

Erick v 250 West 39th Street, LLC

2003 NY Slip Op 30155(U)

March 28, 2003

Supreme Court, New York County

Docket Number: 0117493/2001

Judge: Shirley Werner Kornreich

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: Kornreich

PART 54

0117493/2001

RICKY BY ERICK
VS
250 WEST STREET

INDEX NO. 117493/01
MOTION DATE 3/27/03
MOTION SEQ. NO. 1
MOTION CAL. NO. _____

SEQ 1

STRIKE ANSWER

The following papers, numbered I to _____ were read on this motion to/for _____

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED	
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	<u>1, 2</u>
Answering Affidavits — Exhibits	<u>3, 4</u>
Replying Affidavits	<u>5</u>

SCANNED
APR 03 2003

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

is decided in accordance with the annexed decision and order.

MOTION/ORDER IS REFERRED TO JUSTICE

Dated: 3/28/03


SHIRLEY WERNER KORNREICH
J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 54

-----X
RICKY BY ERICK,

Plaintiff,

Index No.: 117493/01

-against-

**DECISION AND
ORDER**

250 WEST 39TH STREET, LLC,
INSIGNINEDWARD S. GORDON COMPANY, INC.,
CARLYLE REALTY PARTNERS, and PETACH, INC.
d/b/a NICOLE STUDIOS,

Defendants

..... X
KORNREICH, SHIRLEY WERNER, J.:

This is an action to recover for property damage caused by water infiltration at plaintiff's business premises. Plaintiff brought this action alleging defendants were negligent in failing properly to maintain an air conditioning unit and roof at the premises.

Facts

On or about October 2000, the premises at 250 West 39th Street were sold by First Republic Corporation of America to defendant 250 West 39th Street, LLC ("250 West"). Plaintiff submits the affidavit of Debbie Freeman, an employee of nonparty GVA Williams, the managing agent of the premises for First Republic, stating that

[b]y letter of October 13, 2000, and acting upon instructions from First Republic, GVA forwarded all information pertaining to the tenants of the Subject Premises then in its possession to Michael Mader of Insignia/ESG. To the best of my knowledge these tenant files would have included all leases and any and all other miscellaneous information in our possession regarding the tenants of the Subject Premises. GVA received written confirmation from

a Lewis Brown of Insignia/ESG, dated November 1,2000, that Insignia/ESG hereof had in fact received the information as set forth [above].

Supplemental Affirmation of Aboulafia, Exhibit D.

On April 12,2002, plaintiff served defendants with discovery demands, including a demand for bill of particulars, notice of discovery and inspection, demand for “a list of all witnesses to the occurrence the subject matter of the complaint [sic]” and demand for information as to any “individuals expected to be called as an expert witness.” Affiiation of D. Aboulafia, Exhibit B. After repeated reminders by plaintiff and Orders of this Court requiring defendants to comply with plaintiffs discovery demands, defendants’ affirmative defenses were stricken, and plaintiff proceeded with depositions. Plaintiff served post-EBT demands on December 16,2002, requesting that defendants produce inter alia copies of contracts between them relative to the premises, incident reports pertaining to plaintiffs complaint, any governmental notices of violations of government agencies pertaining to the premises for the period from February 14, 1998 to February 14,2001 and the complete contents of files maintained by defendants regarding plaintiff. Aboulafia Aff., Ex. B.

On February 6,2003, defendants served a response to plaintiff’s discovery demand and produced some of the documents requested, including a copy of plaintiffs lease. However, on February 27,2003, this Court issued a compliance conference order stating that: “a number of prior discovery orders addressing in substance the issues at hand have as yet not been completely complied with. Accordingly, defendants are to either produce the document discovery designated in those former orders, as well as addressed in plaintiffs motion papers, within 15 days of today or...to provide plaintiff with a ‘Jackson Affidavit’ from the custodian of records. Failure to

comply with the foregoing shall result in the striking of defendants' answer, as well as [preclusion of] testimony at trial as to the underlying issues." By the same order, the present motion was withdrawn as to defendant Petach, Inc. d/b/a Nicole Studios. No further discovery was produced, but defendants produced two Jackson affidavits, identical in substance, from Feta Fishta, maintenance supervisor for the premises employed by nonparty Onesource and Thomas Dima, property manager for Insignia. The affidavits set forth documents requested by plaintiff, and stated:

The records pertaining to the building know [sic] as 250 West 39th Street, New York, New York and its tenants are maintained in my office located within 250 West 39th Street. I have provided my attorney with all the records I maintain in the regular course of business. I have conducted subsequent searches for the documents that I have previously been unable to provide and those records and/or documents are not in my files or they do not exist.

Affidavit of F. Fishta, ¶¶ 4-6.

Motion

Plaintiff now moves to strike defendants' answer for failure to comply with disclosure requests and orders of this Court. Plaintiff argues that defendants' Jackson affidavits are insufficient; that defendants have failed to respond to outstanding discovery requests and that, therefore, consistent with previous Court orders in this action, this Court should issue an Order striking defendants' answer. Plaintiff submits its attorneys affirmations, copies of discovery Orders of this Court, the affidavits of Feta Fishta, Thomas Dima, Debbie Freeman and other documentary evidence including plaintiff's discovery demands.

In opposition, defendants submit their attorney's affirmation and copies of their response to plaintiff's discovery demands, the amended complaint and answer and other documentary

evidence. Defendants argue that they have complied with their disclosure obligations, that they are unable, despite diligent effort, to locate certain requested documents, and that any delays in production should be excused due to the fact that defendants were not in possession of the premises on the date of the accident, and that as a consequence, documents may have been lost or misplaced during the subsequent transfer of ownership.

Conclusions of Law

Although actions should be resolved on the merits wherever possible, a court may, inter alia, strike the pleadings or parts thereof **as** a sanction against a party who refuses to obey an order for disclosure or wilfully fails to disclose information which the court finds ought to have been disclosed upon notice. Herrera v. City of New York, 238 A.D.2d 475 (2nd Dept. 1997) (citations omitted). “[S]triking an answer is inappropriate absent a clear showing that the failure to comply with discovery demands is willful, contumacious, or in bad faith;” however, “willful and contumacious conduct can be inferred from [a party’s] repeated failure to comply with court orders directing disclosure.” Id. Here, defendants have repeatedly failed to comply with plaintiffs discovery requests and this Court’s Orders requiring disclosure. Defendants’ proffered excuse (that ownership of the building was transferred after the incident at issue) is not a reasonable excuse for these failures, especially where there is evidence that documents were properly transferred from the previous owner in 2000. Thus, Jackson affidavits were ordered to assure the Court that defendants’ failure to produce the requested documents was not willful and contumacious.

The Jackson affidavits submitted are insufficient to prove a diligent search for the requested documents. Jackson affidavits must provide a “showing as to where the subject records

were likely to be kept, what efforts, if any, were made to preserve them, whether such records were routinely destroyed, or whether a search had been conducted in every location where the records were likely to be found.” See Jackson v. New York, 185 A.D.2d 768 (1st Dept. 1992). The affidavits of Ms. Feta and Mr. Dima fail to reveal any effort by defendant to find the records other than by looking in the affiant’s “files,” i.e., the same place where the records have consistently not been found. The affidavits refer to “records I maintain in the regular course of business,” but do not describe the course of business in any detail. Thus, **as in Jackson, supra**, the affidavits here provide the Court with “no basis to find that the search had been a thorough one or that it had been conducted in a good faith effort to provide these necessary records to plaintiff.” See id. Accordingly, it is

ORDERED that defendants serve plaintiff within 20 days from service of this order with notice of entry, with further affidavits complying completely with the requirements set forth in Jackson v. New York, 185 A.D.2d 768 (1st Dept. 1992) or their answer will be stricken; and it is further

ORDERED that defendants serve plaintiff with the requested witness list within 20 days from service of this order with notice of entry or they will be precluded from calling at trial any witness not so disclosed; and it is further

ORDERED that defendants serve plaintiff with the requested expert witness information within 20 days from service of this order with notice of entry or they will be precluded from calling at trial any expert witness not so disclosed.

The foregoing constitutes the decision and order of the Court.

Date: March 28, 2003
New York, New York



SHIRLEY WERNER KORNREICH