth the basis for its blanket assertion of lack of relevance, particularly as there is a compelling reason to believe that the redactions may be relevant based on their time period (*see In re State St. Bank, supra*). Put another way, the Zhu Defendants are not required to just take Hansen's word for it and in any event such redactions must be reviewable by the court when challenged, as here.

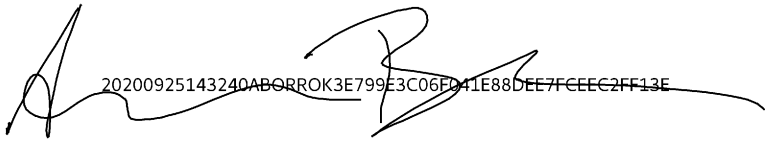
Accordingly, the parties are directed to agree on an ESI protocol with respect to the WeChat Messages within two weeks of this decision and order, including search terms. Hansen is required to have all of the WeChat Messages translated by a certified translator and to upload the WeChat Messages to a searchable database within 30 days of this decision, which database shall be preserved in the event of any disputes, and to produce all responsive messages pursuant to the ESI protocol within 45 days of this decision, along with a detailed log stating the specific bases for any assertion of non-relevance. In the event of any disputes as to the propriety of the redactions, the parties may contact the court and the court will conduct an in camera review of such translated WeChat Messages.

Accordingly, it is

ORDERED that the Zhu Defendants' motion to compel (Seq. No. 005) is granted as set forth above; and it is further

ORDERED that Hansen's motion for a voluntary discontinuance (Seq. No. 006) is granted with prejudice, the first-party action is discontinued and the Clerk is respectfully directed to mark the court's records accordingly; and it is further

ORDERED that the parties shall appear for a remote status conference on **October 26, 2020 at 11:30 a.m.**



9/25/2020
DATE

ANDREW BORROK, J.S.C.

CHECK ONE:		**CASE DISPOSED**			X	**NON-FINAL DISPOSITION**	
	X	**GRANTED**		**DENIED**		**GRANTED IN PART**	**OTHER**
APPLICATION:		**SETTLE ORDER**				**SUBMIT ORDER**	
CHECK IF APPROPRIATE:		**INCLUDES TRANSFER/REASSIGN**				**FIDUCIARY APPOINTMENT**	**REFERENCE**