

Krulewitz v 201 W. 21st St. Tenants Corp.

2018 NY Slip Op 32559(U)

October 3, 2018

Supreme Court, New York County

Docket Number: 151003/17

Judge: Lynn R. Kotler

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. LYNN R. KOTLER, J.S.C.

PART 8

JAMIE KRULEWITZ

INDEX NO. 151003/17

MOT. DATE

- v -
201 WEST 21ST STREET TENANTS CORP.

MOT. SEQ. NO. 004

The following numbered papers were read on this motion to/for strike
Notice of Motion/Petition/O.S.C. — Affidavits — Exhibits
5/15/18 So-Ordered Stipulation
NYSCEF Doc No(s). 57-60
NYSCEF Doc No(s). 61

This action arises from property damage due to water incursions in plaintiff's cooperative apartment. Plaintiff is the shareholder and proprietary lessee for Unit 2K (the "apartment") in the building known as 201 West 21st Street, New York, New York 10011, which in turn is owned by the defendant. Previously, in an order dated August 2, 2018, the court directed defendant to submit to the court all board minutes from January 1, 2014 through the present to the court for in camera review. Defendant has now submitted the board minutes to the court for review. The results of the court's review, as well as plaintiff's motion to strike, which will be discussed infra, are the subject of this decision/order.

By way of background, in a demand dated July 20, 2017, plaintiff sought, inter alia, "[a]ll documents related to and concerning board minutes, internal memoranda, resolutions, correspondence, maintenance requests, comments on and other response to such requests (by email or otherwise) concerning leaks and/or repair of the leaks in the Building, the leaks affecting the Apartment, and the water and mold damage in the Apartment" from January 1, 2014 to date.

In motion sequence number, 002 filed December 7, 2017, plaintiff moved to, inter alia, strike defendant's answer because "no discovery documents or response has been sent by defendant." Defendant in turn cross-moved to dismiss plaintiff's complaint for failing to provide discovery. That motion was resolved pursuant to a 3/6/18 so-ordered stipulation which provided that:

Pursuant to P's demand dated July 20, 2017, the following to be produced w/i 30 days:

- Board minutes, internal memos, maintenance requests, resolutions, repair records & invoices
Maintenance log
Contractor/employee list
Internal emails & all emails for relevant period as specified in Plaintiff's demand 7/20/17 & correspondence
Compensation & repair offers &/or agreements

Dated: 10/3/18

HON. LYNN R. KOTLER, J.S.C.

- 1. Check one: [] CASE DISPOSED [X] NON-FINAL DISPOSITION
2. Check as appropriate: Motion is [] GRANTED [] DENIED [X] GRANTED IN PART [] OTHER
3. Check if appropriate: [] SETTLE ORDER [] SUBMIT ORDER [] DO NOT POST
[] FIDUCIARY APPOINTMENT [] REFERENCE

Scanned to New York State EFO

Coop policies for leaks & related damage
Coop's insurance
Records of leaks in other apartments/building & related damage
Records of alteration review process
Reports from relevant authorities

Alongside this list are the words "to the extent not previously provided." Defendant also reserved the right to serve a demand for a supplemental BP and defendant was to inspect the apartment on a mutually agreeable date.

Plaintiff then filed a motion on April 24, 2018 to amend her complaint concerning ongoing leaks and to strike defendant's answer for failure to provide discovery. In a decision/order dated June 4, 2018, the court granted the amendment and noted that the discovery issues in the motion were resolved pursuant to a so-ordered stipulation dated May 15, 2018 which directed defendant to: [1] respond to plaintiff's demands dated June 20, 2017 and April 23, 2018 within 30 days to extent not already provided; and [2] "provide affidavit of defendant representative as to unavailable documents, in applicable, w/in 30 days." Plaintiff also agreed to respond to defendant's demand dated April 5, 2018 within 30 days.

The August 2, 2018 order directing an *in camera* review stemmed from an affidavit provided by defendant in response to a so-ordered stipulation dated May 15, 2018, wherein Janice Cebollero, who is currently employed by First Service Residential as the Property Manager for the defendant since 2016. At a compliance conference held before the court, plaintiff's counsel raised concerns regarding the accuracy of said affidavit. In that affidavit, Cebollero attested under oath based upon her search of defendant's records that:

The only documents I found responsive to plaintiff's First Demand for Discovery and Inspection were the following documents: the Fungal (Mold) Investigation Report submitted by JLC Environmental Consultants, Inc. dated August 11, 2015; Proline Finishing Corp's estimate dated September 28, 2015; JMA Consultants, Inc. report dated December 4, 2017; emails between plaintiff and defendant with subject line "Appointment with Building Engineer Today"; emails between plaintiff and defendant with subject line "Leak in closet".

The only documents I found responsive to plaintiff's Second Demand for Discovery and Inspection were several photographs.

In light of plaintiff's counsel's concerns, the court ordered defendant to submit the board minutes for *in camera* review in the August 2, 2018 order. That order further directed plaintiff to move to compel defendant to comply with her demand dated January 20, 2017 by "specifically identifying any deficiencies with defendant's response..."

Plaintiff brought a motion to strike defendant's answer (motion sequence number 004), which was marked submitted on September 12, 2018. Defendant opposes that motion, arguing that plaintiff did not follow the court's 8/2/18 directed to move to compel and identify deficiencies in defendant's response. Defendant further maintains that it has fully complied with the court's prior orders, has otherwise provided all material and relevant discovery and that Cebollero's affidavit is not vague or incredible.

Discussion

CPLR 3101(a) provides that "[t]here shall be full disclosure of all matter material and necessary in the prosecution or defense of an action." In determining whether the information sought is subject to discovery, "[t]he test is one of usefulness and reason" (*Allen v. Crowell-Collier Publ. Co.*, 21 NY2d 403, 406, [1968]). Upon review, the court finds that the board minutes contain material and relevant information concerning plaintiff's claims. To wit, there are references to a 2nd Floor Roof Project, which describe the installation/replacement of windows and terrace doors for certain units including plaintiff's

apartment. Further, there are numerous discussions in the minutes about parapet wall repair and facade restoration. Another notation indicates that: "key apartment renovations" for apartment 2K were completed.

The Board Minutes for October 23, 2017 state in pertinent part as follows:

2K reported that water had been coming in from her close from her patio. The staff ran a test, but was unable to identify where it was coming from. Shareholder complained of a smell coming from closet.

The Board Minutes for March 21, 2018 provide as follows:

Apt 2K – The shareholder has not granted access to the bathroom – the Court has ordered access to her apartment. The problem could be originating from outside.

Given that plaintiff's claims arise from leaks "caused by issues outside the apartment", ongoing leaks and that plaintiff was constructively evicted from her terrace due to roof repairs made by defendant, the court can find no reason why these board minutes were not disclosed to plaintiff upon due demand.

In light of the foregoing, the court finds that defendant has been deficient in meeting its discovery obligations in this case. Further, Cebollero's affidavit presents a serious issue which the court must resolve: either Cebollero did not have access to or otherwise fully review defendant's records, Cebollero misapprehended defendant's obligations and what exactly would constitute a responsive document or Cebollero flatly lied and secreted relevant and material information.

Despite the underlying cause and/or rationale, defendant's actions have served to delay this action, Further, Cebollero's affidavit is frivolous within the meaning of the court rules. 22 NYCRR 130-1.1[c] defines conduct as frivolous if:

[1] it is completely without merit in law and cannot be supported by a reasonable argument for an extension, modification or reversal of existing law;

[2] it is undertaken primarily to delay or prolong the resolution of the litigation, or to harass or maliciously injure another; or

[3] it asserts material factual statements that are false.

Defendant's conduct is the type of conduct which Part 130 was designed to discourage. Defendant has had numerous opportunities to provide the subject discovery, and still resisted turning over relevant and material information even in the face of an *in camera* review. There is no basis in law which would justify defendant's failure to turn over the specific board minutes this court identified herein. Accordingly, plaintiff's motion is granted to the extent that defendant and defense counsel are sanctioned \$500 each for their frivolous conduct. The court further grants plaintiff's motion to the extent that defendant is directed to turn over, within 14 days from the date of service of this order with notice of entry:

[1] all material and relevant board minutes, internal memos, maintenance requests, resolutions, repair records & invoices and maintenance log for the period January 1, 2014 to date;

[2] a contractor/employee list in connection with any work performed or relating to the apartment from January 1, 2014 to date;

[3] all emails and correspondence for the period from January 1, 2014 to date;

[4] any compensation & repair offers &/or agreements in connection with any work performed or relating to the apartment from January 1, 2014 to date;

[5] any documents concerning defendant's policies for leaks & related damage for the period from January 1, 2014 to date;

[6] the defendant's insurance policy documents for the period from January 1, 2014 to date; and

[7] all records of leaks in other apartments in defendant's building for the period from January 1, 2014 to date.

To the extent that such documents do not exist, defendant is directed to provide a detailed affidavit from a custodian of defendant's records detailing the search conducted for same and attesting to their non-existence. The determination of whether said person shall be produced for a deposition shall be held in abeyance pending the subject disclosure.

The nature of the remaining records and/or plaintiff's need for same has not been sufficiently explained by plaintiff so as to warrant an order concerning same. Therefore, the court declines to address same without prejudice to renew.

While defendant has engaged in dilatory and frivolous conduct, the court cannot say that an order striking its answer is warranted. Such relief is a drastic remedy, and plaintiff is certainly in possession of some discovery. However, any further conduct in derogation of the parties' discovery obligations may result in such drastic relief. Accordingly, the balance of the motion is denied at this time.

Conclusion

In accordance herewith, it is hereby

ORDERED that plaintiff's motion is granted to the extent that defendant and defense counsel are sanctioned \$500 each for their frivolous conduct and defendant is directed to turn over, within 20 days from the date of service of this order with notice of entry:

[1] all material and relevant board minutes, internal memos, maintenance requests, resolutions, repair records & invoices and maintenance log for the period January 1, 2014 to date;

[2] a contractor/employee list in connection with any work performed or relating to the apartment from January 1, 2014 to date;

[3] all emails and correspondence for the period from January 1, 2014 to date;

[4] any compensation & repair offers &/or agreements in connection with any work performed or relating to the apartment from January 1, 2014 to date;

[5] any documents concerning defendant's policies for leaks & related damage for the period from January 1, 2014 to date;

[6] the defendant's insurance policy documents for the period from January 1, 2014 to date; and

[7] all records of leaks in other apartments in defendant's building for the period from January 1, 2014 to date.

To the extent that such documents do not exist, defendant is directed to provide a detailed affidavit from a custodian of defendant's records detailing the search conducted for same and attesting to their non-existence; and it is further

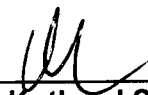
ORDERED that the motion is otherwise denied without prejudice to renew; and it is further

ORDERED that in light of the court's order, the compliance conference presently scheduled for October 16, 2018 is hereby adjourned to October 30, 2018 at 9:30am; and it is further

ORDERED that defendant is directed to retrieve the documents submitted for *in camera* review within 14 days from the Part 8 courtroom or they will be discarded by the court.

Any requested relief not expressly addressed herein has nonetheless been considered and is hereby expressly rejected and this constitutes the decision and order of the court.

Dated: 10/3/18
New York, New York

So Ordered: 

Hon. Lynn R. Kotler, J.S.C.