Li Ping Xie v Jang
2012 NY Slip Op 33871(U)
February 28, 2012
Supreme Court, New York County
Docket Number: 117222/2008E
Judge: Paul G. Feinman

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: CIVIL TERM: PART 12

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LI PING XIE and MEE MEE XIE,
Plaintiffs,

Index Number 117222/2008E
Mot. Seq. No. 004

-against-

HELEN H. JANG a/k/a HELEN JAN LEE, WINZONE REALTY, INC. and XIAO FENG PAN,
Defendants.

DECISION AND ORDER

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For the Defendant Helen Jang:
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For the Plaintiffs:
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Papers considered in review of this e-filed motion	**E-Filing Document Numbers**
Notice of motion, Wang affirmation and annexed exhibits A - H	40 - 40-8
Xue affirmation in opposition and annexed exhibits A - F	44 - 44-6

PAUL G. FEINMAN, J.:

Defendant, Helen Jan Lee, moves pursuant to CPLR 3126 to strike the complaint, or in the alternative, to preclude plaintiffs, Li Ping Xie and Mee Mee Xie, from offering any evidence or testimony at trial. Plaintiffs oppose. For the reasons provided below, the motion is granted in part and denied in part.

Background

The facts of this case and its lengthy procedural history are more fully set forth in this court's prior decision and orders of July 9, 2009, and January 7, 2011 (*see Xie v Jang*, Sup Ct, NY County, July 9, 2009, Feinman, J., index no. 117222/2008E, seq. no. 001; *see also*, *Xie v Jang*, Sup Ct, NY County, Jan. 7, 2011, Feinman, J., index no. 117222/2008E, seq. no. 002) and

the reader's familiarity with same is presumed.

In short, plaintiffs, a father and daughter, commenced this action arising out of the sale of plaintiffs' property located at 146-09 Hawthorne Avenue in Flushing, New York, against defendants Helen H. Jang, purported real estate agent, and Jang's former employers, WinZone Realty Inc. and Xiao Feng Pan. The complaint asserts 11 causes of action which include, among others, defamation, intentional infliction of emotional distress, malicious prosecution, abuse of process, fraud, breach of contract, and negligence. Jang answered and cross-claimed against WinZone and Pan for breach of fiduciary duty seeking "commissions resulting from the sale of the subject premises" (Doc. 3, Answer at ¶ 4).

At the preliminary conference held on August 19, 2009, the parties agreed to a schedule for the completion of discovery in this action. The resulting preliminary conference order provides, among other things, that all demands for discovery and inspection would be exchanged by November 5, 2009, all depositions would be completed by December 10, 2009, the end date for all disclosure would be April 19, 2010, and plaintiffs were to file the note of issue by April 30, 2010 (Doc. 40-6, ex. F, PC order). At the next compliance conference on January 13, 2010, the original schedule from the preliminary conference order was modified so that depositions of all defendants were to be held on March 10 and 11, 2010. After this conference, Jang's counsel served her "first request for the production of documents," dated February 11, 2010 (Doc. 40-3, ex. C, Feb. 2010 demand). Although plaintiffs' counsel now claims that these demands were rejected as untimely, it offers no proof to support this contention (Doc. 44, Xue affirm. at ¶ 13). The day before their scheduled deposition date of March 11, 2010, defendants, Xiao Feng Pan and Winzone Realty, Inc., moved for summary judgment, thus staying discovery in this action.

That stay remained in place until the motion was disposed of by the court's decision and order of January 7, 2011, which scheduled a compliance conference for February 9, 2011. At that conference, an order was issued requiring all discovery to be completed by May 27, 2011 (Doc. 40-7, ex. G, Feb. 2011 conference order).

Thereafter, Jang moved by order to show cause on April 26, 2011, to compel plaintiffs to comply with her February 2010 discovery demands and for sanctions pursuant to CPLR 3126. Argument was heard on the order to show cause by the court on May 4, 2011, and a decision was made on the record (Doc. 40-8, ex. H, Transcript). Initially, the court noted that Jang's failure to raise plaintiffs' noncompliance with its February 2010 demands at the February 2011 compliance conference was deemed as a waiver of the right to that discovery (*id.* at 6). Nonetheless, in light of the lack of documents produced by plaintiffs, and the relevance of some of the materials now being sought, to avoid prejudice to the defendants, the court reviewed the specific discovery demands on the merits. As a result of this review, plaintiffs were directed to provide documents responsive to several individual demands within 30 days, including demand numbers 6, 7, 8, 15, 17, 20 and 24, subject to the limitations described by the court on the record. Plaintiffs' attorney agreed to produce these documents, and in some instances, indicated that he had the responsive documents in his possession. The court warned plaintiffs that the "failure to provide the documents means that they cannot be produced at trial[,] assuming that it's a document that was responsive to the demand that [the court] just told you to comply with" (*id.* at 31). Also, Jang was told by the court not to delay in taking actions to enforce the court's order, stating "[i]n other words, [plaintiffs' attorney] has 30 days to do these things. If he hasn't done it, make your motion" (*id.* at 32).

On June 28, 2011, Jang filed the instant motion for sanctions based on plaintiffs' failure to provide any responsive documents within 30 days as directed by the court. According to plaintiffs' attorney, his office was not contacted by Jang's attorney before he filed the instant motion, and did not provide him with a copy of the transcript from the May 4, 2011 proceeding. After Jang's motion was filed, plaintiffs served responses, dated July 5, 2011, which stated that no documents were currently in their possession that were responsive to demands 6, 7, 9 and 15, but produced copies documents responsive to demands 17, 20 and 24 (Doc. 44-1, ex. A, July 5 responses). By letter dated July 27, 2011, plaintiffs provided copies of closing statements that had been obtained from their attorney's archives, as well as additional proof of medical treatments (Doc. 44-2, ex. B, July 27 letter). Also in this letter, plaintiffs' attorney claimed that he was "still waiting to hear from the Criminal Court when we would be able to copy the sealed entire case files of the matter: People v. Liping Xie, Docket No.: 2008NY047904 that were in transit and were not yet available" (*id.*). Finally, the court notes that plaintiffs' attorney also wrote a letter on July 8, 2011, to Jang's attorney which, after noting Jang's refusal to withdraw the instant motion, requested an adjournment of the return date until August 10, 2011 – a date almost two weeks after the note of issue was scheduled to filed.

Analysis

CPLR 3126 provides a nonexclusive list of penalties that a court may apply where a party "refuses to obey an order for disclosure or wilfully fails to disclose information which the court finds ought to have been disclosed ..." To prevail on a motion for sanctions under CPLR 3126, the moving party has the burden of clearly demonstrating that the other party failed to comply with a discovery order and that such failure was "willful, contumacious or in bad faith" (*see*

Pezhman v Dept. of Educ. of the City of New York, 79 AD3d 543, 544 [1st Dept 2010]). As with any motion related to discovery, a party moving for discovery sanctions must submit an affirmation by its attorney of the good faith efforts to resolve the issues, setting forth the "time, place and nature of the consultation and the issues discussed and any resolutions" (*148 Magnolia, LLC v Merrimack Mut. Fire Ins. Co.*, 62 AD3d 486, 487 [1st Dept 2009]; quoting 22 NYCRR 202.7 [a] [2]).

Here, Jang argues that plaintiffs' failure to provide timely responses pursuant to the court's May 4, 2011 directives, was willful and contumacious. In support, Jang refers to the court's warning on the record to plaintiffs' attorney that its failure to timely comply with the order could result in sanctions, including striking the complaint (Doc. 40, Wang affirm. at ¶ 14). Also, Jang points to places in the transcript where plaintiffs' attorney admitted to possessing certain requested documents as proof that the subsequent failure to produce such documents was "willful" (*id.* at ¶ 20). Jang also mentions previous instances where plaintiffs have refused to provide requested documents.

As an initial matter, throughout plaintiffs' attorney's affirmation, he repeatedly refers to actions taken by "Judge Friedman." While the court is flattered to be mistaken for the brilliant Justice Marcy Friedman, the court presumes this to be a mistaken reference to this court. Setting this confusion aside, plaintiffs' attorney argues that Jang's motion has been brought in "bad faith" because until he received the papers on the instant motion, he had not been provided with a copy of the transcript from May 4, 2011, and had not been contacted by Jang's attorney to obtain the discovery responses ordered by the court (Doc. 44, Xue affirm. at ¶ 29). Plaintiffs contend that Jang's discovery demands were untimely and we were waived by Jang's failure to raise them

at the February 2011 compliance conference, making the same argument they had previously raised in connection with Jang's underlying order to show cause. Furthermore, plaintiffs argue that their conduct was not "dilatory, evasive, obstructive, or contumacious" because they provided "full and complete responses to those document requests" on July 5, 2011, with a supplemental production being made on July 27, 2011. The only outstanding discovery request from the May 4 order, they claim, is Li Ping Xie's criminal file, of which plaintiffs' attorney was advised on June 29, 2011, by the clerk in "Criminal Court in New York County" that the file was in "the process of being packed and shipped to a new location," and was later told, on August 25, 2011, that it "would be another week or so until he could make a request for the file" (*id.* at ¶ 10).

Although the affirmation submitted by Jang's attorney in support of this motion is labeled, "affiramation [*sic*] in support of motion and good faith affirmation," it does not specify the efforts made to resolve these issues *after* May 4, 2011, when the court ordered plaintiffs to produce documents responsive to seven of Jang's discovery demands, and before the filing of the instant motion. However, Jang's attorney does sufficiently detail the efforts made to resolve these discovery disputes prior to May 4, 2011. Furthermore, at the May 4 oral argument, the court's warnings to Jang's attorney that he should promptly make a motion if plaintiffs failed to comply gave plaintiffs sufficient notice of the likelihood of the instant motion being filed (Doc. 40-8, ex. H, Transcript at 32). Thus, in light of plaintiffs' prior refusal and delays in providing documents that are essential to proving their claims in this action, its failure to comply with the court's May 4, 2011 order even though their attorney claimed to have in his possession at least some of the relevant documents, the approaching deadline for filing the note of issue at the time this motion was brought, and Jang's attorney's description of the efforts taken prior to May 4,

2011, to resolve these discovery disputes, under the facts of this case, it would have been futile to compel Jang to confer once more with plaintiffs as a condition for moving for sanctions under CPLR 3126 (*see Diamond State Ins. Co. v Utica First Ins. Co.*, 67 AD3d 613, 613-614 [1st Dept]; citing *Carrasquillo v Netsloh Realty Corp.*, 279 AD2d 334, 334-345 [1st Dept 2001]).

There is no dispute that plaintiffs failed to provide the court-ordered discovery within 30 days of the May 4 order, notwithstanding the court's warning that such failure would lead to sanctions. Contrary to plaintiffs' suggestion, their obligation to produce these documents was not contingent upon Jang providing them with a copy of the May 4 transcript. The court's disposition of Jang's order to show cause was provided in a short-form order, filed May 4, 2011, which indicates that it was "decided to the extent indicated on the record on 5/4/2011 and otherwise denied (Court Reporter Kathy Jones)" (Doc. 40-1, May 4 short-form order). Plaintiffs' counsel was present in court when the ruling and directives were made. If plaintiffs were uncertain of the court's specific directives, they should have taken the appropriate steps to obtain clarification, such as contacting Jang's attorney or ordering a copy of the May 4 transcript from the court reporter. Instead, fully aware of the potentially harsh consequences of noncompliance, plaintiffs did nothing.

Furthermore, in addition to being untimely, plaintiffs' responses were insufficient. In their first response, dated July 5, 2011, plaintiffs denied having any responsive documents in their possession for demand numbers 6, 7, 9 and 15, while "reserv[ing] the right to supplement their response to this request and to make any objections that may become apparent as additional documents and/or information are located during and thereafter" (Doc. 44-1, ex. A, July 5 responses). For demand numbers 17, 20 and 24, plaintiffs reference documents annexed to the

response, although these exhibits were not submitted with their opposition papers on this motion. Plaintiffs' supplemental response on July 27, 2011, attached "closing statements ...from [plaintiffs'] attorney's archives and some additional proof of medical treatments," and indicated that plaintiffs were still waiting to hear from the Criminal Court as to when they would be able to copy the relevant case files (Doc. 44-2, ex. B, July 7 responses). This response was served the same day that plaintiffs filed the note of issue and certificate of readiness for trial, in which plaintiffs's attorney certified that medical reports were not required, discovery proceedings now known to be necessary were completed and there were no outstanding requests for discovery (Doc. 43, Note of issue). This certification is suspect given plaintiffs' purported reservation of their right to supplement their productions as additional documents are located. It is clear from the nature of these untimely productions that plaintiffs have been anything but diligent in their efforts to comply with defendants' discovery demands and this court's order. No explanation has been provided as to why plaintiffs made no efforts to obtain the documents responsive to the court's May 4 order until after 30 days had passed and a motion was filed. Also, no explanation has been provided as to why it took plaintiffs another month after its initial untimely production to produce the closing statements and additional proof of medical treatment, when plaintiffs' attorney had indicated that he possessed some of these documents at the May 4 oral argument.

Based on the above, it is clear that plaintiffs have not shown that they have complied with the court's May 4 order, which would require "both a timely response and one that evinces a good-faith effort to address the requests meaningfully" (*Kihl v Pfeffer*, 94 NY2d 118, 123 [1999]). The lack of any explanation as to why documents were not produced in a timely manner, especially those that were inexplicably withheld for nearly a month after plaintiffs' first untimely response and were not produced until plaintiffs filed their note of issue, leads to the

conclusion that plaintiffs' conduct was "willful and warrants imposition of some sanction" (*Allstate Ins. Co. v Buziashvili*, 71 AD3d 571, 572-573 [1st Dept 2010]). The court's May 4 order expressly warned plaintiffs that they would be precluded from introducing at trial any responsive evidence that was not produced within 30 days. As such, plaintiffs were appraised of the serious consequences that it faced for noncompliance (*id.* at 573). In light of plaintiffs' behavior, and their apparent belief that they have reserved their right to supplement their untimely and incomplete discovery responses even after filing their note of issue, nothing short of precluding plaintiffs from introducing at trial the evidence they produced after the 30-day period had expired will "restore balance to the matter" (*see Baldwin v Gerard Ave., LLC*, 58 AD3d 484, 485 [2009]). Because the court finds preclusion to be a sufficient remedy, the more extreme sanction of striking plaintiffs' complaint is not warranted.

Plaintiff having established that defendant has willfully failed and refused to provide discovery within 30 days as directed by the court in its May 4, 2011 order, without reasonable justification, failed and refused to produce documents responsive to defendant's demands, as limited by the court in its May 4, 2011 order, it is hereby

ORDERED that the motion of defendant, Helen H. Jang a/k/a Helen Jan Lee, is granted solely to the extent that plaintiffs, Li Ping Xie and Mee Mee Xie, are precluded from offering proof at trial of any documents responsive to defendant's discovery demands as described in the court's order of May 4, 2011, and the motion is otherwise denied in its entirety; and it is further

ORDERED that defendant Jang is awarded $100.00 costs pursuant to CPLR 8106 and 8202.

This constitutes the decision and order of the court.

Dated: February 28, 2012
New York, New York

Paul H. Feinman
J.S.C.