

Nelson v CRP N.Y. Ave. LLC

2023 NY Slip Op 34207(U)

November 28, 2023

Supreme Court, Kings County

Docket Number: Index No. 522182/2016

Judge: Leon Ruchelsman

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS : CIVIL TERM: CCP

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GRANT NELSON,

Plaintiff,

Decision and order
Index No. 522182/2016

- against -

CRP NEW YORK AVENUE LLC, CASTELLAN REAL
ESTATE PARTNERS, 1084 NEW YORK D. LLC,
LIBERTY PLACE PROPERTY MANAGEMENT LLC,

Defendants,

November 28, 2023

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PRESENT: HON. LEON RUCHELSMAN

Motion Seq. #12

The plaintiff has moved seeking to strike the defendant's answer for the failure to provide a compliant Jackson affidavit pursuant to a court order dated January 30, 2023. The defendants oppose the motion. Papers were submitted by the parties and arguments were held. After reviewing all the arguments this court now makes the following determination.

The lawsuit concerns the plaintiff, who suffered the loss of a lung while living in the defendant's alleged mold infested apartment. The plaintiff suffers from AIDS and the plaintiff has asserted the defendants were aware of that condition and failed to remedy the mold contained within the apartment. Relevant to this motion, on January 30, 2023 the court issued an order requiring the defendant to provide "a Jackson-complaint affidavit with respect to the records demanded by plaintiff which defendants claim were not found or located" (see, Order dated January 30, 2023 [NYSCEF Doc. No. 262]). In response to the

order the defendants submitted an affidavit of Rosario Ruiz, a senior property manager of the plaintiff's residence, dated March 31, 2023. Ms. Ruiz stated that she searched for all relevant documents related to the plaintiff's apartment. The search was conducted by reviewing all the files maintained at the property manager's office.

The plaintiff has moved arguing the affidavit is insufficient since it fails to explain "where the trove of missing documents are, including the tenant file, apartment access letters, work orders, tenant complaints, maintenance and repair records, physical evidence, mold testing, roof records, work proposals, inspection records, emails, computer files, cell phones, and other electronic files" (see, Affirmation in Support, pages 5,6 [NYSCEF Doc. No. 316]). Thus, the plaintiff insists the answer should be stricken. The defendants oppose the motion arguing there is no further discovery that needs to be provided.

Conclusions of Law

It is well settled that the trial court maintains broad discretion concerning the discovery process and any sanction for any violation (Bouri v. Jackson, 177 AD3d 947, 113 NYS3d 232 [2d Dept., 2019]). The severe sanction of striking a pleading is appropriate where it can be demonstrated that the failure to comply with discovery was the result of wilful and contumacious

conduct (Rosenblatt v. Franklin Hospital Medical Center, 165 AD3d 862, 85 NYS3d 488 [2d Dept., 2018]). Such conduct may be inferred from a party's actions, specifically a long period of time passing without complying with the discovery coupled with the absence of any reasonable excuse to explain such failure to comply (Morson v. 5899 Realty LLC, 171 AD3d 916, 98 NYS3d 127 [2d Dept., 2019]). Generally, the failure of either party to provide sought after discovery and to follow the express order of the court demonstrates a pattern of wilful default and neglect concerning the outstanding discovery (Espinal v. New York City Health and Hospitals Corp., 115 AD3d 641, 981 NYS2d 569 [2d Dept., 2014]).

The crux of plaintiff's motion is that the defendants failed to provide a compliant Jackson affidavit. The plaintiff asserts, therefore, that the Jackson affidavit filed is deficient. Specifically, the plaintiff argues the defendants failed to demonstrate where the subject records were likely kept, what efforts were made to preserve them and whether a search was conducted in every location where the records were likely to be found (see, Jackson v. New York, 185 AD2d 768, 586 NYS2d 952 [1st Dept., 1992]).

However, Rosario Ruiz, an employee of defendant Liberty Place Property Management LLC, the management company of the owner gave two depositions. On December 17, 2020 she was deposed

and she specifically testified that since the building wherein the plaintiff lived at the time of the lawsuit had since been sold the defendants no longer maintained any files there. She was specifically asked whether she spoke to anyone at 1084 or CRP, or Castellan to get access to any files and she responded "No, because we don't have anything there. There's nothing there, and everything's gone with the building. And my prior boss is no longer in the office" (see, Deposition of Rosario Ruiz, page 27 [NYSCEF Doc. No. 352]). Again, on page 47 she testified that all physical files "went with the building when the building was sold" (*id.*). Further, on pages 48 and 49 she reiterated that she no longer had any access to the files and that she never spoke with anyone who may have had such access following the sale of the building.

On June 15, 2023 she gave another deposition. She was asked why she did not review any of the tenant records prior to the deposition. She responded "because I no longer have the tenant records. The building was sold many years ago" (see, Deposition of Rosario Ruiz, page 31 [NYSCEF Doc. No. 299]). Again, on page 40 Ms. Ruiz testified that "we don't have a tenant file any longer" (*id.*). She explained that "when the building was sold all the tenant files go to the new owner" (*id.*). Again, on page 43 Ms. Ruiz testified that the defendants no longer have access to the tenant's file since "the files were left with the new owner"

(id). On the following page she again explained that "I don't have access to the file because the tenant file went with the new owners so that means Liberty Property Management doesn't have access to the file" (id). Finally, on page 51 Ms. Ruiz was asked if there was anyone she could have talked to about the tenant files. She responded no and explained "because the files are gone, and we don't have the files, we don't have the application" (id).

A deposition was conducted of Rick Serrapica, another employee of Liberty Place Property Management. He testified and explained that when the building was sold all the tenant files were placed in boxes and presented to the new owner. When asked whether Liberty Place Property Management had access to the plaintiff's tenant file he responded "we do not" (see, Deposition of Rick Serrapica, page 33 [NYSCEF Doc. No. 354]).

Further, a deposition was conducted of Richard Bartolomeo, another employee of Liberty Place Property Management. He testified that there were no longer files of any tenants including the plaintiff since the building was sold.

Thus, the plaintiff seeks inclusion of language in a Jackson affidavit that has already been the subject of multiple deposition inquiries. All the employees of Liberty have repeatedly and consistently testified that there is no longer a tenant file since all tenant files were given to the new owner of

the building. Thus, there is nothing in this regard that renders the Jackson affidavit insufficient or deficient. There is no basis to require Ms. Ruiz to include in an affidavit matters to which she testified numerous times. Further, it is inaccurate to argue there are "missing" documents which are being hidden by the defendants or which the defendants have thus far failed to explain their whereabouts. Indeed, the defendants have repeatedly testified there are no further documents in their possession regarding any information pertaining to the plaintiff's apartment. To be sure, the Jackson affidavit merely confirms all the searches conducted to support such testimony. Consequently, there is no basis at all to question the completeness of the Jackson affidavit. Therefore, based on the foregoing, the motion seeking any sanction against the defendants based upon the Jackson affidavit is denied.

For similar reasons the portion of the motion that seeks a sanction due to the defendants failure to produce a witness with knowledge about housing individuals with AIDS is denied. Ms. Ruiz and other have testified that they do not know whether Liberty was aware of the plaintiff's medical condition when he rented the apartment or any time thereafter. As noted the defendants cannot be faulted for the lack of documents no longer in their possession. Likewise, the defendants cannot be faulted for failing to review documents for depositions that are not in

their possession. Moreover, the defendants cannot be faulted for not knowing whether the plaintiff may have participated in governmental programs assisting people with AIDS. Since the defendants cannot be faulted for not knowing the information sought, no sanction at all is appropriate.

Therefore, based on the foregoing, all of the plaintiff's motions are denied and all motions seeking sanctions are denied.

So ordered.

ENTER:

DATED: November 28, 2023
Brooklyn, N.Y.



Hon. Leon Ruchelsman
JSC