Leon v Harlan
2018 NY Slip Op 31682(U)
July 12, 2018
Supreme Court, New York County
Docket Number: 153936/15
Judge: Nancy M. Bannon

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY - PART 42

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LAURA LEON

Plaintiff

DECISION AND ORDER

-against-

INDEX NO.: 153936/15

WYATT HARLAN and 327 CENTRAL PARK WEST CONDOMINIUM BOARD

MOT. SEQ. 005

Defendants

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NANCY M. BANNON, J.

I. Background

In this nuisance action, the plaintiff, Laura Leon, a classical pianist who plays and teaches piano in her Central Park West apartment, complains that the defendant, Wyatt Harlan, her upstairs neighbor, makes "disturbing noises" including the use of a "gong" and the playing of "techno-music", in violation of the condominium by-laws. Harlan and the condominium board, defendant 327 Central Park West Condominium Board of Managers (327 CPW), answered the complaint and asserted cross-claims and counterclaims.

Harlan asserted a nuisance counterclaim against the plaintiff and asserted a single cross-claim against 327 CPW sounding in nuisance, breach of fiduciary duty and indemnification. Harlan alleged that the plaintiff was permitted to play the piano "almost non-stop at excessive noise levels for six years" in violation of the condominium's by-laws. Harlan is seeking money damages as well as injunctive relief against the plaintiff to prohibit her from playing the piano in violation of local laws and the condominium's governing documents, and injunctive relief against 327 CPW requiring it to enforce the condo by-laws and prohibit the plaintiff from playing the piano or requiring her to soundproof the apartment. 327 CPW cross-claimed against Harlan for indemnification and/or contribution.

The plaintiff sold her apartment in July 2016, while discovery was proceeding in this case. After a mediation session, in April 2017, she settled with the insurer for defendant Harlan

but counsel for Harlan rejected the settlement, allegedly done without his knowledge, and refused to sign the stipulation of discontinuance on behalf of his client. The plaintiff discontinued her claims against defendant 327 Central Park West Condominium Board of Managers (327 CPW) by stipulation dated July 27, 2017.

In July 2017, defendant Harlan filed the instant motion pursuant to CPLR 3126 to strike the plaintiff's reply to her nuisance counterclaim on the ground that the plaintiff failed to comply with discovery demands and court orders. The plaintiff opposes that motion and cross-moves pursuant to CPLR 3212 for summary judgment dismissing Harlan's counterclaim and for sanctions (22 NYCRR 130-1.1), arguing that the counterclaim is now moot since she sold the apartment in 2016. Defendant 327 CPW cross-moves for summary judgment dismissing defendant Harlan's cross-claim against it.

II. Discussion

(A) Defendant Harlan's Motion

CPLR 3126 authorizes the court to sanction a party who "refuses to obey an order for disclosure or wilfully fails to disclose information which the court finds ought to have been disclosed" and that "a failure to comply with discovery, particularly after a court order has been issued, may constitute the "dilatory and obstructive, and thus contumacious, conduct warranting the striking of the [a pleading]." Kutner v Feiden, Dweck & Sladkus, 223 AD2d 488, 489 (1st Dept. 1998); see CDR Creances S.A. v Cohen, 104 AD3d 17 (1st Dept. 2012); Reidel v Ryder TRS, Inc., 13 AD3d 170 (1st Dept. 2004).

In support of her motion pursuant to CPLR 3126, filed July 20, 2017, defendant Harlan alleges that the plaintiff failed to comply with the court's orders to appear for a deposition. The court's compliance conference order dated April 27, 2017, directed the parties to conduct and complete depositions by September 1, 2017, in caption order. After rejecting the purported settlement on behalf of his client, counsel for Harlan, on July 19, 2017, contacted counsel for both the plaintiff and 327 CPW in an attempt to schedule depositions. According to Harlan's counsel, the plaintiffs' counsel replied that he would do nothing in regard to depositions since there was "nothing left" of the case following the settlement with the insurer. Harlan's counsel replied that a counter claim remained and the court's compliance conference order remained in effect. Counsel for the plaintiff thereafter ignored a second attempt by Harlan's counsel to schedule depositions.

The plaintiff does not dispute the allegations made by Harlan, but merely argues that her motion is frivolous since it was brought prior to the then-existing September 1, 2017, deposition deadline. The court notes that a subsequent compliance conference order dated September 14, 2017, states that depositions were not conducted and directs that depositions be conducted on or before December 15, 2017, with "Harlan to be deposed first, Leon second and 327 third" and that discovery shall proceed as to the claims remaining after the plaintiff's discontinuance as to 327 CPW. The order does not attribute the delay to any party.

While it is undisputed that the plaintiff missed court deadlines for depositions, Harlan has not established that such conduct rises to the level of "contumacious" conduct so as to warrant striking a pleading. In any event, inasmuch as the court issued a discovery conference order after all papers on Harlan's motion to strike the plaintiffs' reply were filed, setting new deadlines, Harlan's motion must be denied as moot. Any non-compliance with the September 14, 2017, order, may be the subject of a separate motion. In that regard, the court notes that the last Note of Issue date was set as October 31, 2017, and the dates were marked "final" but no Note of Issue has been filed.

(B) Plaintiff's Cross-Motion

The plaintiff cross-moves for summary judgment dismissing defendant Harlan's counterclaim in its entirety as moot since she sold the apartment and moved out in July 2016. It is well settled that the proponent of a motion for summary judgment is entitled to that relief upon a prima facie showing, by proof in admissible form, that there are no triable issues of fact. See Winegrad v New York Univ. Med. Ctr., 64 NY2d 851 (1985). Once the movant meets this burden, it becomes incumbent upon the party opposing the motion to come forward with proof in admissible form to raise a triable issue of fact. See Alvarez v Prospect Hospital, 68 NY2d 320 (1986); Zuckerman v City of New York, 49 NY2d 557 (1980).

The plaintiff has not met her burden in the first instance as to the portion of Harlan's claim which seeks relief other than injunctive relief. She correctly argues that any claim seeking injunctive relief, *i.e.* having her stop the piano playing, would be rendered moot upon her leaving the apartment. However, the counterclaim seeks more than injunctive relief - it also seeks compensatory and punitive damages from the plaintiff for the years that the alleged nuisance was ongoing. The plaintiff also argues that the claim is moot since she "circulated" a stipulation of settlement to defendant Harlan. However, she fails to also state that Harlan rejected the settlement.

Further, where, as here, it appears that the facts essential to oppose a motion for summary judgment "exist but cannot then be stated" (CPLR 3212[f]), a court may deny the motion. See Schlichting v Elliquence Realty, LLC, 116 AD3d 689 (2nd Dept. 2014); Wesolowski v St. Francis Hospital, 108 AD3d 525 (2nd Dept. 2013). Discovery is not complete in this case. Indeed, as stated above, the most recent compliance conference order states that depositions had not yet been conducted. As such, the parties will appear for a further status conference on October 4, 2018.

Frivolous conduct is defined by that statute as that which "is completely without merit in law and cannot be supported by a reasonable argument for an extension, modification or reversal of existing law," is undertaken to delay or prolong the litigation, or asserts material factual statements that are false. See 22 NYCRR 130-1.1(c); Tornheim v Blue & White Food Products, Corp., 88 AD3d 869 (2nd Dept. 2011); Benishai v Benishai, 83 AD3d 420 (1st Dept. 2011). That branch of her cross-motion is denied as the plaintiff has not demonstrated that Harlan's motion constitutes frivolous conduct within the meaning of the statute. Indeed, the plaintiff does not dispute that she caused some delays in discovery.

Therefore, the plaintiff's cross-motion is granted in part and the counterclaim is dismissed insofar as it seeks injunctive relief and the motion is otherwise denied

(C) Defendant 327 CPW's Cross-Motion

The cross-motion of defendant 327 CPW for summary judgment dismissing defendant Harlan's cross-claim is granted. As correctly argued by 327 CPW, the allegations and arguments made by Harlan in regard to the cross-claim are without merit. First, as noted above, Harlan asserts a single e counterclaim which appears to conflate claims of nuisance, breach of fiduciary duty and indemnification. As for the nuisance portion of the claim, since it is not disputed that the plaintiff no longer resides in the apartment, there can be no need for 327 CPW to restrict her piano playing or require her to soundproof the apartment. Nor is there any factual basis or decisional authority to support her claims for indemnification or breach of fiduciary duty. Thus, defendant 327 CPW has met its burden on its summary judgment motion, and defendant Harlan has failed to raise any triable issue of fact. See CPLR 3212.
In opposition, Harlan submits only an affirmation of her attorney. Since the attorney claims no personal knowledge of the facts, the affirmations are without probative value or evidentiary significance on this motion. See Zuckerman v City of New York, supra; Trawally v East Clarke Realty Corp., 92 AD3d 471 (1st Dept. 2012); Thelen LLP v Omni Contracting Co. Inc., 79 AD3d 605 (1st Dept. 2010) *lv denied* 17 NY3d 713 (2011).

III. Conclusion

The motion of defendant Wyatt Harlan to strike the plaintiff's reply to her counterclaim for failure to provide discovery is denied. The plaintiff's cross-motion for summary judgment dismissing defendant Harlan's counterclaim is granted to the extent that the counterclaim is dismissed insofar as it seeks injunctive relief and the cross-motion is otherwise denied, without prejudice. The cross-motion of defendant 327 Central Park West Condominium is granted and the cross-claim of defendant Wyatt Harlan against it is dismissed. The disposition of these motions leaves for trial the plaintiff's counterclaim against defendant Harlan and that branch of Harlan's counterclaim against the plaintiff that is not seeking injunctive relief.

Accordingly, it is

ORDERED that the motion of defendant Wyatt Harlan to strike the plaintiff's reply to her counterclaim for failure to provide discovery is denied, and it is further,

ORDERED that the plaintiff's cross-motion for summary judgment dismissing defendant Wyatt Harlan's counterclaim is granted to the extent that the counterclaim is dismissed insofar as it seeks injunctive relief and the cross-motion is otherwise denied, without prejudice, and it is further,

ORDERED that the cross-motion of defendant 327 Central Park West Condominium is granted and the cross-claim of defendant Wyatt Harlan against it is dismissed, and it is further,

ORDERED that the parties shall appear for a status conference on October 4, 2018, at 10:30 a.m.

This constitutes the Decision and Order of the court.

Dated: July 12, 2018

, JSC

HON. NANCY M. BANNON