

Julia Props., LLC v Levy
2013 NY Slip Op 34047(U)
December 23, 2013
Supreme Court, Westchester County
Docket Number: 30203/10
Judge: Joan B. Lefkowitz
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FILED AND ENTERED
ON 12-24 2013
WESTCHESTER COUNTY CLERK

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER - COMPLIANCE PART

-----X
JULIA PROPERTIES, LLC,

Plaintiff,

-against-

NORMAN LEVY, DANIEL LEVY and
JOHN DOE NO. 1 through JOHN DOE NO. 3,

Defendants.
-----X

LEFKOWITZ, J.

DECISION & ORDER

Index No. 30203/10
Motion Date: Dec. 16, 2013

Seq. No. 3

FILED
DEC 24 2013
TIMOTHY C. IDOMI
COUNTY CLERK
COUNTY OF WESTCHESTER

The following papers numbered 1 to 40 were read on this motion by plaintiff for a protective order prohibiting defendant Norman Levy from continuing to serve inappropriate discovery demands including ongoing requests for tax returns, and precluding defendant Norman Levy from taking the continued deposition of plaintiff for a third day.

Order to Show Cause-Affirmations in Support-Exhibits	1-9
Memorandum of Law in Support	10
Affidavit in Response to Motion-Exhibits	12-36
Defendant's Memorandum of Law	37
Affidavits of Service	11, 38-40
Filed Papers (Compliance Conference Orders)	

Upon the foregoing papers and the proceedings held on December 16, 2013, the motion is determined as follows:

Plaintiff commenced the present action to recover damages for, inter alia, trespass on property in Silver Bay, New York located on Lake George, which plaintiff was renting and which was occupied by Thomas B. Decea's family at the time of the alleged trespass by defendants. Thomas B. Decea is the managing member of Julia Properties, LLC. Plaintiff alleges that on July 3, 2010, defendants, while intoxicated, entered the property with gardening picks, shovels and wheel barrels and ripped out shrubbery, including a newly planted fifteen foot red maple tree, and dug up plaintiff's driveway. Plaintiff further alleges that defendants built a ramp in plaintiff's back yard in order to drive their truck into the backyard, drove their truck over the backyard, and also "skid" their truck in plaintiff's driveway so as to throw the two inch driveway stones at the home, its occupants and guests. On that date, defendants were arrested and an order

of protection was entered precluding defendants, their invitees or guests from using an easement on plaintiff's property or going near or communicating with the Decea family. On July 5, 2010, defendants returned to plaintiff's property and were arrested a second time. The order of protection was subsequently extended through December 23, 2011. Mr. Decea alleges that defendant Norman Levy had a long standing feud with plaintiff's landlord, plaintiff was unable to rent the subject property and plaintiff was forced to forego the purchase option on the property as the result of defendants' harassment. Plaintiff seeks monetary damages in the amount of \$5,000,000.

The records on this motion indicate that defendant Norman Levy had an easement over the subject property to access his dock on the lake at the rear of the subject property. The extent of the easement is in dispute.

Defendant Norman Levy served various demands for discovery on or about February 13, 2013, including a demand for documents and interrogatories. The demand for documents requested, inter alia: documents as to plaintiff's alleged damages and alleged damage to plaintiff's leased property; the lease for the property; documents referring to the easement; plaintiff's federal and state tax returns for the period of five years from the date of the summons and complaint; documents relating to any alleged loss of rents, loss of income or loss of actual tenants or prospective tenants.

On or about May 14, 2013, plaintiff served documents responsive to defendant Norman Levy's document demand and a supplemental response to interrogatories (Plaintiff's Ex. D). Plaintiff objected to the interrogatories which demanded plaintiff produce its tax returns and the tax returns of its members for the last five years. Documents produced included repair bills for body work on an automobile owned by Thomas Decea, as well as unsigned affidavits from witnesses to defendants' alleged trespass.

By affidavit dated June 25, 2013, Thomas Decea averred that he had conducted a diligent search of plaintiff's records for the demanded documents, was unable to locate certain demanded documents and had produced all demanded documents in his possession (Plaintiff's Ex. D).

On August 19, 2013, Mr. Decea appeared for a deposition on behalf of plaintiff. He testified that plaintiff had intended to rent out the subject property for ten months, but cancelled rental agreements after defendants' trespasses to avoid incurring any liability (Plaintiff's Ex. S at 38-40). He, however, then testified that he did not recall whether he actually cancelled rental agreements as there were some rentals he could not cancel, but that there were a lot of inquiries he did not go forward with and turned away rentals because of defendant Levy (*Id.* at 43-44, 52, 55-56). He further testified that he did not know if he had any of the leases or proof of the cancellations and did not recall whether he had searched for the leases (*Id.* at 41-42).

On August 27, 2013, the parties appeared for a compliance conference. By Compliance Conference Order of the same date, this court directed plaintiff to provide: responses to

defendant's demands with respect to names and addresses of all of plaintiff's members; a verification of the existence or lack thereof of a lease addendum and production if it is in plaintiff's possession; plaintiff's accountant's name and address; receipts or other records of 2008 Toyota repair, to extent not already provided; plaintiff's bank records 2009 through June, 2011; and "cloud" photos if they exist.

By letter dated August 27, 2013, plaintiff produced additional documents, including an executed lease for the subject property and four unexecuted rental agreements for the subject property for weekly rentals in 2011 (Plaintiff's Ex. D).

By letter dated September 6, 2013, plaintiff produced further document discovery and advised defendant Norman Levy that no further documents were available. The documents produced included: a copy of the executed lease for the subject property, which included an option to purchase any time during the two year term of the lease for a set price; six executed rental agreements for the subject property for 2011; over 20 checks, some illegible, payable to plaintiff with notations indicating dates with the subject properties address, or indicating security deposit with dates, or "balance due", or "cleaning fee", or "rent" with dates or the subject properties address, or "security deposit"; correspondence submitting the balance due on rental of the subject property; and checks from plaintiff to William Morgan, the owner of the subject property (Plaintiff's Ex. E). At least nine of the checks which were produced and payable to plaintiff were dated March, April, June and July, 2010. No executed rental agreements for 2010 were produced.

On September 20, 2013, the parties again appeared for a compliance conference. At the conference, plaintiff was directed to supplement its interrogatories on or before September 27, 2013, and the parties were directed to complete all depositions on or before October 2, 2013 and October 7, 2013. An order to that effect was entered on September 30, 2013.

By Second Supplemental Answer and Objections to defendant Levy's interrogatories, which was dated September 30, 2013, plaintiff responded, inter alia, to interrogatory 37 regarding lost income. Therein, plaintiff alleged that it had lost rental income in the winter of 2010 and in 2011 in the amount of approximately \$5,000 for each date income was lost (Plaintiff's Ex. D).

Mr. Decea was deposed for a second day on October 2, 2013. Mr. Decea testified that plaintiff had intended to rent out the subject property year round, except for the month of April, for approximately \$5,000 to \$6,000 per week in 2010 and for approximately \$5,000 per week in 2011 (Defendant's Ex. Y at 35-36). He further testified that at the time of the trespasses in July, 2010, plaintiff had already rented the subject property for a number of weeks in the summer of 2010 (*Id.* at 15-16). He testified that, thereafter, he had advised the renters of the issue with defendant Levy and that none of the renters in 2010 had refused to rent the subject property, but he also testified that some people had declined (*Id.* 15-16, 23, 38-39). He further testified that, after defendants' trespasses, plaintiff did not seek additional renters for the rest of 2010 through

May, 2011, since he did not want to subject any renters to defendants' harassment (*Id.* at 40-41). He testified that plaintiff rented the subject property in the summer of 2011 since defendant Levy had not installed his dock in the lake at the rear of the subject property and had stayed away (*Id.* at 23).

At the deposition, Mr. Decea also testified that for the tax years 2010 and 2011, plaintiff filed a schedule to his personal tax return as he was the single member of the LLC, the income shown was solely derived from rent checks provided to defendant Levy, and the only income for those years was derived from the subject property (Defendant's Ex. Y at 10-13). He was not sure if he had the schedule for 2010, but testified that he had the schedule for 2011 and asserted a privilege as to the tax schedule (*Id.* at 12, 24). He thought the difference in net income between 2010 and 2011 was \$4,000 to \$5,000, and that he paid tax on about \$5,000 in 2010 and on less net income in 2011 (*Id.* at 14, 17). He did not remember the exact amount of income and expenses in 2010 and 2011 (*Id.* at 14, 26-27). He also testified that no journals on income received was kept by plaintiff (*Id.* at 28). With respect to repairing the damage allegedly done to the landscape of the subject property by defendants, he testified that he had paid his gardeners cash to replant the maple tree, remove the gravel ramp and fix the driveway (*Id.* at 125-128).

Another conference was held on October 8, 2013. The parties asserted that depositions were complete, but disagreed on the discovery of plaintiff's tax returns. A briefing schedule was then issued to plaintiff for a motion seeking a protective order with respect to defendant Levy's demand for tax returns.

Although the briefing schedule limited the relief to be sought in the motion, plaintiff now seeks a protective order precluding defendant Levy from continuing to serve discovery demands which have been previously responded to and are otherwise, excessive, palpably improper and irrelevant, including the demand for the production of tax returns; and from taking the deposition of Mr. Decea on behalf of plaintiff for a third day. Plaintiff claims that defendant Levy has engaged in an ongoing pattern of harassment and have abused the discovery process by requesting palpably improper discovery irrelevant to the trespass claim at issue and continuing to raise the same discovery issues at court conferences. Plaintiff also asserts that defendant Levy's repeated applications for sanctions against plaintiff, which have been summarily denied, have been improper. With respect to the deposition, plaintiff contends that defendant Levy is not entitled to another day of deposition. Plaintiff contends that, during the deposition, defendant only marked four documents and failed to mark the majority of documents which were produced and failed to ask questions about damages, instead relying on the position that defendant was entitled to plaintiff's tax returns to quantify damages. Plaintiff also contends that during the two days of deposition, defendant only asked redundant questions about the two different incidents of trespass. Plaintiff asserts that it is unclear what questioning defendant will reach during a third day of deposition.

Defendant Levy opposes the motion and contends that plaintiff's tax returns are necessary to determine plaintiff's damages since plaintiff has failed to produce demanded discovery related to damages. Defendant Levy asserts that certain other demanded discovery has not been

produced and his requests for pre-motion conferences and sanctions were necessitated by plaintiff's failure to produce the demanded discovery. Specifically, defendant Levy argues that plaintiff has failed to produce demanded tax, business or rental records to support or refute plaintiff's claim for lost rental income. Although plaintiff produced some rental agreements for 2011, defendant Levy asserts that plaintiff did not produce any rental agreements for 2010. Defendant Levy therefore asserts that without rental agreements which correspond to the produced checks, it cannot be determined whether the checks constituted rental income for 2010 or 2011. Defendant Levy also notes that some checks produced note on the memo line that the check is "final payment," but no other check was produced from that person, such that it is clear that plaintiff has not produced all of the rent checks. Defendant Levy also argues that plaintiff has failed to produce any estimates, repair bills, statements or proof of payment for repairs that plaintiff allegedly was required to make due to defendant's alleged trespass, except repair bills for Thomas Decea's personal motor vehicle. Accordingly, defendant Levy argues that it is impossible to determine whether plaintiff suffered any loss in rental revenue.

Defendant Levy further contends that, despite an affidavit of Thomas Decea averring that there were no other demanded documents in his possession, Mr. Decea testified at his deposition that plaintiff did maintain and possess many of the demanded documents, including, inter alia: federal and state tax returns with reports and schedules showing income and expenses; fully executed lease for the subject property signed by plaintiff and plaintiff's landlord, William Morgan; leases between plaintiff and third-parties for the subject property; and plaintiff's bank records. Defendant Levy contends that a majority of Mr. Decea's first day of deposition was wasted on attempting to ascertain what books, documents and records plaintiff still maintained, but had not been produced. Defendant Levy also complains that, at Mr. Decea's deposition, plaintiff's counsel improperly directed Mr. Decea not to answer certain questions. Finally, defendant Levy contends that plaintiff has not produced records or documents to demonstrate plaintiff's alleged damages of \$5,000,000.

CPLR 3101(a) requires "full disclosure of all matter material and necessary in the prosecution or defense of an action, regardless of the burden of proof." The phrase "material and necessary" is "to be interpreted liberally 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 is one of usefulness and reason" (*Allen v Crowell-Collier Publishing Co.*, 21 NY2d 403, 406 [1968]; *Foster v Herbert Slepoy Corp.*, 74 AD3d 1139 [2d Dept 2010]). The party seeking disclosure has the burden to demonstrate that the method of discovery sought will result in the disclosure of relevant evidence or is reasonably calculated to lead to the discovery of information bearing on the claims (*Foster*, 74 AD3d at 1140). The court has broad discretion to supervise discovery and to determine whether information sought is material and necessary in light of the issues in the matter (*Mironer v City of New York*, 79 AD3d 1106, 1108 [2d Dept 2010]; *Auerbach v Klein*, 30 AD3d 451, 452 [2d Dept 2006]). The discovery of tax records, however, are only discoverable upon a strong showing that they contain relevant information which cannot be obtained from any alternate source since they contain personal financial information which is confidential and private in nature (*Pugliese v Mondello*, 57 AD3d 637, 639-640 [2d Dept 2008]; *Saratoga Harness Racing v Roemer*, 274 AD2d 887 [3d

Dept 2008] [error to compel discovery of tax returns as there was no claim the information was indispensable]; *Zimmer v Cathedral School of St. Mary & St. Paul*, 204 AD2d 538, 539 [2d Dept 1994]; *Grossman v Lacoff*, 168 AD2d 484 [1990]). The courts have also held that where a plaintiff claims loss of potential income or depreciation as a business deduction, tax records are discoverable as unique since no other evidence would prove the party's contention (*Konrad v 136 E. 64th St. Corp.*, 235 AD2d 258 [1st Dept 1997]; *Ernie Otto Corp. v Inland and Southeast Thompson Monticello, LLC*, 25 Misc3d 1208(A) [Sup Ct, Sullivan County 2007]).

In the present case, defendant Levy has demonstrated that the information which he seeks from plaintiff's tax returns, namely the income and expenses from the rental of the subject property and plaintiff's alleged loss of rental income, can only be obtained from the schedule attached to plaintiff's annual tax returns. Notably, although plaintiff has produced executed rental agreements for the subject property and checks made payable to plaintiff with notations indicating they were payment for rental of the subject property, security deposit or a cleaning fee, plaintiff failed to produce any rental agreements for 2010. Moreover, plaintiff through Mr. Decea has averred that no other rental agreements are in plaintiff's possession. Additionally, some of the produced checks payable to plaintiff do not indicate on the face of the check the purpose of the check or the year of the rental and no corresponding rental agreement was produced. Although defendant Levy failed to question Mr. Decea about the individual checks which were produced to establish whether it was a rental check and as to the period of the rental, Mr. Decea also testified that he did not know the amount of the expenses for the subject property and that said expenses would be listed on the tax schedule which was attached to his personal tax returns in 2010 and 2011. Further, Mr. Decea was unable to testify as to the amount of plaintiff's net income for those years, which he testified was derived only from the rental of the subject property, and was only able to testify that the net income was less in 2011 than 2010 by \$4,000 or \$5,000. Finally, Mr. Decea testified that expenses to repair the landscaping and driveway of the subject property were paid in cash and he had no receipts.

Due to the inability of plaintiff to locate and produce all the rental agreements for the subject property, as well as plaintiff's failure to produce complete documents regarding alleged expenses incurred by plaintiff as the result of defendants' alleged trespasses, plaintiff's tax schedules are necessary to determine the amount of plaintiff's damages in the form of lost rental income and expenses. That branch of plaintiff's motion seeking a protective order is, therefore, denied. Plaintiff shall produce the 2010 and 2011 tax schedules annexed to Mr. Decea's personal tax returns as demanded. Mr. Decea has testified that the 2011 tax schedule is in plaintiff's possession, but was not certain if plaintiff still had the 2010 tax schedule. In the event that the 2010 tax schedule is no longer in plaintiff's possession, plaintiff and Mr. Decea are directed to obtain the tax schedule from the federal and state taxing agencies forthwith and produce them to defendant Levy. It is this court's understanding that an authorization for Mr. Decea's 2010 tax return may not be able to be limited in scope to one schedule. Therefore, an authorization for Mr. Decea's tax return for 2010 would allow defendant Levy access to all of Mr. Decea's personal tax information for the year, which is irrelevant to the issues in the present action.

The remaining relief sought by plaintiff on the current motion falls outside the scope of the briefing schedule. In accordance with the DCM Protocol and Compliance Part Rules, this court will not normally entertain any request for relief which was not the subject of a pre-motion conference and briefing schedule. In order to expedite the completion of discovery in this action, however, this court notes that plaintiff has provided an affidavit from Mr. Decea averring that he conducted a search and certain demanded documents are not in plaintiff's possession. Insofar as a party cannot produce that which is not in its possession, further demands by defendant Levy for those previously demanded documents would, therefore, be futile and cause additional unnecessary delay in this action. To the extent, however, that defense counsel asserts that additional documents were demanded during Mr. Decea's deposition and plaintiff has yet to respond to those demands, plaintiff shall conduct a diligent search for those documents and either produce them to defendant Levy or serve an affidavit to the effect that, after a diligent search, those documents could not be located. The court notes that, during oral argument, counsel for defendant Levy acknowledged that if plaintiff provides an affidavit averring that no further documents are in plaintiff's possession, then no further deposition of Mr. Decea is needed. However, insofar as this court has denied plaintiff's motion for a protective order as to the tax schedules annexed to Mr. Decea's tax returns, which were demanded by defendant Levy, defendant Levy is now entitled to a further deposition of Mr. Decea limited to the tax schedules and any additional documents demanded during the prior days of deposition and produced by plaintiff.

In view of the foregoing, it is

ORDERED that the branch of plaintiff's motion seeking an order of protection is denied; and it is further

ORDERED that plaintiff is directed to turn over plaintiff's 2010 and 2011 tax schedules which were filed with Thomas B. Decea's personal tax returns for those years on or before January 16, 2014; and it is further

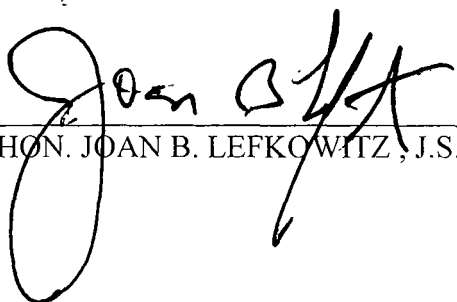
ORDERED that plaintiff shall, on or before January 16, 2014, produce any documents requested during Thomas Decea's second day of deposition or, if such documents are not in plaintiff's possession, an affidavit to that effect and setting forth the details of the search undertaken to locate the demanded documents; and it is further

ORDERED that plaintiff shall, on or before January 28, 2014, produce Thomas B. Decea for a further deposition limited to (1) any documents demanded during his prior depositions and subsequently produced by plaintiffs after the depositions, and (2) the schedules annexed to his personal tax returns for the years 2010 and 2011 which report plaintiff's income and expenses; and it is further

ORDERED that all parties are directed to appear for a conference in the Compliance Part, Courtroom 800, on January 29, 2014 at 10:30 a.m.

The foregoing constitutes the decision and order of this court.

Dated: White Plains, New York
December 23, 2013



HON. JOAN B. LEFKOWITZ, J.S.C.

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cc: Compliance Part Clerk