

Geyer v Perloff

2012 NY Slip Op 30890(U)

March 30, 2012

Supreme Court, Nassau County

Docket Number: 009476/10

Judge: Randy Sue Marber

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SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

Present: **HON. RANDY SUE MARBER**
JUSTICE

TRIAL/IAS PART 14

_____ X

HOLLY GEYER,

Plaintiff,

Index No.: 009476/10

Motion Sequence...07

-against-

Motion Date...02/07/11

CYNTHIA PERLOFF, HARINIBEN PATEL,
SONAH D. PATEL, POOJABEN PATEL,
NITTIN RAJ,

Defendants.

_____ X

Papers Submitted:

Notice of Motion.....x

Affirmation in Partial Opposition.....x

Reply Affirmation.....x

Upon the foregoing papers, the Plaintiff’s motion seeking an order: (i) extending the Plaintiff’s time to file the Note of Issue pursuant to CPLR § 2004; (ii) compelling the Defendant, CYNTHIA PERLOFF (“Perloff”) to turn over certain reports requested in the Plaintiff’s discovery and inspection demands pursuant to CPLR § 3124 and/or § 3126; (iii) compelling the Defendant, Perloff, to respond to certain questions that were propounded at her deposition pursuant to CPLR § 3124 and/or § 3126; (iv) permitting the Plaintiff to serve an amended Bill of Particulars to include “mold and respiratory related injuries”pursuant to CPLR § 3025 (b); and (v) a protective order preventing discovery of

certain medical records in response to a Discovery and Inspection demand, dated July 14, 2011, as palpably improper pursuant to CPLR § 3103, is decided as hereinafter provided.

Relevant Factual Background:

The Plaintiff commenced this action by the filing of a summons and complaint on May 14, 2010, to recover monetary damages and rent abatement for physical and psychological injuries allegedly sustained as a result of the condition of the premises wherein the Plaintiff resided located at 31 James Street, Hicksville, New York (hereinafter “Premises”). Specifically, the Plaintiff alleges causes of action against the Defendant, Perloff, for breach of warranty of habitability, negligent maintenance of the Premises, private nuisance and strict products liability, due to the presence of mold and bedbugs, among other deficiencies, within the Premises. Issue was joined by the service of the Defendant, Perloff’s Verified Answer, dated August 3, 2010.

The complaint also alleged causes of action against the Defendants, HARINIBEN PATEL, SONAH D. PATEL, POOJABEN PATEL and NITTIN RAJ, who resided at the Premises during the relevant time period in a separate portion of the home. According to the Plaintiff’s counsel’s affirmation, following the preliminary conference, the aforementioned Defendants appeared for an examination before trial. Thereafter, they have not engaged in any discovery and have presumably left the country since the commencement of this litigation. Said Defendants stated their intention to leave the country and the Plaintiff’s counsel stated his intention to discontinue the action against them but never did. The instant motion only relates to the Defendant, Perloff.

I. Plaintiff's Application to Extend the Time to File the Note of Issue:

Pursuant to a Certification Order, dated July 21, 2011, this matter was certified for trial and the Plaintiff was directed to file a Note of Issue within ninety days of said date. The time for which to file the Note of Issue expired on October 19, 2011. The instant motion seeking an extension of time was filed on October 3, 2011, prior to the deadline. Counsel for the Defendant, Perloff, has no objection to the Plaintiff's request to extend the time to file the Note of Issue and joined in the Plaintiff's application for same. The Court, in its discretion, hereby extends the Plaintiff's time to file the Note of Issue to May 4, 2012.

II. Plaintiff's Application to Compel the Defendant, Perloff, to Disclose Certain Reports In Response to a Demand for Discovery and Inspection:

The Plaintiff served a demand for Discovery and Inspection, dated October 2, 2010, wherein "copies of all engineer reports, construction reports, repair receipts, other reports, memoranda, writings..." were demanded regarding the Premises. The Defendant, Perloff, objected to disclosing the foregoing items based upon a privilege. The Plaintiff's counsel claims that in light of the fact that a seminal issue in the case is the condition of the Premises while the Plaintiff resided there, the documents requested are discoverable pursuant to CPLR § 3101 (a). Further, the Plaintiff submits that any privilege claimed by the Defendant has been waived due to the second action in which the Defendant, Perloff, is suing the Plaintiff to recover unpaid rent and disposal costs for the Plaintiff's personal property and debris. The Plaintiff also claims that the Defendant waived the privilege by stating in her interrogatory responses that there was no mold in the Premises for the past 10 years which

was ascertained through “testing”.

In opposition, counsel for the Defendant, Perloff, states that the reports requested by the Plaintiff are expert reports created subsequent to the commencement of the litigation.

CPLR § 3101 (b) and (c) state that privileged matters and the work product of an attorney shall not be obtainable, respectively. Further, CPLR § 3101 (d) (2) states that “materials otherwise discoverable under subdivision (a) of this section and prepared in anticipation of litigation ...may be obtained only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of the case and is unable without undue hardship to obtain the substantial equivalent of the materials by other means.”

A review of the privilege log reveals that the Defendant, Perloff, seeks to prevent from disclosure three (3) items of discovery: an inspection report of the Premises dated July 11, 2010 and two (2) expert reports regarding an inspection of the Premises, dated July 29, 2010. All three (3) reports post-date the commencement of this action (May 14, 2010). (*See* Privilege Log attached to the Plaintiff’s Notice of Motion as Exhibit “5”) In the instant matter, the Plaintiff has failed to make a showing of “substantial need” or “undue hardship”. Indeed, after commencement of the litigation, the Plaintiff’s counsel could have hired an expert, or other qualified individual, to inspect the Premises. The Court finds no need to compel the Defendant to disclose information that was obtained in preparation to defend this litigation absent a showing of substantial need or undue hardship.

The Plaintiff’s argument that the Defendant waived the privilege by

commencing an action in small claims court is unavailing. There is no evidence presented that the small claims action, which was joined for trial with this action, was ever pursued. It appears that the claims the Defendant sought to pursue against the Plaintiff have been abandoned.

Accordingly, the portion of the Plaintiff's motion seeking to compel the Defendant, Perloff, to disclose "copies of all engineer reports, construction reports, repair receipts, other reports, memoranda, writings" subsequent to the commencement of the action, is **DENIED**.

III. Plaintiff's Application to Compel the Defendant to Respond to Questions at an Examination Before Trial

During the Examination Before Trial of the Defendant, Perloff, the Plaintiff's counsel inquired about whether the Defendant owned any other properties besides 28 Monroe Avenue. The Defendant's counsel objected and instructed the witness not to respond to the question.

The Plaintiff's counsel submits that the information sought is relevant to the prosecution of the action in order to prove that the Defendant acted similarly with respect to other properties as she acted with the Premises herein and as to her intent. Specifically, counsel contends that allowing said inquiries could reveal that the Defendant engaged in "similar" behavior with other properties including intentionally failing to fix problems, permitting unabated mold growth, permitting criminal acts to be committed, failing to remedy asbestos conditions and failing to keep the premises in a habitable condition.

In opposition, the Defendant's counsel avers that the information sought is not discoverable in the context of this claim and is nothing more than a fishing expedition by the Plaintiff. Counsel further states that any request to inquire as to the Defendant's assets would require that an order of attachment first be obtained.

CPLR § 3101 (a) sets forth the criterion for disclosure under the CPLR, requiring "full disclosure of all matter material and necessary in the prosecution or defense of an action." Requests for disclosure, however, may not be overbroad, burdensome, or lacking in specificity and they may not seek irrelevant information. *Osowski v. AMEC Constr. Mgt., Inc.*, 69 A.D.3d 99, 106 (1st Dept. 2009). The words material and necessary are to be liberally interpreted to "require disclosure, upon request of any facts bearing on the controversy which will assist preparation for trial by sharpening the issues and reducing delay and prolixity. The test to determine if the information sought is material and necessary is one of usefulness and reason." *Allen v. Crowell-Collier Publishing Co.*, 21 N.Y.2d 403, 406-407 (1969).

The principle of full disclosure does not, however, give a party the right to uncontrolled and unfettered disclosure. Matters relating to disclosure lie within the broad discretion of the trial court which is in the best position to determine what is material and necessary. *Buxbaum v. Castro*, 82 A.D.3d 925 (2d Dept. 2011).

The information sought by the Plaintiff's counsel, to wit, whether the Defendant acted in a similar fashion as a landlord and/or property owner with regard to other properties, is not relevant, material or necessary to prosecute the Plaintiff's claims. In this

action, the Plaintiff claims that the Defendant breached certain duties relating to her maintenance and/or operation of the Premises where the Plaintiff resided for nearly seventeen (17) years, located at 31 James Street, Hicksville, New York. The Defendant's maintenance of other properties, where the Plaintiff never resided, is irrelevant to whether the Defendant breached a duty of care with respect to her maintenance of the subject Premises. Accordingly, the portion of the Plaintiff's motion which seeks to compel the Defendant to respond to inquiries regarding "other properties" owned by the Defendant, other than 31 James Street, Hicksville, New York, is **DENIED**.

IV. Plaintiff's Application to Serve an Amended Bill of Particulars

The Plaintiff seeks to amend her Bill of Particulars to include "mold and respiratory related injuries" pursuant to CPLR § 3025 (b). The Plaintiff alleged in her complaint that there was mold growth in the basement, bedrooms and living room. (*See* Plaintiff's Complaint, ¶ 17) The Plaintiff further alleged that she suffered physical injuries, among other ailments and injuries, as a result of the foregoing. (*Id.* at ¶ 30)

The Defendant does not object to the Plaintiff's request except requests that the Plaintiff set forth the new injuries with more particularity. The Defendant also requests that the Court direct the Plaintiff to provide a narrative medical report from a physician establishing a medical foundation and causation for the additional claims the Plaintiff seeks to assert in her Amended Bill of Particulars.

At the outset, the Court notes that CPLR § 3025 is not the proper provision pursuant to which the Plaintiff should seek to amend her Bill of Particulars. Leave to amend

a bill of particulars is ordinarily freely given unless it would unduly prejudice the non-moving party. CPLR § 3042 (b); *Kassis v. Teachers Ins. and Annuity Assoc.*, 258 A.D.2d 271, 272 (1st Dept.1999). The Defendant did not submit any opposition to the Plaintiff's request to amend the bill of particulars. The Plaintiff has shown a reasonable basis for the need of the amendment and there is no showing that this amendment would prejudice the Defendant, especially in light of the fact that the allegations were made in the Plaintiff's complaint. The Plaintiff submitted an Amended Bill of Particulars, dated December 23, 2010, attached as Exhibit "10" to the Plaintiff's Notice of Motion. The Plaintiff's application to amend her Bill of Particulars is **GRANTED**, and the Plaintiff's Amended Bill of Particulars, as annexed to the moving papers, is deemed served. In the event a copy of Exhibit "10" as annexed to the moving papers was not served upon the Defendant's office, same shall be served upon counsel for the Defendant within twenty (20) days of the date of this Order.

The Defendant's request that the Plaintiff provide a physician's report detailing the new injuries claimed is **DENIED** as an improper request for information that is evidentiary in nature and beyond the scope of a bill of particulars.

V. Plaintiff's Application for a Protective Order Preventing Disclosure of Certain Medical Records:

Lastly, the Plaintiff seeks a protective order pursuant to CPLR § 3103 (a), relating to the Defendant's demand for medical authorizations requested in the Defendant's Notice for Discovery and Inspection, dated July 14, 2011.

Of the authorizations requested, those that are still contested are the authorizations seeking the records from Dr. Turk, Dr. Rand, Dr. Turner, a facility in Merrick where the Plaintiff underwent therapy and Hicksville Youth Counseling. The Plaintiff claims that any medical records that pre-date the six-year statute of limitations period for the claims asserted in the complaint are not discoverable.

The Plaintiff fails to reference any legal authority in support of this argument and the Court is unaware of any that exist. The Plaintiff has clearly placed her mental and physical health at issue and claims that certain prior injuries were exacerbated by the Defendant's conduct. (*See* Plaintiff's Amended Bill of Particulars, ¶ 3) The Defendant is entitled to the Plaintiff's prior medical records as same are material and necessary to the defense of this action. As such, the portion of the Plaintiff's motion seeking a protective order to prevent disclosure of medical authorizations demanded in the Defendant's Demand for Discovery and Inspection, dated July 14, 2011, is **DENIED**.

Accordingly, it is hereby

ORDERED, the branch of the Plaintiff's motion seeking an order extending the Plaintiff's time to file the Note of Issue pursuant to CPLR § 2004, is **GRANTED**, and the Plaintiff's time to file the Note of Issue is hereby extended up to and including May 4, 2012; and it is further

ORDERED, that the Plaintiff's failure to file the Note of Issue by May 4, 2012, will result in the dismissal of this action without further order of the Court pursuant to CPLR § 3216; and it is further

ORDERED, that the branch of the Plaintiff's motion seeking to compel the Defendant, Perloff, to turn over certain reports requested in the Plaintiff's discovery and inspection demands pursuant to CPLR § 3124 and/or § 3126, is **DENIED**, consistent with the terms of this order; and it is further

ORDERED, that the branch of the Plaintiff's motion seeking to compel the Defendant, Perloff, to respond to certain questions that were propounded at her deposition pursuant to CPLR § 3124 and/or § 3126, is **DENIED**, consistent with the terms of this order; and it is further

ORDERED, that the branch of the Plaintiff's motion permitting the Plaintiff to serve an amended Bill of Particulars to include "mold and respiratory related injuries", is **GRANTED**, consistent with the terms of this order; and it is further

ORDERED, that the portion of the Plaintiff's motion seeking a protective order preventing discovery of certain medical records in response to a Discovery and Inspection demand, dated July 14, 2011, as palpably improper pursuant to CPLR § 3103, is **DENIED**.

This constitutes the decision and Order of the court.

DATED: Mineola, New York
March 30, 2012



Hon. Randy Sue Marber, J.S.C.

ENTERED
APR 03 2012
NASSAU COUNTY
COUNTY CLERK'S OFFICE