| **High Class Realty SB LLC v Binder** |
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| 2018 NY Slip Op 31555(U) |
| February 16, 2018 |
| Supreme Court, Kings County |
| Docket Number: 520978/16 |
| Judge: Lawrence S. Knipel |
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At an IAS Term, Central Compliance Part of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 16th day of February, 2018.

P R E S E N T:

HON. LAWRENCE KNIPEL,
Justice.

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HIGH CLASS REALTY SB LLC,

Plaintiff,

- against -

RIANA BINDER and MARINA SHEYKMAN,

Defendants.

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**DECISION AND ORDER**

Index No. 520978/16

Mot. Seq. No. 4

| The following e-filed papers read herein: | NYSCEF Docket No.: |
|---|---|
| Notice of Motion, Affirmation (Affidavit), and Exhibits Annexed | 51-67 |
| Affirmations in Opposition and Exhibits Annexed | 71-72, 73 |
| Reply Affirmation | 75 |

The plaintiff High Class Realty SB LLC (the plaintiff) moves for an order (1) pursuant to CPLR 3104 (d), setting aside the order, dated August 10, 2017 (the prior order); (2) upon setting aside the prior order, for leave, pursuant to CPLR 2221 (d), to reargue the separate motions to dismiss of the defendants Marina Sheykman (Sheykman) and Riana Binder (Binder, and collectively with Sheykman, the defendants), dated July 24, 2017, and July 27, 2017, in Seq. No. 2 and 3, respectively (collectively, the prior motions) and, upon reargument, denying the prior motions; and (3) pursuant to CPLR 3103 (a), granting the plaintiff a nunc pro tunc protective order regarding the defendants' separate notices to admit (collectively, the notices of admit).

It is undisputed that neither of the prior motions was accompanied by an affirmation of good faith pursuant to 22 NYCRR 202.7 (a) (2) and (c). Thus, the prior motions should have been denied on that ground alone (*see JPMorgan Chase Bank, Natl. Assn. v Levenson*, 149 AD3d 1053, 1054 [2d Dept 2017]; *Perez v Stonehill*, 121 AD3d 960, 961 [2d Dept 2014]; *Pardo v O'Halleran Family Chiropractic*, 131 AD3d 1214, 1215 [2d Dept 2015]; *Congregation Beth Shalom of Kingsbay v Yaakov*, 130 AD3d 769, 771 [2d Dept 2015]; *Matter of Greenfield v Board of Assessment Review for Town of Babylon*, 106 AD3d 908 [2d Dept 2013]; *Natoli v Milazzo*, 65 AD3d 1309, 1310-1311 [2d Dept 2009]). Accordingly, the prior order is *vacated*. Leave to reargue the prior motions is *granted*, and upon reargument, the prior motions in Seq. No. 2 and 3 are each *denied*.

The remaining branch of the plaintiff's motion which is for a nunc pro tunc protective order, pursuant to CPLR 3103 (a), regarding the defendants' notices to admit is *denied* as to items 1 through 6 in each of the defendants' notices to admit, item 12 in Sheykman's notice to admit, and item 22 in Binder's notice to admit; and is *granted* as to items 7 through 11 and items 13 through 28 in Sheykman's notice to admit, and is further *granted* as to items 7 through 21 and items 23 through 34 in Binder's notice to admit. "[T]he purpose of a notice to admit is only to eliminate from contention those matters which are not in dispute in the litigation and which may be readily disposed of" (*32nd Ave. LLC v Angelo Holding Corp.*, 134 AD3d 696, 698 [2d Dept 2015]). A notice to admit is not to be employed to obtain information in lieu of other disclosure devices, such as the taking of depositions before trial, depositions upon written questions or interrogatories, but only to

eliminate from the issues in litigation matters which will not really be in dispute at the trial (*see Falkowitz v Kings Highway Hosp.*, 43 AD2d 696, 696 [2d Dept 1973]; *see also Taylor v Blair*, 116 AD2d 204, 207-208 [1st Dept 1986] ["The sole function of . . . a notice (to admit) is to expedite the trial by eliminating from contention that which is public knowledge or easily provable and which the party reasonably believes is not in dispute."]).

To a large extent, the notices to admit here are improper under these principles. Items 1 through 6 in each of the defendants' notices to admit, item 12 in Sheykman's notice to admit, and item 22 in Binder's notice to admit are the proper subject of a notice to admit; that is, whether the plaintiff is a real estate brokerage (item 1); whether the plaintiff is licensed by the State of New York (item 2); whether the plaintiff's license number is 109930165 (item 3); whether an Eduard Safanov (Safanov) was a real estate salesperson associated with the plaintiff (item 4); whether Safanov's license number is 10401256073 (item 5); whether "[t]his action is claiming commission due for Sheykman's purchase of . . . Apartment 3U, 2626 Homecrest Avenue, Brooklyn, New York" (item 6); and whether the plaintiff had no written agreement with Binder (item 12 in Sheykman's notice to admit and item 22 in Binder's notice to admit). These items are proper as they seek admissions with respect to clear-cut matters of fact as to which the defendants reasonably believe there can be no dispute or controversy (*see* CPLR 3123 [a]).

On the other hand, the remaining items in the defendants' notices to admit (items 7 through 11 and items 13 through 28 in Sheykman's notice to admit, and items 7 through 21 and items 23 through 34 in Binder's notice to admit) are inconsistent with the basic purpose

underlying a notice to admit; by way of illustration, whether Safanov met Sheykman at an open house at another location (item 7 in Sheykman's notice to admit); whether Safanov learned about the apartment for sale from Sheykman who saw it on Craig's List (item 7 in Binder's notice to admit); and whether Safanov contacted Binder's boyfriend to get access to the apartment (item 20 in Sheykman's notice to admit and item 8 in Binder's notice to admit). With respect to the foregoing items, the defendants' use of their respective notices to admit as substitutes for existing discovery devices was improper (*see Jonas v Liberty Lines Transit, Inc.*, 142 AD2d 554 [2d Dept 1988]; *see also Berg v Flower Fifth Ave. Hosp.*, 102 AD2d 760, 760-761 [1st Dept 1984] ["Essentially, the notices (to admit) here amount to a deposition on written questions which, in this case, would permit (a party) the benefit of an examination before trial conducted solely by leading questions, which, it has been observed justice and fair play dictate . . . should not be allowed. To allow the notice to admit to become perverted into a further form of deposition in the nature of written interrogatories would defeat and detract from their intended purpose."] [internal quotation marks, alterations, and citation omitted]).

***Conclusion***

Accordingly, it is

ORDERED that the branch of the plaintiff's motion which is, pursuant to CPLR 3104 (d), setting aside the order, dated August 10, 2017, is *granted*, and the order, dated August 10, 2017, is hereby *vacated*; and it is further

ORDERED that the branch of the plaintiff's motion which is for leave, pursuant to CPLR 2221 (d), to reargue the defendants' respective motions to dismiss in Seq. No. 2 and 3 is *granted*, and, upon reargument, each such motion is *denied* for lack of an accompanying affirmation of good faith as required by 22 NYCRR 202.7 (a) (2) and (c); and it is further

ORDERED that the remaining branch of the plaintiff's motion which is for a nunc pro tunc protective order, pursuant to CPLR 3103 (a), regarding the defendants' respective notices to admit is *granted* as to items 7 through 11 and items 13 through 28 in the defendant Sheykman's notice to admit, and is *further granted* as to items 7 through 21 and items 23 through 34 in the defendant Binder's notice to admit, but is *denied* as to items 1 through 6 in each of the defendants' notices to admit, item 12 in the defendant Sheykman's notice to admit, and item 22 in the defendant Binder's notice to admit; and it is further

ORDERED that the plaintiff shall respond to items 1 through 6 in each of the defendants' notices to admit, item 12 in the defendant Sheykman's notice to admit, and item 22 in the defendant Binder's notice to admit, in each instance, within 20 days after electronic service of this decision and order by the applicable defendant on the plaintiff's counsel.

~~The parties are reminded of their next scheduled appearance before Justice Devin P. Cohen, Part 91, Central Compliance Part, on February 20, 2018.~~

This constitutes the decision and order of the Court.

ENTER FORTHWITH,

J. S. C.

Justice Lawrence Knipel