Goldman v Bracker
2016 NY Slip Op 32108(U)
October 26, 2016
Civil Court of the City of New York, New York County
Docket Number: 82806/12
Judge: Sabrina B. Kraus
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CIVIL COURT OF THE CITY OF NEW YORK
COUNTY OF NEW YORK: HOUSING PART F
_____X
JANE H. GOLDMAN, ALLAN H. GOLDMAN, AMYH. GOLDMAN, DIANE G. KEMPER AS EXECUTORS FOR THE ESTATE OF LILLIAN GOLDMAN; THE LILLIAN GOLDMAN FAMILY, L.L.C c/o LGF ENTERPRISES

Petitioner-Landlord

-Against-

DECISION & ORDER
Index No.: L&T 82806/12

HON. SABRINA B. KRAUS

SUZANNE K BRACKER
a/k/a SUZANNE KIMBERLY BRACKER
145 West 55th Street, Apt 3F
New York, NY 10019

Respondent-Tenant
_____X

BACKGROUND

This summary holdover proceeding was commenced by **JANE H. GOLDMAN, ALLAN H. GOLDMAN, AMY H. GOLDMAN, et al** (Petitioners) and seeks to recover possession of Apartment 3F at 145 West 55th Street, New York , NY 10019 (Subject Premises), a rent stabilized apartment, based on allegations that **SUZANNE K BRACKER a/k/a SUZANNE KIMBERLY BRACKER** (Respondent) failed to maintain the Subject Premises as her primary residence.

PROCEDURAL HISTORY

Petitioner issued a Notice of Non-Renewal dated May 23, 2012. The Notice of Petition and Petition are dated September 4, 2012, and the proceeding was initially returnable on October 15, 2012.

On October 31, 2012, Respondent, appeared *pro se,* and filed an answer, alleging defenses including failure to state a cause of action, improper service, general denial, and retaliatory eviction.

On October 15, 2012, Petitioner moved for an order striking Respondent's affirmative defenses and granting leave for discovery. On March 19, 2013, the court (Wendt, J), granted the motion to the extent of striking the third affirmative defense of improper service, and granting leave for Petitioner to conduct a deposition and request document production going back to September 2010. The proceeding was marked off calendar, pending discovery.

Over the course of the next three years there was additional motion practice concerning ongoing disputes regarding discovery. The court issued four orders requiring Respondent to produce specific documents and appear for a deposition. The deposition took place in the courthouse on April 4, 2016 and May 6, 2016.

A trial date was set for August 1, 2016, and the parties were going to arrange to view the surveillance footage outside of court.

On August 1, 2016, the trial was adjourned on consent to September 8, 2016. By September 8, 2016, Respondent had retained counsel, and Petitioner agreed by stipulation to adjourn the proceeding to October 13, 2016, and to view the surveillance footage, at Petitioner's attorneys' office, on September 27, 2016.

On September 27, 2016, Respondent and her attorney appeared at Petitioner's attorneys' office and viewed the footage for approximately four hours. The surveillance tapes consist of 302 consecutive days of footage. Respondent argues it would take approximately fifty hours to view the tapes in their entirety. Respondent requested additional time to view the videos, but Petitioner would not allow an additional opportunity to view the tapes in their office. Petitioner suggested Respondent purchase a set of the DVD's to view on their own.

THE PENDING MOTION

On October 13, 2016, Respondent moved for an order pursuant to CPLR §3126(2) excluding the video surveillance footage from trial, based on Petitioner's failure to allow Respondent to view the entirety of the footage in Petitioner's office. Petitioner submitted opposition papers, the court heard argument and the Court reserved decision.

CPLR §3126(2) provides for a preclusion order where a party has failed to comply with discovery in a manner that is willful and contamious (*DA Bennett LLC v Cartz* 113 AD3d 135). Petitioner's conduct does not rise to said level. The issue before the court is whether Petitioner complied with the court's order to disclose the video surveillance footage, by allowing Respondent one afternoon with her attorney to view the footage, or whether Petitioner is required to provide Respondent with additional opportunity to view the footage or provide Respondent with a copy of the material.

On April 18, 2013, the court, (J. Wendt) issued an order, which stated, in part " (i)f landlord intends to use any tapes or digital recordings in the trial herein it shall allow Respondent to view their recordings at the office of Petitioner's attorney at least one month before the trial."

Petitioner's position is that they have complied with the court's order, in allowing Respondent the opportunity to view the video, and Petitioner's attorney provided Respondent with a summary of the video surveillance and a copy of the day to day surveillance report. Petitioner remains willing to provide Respondent with a copy of the DVD's, but at Respondent's cost.

CPLR § 3101(I) requires "full disclosure of any films, photographs, video tapes or audio tapes, including transcripts or memoranda thereof, involving a [party]." Although the court, (J. Wendt) required Petitioner to allow Respondent to view the footage in Petitioner's counsel's office, given the vast amount of surveillance footage, it is unduly burdensome to require Petitioner's counsel to accommodate in their office, Respondent and her attorney, to view the entirety of fifty hours of footage, nor does this court find that same was intended by Judge Wendt in his previous order.

The mandatory nature of disclosure of video codified in the CPLR reflects that parties "... have a substantial need to view surveillance films before trial .... (b)ecause films are so easily altered, and there is a very real danger that deceptive tapes, inadequately authenticated, could contaminate the trial process... Authentication of surveillance films can be a slow and painstaking process, and because of the potentially devastating effects of such evidence, it would be improper to curtail a (party's) efforts to do so (*DiMichel v South Buffalo Ry. Co.* 80 NY 2d 184, 196)."

However, the answer is not for Respondents to spend a month in Petitioner's office reviewing the tapes, but rather to afford them their own opportunity, using their own expert if so inclined to review the authenticity and reliability of the evidence (Id).

It is Respondent who is requesting an opportunity to view the surveillance footage in its entirety. Respondent is to be provided with a copy of the DVDs, at Respondent's cost, so as to view at her leisure. Since it is Respondent's request to view the entirety of the videos, Respondent must bear the cost of same. " ... (E)ach party should shoulder the initial burden of financing his own suit, and based upon such a principle, it is the party seeking discovery of documents who should pay the cost of their reproduction (*Rubin v Alamo Rent A Car* 190 A.D.2d 661, at 663)."

Based on the foregoing, Respondent's order to show cause is granted to the extent of requiring Petitioner to provide Respondent with a copy of the video material, at Respondent's cost, November 7, 2016. Respondent shall have an additional month to review said material and have same evaluated by her own expert. The parties are to meet at Petitioner's counsel's office on Monday, December 14, 2016, to afford Respondent an additional final opportunity to review the original footage.

The proceeding is adjourned to December 19, 2016, 9:30 am, Part F, room 830, for trial.

This constitutes the decision and order of this Court.

Dated: October 26, 2016
New York, New York

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Hon. Sabrina B. Kraus, J.H.C.

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