

Scialdone v Stepping Stones Assoc., LP
2013 NY Slip Op 34140(U)
September 11, 2013
Supreme Court, Westchester County
Docket Number: 12514/11
Judge: Joan B. Lefkowitz
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To commence the statutory time period for appeals as of right [CPLR 5513(a)], you are advised to serve a copy of this order, with notice of entry upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER - COMPLIANCE PART

**FILED
AND
ENTERED**
ON 9-11 2013
WESTCHESTER
COUNTY CLERK

GREGORY P. SCIALDONE,

FILED
SEP 11 2013
TIMOTHY C. IDOMI
COUNTY CLERK
COUNTY OF WESTCHESTER

Plaintiff,

DECISION & ORDER

-against-

Index No. 12514/11
Motion Date: June 24, 2013

STEPPING STONES ASSOCIATES, LP,
and DEROSA BUILDERS INC.,

Seq. No. 12, 13

Defendants.

LEFKOWITZ, J.

The following papers numbered 1 to 41 were read on this motion by plaintiff for an order compelling defendants to provide a complete bill of particulars pursuant to the Court's January 28, 2013 order, compelling defendants to respond to plaintiff's supplemental discovery demands, or in the alternative, striking defendants' answers for failure to provide discovery. Plaintiff seeks an order compelling the depositions of John DeRosa, Sr. and Bridgette Rocha. Plaintiff seeks a protective order striking defendants' demand for medical reports and authorizations related to plaintiff's claim under the Fair Housing Protection Act of 1988, 42 U.S.C. 3604(f), prohibiting defendants from demanding a further bill of particulars, and prohibiting defendants from obtaining a deposition of the plaintiff. Plaintiff seeks the return of previously disclosed medical records based on the dismissal of plaintiff's causes of action for harassment and intentional infliction of emotional distress and seeks a confidentiality order pertaining to the records, and an award of costs and sanctions for defendants' willful and contumacious failure to comply with Court ordered discovery and for frivolous litigation practices.

Defendants move for an order dismissing the complaint or precluding plaintiff from offering evidence for failure to comply with defendants' discovery demands and defendants' demand for a verified bill of particulars, or alternatively, compelling plaintiff to comply with discovery demands previously served and prior court orders and compelling plaintiff to provide medical and psychiatric authorizations without limitation as to time. Defendants seek sanctions and attorneys' fees for costs related to several conferences and the instant motion.

Order to Show Cause - Affirmation in Support by Theresa Gugliotta, Esq. -

Exhibits

1-18

Affirmation in Opposition by Kenneth Finger, Esq. - Exhibits

19-23

Order to Show Cause - Affirmation in Support by Kenneth Finger, Esq. - Exhibits ¹	24-34
Affirmation in Opposition by Theresa Gugliotta, Esq. - Exhibits ²	35-41

Upon the foregoing papers and the proceedings held on June 24, 2013, these motions are determined as follows:

Plaintiff commenced this action for, inter alia, declaratory and injunctive relief relating to a parking space at an apartment complex owned and operated by defendants. Plaintiff is a tenant in the apartment complex. Defendants moved to dismiss twenty three causes of action in the amended complaint. In an order dated February 27, 2013 (Jamieson, J.), the Court dismissed a number of the causes of action and ruled the seventh, eighth, ninth, tenth, eleventh and twentieth causes of action remain (Affirmation in Opposition by Kenneth Finger, Exhibit 2). In the remaining causes of action, plaintiff alleges he is entitled to a declaratory judgment declaring the lease or some of its provisions unconscionable, declaring plaintiff to be a tenant under the rent stabilization laws and the emergency tenant protection act, declaring all rents and rent increase for all apartments at the premises frozen pursuant to the emergency tenant protection act and the rent stabilization laws, and directing defendants to issue a statutory tenancy and lease renewal. Plaintiff alleges the plaintiff and the plaintiff's wife have medical conditions and disabilities and have been issued handicap parking permits, defendants failed to provide plaintiff with parking spaces for disabled persons, defendants have discriminated against persons with disabilities, and defendants have violated the fair housing protection act. Plaintiff seeks an order directing defendants to provide handicapped parking spaces at the premises.

Plaintiff seeks an order compelling defendants to provide a complete bill of particulars pursuant to the Court's January 28, 2013 order, or alternatively, striking their answers for willful and contumacious failure to provide a proper bill of particulars. Plaintiff served a demand for a bill of particulars on July 18, 2012 (Plaintiff's Exhibit A). Defendants served a letter dated August 27, 2012 stating general objections to the demand for a bill of particulars (Plaintiff's Exhibit B). Defendants served a response to demands for discovery and inspection and for a bill of particulars dated September 28, 2012 (Plaintiff's Exhibit C). Pursuant to a January 28, 2013 court order, defendants served a further response to the demand for bill of particulars on or about February 18, 2013 (Plaintiff's Exhibits D). Plaintiff argues defendants' further response to

¹ The Court is in receipt of a memorandum of law filed by plaintiff's counsel on July 10, 2013. The memorandum of law was filed late and it was not considered on the motions.

² Insofar as the affirmation in opposition was submitted in further support of plaintiff's motion, counsel should note the order to show cause directs that no reply papers shall be accepted. Those arguments in plaintiff's affirmation in opposition which were made in reply were not considered on the motions. At oral argument on June 24, 2013 plaintiff's counsel had an opportunity to state arguments in reply to defendants' affirmation in opposition and defendant's request to submit a written reply was denied.

plaintiff's demand for a bill of particulars is inadequate. Plaintiff contends that defendants' failure to provide particulars as ordered and particulars related to defendants' thirty affirmative defenses and five counterclaims is willful and contumacious. Defendants argue their bill of particulars was served almost a year ago and a supplemental bill of particulars was served in February 2013 and plaintiff failed to timely raise an objection, waiving the right to bring a motion seeking relief related to the bills of particulars.

Defendants previously moved to strike plaintiff's demand for a bill of particulars, objecting to the following items in the demand: Part II (as to all thirty affirmative defenses): b-i, m, q, u; Part III (as to each of the separate affirmative defenses): 14, 15a; and Part IV (as to the counterclaims): 31, 32B, 33A-E, M, N, 34 A-B, E, R-X, 35 A-B. By order dated January 28, 2013 (Lefkowitz, J.), this Court issued an order granting the branch of defendants' motion to strike plaintiff's demand for a bill of particulars to the extent that defendants did not have to respond to items Part II e; Part IV, 31B, L-P, 33B-N, 34A-B, R-X, 35A-B. Defendants were directed to provide a bill of particulars responding to the remaining items in plaintiff's demand for a bill of particulars within twenty days of the order (Plaintiff's Exhibit H).³

The role of a bill of particulars is to amplify the pleadings, including affirmative defenses and counterclaims, "by setting forth in greater detail the nature of the allegations and what the party making them intends to prove" in order to limit proof and prevent surprise at trial (*Northway Engineering, Inc. v Felix Industries, Inc.*, 77 NY2d 332 [1991]; *Jurado v Kalache*, 93 AD3d 759 [2d Dept 2012]; *Jones v LeFrance Leasing Ltd. Partnership*, 61 AD3d 824 [2d Dept 2009]; *Ginsberg v Ginsberg*, 104 AD2d 482 [2d Dept 1984]). The laws relied upon, as well as the facts alleged, must be particularized (*Ramondi v Paramount Fee, LP*, 30 AD3d 396 [2d Dept 2006]; *Alvarado v New York City Hous. Auth.*, 302 AD2d 264 [1st Dept 2003]; *Sacks v Town of Thompson*, 33 AD2d 627 [3d Dept 1969]). A party is required to particularize only that for which they have the burden of proof. A bill of particulars is not a form of disclosure and may not be used to obtain evidentiary material (*Northway Engineering, Inc. v Felix Industries, Inc.*, 77 NY2d at 334; *Tully v Town of North Hempstead*, 133 AD2d 657 [2d Dept 1987]; *Ginsberg v Ginsberg*, 104 AD2d at 484).

Upon review of defendants' further response to demands for verified bill of particulars dated February 18, 2013 (Plaintiff's Exhibit D), defendants shall provide a supplemental response to plaintiff's demand for a bill of particulars dated July 18, 2012 as to demands II f, k-l, n-p; III 1a, 2-4, 5a, c, 6-9, 10a-e, 11-13, 16, 18-30 to the extent the demands relate to the

³ Pursuant to the January 28, 2013 order, the Court noted defendants failed to provide a formal response to plaintiff's demand for a bill of particulars. It appears on the prior motion the parties did not submit defendants' response to demands for discovery and inspection and for a bill of particulars dated September 28, 2012.

remaining claims.⁴ Plaintiff's demands II j, q-t, v; III 1b-d, 5b, d, e, 10f, 14b-g, 15b-f; IV 31B, 32, 33S-T, 34I are stricken as vague, duplicative, beyond the proper scope of a bill of particulars, or they seek evidentiary material. The remaining responses in defendants' further response to demands for verified bill of particulars are sufficient.

Plaintiff served an April 12, 2013 notice of discovery demands pursuant to court order (Plaintiff's Exhibit E). Defendants served a response to discovery demands dated April 29, 2013 (Plaintiff's Exhibit M). Plaintiff argues defendants failed to provide complete responses in violation of prior Court orders. Plaintiff seeks an order compelling defendants to provide supplemental responses to the following demands, or alternatively, striking defendants' answers.

(1) Plaintiff demands production of original notices or other documents with tape alleged to be affixed and taped to any part of the building or any vehicles by plaintiff for testing at a laboratory (Plaintiff's Exhibit E, notice of discovery demands pursuant to court order, demand 1). Defendants provided a copy of notices, but objected to the demand for originals as not timely made and withdrawn at a court conference. Plaintiff argues that pursuant to the Court's March 22, 2013 order (Lefkowitz, J.) and discussions at a compliance conference, defendants were to produce the original documents on May 21, 2013. Plaintiff now seeks to have the documents alleged to have been affixed by tape tested by a forensic testing service. In the event the original documents cannot be produced, plaintiff seeks an order precluding introduction of the originals at trial and directing defendants to provide an affidavit stating no originals exist. Pursuant to the March 22, 2013 order, defendants were directed to produce on or before April 12, 2013 copies of the documents claimed to have been improperly attached by plaintiff to the premises or automobiles and make the originals available to plaintiff for inspection, if demanded in writing by plaintiff on or before April 5, 2013. On this motion, plaintiff fails to demonstrate that any effort was made thereafter to demand a date to inspect the originals and plaintiff provides no information as to why production of the originals and testing at a laboratory are necessary. Plaintiff's opportunity to inspect the original documents is deemed waived and defendants' response to demand 1 is sufficient.

(2)(7) Plaintiff demands production of forms, leases, licenses or other documents in use for parking spaces at the premises on the date plaintiff occupied the third parking space (Plaintiff's Exhibit E, notice of discovery demands pursuant to court order, demand 2). The demand is overbroad, seeking documents pertaining to all parking spaces at the premises. Plaintiff seeks form parking applications and form separate parking leases for all tenants and parking spaces at the premises for the years 2010 through 2012, with the identities of the tenants redacted (Plaintiff's Exhibit E, notice of discovery demands pursuant to court order, demand 7). The demand is overbroad, seeking documents pertaining to all tenants and parking spaces at the premises. Plaintiff seeks an order precluding defendants from offering any evidence regarding the parking application for willful failure to provide a response as directed by the Court. The

⁴ In defendants' further response to demands for verified bill of particulars, defendants failed to provide a response to demands III 16, 18-30.

March 22, 2013 order granted plaintiff leave to serve on or before April 12, 2013 limited document demands, including a demand for the “‘application form’ and ‘form parking lease’ used by defendants during the years 2010 through 2012,” or the demand shall be deemed waived. Insofar as plaintiff fails to demonstrate on this motion that he served a demand seeking these specific documents, the demand is deemed waived. In any event, defendants provided a parking request form executed by plaintiff’s wife and state this is the only relevant parking document (Plaintiff’s Exhibit M, Response to Discovery Demands, p. 1; Affirmation in Opposition by Kenneth Finger, p. 6).

(3) Plaintiff seeks the original building plans prepared by Moeger which are not publicly available (Plaintiff’s Exhibit E, notice of discovery demands pursuant to court order, demand 3). Although plaintiff argues pursuant to the March 22, 2013 order and the May 7, 2013 compliance conference defense counsel was directed to produce original documents, plaintiff does not argue defendants were directed to produce original building plans and it appears such language is not included in a prior order. Defendants argue the original building plans were produced by the defendants at the office of the plaintiff on May 21, 2013 for examination by the plaintiff. In any event, plaintiff fails to demonstrate on this motion that the original building plans are relevant.

(4)(5)(6) Plaintiff demands documents and records regarding the rental assignment and use of each and every parking space at the premises from 2010 through 2012, including parking rent rolls and parking assignment lists (Plaintiff’s Exhibit E, notice of discovery demands pursuant to court order, demand 4). Plaintiff demands documents evidencing the number of parking spots available at the premises with identities of the tenants redacted (Plaintiff’s Exhibit E, notice of discovery demands pursuant to court order, demand 5). Plaintiff seeks rent rolls, records or documents regarding the number of parking spaces available at the premises for any tenant, employee, or contractor, with the amount of consideration paid redacted, for the periods 2010 through 2012 (Plaintiff’s Exhibit E, notice of discovery demands pursuant to court order, demand 6). In response to demand 6, defendants state there are no separate rent rolls as to parking spaces, but they attach a parking list with space numbers and the associated apartment. The March 22, 2013 order granted plaintiff leave to serve a demand for “documents regarding the number of parking spaces at the premises, including parking rent rolls limited to the years 2010 through 2012...” Insofar as demand 4 seeks documents regarding the rental assignment and use of each and every parking space at the premises from 2010 through 2012, including parking assignment lists, this demand is overbroad. Insofar as plaintiff seeks the number of parking spaces at the premises, including parking rent rolls for 2010 through 2012, defendants’ response to demand 6 sufficiently addresses the information sought (Plaintiff’s Exhibit M, Response to discovery demands, p. 2, Exhibit C).

(8) Plaintiff demands documents for the period 2010 through 2012, demonstrating the number of parking spaces leased or available on the premises in those years with the identification of the individual who leased or used the parking space redacted. The demand seeks information that is not relevant to the claims. In any event, defendants’ response to demand 6 and the parking list provided is sufficient.

(9) Plaintiff demands resolutions, amended certificate of occupancy, correspondence or other records permitting the use of ten parking spaces required for guest use by defendants' zoning ordinance and permitting the ten spaces to be rented to individual tenants as set forth in the September 19, 2011 affidavit of Lisa DeRosa. Plaintiff argues he submitted a FOIL request to the City of White Plains for correspondence from the City granting approval to use the ten guest parking spaces required by the zoning variance for the buildings use as rental spaces for the tenants. Although plaintiff argues such documents are material and necessary, it is unclear on this motion how such documents are relevant to the remaining claims and it appears the demand is overbroad.

(10) Plaintiff demands documents reflecting the designation and number of handicapped parking at the premises, including the number of handicapped parking spaces required by law to be made available to the tenants for the years 2010 through 2012. Defendants' response that there are no documents reflecting the designation and number of handicapped parking and there are no documents in defendants' possession regarding the number of handicapped parking spaces which defendants were required by law to make available at the premises is sufficient.

Insofar as plaintiff seeks additional documents in response to the April 12, 2013 notice of discovery demands, plaintiff fails to demonstrate on this motion that such discovery is relevant to the surviving claims. As plaintiff fails to demonstrate on this motion that defendants willfully and contumaciously failed to provide court ordered discovery, an order striking defendants' answers is not warranted under the circumstances of this case (*see Voutsinas v Voutsinas*, 43 AD3d 1156, 843 NYS2d 130 [2d Dept 2007]; *Gateway Tit. & Abstract, Inc. v Your Home Funding, Inc.*, 40 AD3d 919, 836 NYS2d 667 [2d Dept 2007]).

Plaintiff seeks a protective order striking defendants' demand for medical reports and authorizations related to plaintiff's claim that the landlord failed to provide handicapped parking in violation of the Fair Housing Protection Act of 1988, 42 U.S.C. 3604(f). Plaintiff argues at oral argument on a prior motion on January 28, 2013, the Court stated that if plaintiff withdrew claims for physical, emotional, and psychological injuries, plaintiff would not have to provide responses to document demands regarding his physical and mental condition. Plaintiff's counsel withdrew plaintiff's claims for physical injuries, but did not withdraw plaintiff's claims for psychological and emotional injuries (Plaintiff's Exhibit I, transcript January 28, 2013, p. 14; Plaintiff's Exhibit H, Order dated January 28, 2013, p.6).⁵ Plaintiff argues both the plaintiff and his spouse, a co-tenant at the premises, have produced permanent handicap permits. Plaintiff argues the state issued the handicap permits and the issuance of these permits establishes the plaintiff and his wife have disabilities requiring handicap parking. New York State Department

⁵ The Court found plaintiff did not need to provide responses to demands with respect to plaintiff's physical condition and treatment. Plaintiff was directed to respond to demands regarding his psychological and emotional conditions and treatment, unless plaintiff discontinued his claim for damages based upon emotional and psychological injuries within twenty days of the order.

of Motor Vehicles makes the determination to issue a permanent handicap parking permit with supporting documentation from a physician. Plaintiff argues proof of an impairment has been conclusively established by the issuance of the permit by the state and defendants are not entitled to medical or psychiatric records related to the issuance of the parking permit.

Defendants seek an order compelling plaintiff to provide medical and mental health authorizations without limitation as to time. Defendants argue plaintiff never discontinued the claim that he suffered psychological injuries as a result of defendants' acts and authorizations should be provided for mental health providers. Defendants argue as plaintiff has put his physical and mental condition at issue by arguing he has a right to handicapped parking, defendants have a right to authorizations for medical and mental health records without limitation as to time. The authorizations previously provided were reportedly limited to a one year period and defendants rejected them. Defendants argue the states issue permits, but send them to cities, towns, and villages for distribution. Most states do not check to determine whether the signature on the form is in fact a physician and communities have their own standards for distributing handicapped permits. Defendants argue they are entitled to medical and mental health records to determine whether or not plaintiff is in fact disabled under the law so as to entitle him to bring a cause of action predicated on the claim that he is handicapped.

Plaintiff alleges plaintiff and his wife were issued handicap parking permits, defendants failed to provide plaintiff with parking spaces for disabled persons, defendants discriminated against persons with disabilities, and violated the Fair Housing Protection Act. Pursuant to 42 USCS 3604(f)(2), defendants may not discriminate against any person in the terms, conditions, or privileges of rental of a dwelling, or in the provision of services or facilities in connection with such a dwelling because of handicap of that person or any person associated with that person. Pursuant to 42 USCS 3602(h), handicap means a physical or mental impairment which substantially limits one or more of such person's major life activities, a record of having such an impairment, or being regarded as having such an impairment. Here, plaintiff alleges he and his wife had medical conditions and were issued handicap parking permits. Such permits and the supporting documentation from a physician for the permits clearly constitute a record of having such an impairment or being regarded as having an impairment. Any additional medical records of the plaintiff and whether the permit was properly issued to the plaintiff are not relevant to the claims in this action. Plaintiff should not have to provide authorizations and medical records related to the medical conditions for which a permit was issued. Insofar as defendants' seek medical reports and authorizations related to plaintiff's claim that the landlord failed to provide handicapped parking, this demand is granted to the limited extent that plaintiff shall provide an authorization for a physician permitting defendants to obtain the supporting documentation for the issuance of the handicap parking permit.

Insofar as defendants seek an order compelling plaintiff to provide mental health authorizations without limitation as to time, the Court notes plaintiff alleges psychological and emotional injuries including emotional distress and anxiety in his bill of particulars (Affirmation in Support by Theresa Gugliotta, Exhibit P, p.25). It is unclear on this motion whether plaintiff alleges he sustained psychological and emotional injuries related to the remaining claims.

Accordingly, plaintiff shall provide on or before September 16, 2013 authorizations for mental health providers who treated plaintiff from 2009 to present, or alternatively, a statement by plaintiff's counsel in writing discontinuing plaintiff's claim for damages based on psychological and emotional injuries.

Plaintiff seeks a protective order prohibiting defendants from demanding a further bill of particulars. Plaintiff argues defendants' seventy-five page demand for a bill of particulars included demands 47 through 511, demanding the grounds for each and every allegation in the complaint (Defendants' Affirmation in Opposition, Exhibit 4, Demand for a Verified Bill of Particulars dated July 18, 2012). Plaintiff objected to the demands as beyond the scope of a bill of particulars and plaintiff argues the demands are harassing, improper, and overly burdensome (Plaintiff's Exhibit P, Plaintiff's Verified Bill of Particulars dated August 23, 2012). Plaintiff contends that defendants' demand should be stricken in its entirety and any demand by defendants for a further bill of particulars should be denied.

Defendants submit opposition, seeking responses to certain demands related to the remaining causes of action in their demand for a verified bill of particulars. Defendants argue demands 301 through 321 are related to the remaining causes of action, demands 406 through 428 are related to the seventh, eighth, ninth, tenth, and eleventh causes of action, and demands 493 through 499 are related to the twentieth cause of action.

CPLR 3103 provides the court may make a protective order denying, limiting, conditioning or regulating the use of any disclosure device to prevent unreasonable annoyance, expense, embarrassment, disadvantage, or other prejudice to any person or the courts. Pursuant to CPLR 3042(e), if a demand for particulars, or a part thereof, is improper or unduly burdensome, the court may vacate or modify the demand or make such order with regard to the improper or unduly burdensome demand as is just. The purpose of a bill of particulars is to amplify the pleadings, limit proof, and prevent surprise at trial (*Fremont Inv. & Loan v Gentile*, 94 AD3d 1046 [2d Dept 2012]). Generally, a demand for the reasons or grounds underlying conclusory allegations in the complaint are proper to obtain a more expansive statement of the plaintiff's allegations (*Forte v Perry*, 108 AD2d 895 [2d Dept 1985]). Insofar as defendants seek responses to demands 301 through 321 in defendants' demand for a verified bill of particulars, these demands are stricken, as they pertain to claims that were dismissed pursuant to the February 27, 2013 Order (Jamieson, J.). Plaintiff is directed to provide a supplemental bill of particulars as to demands 406 through 415, and 417 through 428, which relate to the allegations in the seventh, eighth, ninth, tenth, and eleventh causes of action. Demand 416 is stricken, as it is overbroad.⁶ Plaintiff is directed to provide a supplemental bill of particulars as to demands

⁶ Demand 416 demands that plaintiff set forth the grounds for the allegations that plaintiff and plaintiff's wife are persons suffering from medical conditions and disabilities, giving complete and specific details as to each of the alleged conditions and disabilities, the diagnosis, prognosis, treatment dates, doctor's names and addresses, hospital names and addresses and treatment dates, including all treatment for physical and mental conditions.

493 through 499, which relate to the twentieth cause of action.

Defendants seek an order dismissing the complaint or precluding plaintiff from offering evidence for failure to comply with defendants' discovery demands and defendants' demand for a verified bill of particulars. "The nature and degree of the penalty to be imposed on a motion pursuant to CPLR 3126 is a matter generally left to the discretion of the Supreme Court" (*Carbajal v Bobo Robo, Inc.*, 38 AD3d 820 [2d Dept 2007]). To invoke the drastic remedy of striking a pleading or of preclusion a court must determine that the party's failure to disclose is willful and contumacious (*Greene v Mullen*, 70 AD3d 996 [2d Dept 2010]; *Kingsley v Kantor*, 265 AD2d 529 [2d Dept 1999]). Willful and contumacious conduct can be inferred from repeated noncompliance with court orders or a failure to comply with court ordered discovery over an extended period of time, coupled with the lack of an adequate excuse for the failure (*Mei Yan Zhang v Santana*, 52 AD3d 484 [2d Dept 2008]; *Carbajal v Bobo Robo, Inc.*, 38 AD3d 820 [2d Dept 2007]; *Prappas v Papadatos*, 38 AD3d 871 [2d Dept 2007]). As defendants fail to demonstrate on this motion that plaintiff willfully and contumaciously failed to provide court ordered discovery, an order dismissing the complaint or precluding is not warranted under the circumstances of this case (*see Voutsinas v Voutsinas*, 43 AD3d 1156, 843 NYS2d 130 [2d Dept 2007]; *Gateway Tit. & Abstract, Inc. v Your Home Funding, Inc.*, 40 AD3d 919, 836 NYS2d 667 [2d Dept 2007]).

Plaintiff seeks a protective order prohibiting defendants from obtaining a deposition of the plaintiff which defendants failed to do pursuant to the preliminary conference order. Pursuant to the June 18, 2012 preliminary conference order, plaintiff was to be produced for a deposition on September 21, 2012 at Dalco Reporting (Plaintiff's Exhibit N). Plaintiff argues he appeared on that date for a deposition at defense counsel's office and defense counsel refused to take the deposition. Defense counsel has reportedly not indicated at any time in the last year that he has any intention of taking plaintiff's deposition. Plaintiff argues defendants waived plaintiff's deposition. Although plaintiff argues defense counsel failed to follow for plaintiff's deposition, there is no showing on this motion that plaintiff's counsel made any effort to communicate with defense counsel regarding producing his client for a deposition on September 21, 2012 or any other date. Plaintiff shall be produced for a deposition on October 1, 2013 from 10 a.m. to 5 p.m., and continuing on October 2, 2013 if necessary. The deposition shall be conducted at a court reporter's office in White Plains to be designated by plaintiff's counsel on or before September 17, 2013. If defense counsel fails to appear, plaintiff's counsel shall put a statement on the record and the deposition will be deemed waived.

Plaintiff seeks the return of previously disclosed medical records based on the dismissal of plaintiff's causes of action for harassment and intentional infliction of emotional distress. Plaintiff argues the records should be returned and a confidentiality order should be issued directing defendants not to reproduce, discuss, or disseminate the records or their contents. It is unclear on this motion what medical records were exchanged and whether they are relevant to the remaining causes of action. In any event, the Court is not inclined under these circumstances to direct that they be returned to plaintiff's counsel or that a confidentiality order be issued.

Plaintiff seeks an order compelling the depositions of John DeRosa, Sr. and Bridgette Rocha, arguing John DeRosa, Sr. is the only witness with knowledge of defendants' zoning variance, use of the parking spaces, and violation of the zoning ordinance from the time of the building of the rent stabilized premises. Plaintiff argues the witness produced by defendants, Lisa DeRosa, testified she had no knowledge of these matters at her deposition. Plaintiff argues Lisa DeRosa testified she did not have knowledge of basic operations of the office and the management of parking spaces, indicating Bridgette Rocha was the employee with this knowledge. Plaintiff fails to submit Lisa DeRosa's deposition transcript on this motion. In opposition, defendants argue John DeRosa, Sr. is eighty-six years old, is not in good health, and is unable to testify at a deposition. He reportedly has no substantive information to add to the record.

A corporate entity has the right to designate which of its representatives will appear for a deposition (*Barone v A&P*, 260 AD2d 417 [2d Dept 1999]). However, depositions of additional witnesses may be ordered "where it is demonstrated that the employee who had already been deposed had insufficient knowledge, or was otherwise inadequate, and that the employee proposed to be deposed can offer information that is material and necessary to the prosecution of the case" (*Aronson v Im*, 2011 NY Slip Op 633 [2d Dept 2011]; *Mercado v Alexander*, 227 AD2d 391 [2d Dept 1996]; *Zollner v City of New York*, 204 AD2d 626 [2d Dept 1994]). The burden is on the examining party to show the witness already deposed did not have sufficient knowledge of the relevant facts or was otherwise inadequate (*Seattle Pac. Indus., Inc. v Golden Val. Realty Assoc.*, 54 AD3d 930 [2d Dept 2008]). Plaintiff fails to demonstrate on this motion that Lisa DeRosa was an inadequate witness and that John DeRosa, Sr. and Bridgette Rocha would be able to offer testimony material and necessary to the prosecution of the case (*see Aronson v Im*, 2011 NY Slip Op 633 [2d Dept 2011]).

In view of the foregoing, it is

ORDERED that the branch of plaintiff's motion for an order compelling defendants to provide a complete bill of particulars pursuant to the Court's January 28, 2013 order is granted to the extent that defendants shall provide on or before September 24, 2013 a supplemental response to plaintiff's demand for a bill of particulars dated July 18, 2012 as to demands II f, k-l, n-p; III 1a, 2-4, 5a, c, 6-9, 10a-e, 11-13, 16, 18-30 to the extent the demands relate to the remaining claims. Plaintiff's demands IIj, q-t, v; III 1b-d, 5b, d, e, 10f, 14b-g, 15b-f; IV 31B, 32, 33S-T, 34I are stricken; and it is further

ORDERED that the branch of plaintiff's motion seeking an order compelling defendants to provide further responses to plaintiff's discovery demands is denied; and it is further

ORDERED that the branch of plaintiff's motion seeking an order striking defendants' answers for failure to provide discovery is denied; and it is further

ORDERED that the branch of plaintiff's motion seeking a protective order striking defendants' demand for medical reports and authorizations related to plaintiff's claim that the

landlord failed to provide handicapped parking is denied. Plaintiff shall provide on or before September 24, 2013 an authorization for plaintiff's physician permitting defendants to obtain the supporting documentation for the issuance of the handicap parking permit; and it is further

ORDERED that the branch of plaintiff's motion seeking a protective order precluding defendants from demanding a further bill of particulars is denied. Plaintiff is directed to provide on or before September 24, 2013 a supplemental bill of particulars as to demands 406 through 415, 417 through 428, and 493 through 499. Demand 416 is stricken, as it is overbroad; and it is further

ORDERED that the branch of plaintiff's motion seeking a protective order prohibiting defendants from obtaining a deposition of the plaintiff is denied. Plaintiff shall be produced for a deposition on October 1, 2013 from 10 a.m. to 5 p.m., and continuing on October 2, 2013 if necessary. The deposition shall be conducted at a court reporter's office in White Plains to be designated by plaintiff's counsel on or before September 17, 2013. If defense counsel fails to appear, plaintiff's counsel shall put a statement on the record and the deposition will be deemed waived; and it is further

ORDERED that the branch of plaintiff's motion seeking the return of previously disclosed medical records and seeking a confidentiality order pertaining to the records is denied; and it is further

ORDERED that the branch of plaintiff's motion seeking an order compelling the depositions of John DeRosa, Sr. and Bridgette Rocha is denied; and it is further

ORDERED that the branch of plaintiff's motion seeking an award of costs and attorney's fees is denied, as plaintiff has failed to demonstrate that defendants' conduct was frivolous (22 NYCRR 130-1.1[c]); and it is further

ORDERED that the branch of defendants' motion seeking an order compelling plaintiff to comply with prior discovery demands and orders and to provide medical and psychiatric authorizations without limitation as to time is granted to the extent that plaintiff shall provide on or before September 24, 2013 authorizations for mental health providers who treated plaintiff from 2009 to present, or alternatively, a statement by plaintiff's counsel in writing discontinuing plaintiff's claim for damages based on psychological and emotional injuries; and it is further


ORDERED that the branch of defendants' motion seeking an order dismissing the complaint and precluding plaintiff from offering evidence for failure to comply with defendants' discovery demands and defendants' demand for a verified bill of particulars is denied; and it is further

ORDERED that the branch of defendants' motion seeking sanctions and attorneys' fees is denied; and it is further

ORDERED that all parties are directed to appear in the Compliance Part, Courtroom 800, for a conference on October 9, 2013 at 9:30 a.m.

The foregoing constitutes the decision and order of this Court.

Dated: White Plains, New York
September 11, 2013



HON. JOAN B. LEFKOWITZ, J.S.C.

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