Scialdone v Stepping Stones Assoc., LP
2014 NY Slip Op 33860(U)
June 19, 2014
Supreme Court, Westchester County
Docket Number: 12514/11
Judge: Joan B. Lefkowitz
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[* 1]

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.

FILED AND ENTERED ON 6-20 2014 WESTCHESTER COUNTY CLERK

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

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GREGORY P. SCIALDONE,

Plaintiff,

-against-

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

Defendants.

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DECISION & ORDER

Index No. 12514/11

Motion Date: May 14, 2014
Seq. No. 18

FILED
JUN 20 2014
TIMOTHY C. IDONI
COUNTY CLERK
COUNTY OF WESTCHESTER

LEFKOWITZ, J.

The following papers numbered 1 to 30 were read on this motion by plaintiff for an order pursuant to CPLR 3124 and 3126 compelling defendants to produce all original documents allegedly affixed by the plaintiff to the premises or tenants' automobiles with tape; striking defendants answers for failure to provide discovery in violation of Court orders; compelling defense counsel Kenneth Finger to comply with a subpoena and notice of nonparty deposition served on him on November 20, 2013 and holding him in contempt for failing to appear or move for protective relief; striking certain language contained in defendants' supplemental bill of particulars and precluding defendants from relying on or introducing any additional documents referenced therein; compelling defendants to serve an expert disclosure or be precluded from introducing any testimony from experts at trial; permitting plaintiff to take the out of state deposition of plaintiff's expert Heiki Heitur of Micron Inc. in the State of Delaware; imposing a fine in the amount of $10,000 pursuant to 22 NYCRR 130-1.1(A)(3) and $5,000 pursuant to 9 NYCRR 2526.2 against defense counsel and the defendants for frivolous litigation practices and harassment of a rent stabilized tenant, together with attorneys fees and costs associated with hiring Advanced Investigations to take photographs of discovery documents; issuing a final order of preclusion; and granting plaintiff costs and disbursements related to this action.

Order to Show Cause - Affirmation in Support - Exhibits	1-17
Affirmation in Opposition - Exhibits	18-24
Reply Affirmation - Exhibits	25-30

Upon the foregoing papers, this motion is 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. 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 increases 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 he and his 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 handicap parking spaces at the premises.

Plaintiff moves for an order pursuant to CPLR 3124 and 3126 compelling defendants to produce all original documents allegedly affixed by the plaintiff to the premises or tenants' automobiles with tape, and striking defendants answers for obstruction of discovery in violation of Court orders. Plaintiff argues on May 21, 2013 he appeared at defense counsel's office to inspect seven sets of documents defendants allege plaintiff taped to the premises and automobiles in violation of the lease. When plaintiff began photographing the documents, defense counsel removed the documents from the table. The Court issued a May 28, 2013 compliance conference order directing defendants to provide access at counsel's office to the documents left by plaintiff at the premises or on cars. Plaintiff was to identify an expert, who would be permitted to photograph the documents. Plaintiff moved in relevant part for an order pursuant to CPLR 2221 and 5015(a)(3) vacating, modifying, rearguing and renewing that portion of the May 28, 2013 compliance conference order directing plaintiff to retain an expert to take photographs of the documents at issue. By order dated January 30, 2014 (Lefkowitz, J.), the Court directed that defendants produce at defense counsel's office on or before February 14, 2014 the documents allegedly affixed to the premises by plaintiff to be photographed by an expert retained by the plaintiff. On or before February 7, 2014, plaintiff was to designate in writing an expert to photograph the documents. If plaintiff failed to designate an expert to take such photographs as directed, further discovery related to these documents would be deemed waived.

On February 12, 2014, plaintiff and an investigative expert appeared at defense counsel's office to take photographs of the documents at issue. Plaintiff argues that on February 12, 2014 defendants only produced four sets of documents instead of the seven sets of documents previously produced on May 21, 2013. Upon examining the photographs, plaintiff concluded that defendants failed to produce the original documents. In a February 13, 2014 letter, plaintiff's counsel requested to return to defense counsel's office to photograph all original documents. In the alternative, defense counsel requested that an affidavit be provided that there are no documents with any tape on them claimed to have been taped to the premises or

automobiles.

In opposition, defendants argue that their pleadings in this action do not allege that plaintiff taped documents to the premises or automobiles. Defendants' supplemental bill of particulars alleges plaintiff allowed a dangerous condition to be created by placing a sign, paper or other matter on parked cars (Plaintiff's Exhibit F).[1] With regard to the documents produced for inspection on February 12, 2014, defense counsel states he put some of the piles together making four piles of the several sets of documents and over fifty documents were photographed by plaintiff's investigative expert. Counsel argues that defendants are not in possession of any other documents that were place on the cars or in the building.

Plaintiff fails to demonstrate on this motion that defendants failed to produce the complete set of documents or the original documents at issue. Defense counsel provides a reasonable explanation as to why there were reportedly seven sets of documents at the first inspection and four sets of documents at the second inspection. The documents were not counted or fully examined at the first inspection and it is unclear how many documents were produced at that time. Defense counsel states that he has produced all of the original documents at issue for inspection and photographing pursuant to the January 30, 2014 order. Insofar as plaintiff does not demonstrate on this motion that defendants willfully and contumaciously failed to provide court ordered discovery, an order striking defendants' answers is not warranted (*See Voutsinas v Voutsinas*, 43 AD3d 1156 [2d Dept 2007]; *Gateway Tit. & Abstract, Inc. v Your Home Funding, Inc.*, 40 AD3d 919 [2d Dept 2007]).

In a January 28, 2013 order (Lefkowitz, J.), the Court denied defendants' motion to strike plaintiff's demand for a bill of particulars, finding that it could not be said that as a whole plaintiff's demand for a bill of particulars is unduly burdensome and oppressive. However, the Court determine that defendants did not have to respond to certain sections. 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. On or about February 18, 2013, defendants served a further response to plaintiff's demand for a bill of particulars. Plaintiff later moved in part for an order compelling defendants to provide a complete bill of particulars pursuant to the January 28, 2013 order, arguing defendants' further response to plaintiff's demand for a bill of particulars was inadequate. In a September 11, 2013 order (Lefkowitz, J.), the Court directed defendants to provide a supplemental response to plaintiff's demand for a bill of particulars 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 now moves for an order striking certain language contained in defendants'

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[1] The Court notes the only document submitted indicating documents were attached to the building or automobiles with adhesive is a petition reportedly filed in White Plains City Court (Plaintiff's Exhibit D). Defendants assert this document is a holdover notice, not a pleading in this action.

further response to demand for bill of particulars served on October 8, 2013 as to demands II f, k-l, n-p; III 1a, 2a, 3a, b, 4a, b, c, e, 5a, c, 6a, b, c, d, 7a, b, c, d, e, f, 8a, b, c, 9a, b, d, e, 10a, b, c, e, 11a, b, d, e, 12a, b, d, e, 13a, b, c (Plaintiff's Exhibit K). Plaintiff objects to language included in certain responses stating "this response is objected to insofar as same was struck by order of the Supreme Court dated January 30, 2013. Without prejudice, under protest and with all rights reserved, the following is the response..." Plaintiff argues such language should be stricken, as it is improper, will prejudice plaintiff, and will create problems at trial. Contrary to plaintiff's objection, the demands at issue in plaintiff's bill of particulars were not addressed in the January 30, 2013 order. In the September 11, 2013 order, the Court directs defendants to provide responses to these demands. If defendants objected to the relief set forth in this order, the proper recourse was to timely move to reargue or appeal the order. Accordingly, the language in defendants' further response to demand for bill of particulars served on October 8, 2013 stating "this response is objected to insofar as same was struck by order of the Supreme Court dated January 30, 2013" is hereby stricken.

Plaintiff seeks an order precluding defendants from relying on or introducing any documents into evidence which defendants' bill of particulars responses indicate may exist, but have not been produced. Plaintiff objects to certain language in defendants' further response to demand for bill of particulars stating "plaintiff seeks information which, in many instances, is contained in numerous files and records available to it. Further, certain of these requests may call for the collection of information from various sources. Therefore, the defendants respond on the basis of information now available. Any additional information subsequently located will be provided in a supplemental response pursuant to the applicable provisions of the CPLR." Plaintiff argues this language seeks to reserve defendants' rights to search documents and materials that should have previously been provided and to supplement responses at a later date. Plaintiff requests that the Court strike every response contained in defendants' further response to demand for bill of particulars based on the limiting nature of the responses and the reservation of rights to supplement responses. Plaintiff does not argue that any specific response is insufficient. Defendants object to an order of preclusion related to documents that have not been disclosed. As there has been extensive discovery over a number of years in this case, both the plaintiff and the defendants are precluded from introducing at trial any document not previously disclosed.

Plaintiff seeks an order permitting him to take the out of state deposition of plaintiff's expert Heiki Heitur of Micron, Inc. in the State of Delaware. Plaintiff served an expert witness disclosure dated March 26, 2014 for Heiki Heitur, a senior technologist at Micron, Inc., who is expected to testify as to the print on the September 29, 1987 original lease between the plaintiff and defendants.

In opposition, defendants argue plaintiff has failed to serve a notice of deposition. Defendants object to the expense of attending an out of state deposition and argue plaintiff fails to cite to any authority to conduct the deposition out of state. Defendants argue that it is common practice for the retaining party to have his expert travel to the trial venue to attend a deposition and the trial. In reply, plaintiff argues Mr. Heitur has advised that Micron, Inc. prefers that its employees who give testimony in any legal proceeding be deposed at their laboratory in

Wilmington, Delaware. The testing equipment, a Keyence 600 microscope system, will assist the trier of fact in making determinations and the industrial microscope equipment cannot be transported to New York. Plaintiff argues the deposition would be completed in one day and would be of limited expense to the defendants.

CPLR 3101(d)(1)(iii) requires a showing of special circumstances to warrant the deposition of a party's expert witness. Although this requirement is more than a "nominal barrier" to discovery, such circumstances exist where "physical evidence is lost or destroyed or where some other unique factual situation exists, such as proof that the information sought to be discovered cannot be obtained from other sources" (*Brooklyn Floor Maintenance Co. v Providence Washington Ins. Co.*, 296 AD2d 520, 745 NYS2d 208 [2d Dept 2002](internal citations omitted); *see also Kaufman v Lund Fire Products Co., Inc.*, 8 AD3d 242, 777 NYS2d 686 [2d Dept 2004]). Plaintiff fails to demonstrate there are special circumstances warranting a deposition of plaintiff's expert. An expert disclosure has been served stating the expert's qualifications, the subject matter on which the expert is expected to testify, and a summary of the grounds for the expert's opinion. Although the expert report was not submitted to the Court on this motion, the expert witness disclosure states the report was attached.

Furthermore, an open commission may be issued where necessary or convenient for the taking of a deposition outside of the state (CPLR 3108). A party seeking an open commission must demonstrate not only that the information sought is necessary to the action, but also that the proposed deponent would not cooperate with a notice of deposition or would not voluntarily come within the State. Under such circumstances, the movant demonstrates that the judicial imprimatur accompanying a commission will be necessary or helpful when seeking the assistance of the foreign court in compelling the witness to attend the examination (*Reyes v Riverside Park Community (Stage I), Inc.*, 59 AD3d 219 [1st Dept 2009]; *Susan A. v. Steven J. A.*, 141 AD2d 790 [2d Dept 1998]). Plaintiff fails to demonstrate on this motion that a notice of deposition was served on Mr. Heitur and that he will not voluntarily appear in New York or there is some legitimate reason that he cannot appear in New York. Plaintiff fails to demonstrate on this motion that an open commission is necessary or convenient.

Plaintiff moves for an order compelling defendants to serve an expert disclosure or be precluded from introducing any testimony from an expert at trial. On July 19, 2012, plaintiff served a demand for expert disclosure (Plaintiff's Exhibit M). Defense counsel reportedly stated that defendants had the lease print measured in connection with plaintiff's claims that the lease is inadmissable and cannot be introduced into evidence. Plaintiff asserts the defendants should be compelled to provide an expert witness disclosure related to the inspection of the lease prior to the case being certified, or be precluded from introducing any testimony from an expert at trial. In opposition, defendants argue they have not yet retained an expert witness and the relief sought in this branch of the motion is premature.

CPLR 3101(d)(1)(i) provides that upon request a party shall identify each person it expects to call as an expert witness prior to trial, but it does not specify that such disclosure must be made prior to the filing of the note of issue and certificate of readiness. The statute does not

require a party to respond to a demand for expert witness information within any specific time, nor does it require that a party be precluded from proffering expert testimony merely because of noncompliance with the statute. Even where a party demands an expert disclosure during discovery, a party who fails to respond until after the filing of the note of issue will not automatically be subject to preclusion of its expert's trial testimony (*Rivers v Birnbaum*, 102 AD3d 26 [2d Dept 2012]). Pursuant to the preliminary conference order dated June 18, 2012, all parties are to exchange information relating to expert witnesses in compliance with CPLR 3101 and the governing caselaw. Defendants argue they have not yet retained an expert they expect to call as a witness at trial (*See Rivers v Birnbaum*, 102 AD3d 26 [2d Dept 2012]). Plaintiff's request for a conditional order compelling defendants to serve an expert disclosure or be precluded from introducing testimony from an expert at trial is denied.

Plaintiff served a notice of nonparty deposition and subpoena on November 20, 2014 on defense counsel Kenneth Finger seeking to take his deposition (Plaintiff's Exhibit N). Plaintiff moves for an order compelling Kenneth Finger to comply with the subpoena and notice of deposition and holding him in contempt for failing to appear or move for protective relief. Plaintiff asserts the lease at issue was authored by Finger and Finger, P.C. in 1981 and it breaches the warranties of habitability and quiet enjoyment and its provisions are inadmissible. Plaintiff argues Kenneth Finger will be called as a witness to give testimony concerning the lease. In opposition, Finger states his deposition is not material and necessary. He wrote certain portions of the lease, but did not have anything to do with the size of the print. He argues the lease speaks for itself and the legal work done for the defendants in preparing the lease is subject to the attorney client work privilege.

CPLR 3101(a) requires "full disclosure of all matter material and necessary in the prosecution or defense of an action." The phrase "material and necessary" is "to be interpreted liberally to require disclosure, upon request, of any facts bearing on the controversy which will assist preparation for trial by sharpening the issues and reducing delay and prolixity. The test is one of usefulness and reason" (*Allen v Crowell-Collier Publishing Co.*, 21 NY2d 403 [1968]; *Foster v Herbert Slepoy Corp.*, 74 AD3d 1139 [2d Dept 2010]). Although the discovery provisions of the CPLR are to be liberally construed, "a party does not have the right to uncontrolled and unfettered disclosure" (*Merkos L'Inyonei Chinuch, Inc. v Sharf*, 59 AD3d 408 [2d Dept 2009]; *Gilman & Ciocia, Inc. v Walsh*, 45 AD3d 531 [2d Dept 2007]). As recently held by the Court of Appeals in *Matter of Kapon v Koch*, to obtain nonparty discovery, a party must only show that the nonparty discovery is "material and necessary" to the prosecution or defense of the action. A nonparty subpoena should be quashed "where the futility of the process to uncover anything legitimate is inevitable or obvious or where the information sought is 'utterly irrelevant to any proper inquiry'" (*Matter of Kapon v Koch*, __ NY3d __, 2014 NY Slip Op 02327 [Apr. 3, 2014]). The one seeking to quash the subpoena has the burden of demonstrating the subpoena should be vacated under the circumstances (*Matter of Kapon v Koch*, __ NY3d __, 2014 NY Slip Op 02327 [Apr. 3, 2014]). Here, defendants establish the deposition of Kenneth Finger is not relevant to the remaining claims in the action.

Plaintiff moves for an order awarding sanctions in the amount of $15,000 against defendants and defense counsel pursuant to 22 NYCRR 130-1.1(A)(3) and 9 NYCRR 2526.2 for frivolous, willful, and harassing obstruction of discovery, harassment of a rent stabilized tenant, and violation of court orders, together with attorneys' fees and costs associated with hiring an investigative expert to photograph documents. Insofar as plaintiff seeks costs associated with hiring an investigative expert, the Court notes the May 28, 2013 compliance conference order directed plaintiff to retain an expert to take photographs of the documents at issue. Plaintiff later moved to vacate, modify, renew and reargue this branch of the order, objecting to assuming the expense of hiring a photographer. In the January 30, 2014 order, the Court denied leave to renew or reargue as untimely and found in supervising discovery it was within the Court's discretion to direct plaintiff to retain a photographer to take photographs of the documents.[2] Plaintiff's request seeking that the court impose sanctions upon the defendants and defense counsel is denied, as plaintiff fails to demonstrate that the defendants or defense counsel engaged in frivolous conduct, harassment, or the violation of any Court order (*See* 22 NYCRR 130-1.1).

In view of the foregoing, it is

ORDERED that the branch of plaintiff's motion seeking an order compelling defendants to produce all original documents allegedly placed on the premises or tenants' automobiles is denied; and it is further

ORDERED that the branch of the motion seeking an order striking defendants' answers is denied; and it is further

ORDERED that the language in defendants' further response to demand for bill of particulars served on October 8, 2013 stating "this response is objected to insofar as same was struck by order of the Supreme Court dated January 30, 2013" is stricken; and it is further

ORDERED that the plaintiff and the defendants are precluded from introducing at trial any document not previously disclosed; and it is further

ORDERED that the branch of plaintiff's motion seeking an order permitting him to take the deposition of plaintiff's expert Heiki Heitur of Micron, Inc. out of state is denied; and it is further

ORDERED that the branch of plaintiff's motion seeking a conditional order compelling defendants to serve an expert disclosure or be precluded from introducing testimony from an expert at trial is denied; and it is further

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[2] The Court is frustrated with plaintiff's pattern of repeatedly raising arguments previously addressed and issues decided in prior decisions and orders, delaying discovery and burdening defense counsel and the Court unnecessarily.

ORDERED that the branches of plaintiff's motion seeking an order compelling defense counsel Kenneth Finger to comply with a subpoena and notice of nonparty deposition and holding him in contempt for failing to appear for a deposition are denied; and it is further

ORDERED that the branch of the motion seeking an order imposing sanctions upon the defendants and defense counsel is denied, as plaintiff fails to demonstrate that defendants' or defense counsel's conduct was frivolous; and it is further

ORDERED that the branch of plaintiff's motion seeking an order granting costs and disbursements is denied; and it is further

ORDERED that defendants' request for a monetary award against plaintiff and legal fees incurred in opposing this motion based on plaintiff's frivolous litigation practices is denied; and it is further

ORDERED that all parties are directed to appear in the Compliance Part, Courtroom 800, for a conference on July 2, 2014 at 9:30 a.m. All discovery is to be completed prior to July 2, 2014 and it is anticipated that a trial readiness order will be issued on that date.

The foregoing constitutes the decision and order of this Court.

Dated: White Plains, New York
June 19, 2014

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

TO: Finger & Finger, P.C.
158 Grand Street
White Plains, New York 10601
FAX: 914-949-3608

Theresa Gugliotta, Esq.
405 Tarrytown Road
No. B-1151
White Plains, New York 10607
FAX: 914-997-0332

cc: Compliance Part Clerk