San-Dar Assoc. v Fried
2014 NY Slip Op 31027(U)
April 17, 2014
Sup Ct, New York County
Docket Number: 150850/12
Judge: Jeremy R. Feinberg
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 84R

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SAN-DAR ASSOCIATES AND S&M 52nd FEE, LLC,

Plaintiffs,

Index No.: 150850/12

-against-

Order
Pursuant to CPLR 3104

JACQUELINE FRIED AND RIVER 52 LLC,

Defendants,

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JEREMY R. FEINBERG, SPECIAL REFEREE:

By order dated September 12, 2013, the Honorable Doris Ling-Cohan referred "monitoring discovery and resolving any and all future discovery disputes, as well as to supervise settlement negotiations" to the Special Referee Part in accordance with CPLR 3104 (the "September 12, 2013 Order"). This matter was assigned to me on November 25, 2013. At the initial conference and thereafter, Plaintiffs were represented by Maia M. Walter, Esq. of Kaufman, Friedman, Plotnicki & Grun LLP. Defendants were represented by Andrew Weltchek, Esq. of Weltchek Law.

Between November 25, 2013 and March 11, 2014, I met with counsel numerous times in an attempt to narrow, if not resolve, the discovery disputes described below. Also within that span, consistent with the Court's direction that settlement discussions take place, I met with counsel and their clients multiple times in an ultimately unsuccessful attempt to settle the entire

matter. I note that both sides, and particularly their counsel, appeared in good faith and made a meaningful effort to settle, but the parties' differences made a negotiated resolution impossible.

Following the final conference, I directed counsel to file letter briefs on the remaining discovery issues by April 1, 2014. I received those filings on that date, fully submitting the matter before me.

BACKGROUND

Familiarity with the Court's prior decisions in this case is assumed. As is revealed in the pleadings contained in the Court's electronic records, this is a real estate dispute between two neighboring buildings - 425 East 52nd Street (the "425 Building") and 429 East 52nd Street (the "429 Building"). The 429 Building is owned by Plaintiff S&M 52nd Fee, LLC ("Fee") and its current net lessee is Plaintiff San-Dar Associates ("San-Dar"). The 425 Building is currently owned by Defendant River 52 LLC ("River 52") and was formerly owned by Defendant Fried.

Plaintiffs' amended complaint seeks damages and injunctive relief for alleged encroachment by Defendants on certain development rights that had been reserved to Plaintiffs (*see e.g.*, Amended Complaint ¶ 25). Specifically, Plaintiffs claim that by adding an additional story onto the 425 Building,

Defendants have violated a restrictive covenant contained in the governing 50-year lease for the 425 Building. That covenant reserved the development rights of the 425 Building for the 429 Building, should the latter seek to submit a zoning application for a development project.[1]

Defendants answered the complaint on February 13, 2013, asserting counterclaims and affirmative defenses. Shortly thereafter, on February 20, 2013, Defendants filed an amended answer with amended affirmative defenses and counterclaims. Following Plaintiffs' reply to the amended answer on March 12, 2013, Defendants filed another amended answer with second amended affirmative defenses and second amended counterclaims. Plaintiffs moved to dismiss that pleading, and Defendants cross-moved for leave to interpose yet another amended answer with third amended affirmative defenses and third amended counterclaims. By Order dated January 17, 2014, Justice Ling-Cohan granted Plaintiffs' motion dismissing the second amended answer and denied Defendants' cross-motion regarding the third amended answer due to certain enumerated procedural defects.

Thus, the amended answer dated February 20, 2013 is the current operative pleading in this case. Defendants have, by

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[1] Justice Ling-Cohan initially dismissed the complaint for failure to include Fee as a necessary party in an order dated December 7, 2012. Plaintiff remedied this defect with an amended complaint filed December 18, 2012.

notice of motion dated March 5, 2014, sought leave of Justice Ling-Cohan to submit a third amended answer. That motion, which has now been fully briefed, is currently *sub judice*.

Finally, the Court issued a 90-day warning to the parties, by Order dated February 27, 2014 (the "February 27, 2014 Order"). The February 27, 2014 Order directs that the note of issue must be filed within 90 days (i.e., May 28, 2014), but also directed that the date could be extended for one month for good cause shown by application to the Special Referee.

THE DISCOVERY DISPUTES BEFORE THE COURT

There are presently four discovery disputes in need of resolution. These disputes include:

- Whether Defendants are entitled to production of all correspondence between the parties;
- Where and when the deposition of Alex Dembitzer, a trustee of the trusts that are members of Defendant River 52 LLC, will take place;
- Whether, where, and when the deposition of Defendant Jacqueline Fried will take place; and
- Whether Defendants are entitled to measure the 429 Building pursuant to CPLR 3120(a)(1)(ii).

I address each of these issues in turn, below.

DISCUSSION

1. Production of all communications between the parties

Defendants have sought all communications between the parties to further their counterclaims regarding certain building services purportedly required by their contractual relationships (Amended Answer ¶¶ 11-23). In response to an initial objection from Plaintiffs that the request was overly broad, Defendants offered to limit the scope of that request, to the range of May 12, 1994 (the date Defendant Fried acquired the 425 Building) to the present (Def. Mem. 4).

Plaintiffs counter that even this restriction is too burdensome to comply with; they argue in conclusory fashion both that they have already produced many documents of this nature relating to their claims in this case and that Defendants should be required to provide a more specific list of documents to be produced (Pl. Mem at 10-11).

Recognizing that the CPLR requires "full disclosure of all evidence material and necessary in the prosecution or defense of the action" (CPLR 3101; *Allen v. Crowell-Collier Publishing Co.*, 21 NY2d 403, 406 [1968]), and that the words "material and necessary" are to be interpreted liberally, with the test being one of "usefulness and reason" (*Id.*), I conclude that Defendants

are entitled to the additional discovery they seek. Specifically, I adopt the limitation most recently offered by Defendants and direct that, to the extent not already produced, Plaintiff shall produce all communications, electronic or otherwise, between the parties from May 12, 1994 to the present. This production is to be completed by no later than May 12, 2014.

2. Depositions of Alex Dembitzer and Jacqueline Fried

A. Dembitzer

There is no dispute between the parties about whether Mr. Dembitzer should be deposed. Indeed, Defendants do not dispute that he has relevant knowledge of the facts and circumstances underlying this matter. Where they part company is when and where he should be deposed: Defendants assert that Mr. Dembitzer, a resident of Israel, should not be deposed until his next scheduled trip to the United States, between May 15 and 20 for his daughter's graduation. During conferences, although not in their current brief, Defendants also offered to make Mr. Dembitzer available for deposition earlier, in Israel.

Plaintiffs counter that, should Mr. Dembitzer's deposition raise issues that require further court involvement, such timing risks running afoul of the Court's note of issue deadline of May 28, 2014, set in the February 27, 2014 Order. They do not offer any other meaningful argument as to when the deposition should

otherwise occur, however.

Under the circumstances, and in light of my conclusion regarding Defendant Fried, below, I conclude that the deposition of Dembitzer should take place in New York City, on May 15, 2014 and continue day-to-day thereafter (subject to obligations with respect to Dembitzer's daughter's graduation ceremony) until completed. Should Dembitzer's travel plans change, such that he will be in New York City sooner, the parties are directed to meet and confer as to whether such earlier date(s) for his deposition are practical.

B. Fried

Defendants urge that there is no basis to depose Defendant Fried, who is Dembitzer's mother. In conferences, Defendants have characterized Fried as an individual who (1) had no involvement in the matters in dispute; (2) would be burdened by overseas travel; and, (3) is a resident of Israel who is not normally in New York City. In their current motion papers, Defendants have not taken steps to establish these facts by affidavit, nor do they offer case law to support their position. Instead, they repeat an offer made in conference, that they will waive any claims for building services prior to September 25, 2009 and agree not to call Fried as a witness in this case (Def. Mem. at 4) in an attempt to further obviate any potential ties Fried has to this dispute. Plaintiffs rejected that proposal, in

favor of taking the deposition.

In addition to pointing out her role as a named Defendant, Plaintiffs offer some basis to conclude that Fried has knowledge relevant to the facts at issue in this dispute (Pl. Mem. at 10 n.6 [citing Fried's role in leasing the 425 Building from 2005-2009 and as a "main negotiator" for the entity now managing the 425 Building]). Although that alone might be sufficient to justify a deposition, I also recognize that Defendants are themselves seeking (and I am ordering production of) communications from Plaintiffs to which Fried would have been a party. Moreover, Fried's testimony appears to be relevant to Defendants' second and third counterclaims (Amended Answer ¶¶ 11-23). Taken together, and in the absence of a sufficient demonstration of hardship, I see no sufficient basis to prevent the deposition from proceeding (*cf. Wygocki v. Milford Plaza Hotel*, 38 AD3d 237 [1st Dept 2007] [medical reasons justified not requiring deposition of 76-year old plaintiff in New York]).

I direct that the Fried deposition take place during the same time period as Dembitzer's next trip to New York City (i.e., May 15-20) and specifically set the date of May 19, 2014.[2] Counsel may agree upon another mutually convenient date between May 15-20, or on any earlier trip to New York City Dembitzer

[2] Traveling with her son, Dembitzer, should help ameliorate any actual burden on Fried.

makes, if they wish.

3. Measurements of the 429 Building

There is no question that a key issue in this case is whether and to what extent Defendants have encroached on development rights that purportedly belong to Plaintiffs by virtue of the agreements governing the relationship between the 425 Building and the 429 Building. Defendants seek access to the 429 Building pursuant to CPLR 3120(a)(1)(ii), for purposes of measuring that building in order to defend against Plaintiffs' claims.

Plaintiffs assert that all that is needed to assess the amount of encroachment is to take measurements of the 425 Building. They urge that there is no existing counterclaim in which the Defendants argue that the 429 Building is overbuilt, and thus the only issue that need be resolved is the floor area of the 425 Building. They note, too, that Defendants have since twice sought to interpose such a counterclaim - in the second amended answer that Justice Ling-Cohan dismissed and again, in the proposed third amended answer for which leave is sought in the motion that is *sub judice*.

Plaintiffs also assert that the measurement of the 429 Building would prove to be a scheduling and logistical nightmare, as Plaintiffs would have to allow access to 300 residential units

in order to permit Defendants to measure each. Plaintiffs posit that it would be impossible to accomplish this within the existing discovery deadline set by the Court.

Defendants counter in two ways - first pointing out that in order to prove the existence of any encroachment by Defendants, Plaintiffs must be able to prove the amount of the development rights they have already used in their building. Second, they point out that measuring the 429 Building need not be onerous and burdensome - instead it could be performed by measuring the exterior dimensions of the building and subtracting out common areas from within the building (*e.g.*, mechanical space and elevators) (Def. Mem at 3).

To be sure, the Appellate Division, First Department has held that inspections of real property pursuant to CPLR 3120(a)(1)(ii) should be routinely granted in instances, analogous to those here, where the condition of the real property is a central issue (*Iskowitz v. Forkosh Constr. Co., Inc.*, 269 AD2d 131 [1st Dept 2000]). Plaintiffs urge that there is no live counterclaim that focuses on the measurements of the 429 Building. Even in the absence of such a counterclaim, I nonetheless conclude that the measurements are relevant to a key issue in this case.

There is no dispute that the amount of available development rights is a central, if not the central, issue before the Court.

Plaintiffs will already be measuring the 425 Building - a matter that is not disputed. Defendants should be entitled to defend against the encroachment claim by offering their own theory of where the 429 Building ends and where the portion of the 425 Building purportedly reserved for the development of the 429 Building begins. Defendants are not required to take Plaintiffs' word for the answer to these questions and are entitled to discovery to establish this defense (*Haddad v. Salzman*, 173 AD2d 522 [2d Dept 1991] [inspection and measurements should have been permitted to determine potential violation of zoning laws]).[3]

Thus, I direct that Plaintiffs give Defendants access to the 429 Building for purposes of inspecting it and performing measurements as soon as possible but by no later than May 8, 2014. The parties are to meet and confer immediately in an attempt to agree on a protocol for measurement of the 429 Building that minimizes burden on non-parties. The default, if the parties fail to reach accord within 48 hours of meeting and conferring, will be measuring the exterior of the building and internal common areas of the building, as proposed by Defendants in their brief (Def. Mem. at 3).

Finally, I am mindful of Plaintiffs' concern that the timing

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[3] Similarly, Plaintiffs are not required to accept Defendants' measurements for purposes of trial. But each side should be enabled to develop and present its theory of the case on this key issue to the trier of fact.

of the two depositions and the measurement of the 429 Building, and possible follow up therefrom, could run up against the note of issue deadline of May 28, 2014. The parties are directed to proceed with all of the discovery outlined herein forthwith, and as efficiently as possible. The degree of cordiality and civility shown by counsel in appearances before me strongly suggests that they will be able to complete discovery in the time allotted. Nonetheless, as Justice Ling-Cohan ordered, the parties may seek the one month extension for good cause shown, contemplated in the warning notice contained in the February 27, 2014, by application to me, if necessary.

Accordingly, it is:

ORDERED that to the extent not already produced, Plaintiffs shall produce all communications, whether in paper form or electronic, between the parties from May 12, 1994 to the present. This production is to be completed by no later than May 12, 2014; and it is further

ORDERED that Alex Dembitzer shall appear for a deposition on May 15, 2014, or on any date prior to May 15, 2014 that the parties can mutually agree to. Said deposition shall continue day-to-day until completed (other than subject to obligations related to

Dembitzer's daughter's graduation ceremonies); and it is further

ORDERED that Defendant Jacqueline Fried shall appear for a deposition on May 19, 2014, or on any other date counsel can mutually agree upon during (1) Dembitzer's trip to New York City between May 15 - May 20 or (2) any other earlier trip to New York City that Dembitzer makes; and it is further

ORDERED that Plaintiffs shall permit Defendants to enter and inspect the 429 Building pursuant to CPLR 3120(a)(1)(ii) for the purpose of measuring the building. Said inspection and measurement shall commence as quickly as possible but by no later than May 8, 2014, following the parties meeting and conferring to devise a process that minimizes burden on non-parties. Should the parties fail to agree on such a process within 48 hours of meeting and conferring, the method described by Defendants on page three of their brief dated April 1, 2014 shall be used.

This constitutes the decision and order of the Referee.

Dated: April 17, 2014

JEREMY R. FEINBERG
SPECIAL REFEREE

JEREMY R. FEINBERG

Special Referee