Scott v Towers on the Park Condominium
2017 NY Slip Op 31449(U)
July 7, 2017
Supreme Court, New York County
Docket Number: 156240/13
Judge: Manuel J. Mendez
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: MANUEL J. MENDEZ PART 13
Justice

ROSE SCOTT,
Plaintiff

- Against-

TOWERS ON THE PARK CONDOMINIUM, THE BOARD OF MANAGERS OF TOWERS ON THE PARK CONDOMINIUM and TUDOR REALTY SERVICES CORP.,
Defendant.

INDEX NO. 156240 /13
MOTION DATE 06-28-2017
MOTION SEQ. NO. 001
MOTION CAL. NO.

---X

TOWERS ON THE PARK CONDOMINIUM, THE BOARD OF MANAGERS OF TOWERS ON THE PARK CONDOMINIUM and TUDOR REALTY SERVICES, CORP.,
Third-party Plaintiffs,

- Against-

CONSOLIDATED EDISON COMPANY OF NEW YORK, INC., And FRED SMITH PLUMBING & HEATING CO., INC.,
Third-party Defendants.

The following papers, numbered 1 to 7 were read on this motion to vacate Note of Issue and for discovery.

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1-2
Answering Affidavits — Exhibits	3-4
Replying Affidavits	5-6, 7

Cross-Motion: ☐ Yes X No

Upon a reading of the foregoing papers, it is ordered that this motion by defendants/Third-party plaintiffs TOWERS ON THE PARK CONDOMINIUM, THE BOARD OF MANAGERS OF TOWERS ON THE PARK CONDOMINIUM and TUDOR REALTY SERVICES CORP., (collectively "TOWERS") to vacate plaintiff's Note of Issue, and compelling outstanding discovery in the nature of authorizations to obtain plaintiff's cellular telephone and home phone records for April 4 and 5, 2012 is denied.

Plaintiff brings this action to recover for personal injuries sustained as a result of gas leak in her apartment at the premises located at 300 West 110th Street Apt. 8A. After joinder of issue and pursuant to a court conference order the plaintiff was deposed by the defendants on January 16, 2015. At the deposition plaintiff testified under oath as follows:

- She first smelled gas or thought there was a gas leak in the apartment on April 4th, 2012 at about 5:30 PM. (EBT P. 19 Ln 8-15).

- The gas in the entire building was shut off in late February or early March, all apartments were without gas (EBT P.28 Ln. 15 to P.29 Ln 11).

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

- The gas to her stove was turned back on April 5, 2012 at about 4 PM by two plumbers who came to make repairs, pulled the stove out, removed rods from the back and the wall, and replaced the rods in the wall.... they were there for about one and a half hours (EBT P.30 Ln11 to P. 34 Ln 12).

- On April 4, 2012 Angel Velle, assistant super, came into the apartment at around 5 PM, pulled the stove out, to turn the gas on. (P.34 Ln 21 to P.35 Ln 22).

- At around 5:30 PM she smelled gas, called security stationed at the front desk in the building and spoke to Luis Gonzalez. Told Mr. Gonzalez that she smelled gas and to please page Mr. Velle to come back to her apartment because she smelled gas. Mr. Velle did not come back. She called security twice, the second time at around 5:45 Pm. Spoke to Mr. Gonzalez, told him the same thing and asked for Mr. Velle to come back. Mr. Gonzalez said he tried paging Mr. Velle. Also spoke to Mr. Anthony Pereyra, the senior Maintenance man, in person. (EBT P. 37 Ln 17 to P. 40 Ln 19).

- Asked Mr. Pereyra to please come into her apartment because she smelled gas in the apartment. She had already called security and reported it and would he please come in. Mr. Pereyra came into the apartment. Came to the stove and said to her that he smelled gas, but it's probably the aftermath of them turning the gas on, and he left. He tried to turn on the stove but the burners did not light up. He was in the apartment for about two minutes. After he left she called her sisters and her husband. (EBT P. 41 Ln. 11 to P. 43 Ln.23).

On January 30, 2017 Defendant Consolidated Edison produced a witness, Ryan Boula, for deposition. Mr. Boula was one of the plumbers that worked in the building to turn the gas back on. At his deposition Mr. Boula testified under oath:

-That he didn't recall if there was anything on when he got to the building or not. (EBT P. 19 Ln 7-8).

- That to his knowledge there was no gas to anything that he turned. (EBT P. 20 Ln. 20-22).

- That he couldn't tell whether or not there was anything else on in the building because he doesn't know. He doesn't remember. There could be multiple meters that were not part of his job and he doesn't know if the gas to the building was on somewhere else.

- He couldn't say if, when he arrived at the location on April 5, 2012, gas on the "A" Riser was already on. (EBT P. 42 Ln. 22-25).

- He Doesn't know if there was gas flowing into the "A" line apartments on April 4, 2012 at any time. (EBT P. 44 Ln 3-6).

After the deposition of Mr. Boula defendant/third-party plaintiff Towers served the plaintiff with a demand for discovery and inspection requesting an authorization to obtain plaintiff's cellular phone and home phone records. Towers alleges that this information is material and necessary to the defense as these records will either support plaintiff's claim that she called the security desk twice to complain about a gas leak and also to determine if this occurred on April 4, 2012 or April 5, 2012. Towers alleges that it was not until after the deposition of Mr. Boula that the need for these records became clear.

Plaintiff objected to the discovery request on privacy grounds, on grounds that this is fishing expedition that will not lead to any relevant evidence.

On March 2, 2017 Plaintiff filed her Note of Issue alleging that all discovery is complete. Towers moved on March 20, 2017 to vacate the Note of Issue and to Compel discovery in the nature of authorizations to obtain the Cellular phone and home phone records.

Uniform Rule 202.21(e)(1) provides the vehicle for vacating a note of issue and striking a case from the trial calendar. It states that the motion must be made within twenty (20) days of service of the note and certificate of readiness. (See NY Practice § 31:12). A party which seeks to vacate the note of issue after the 20 day time limit must seek court leave upon a showing of good cause.

A note of issue and certificate of readiness will be vacated where there is still extensive discovery to be completed or where the certificate of readiness erroneously states that all discovery is complete (see Carte v. Segall, 134 A.D. 2d 396, 520 N.Y.S. 2d 943 [2nd. Dept. 1987] note of issue vacated where extensive discovery yet to be completed); Ortiz v. Arias, 285 A.D. 2d 390, 727 N.Y.S. 2d 879[1st. Dept. 2001], vacating note of issue that contained erroneous facts including incorrect statement that discovery had been completed or waived); Nielsen v. New York State Dormitory Authority, 84 A.D. 3d 519, 923 N.Y.S. 2d 66 [1st. Dept. 2011], a note of issue should be vacated where it is based upon a certificate of readiness that incorrectly states that all discovery has been completed).

However, where the discovery remaining is not extensive the court may deny the motion to vacate a note of issue and allow the case to remain on the trial calendar, while Permitting defendant a reasonable period of time within which to conclude discovery(see Mac Asphalt contracting Co., Inc., v. CMI Corp., 46 A.D.2d 888, 361 N.Y.S.2d 393 [2nd. Dept. 1974]; the court may exercise its discretion and decline to vacate a note of issue where few discovery items remain outstanding, and the court directs the parties to complete discovery by a date certain (see Rampersant v. Nationwide Mut. Fire Ins. Co., 71 A.D.3d 972, 898 N.Y.S.2d 567 [2nd. Dept. 2010]; Torres v. New York City Transit Authority, 192 A.D.2d 400, 596 N.Y.S.2d 66 [1st. Dept. 1993]).

The discovery Towers seeks is not extensive. What Towers requests is a few authorizations to obtain Plaintiff's Cellular phone and home phone records and the fact that these authorizations have not been provided is not a reason to vacate the Note of Issue on this 2013 case.

CPLR § 3124 grants the court the power to compel a party to provide discovery demanded. "CPLR § 3101 requires the production of all matter material and necessary in the prosecution and defense of an action. The term "material and necessary" must be interpreted liberally to require disclosure, upon request, of any facts bearing on the controversy which will assist preparation for trial by sharpening issues and reducing delay and prolixity (CPLR 3101(a)(1)). A party is not entitled to unlimited, uncontrolled, unfettered disclosure (Geffner v. Mercy Med. Center 83 A.D.3d 998, 922 N.Y.S.2d 470). It is incumbent on the party seeking disclosure 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 bearing on the claims." (Matter of Kapon v. Koch, 23 N.Y.3d 32, 988 N.Y.S.2d 559, 11 N.E.3d 709; Crazytown Furniture v. Brooklyn Union Gas Co., 150 A.D.2d 420, 541 N.Y.S.2d 30).

The tests to be employed by the Supreme Court when determining discovery issues is one based on usefulness and reason, and its determination will not be disturbed on appeal unless improvidently made. Where the defendant fails to demonstrate that the telephone records of the plaintiff that they demanded are either material or relevant to the case, or would lead to possibly relevant evidence, Supreme Court's determination denying production of those records is a provident exercise of its discretion (see H.R. Prince, Inc., v. Elite Environmental Systems, Inc., 107 A.D.3d 850, 968 N.Y.S.2d 122 [2nd. Dept. 2013]).

Here Towers has failed to demonstrate that the telephone records it seeks are either material or relevant to the case or would lead to possibly relevant evidence. Plaintiff testified under oath that an assistant Super Mr. Angel Velle came to her apartment on April 4, 2012 at around 5 P.M. to turn the gas on, that after he left she smelled gas and that she called the security desk twice, spoke on those two occasions to a Mr. Luis Gonzalez and asked that Mr. Velle be paged and told to return to her apartment. She further stated that when Mr. Velle did not return she went out to speak to someone at the security desk, and in the hallway she met Mr. Pereyra who returned with her to the apartment and also told her that he smelled gas. She stated that on April 5, 2012 at around 4 PM two plumbers came to her apartment to turn the gas on and were there for approximately one and a half hours. She stated that the gas to her stove was restored on April 5, 2012.

On the other hand Con Edison's witness was not able to definitely say that the gas to plaintiff's apartment was not turned on prior to April 5, 2012, which is the day he was at the premises trying to restore the gas to some of the lines.

Defendants have not shown how plaintiff's telephone records will lead to any information that is not already known. If it is notice, they can speak to all the individuals that plaintiff alleges she spoke with, on the phone or in person, about the smell of gas in her apartment (Mr. Velle, Mr. Gonzalez and Mr. Pereyra, all employees of Towers). Towers has failed to show that these telephone records will lead to material or relevant evidence.

Accordingly, it is hereby ORDERED that defendant/ Third-party Plaintiff Tower's motion to vacate the Note of Issue and compelling outstanding discovery in the nature of authorizations to obtain plaintiff's Cellular Telephone and Home phone records is denied.

ENTER: MANUEL J. MENDEZ
J.S.C.

Dated: July 7, 2017

Manuel J. Mendez
J.S.C.

Check one: FINAL DISPOSITION X NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE