Gallo v DMHZ Corp.
2012 NY Slip Op 33970(U)
May 22, 2012
Supreme Court, New York County
Docket Number: 107464/2009
Judge: Paul G. Feinman

[* 1]

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

----------X

JACQUELYN GALLO, NICHOLAS FRIEDMAN, ERIN SPADOLA, ANJA DORNIEDEN, and ANNIE LING,

Plaintiffs,

Index Number 107464/2009
Mot. Seq. Nos. 005, 006

against

DMHZ CORP., RONG DING CHEN, and NEW GRAND ELECTRIC, INC.,

Defendants.

DECISION AND ORDER

----------X

DMHZ CORP. and DAVID CHEN,

Third-Party Plaintiffs,

T.P. Index No. 591077/2009

against

NEW GRAND ELECTRIC, INC.,

Third-Party Defendant.

----------X

For the Plaintiffs:
The Bostany Law Firm
By: Matthew A. Windman, Esq.
70 Wall St , ste 24F
New York, NY 10005
212-530-4400

For the Defendants/Third-Party Plaintiffs:
Callahan & Fusco, LLC
Brian R. Masterson, Esq
40 Exchange Place, 18th Fl.
New York, NY 10005
212-448-9570

For the Third-Party Defendants:
Kral, Clerkin, Redmond, Ryan, Perry & Grivan, LLP
By: Jeffrey K. Van Etten, Esq.
170 Broadway, Ste. 500
New York, NY 10038
212-406-9710

E-filed papers considered in review of these motions to dismiss and vacate, and cross motion to compel:

	PAPERS	E-FILING DOCUMENT NUMBER
Mot. Seq. 005	Notice of Motion, Affirmation, exhibits	77, 79,81
	Notice of Cross Motion	215
	Affirmation in Opposition and Support, exhibits	216, 217-235
	Affirmation in Reply (filed twice)	238, 239
Mot. Seq. 006	Notice of Motion	82
	Affirmation in Opposition and Support, exhibits	216, 217-235
	Reply Affirmation	237
	Affirmation, exhibits A-C	240, 241-243

PAUL G. FEINMAN, J.:

Motions bearing sequence numbers 005 and 006, and the cross motion filed under motion sequence number 005, are all consolidated for the purposes of decision.

In motion sequence number 005 (Doc. 77), defendants/third-party plaintiffs DMHZ Corp. and Rong Ding Chen move: (1) to dismiss the complaint as to co-plaintiff Anja Dornieden pursuant to CPLR 3126, based on her alleged refusal to submit to a deposition or comply with court-ordered discovery obligations; (2) to preclude plaintiff Dornieden from testifying at trial; (3) to vacate the note of issue and certificate of readiness and strike the case from the Trial Calendar pursuant to 22 NYCRR § 202.21 (4); (4) to extend the defendants' time to file their motion for summary judgment in the event the note of issue is not vacated; and (5) for costs and reasonable attorney's fees pursuant to 22 NYCRR § 130-1.1, based on plaintiffs' "repeated frivolous conduct" resulting in motion practice. Plaintiffs cross- move: (1) to compel defendant New Grand Electric, Inc. to respond to their interrogatories; and (2) to strike defendants DMHZ and Chen's answer for "persistent disregard" of the court's orders and violation of a conditional order (Doc. 215).

In motion sequence number 006 (Doc. 82), defendant New Grand Electric, Inc. ("New Grand") moves: (1) to vacate the note of issue and certificate of readiness and strike the case from the Trial Calendar pursuant to 22 NYCRR § 202.21 (4); and (2) to extend the defendants' time to file their motions for summary judgment in the event the note of issue is not vacated.

For the reasons set forth below, the motion by defendants/third-party plaintiffs (Mot. Seq. 005), is granted in part and otherwise denied; and the cross motion by plaintiffs is granted in part and otherwise denied. The motion by New Grand (Mot. Seq. 006) is granted in part and

otherwise denied.

In these motions and cross motion, the parties each cast aspersions on another for the inordinate delay in discovery, including basic things like a plaintiff's deposition. The court has supervised this case actively and presided over numerous conferences where the parties have been unable to resolve things in anything approaching a cooperative or collaborative fashion. Indeed, upon reading the papers the court recalls the oft-quoted line of Mercutio in Shakespeare's *Romeo and Juliet*, Act 3, scene 1, "A plague a' both your houses!"

This action is one of three personal injury and property damage actions arising from a fire that occurred in an apartment building on February 24, 2009. Plaintiffs here, former tenants of the building, commenced their action against the building's owner and manager by filing a summons and complaint on May 26, 2009, which was amended with court permission in September 2010 (Doc. 30). The complaint appears to allege negligence, failure to comply with applicable statutes, regulations, and building codes, gross negligence, and willful misconduct.[1] With the amendment, New Grand was added as a direct defendant. New Grand answered the amended complaint in February 2010 (Doc. 51). Previously, in November 2009, defendants DMHZ and Chen had commenced a third-party action against New Grand, seeking common law indemnification, contribution, contractual defense and indemnification, and alleging two claims of breach of contract (Doc. 3).

Upon an unopposed motion by defendants DMHZ and Chen, the three actions were directed to be consolidated by the court's decision and order dated November 14, 2011, under

[1]The amended complaint does not list separate causes of action in its narrative. However, this court allowed plaintiffs to amend their complaint to allege "negligence and/or gross negligence and/or willful misconduct" (Doc. 28, Ord. 5/12/10).

Index number 104930/2009 (see NYSCEF index no. 104930/2009, Doc. 40, *Liu, et al. v DMHZ, et al.*).[2] As the instant motions and the cross motion were filed prior to the court's November 14, 2011 decision and order, they are individually addressed by the court, and the court's rulings pertain solely to these particular litigants, and not to the claims and defenses of the other litigants in what should be the now-consolidated matter.

MOTION SEQUENCE 005

1. The Note of Issue and Summary Judgment Motions

The court first addresses the branch of defendants' motion seeking to strike the note of issue and certificate of readiness filed on August 10, 2011, and to remove the matter from the Trial Calendar. Their motion is granted, not for the reasons they put forth, but rather based on the order issued on November 14, 2011, consolidating this litigation with the two other litigations brought by other tenants claiming damages from the same apartment fire against the same defendants. The litigants in one of the three cases now consolidated into a single case had not yet filed a note of issue or certificate of readiness.[3] Therefore, the consolidated action is not trial ready, and the note of issue filed in this particular litigation must be stricken and the matter removed from the Trial Calendar so that all discovery can be completed. Accordingly, this

---

[2] Orders of consolidation are not self-executing, but rather must be served upon the office of the County Clerk and Trial Support. The directive to do so was contained in the penultimate decretal paragraph at page 5 of the November 14th order. The affidavit of service for the notice of entry of that order does not reflect service upon the County Clerk and the Trial Support Office as directed in the decretal paragraphs (see NYSCEF index no. 104930/2009, Doc. 41). Thus, it appears the consolidation has not yet been effected. As these are e-filed matters, the parties are directed to www.nycourts.gov/supctmanh. On the main page of the e-filing link appears the Protocol on Courthouse Procedures For Electronically Filed Cases, which can assist the user in serving documents on the proper offices using the NYSCEF system.

[3] *Luu, et al. v DMHZ Corp., et al.* Index no. 118010/2009. The note of issue was filed on March 15, 2012 in the action titled *Liu, et al. v DMHZ Corp., et al,* Index no. 104930/2009; this is the Index number under which the three matters are consolidated.

branch of defendants' motion is granted.

As the note of issue is stricken, the branch of defendants' motion seeking an extension of the parties' time to file a motion for summary judgment is rendered academic.

2. Dismissal of Anja Dornieden as Plaintiff

Defendants DMHZ and Chen also move pursuant to CPLR 3126 for an order dismissing the complaint as to co-plaintiff Anja Dornieden, based on her alleged refusal to submit to a deposition or comply with court-ordered discovery obligations, and that she be precluded from testifying at trial for the same reason.

CPLR 3216 provides that where a party "refuses to obey an order for disclosure or willfully fails to disclose information which the court finds out to have been disclosed," the court may sanction the non-complying party in various fashions, including striking out pleadings or parts thereof, staying further proceedings until the order is obeyed, or rendering a judgment by default (CPLR 3126 [3]).

The scheduling and taking of depositions of the parties has been one of the ongoing issues in this litigation. After repeated delays including motion practice for failure to schedule or conduct, plaintiffs Spadola, Gallo, Friedman, and Ling were deposed between June 14 and June 20, 2011 (Doc. 216, Windman Affirm. in Opp. ¶ 11). At the June 29, 2011 compliance conference, the court issued an order that in part directed the deposition of Dornieden be completed "on or before" July 29, 2011 (Doc. 81 at 85, Masterson Affirm. ex. J, Order of 06/29/11). The Order further directed that the "dates may not be adjourned or extended without prior court approval." However, her deposition was not scheduled or held by July 29, 2011 and has not been conducted. The parties blame each other.

DMHZ and Chen, in arguing that the complaint as to Dornieden should be dismissed pursuant to CPLR 3126, argue that they attempted to comply with the court's July 29, 2010 order and that plaintiffs did not. They proffer copies of their letter and that of co-defendant New Grand, sent to plaintiffs' counsel dated July 21, 2011, and July 18, 2011, respectively, asking for deposition dates for Dornieden (Doc. 81 at 87-88, 92-94, Masterson Affim. ex. K, M). They also point to other letters sent to plaintiffs' counsel dated between June 7 and August 24, 2011, along with those from co-defendant New Grand, requesting Dornieden's presence for a deposition, followed by letters from both sets of defendants notifying plaintiffs that motions to preclude would be made based upon her failure to appear (Doc. 81, at 81, *et seq.*, Masterson Affirm., ex. H, I, K, L, M, O, P, R [letters]).

Plaintiffs counter that DMHZ and Chen's letter seeking available dates, sent 20 days after the court's order, only gave Dornieden 10 days to make herself available for the deposition, a time frame that was too narrow and further evidence of defendants' lethargic compliance not only with the court imposed July 29, 2011 deadline, but with their conduct of the entire litigation. Plaintiffs point to the court orders dated September 23, 2009, June 30, 2010, February 2, 2011, and March 30, 2010 each directing defendants to schedule and conduct plaintiffs' depositions (Doc. 216, Windman Affirm. in Opp., Docs. 218, 219, 220, 224 [ex. A, B, C, G]). They also contacted defendants on "numerous occasions" asking to schedule plaintiffs' depositions, and submit copies of letters mailed to defendants' counsel dated March, 3, 2011 and March 14, 2011, requesting dates, neither of which was responded to (Doc. 216, Windman Affirm. in Opp. ¶ 8; Doc. 221, 223, ex. D, F [letters from plaintiffs' counsel]).

At the parties' next compliance conference, August 10, 2011, after hearing the various

issues and concerns of the parties, the court extended the deadline for filing the note of issue to October 26, 2011 (Doc. 81, at 96, Masterson Affirm. ex. N, Order).[4] The order was silent as concerns Dornieden's deposition or any other issue. Although not spelled out, the assumed objective in extending the note of issue was to allow the parties to work out any remaining discovery issues, and the court scheduled one last compliance conference prior to the filing deadline (Doc. 81, at 96, Masterson Affirm. ex. N, Order). Plaintiffs, however, filed the note of issue the next day, August 11, 2011 (Doc. 81, at 102, Masterson Affirm. ex. Q). The parties then engaged in back and forth correspondence with plaintiffs contending that defendants had waived Dornieden's deposition, and defendants continuing to attempt to schedule her deposition (Doc. 81, at 105 - 108, Masterson Affirm. exs. R & S).

It does not appear that plaintiffs attempted to compromise by offering a belated deposition of Dornieden for a date certain. Plaintiffs' position was and is that defendants' right to Dornieden's depostion was waived; however, this is not borne out by the documentary evidence and the court's recollection of its supervision of the various compliance conferences. The court's clear and unambiguous order set a July 29, 2011 deadline for Dornieden to appear absent court approval of an extension. Certainly, if there was an issue as to scheduling same it was incumbent upon the parties to contact the court or move by order to show cause within the

[4]Also on August 10, 2011, the court entertained oral argument and then ruled from the bench on plaintiffs' motion to strike the answer of DMHZ and Chen based on failure to provide sufficient answers to interrogatories, and defendants' cross motion for a protective order. As discussed below in considering the cross motion, plaintiffs' motion was granted conditionally; the cross motion was denied (see Doc. 228, Windham Affirm. ex. K, Order).

deadline to extend it.[5] The court never indicated that the deposition would be deemed waived if defendant failed to serve a notice of deposition by a date certain. Absent any evidence that the court was contacted and approved an extension, the portion of defendant's motion which seeks to strike the complaint as to claims brought by plaintiff Anja Dornieden is granted. The Clerk shall enter judgment dismissing the complaint as to her only.

3. Sanctions

Defendants also seek costs and sanctions against plaintiffs pursuant to 22 NYCRR § 130-1.1, based on the premature filing of the note of issue and certificate of readiness. Under § 130-1.1 of the New York Rules of Court, the court may award sanctions costs, in the form of reimbursement for actual expenses incurred and attorneys' fees, resulting from "frivolous conduct." Conduct is frivolous when it is "completely without merit in law or fact and cannot be supported by a reasonable extension, modification or reversal of existing law," or "undertaken primarily to delay or prolong the resolution of the litigation, or to harass or maliciously injure another," or "asserts material factual statements that are false." (*Yenom Corp. v 155 Wooster St., Inc.*, 33 AD3d 67, 73 [1st Dept 2006], citing 22 NYCRR § 130-1.1 (c)]). Plaintiffs' actions do not rise to the level of frivolous conduct required by the statute. Accordingly, this branch of defendants' motion is also denied.

4. Cross Motion

Plaintiffs seek two types of relief. First, they seek an order compelling New Grand to

---

[5]According to the affirmation by plaintiffs' counsel dated September 12, 2011, Dornieden is now living in Germany (Doc. 216, Windman Affirm. in Opp. ¶ 15).

answer plaintiffs' interrogatories (Doc. 216, Windham Affirm. in Opp. ¶ 23).[6] Plaintiffs attach their proposed interrogatories to New Grand, as exhibit J of their cross motion (Doc. 227).

Pursuant to CPLR 3130 (1), a party in an action to recover damages for personal injury, injury to property, or wrongful death based on negligence, must seek leave of court to employ both a deposition and interrogatories of the same party. The requesting party must show that the second discovery device is "reasonably necessary," and permission will be granted under this standard only if the requesting party has not already obtained complete disclosure through the first device (*see Yandolino v Cohen*, 102 Misc 2d 38, 39-40 [Sup Ct Nassau County 1979]).

Plaintiffs rely on the terms of the September 23, 2009 preliminary conference order providing that in addition to the use of depositions of the parties, a maximum of 15 interrogatories per party could be served by December 15, 2009 (Doc. 4). Of course, at the time the preliminary conference order was signed, New Grand was not a party, or even a third-party defendant. While, in general, additional parties are deemed bound by the previous court orders and decisions in their particular litigation, here where New Grand was added as a direct defendant approximately one year after the preliminary conference order was signed, and the deadline for serving interrogatories as well the implementation of other disclosure devices had long passed, clearly the particular terms of the preliminary conference order are not automatically applicable to the newly added defendant. Here especially, where the order made an exception to the general disclosure rules in a negligence claim, based on the arguments of the two parties

---

[6]This branch of the cross motion is, in actuality, procedurally improper. CPLR 2215 provides that a cross motion is to be served "upon the moving party." The moving parties in motion sequence number 005 are DMHZ and Chen. However, New Grand moved nearly simultaneously in motion sequence number 006, and it therefore appears that the cross motion, although denominated as part of motion sequence number 005, actually serves as a cross motion in both sequence numbers 005 and 006. The cross motion is therefore considered in its entirety.

attending the preliminary conference, such an exception does not necessarily extend to new parties. Plaintiffs are thus required to make a showing that they did not and could not obtain complete disclosure through the depositions, and thus require answers to interrogatories.

According to New Grand's attorney, plaintiffs participated in the first session of the deposition of New Grand's first witness, but chose not to appear for the second session of that witness and did not appear at the deposition of the second witness (Doc. 237, Redmond Reply Affirm. ¶ 6). The court cannot, of course, determine what the plaintiffs were able to obtain during the first day's deposition testimony and why they could not get all that they needed. However, because of the procedural posture of this case, and in the interest of justice, plaintiffs' motion is granted to the extent that it may serve amended interrogatories on New Grand, limiting themselves to 12 questions, the answers of which were not obtainable through deposition testimony. Plaintiffs are cautioned not to create so-called subsections of questions, as attempted in the current version of their interrogatories, which impermissibly created an actual total of 17 interrogatories. Plaintiffs are to serve a copy of their 12-maximum interrogatories on New Grand within 10 days of the date of entry of this order. New Grand shall serve answers within 30 days thereafter. Failure to respond will result in the imposition of costs or other sanctions.

The second item sought by plaintiffs is that the answer of DMHZ and Chen be stricken for "persistent disregard of this Court's orders and a violation of a conditional order" (Doc. 215, Not. of Cross Mot). They argue that defendants have repeatedly violated court orders and necessitated unwarranted motion practice. Specifically, they point to the August 10, 2011 order stating that DMHZ and Chen's answer would be "deemed stricken" unless plaintiffs' interrogatories were "fully and completely responded to by August 30, 2011." (Doc. 216.

Windham Affirm. ¶ 27, citing Doc. 228, ex. K, Order). Plaintiffs contend that defendants still have not completely responded to the interrogatories and they remain inadequate. They also point out that defendants' response was received by fax on August 31, 2011, one day after the court-imposed deadline (Doc. 216, Windham Affirm. ¶ 28, citing Doc. 230, ex. M, Second Supp. Response).

As to the answers provided to the interrogatories, plaintiffs argue that defendants reworded and narrowed the scope of Interrogatory No. 2; failed to provide, along with the names and addresses of "any person who has made a statement" about the fire's cause, the dates of the statements and to whom made, as requested in Interrogatory No. 3; and instead of providing in addition to the name of the person in charge of maintaining or checking the building's safety devices, the dates the devices were checked over the last five years, and by whom, as requested in Interrogatory No. 9, answered that the smoke detectors and carbon monoxide detectors were checked after apartments were vacated or leases renewed, fire extinguishers were checked every six months, and emergency lighting and exit signs were checked once a year (Doc. 216, Windham Affirm. ¶¶ 31-35; 36-38; 39-40).

Defendants contend that they have fully complied, although they do not address the issue of untimeliness. However, the court agrees that the answers remain incomplete, at least as to Interrogatories Nos. 3 and 9. The ramifications of the rewording of Interrogatory No. 2, and answering the narrowed interrogatory are not clear.

The August 10, 2011 conditional order was the culmination of six previous so ordered stipulations or orders directing DMHZ and Chen to respond to the interrogatories. The preliminary conference on September 9,2009, provided that interrogatories were to be served by

December 15, 2009, and responded to within 30 days thereafter (Doc. 233, Windham Affirm, ex P). The date for defendants to respond was extended to February 10, 2010, by so ordered stipulation following a compliance conference on January 27, 2010 (Doc. 234, Windham Affirm, ex. Q). On May 12, 2010, the parties entered into a so ordered stipulation resolving a discovery motion and a cross motion, in part extending the date to respond to the interrogatories to June 11, 2010 (Doc. 235, Windham Affirm, ex. R). A compliance conference Order dated June 30, 2010 again extended the time to answer the interrogatories, this time to no later than July 21, 2010 (Doc. 226, Windham Affirm, ex. I). On March 9, 2011, the court issued another Order directing "certain supplemental responses to the interrogatory responses . . . to be completed within 20 days of today" (Doc. 231, Windham Affirm, ex. N). Most recently, in resolving motion sequence 004 concerning outstanding discovery, the court issued its conditional order of August 10, 2011 holding that DMHZ and Chen's answer would be stricken if they failed to completely respond to the March 9, 2011 order by August 30, 2011, and imposed costs on the motion (Doc. 228, Windham Affirm, ex. K).

Defendants DMHZ and Chen's history of non-compliance in answering the interrogatories has been egregious. It is shocking that at this juncture they would even dare serve their answers a day past the court-ordered deadline. They appear determined in their obstinacy not to respond fully to the questions. This cannot be tolerated any further. Plaintiffs' cross motion to strike the answer of DMHZ Corp. and Rong Ding Chen is granted. The issue of damages will be decided at an inquest to be held at the time of trial as against New Grand.

Plaintiffs' counsel also states that defendants have not yet paid plaintiffs the costs associated with the August 10, 2011 order (Doc. 216, Windham Affirm. ¶ 29). Defendants'

counsel states that he has attempted on several occasions by telephone without success to obtain counsel's tax identification number, and that each time he was told that the person with whom he was speaking was not authorized to release this information (Doc. 239, Masterson Reply ¶¶ 48-49). He states he made a request in writing by letter dates September 22, 2011, and once he receives the identification number, he will effectuate payment (Doc. 239, Masterson Reply ¶¶ 51-52). Plaintiffs' counsel is directed to provide this information to defendants' counsel, if not already provided, within 5 business days of the date of entry of this order. Defendants are to effectuate payment within 10 business days after receipt of the number; failure to do so will be sanctionable.

MOTION SEQUENCE 006

Co-defendant New Grand's motion (Doc. 82, Not. of Mot.), seeking vacatur of the note of issue and striking this action from the Trial Calendar is granted for the reasons set forth above. The branch of its motion for an extension of time to file summary judgment motions is therefore rendered academic.

It is

ORDERED that in Motion Sequence 005 the defendants' motion is granted in part to the extent that the note of issue is vacated and the matter shall be stricken from the trial calendar, and the complaint shall be dismissed as against plaintiff Anja Dornieden only, and the motion is otherwise denied; and it is further

ORDERED that the plaintiffs' cross motion filed under Motion Sequence 005 is granted to the extent that New Grand is directed to answer the plaintiffs' interrogatories in accordance with this decision, and the answer of defendants DMHZ Corp. and Rong Ding Chen in the first-

party action is stricken, and is otherwise denied; and it is further

ORDERED that defendant New Grand's motion filed in Motion Sequence 006 is granted to the extent of vacating the note of issue and is otherwise denied; and it is further

ORDERED that upon presentation of proof of service of a copy of this order together with notice of its entry upon all parties and third-parties, the Clerk of the Trial Support Office (60 Centre, rm 119) and the Clerk of Court (60 Centre, Basement) shall:

(1) strike this action from the list of trial ready matters and vacate the note of issue; and

(2) enter judgment dismissing the complaint in its entirety as it relates to plaintiff Anja Dornieden; and

(3) strike the answer of defendants DMHZ Corp. and Rong Ding Chen in the first-party action only; and

(4) sever the remainder of the action as against defendant New Grand and continue it under this index number along with the third-party action; and it is further

ORDERED that an inquest as to damages as against DMHZ Corp and Rong Ding Chen in the main action shall be held at the time of the trial of the remainder of the first-party action as against defendant New Grand Electric, Inc. and the third-party action, and that upon completion of the inquest the Clerk of the Court shall enter judgment in favor of the remaining plaintiffs against DMHZ Corp. and Rong Ding Chen in the amount determined at the inquest to be owing, together with costs and disbursements; and it is further

ORDERED that defendants-movants in motion sequence number 005 shall serve a copy of this order, together with proof of notice of its entry upon all parties and third-parties, upon the Clerk of Trial Support (60 Centre, rm 119) and the Clerk of Court (60 Centre, basement), within

ten (10) days of its entry.

This constitutes the decision and order of the court.

Dated: May 22, 2012
New York, New York

Paul G. Feinman
J.S.C.