Manna Amsterdam Ave. LLC v West 73rd Tenants Corp.

2020 NY Slip Op 32966(U)

September 8, 2020

Supreme Court, New York County

Docket Number: 157764/2017

Judge: Melissa A. Crane

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. MELISSA ANNE CRANE** ***Justice***

PART **IAS MOTION 15EFM**

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MANNA AMSTERDAM AVENUE LLC

Plaintiff,

- v -

WEST 73RD TENANTS CORP.

Defendant.

---X

INDEX NO. 157764/2017

MOTION DATE 02/07/2020, 04/02/2020, 05/12/2020

MOTION SEQ. NO. 010 011 012

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 010) 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287

were read on this motion to/for STRIKE PLEADINGS.

The following e-filed documents, listed by NYSCEF document number (Motion 011) 292, 293, 294, 295, 296, 297, 298, 299, 300

were read on this motion to/for SUBPOENA.

The following e-filed documents, listed by NYSCEF document number (Motion 012) 301, 302, 303, 304, 305, 306, 307, 308, 309

were read on this motion to/for QUASH SUBPOENA, FIX CONDITIONS.

Motion sequence nos. 010, 011 and 012 are consolidated for disposition.

In this action for economic loss, defendants West 73rd Tenants Corp., Firstservice Residential New York, Inc., Cooper Square Realty, Inc., Kathleen Murphy, Victoria Bruni, Stan Metelis, Ann Clarke, Aleka Mazarahis, Danny Ben Ari, Ken Borland and John Does/ABC Companies 1-10 (Fictitious Person/Corporations as Currently Unknown) (collectively, defendants), move, pursuant to CPLR 3126 and 3042 (b), for an order striking plaintiff's bill of particulars filed on January 6, 2020 (motion sequence no. 010).

Plaintiff, Manna Amsterdam Avenue LLC d/b/a Gina La Fornarina (Manna or plaintiff), opposes and cross-moves, pursuant to CPLR 3042 (b), 3043 (b) and (c) and the common law

construed thereunder, for an order granting plaintiff leave and deeming timely served, *nunc pro tunc*, plaintiff's supplemental verified bill of particulars dated January 2, 2020 and served on January 6, 2020 (010).

In motion sequence no. 011, plaintiff moves, pursuant to CPLR 2307, for an order compelling the Fire Department of the City of New York (FDNY), Bureau of Legal Affairs/CDLS Unit, 9 MetroTech Center, 401 Floor, Brooklyn, New York 11201 to produce to plaintiff the last known address of Battalion Chief Patrick G. Tansey (retired) to permit plaintiff to serve a subpoena ad testificandum on Battalion Chief Tansey (Tansey Subpoena). The motion is unopposed.

In motion sequence no. 012, plaintiff moves for an order: (a) pursuant to CPLR 2103 (b) (2), 2304, 3101, 3103 and 3107, quashing the subpoena ad testificandum and duces tecum dated February 27, 2020, served on James Valentine by defendants and returnable on March 18, 2020 (Valentine Subpoena) ; and (b) pursuant to 22 NYCRR Part 130-1.1, awarding plaintiff costs and attorney's fees incurred on this motion practice due to defendants' alleged frivolous conduct in failing to withdraw the Valentine Subpoena. The motion is also unopposed.

Background

Plaintiff brings this action for economic loss as a result of a fire that occurred on January 8, 2015 at Manna. At the time of the fire, plaintiff's restaurant was equipped with a wet sprinkler system. When the fire occurred at the restaurant's lower level, the sprinkler system is alleged to have failed to deploy. According to the FDNY's Incident Report, the sprinkler system's valve was manually disabled at the time of the subject incident, and therefore the sprinkler could not activate. Battalion Chief Tansey prepared a Fire Department Report, that indicated the defendants manually disabled the fire suppression system. As a result, no water flowed into

Manna's internal fire sprinkler system to fight the fire.

On August 30, 2017, plaintiff commenced this action by filing and serving a summons and complaint. In October 2017, defendants interposed an answer, demand for a bill of particulars and combined discovery demands, including, among other things, a demand for statutory violations. On March 20, 2018, defendants filed a motion to preclude due to plaintiff's alleged failure to respond to outstanding discovery. At the preliminary conference, the court ordered and set various dates for outstanding discovery (PC order).

On September 13, 2018, defense counsel served plaintiff with a supplemental demand for a verified bill of particulars, as per the PC order. Plaintiff failed to respond. Thereafter, on October 5, 2018, October 24, 2018 and November 1, 2018, defense counsel wrote to plaintiff seeking a response to the supplemental demand for a verified bill of particulars. On January 8, 2019, defendants received plaintiff's verified bill of particulars. On July 7, 2019, plaintiff filed a note of issue.

While a motion for summary judgment was pending, wherein defendants argued that plaintiff's arguments were moot given its failure to allege specific statutory violations as required by law, plaintiff filed a "supplemental bill of particulars alleging statutory violations."

Discussion

Motion Sequence No. 010

"Under CPLR 3042 (b) . . ., a party is entitled to amend the bill of particulars once as of right, regardless of the timing, so long as the note of issue has not been filed" (*Dubose v New York City Health & Hosp. Corp.*, 229 AD2d 312, 312 [1st Dept 1996]). "The decision to permit an amendment to a pleading or bill of particulars, especially on the eve of trial, is committed to the sound discretion of the IAS court" (*Rueling v Consolidated Edison Co. of N.Y., Inc.*, 138

AD3d 439, 440 [1st Dept 2016]). "The purpose of a bill of particulars is to amplify the pleadings, limit the proof, and prevent surprise at trial" (*Jones v LeFrance Leasing Ltd. Partnership*, 61 AD3d 824, 825 [2d Dept 2009]). CPLR 3043 (b), permits a party to serve a supplemental bill of particulars citing specific statutory violations as long as no additional factual allegations or new theories of liability are introduced (*Scherrer v Time Equities, Inc*., 27 AD3d 208, 209 [1st Dept 2006]).

Defendants assert that plaintiff merely alleges in its complaint that defendants violated "all applicable laws, statutes, rules, regulations codes and ordinance there in effect and existing ta the place and time of the fire" citing complaint, ¶ 85, that they claim is insufficient to defeat the requirement that plaintiff's claims must be alleged with specificity in order to impute constructive notice. A review of the complaint, however, reflects that plaintiff alleges that "on January 8, 2015, it was the duty of [defendants] to own, manage, control, maintain and operate the Premises including the Manna leasehold in a reasonably safe condition, including compliance with all building and fire codes, statutes and regulations" (complaint, ¶¶ 55 – 65). In addition, the complaint alleges that "defendants had a nondelegable duty under New York State and New York City code, statute and common law to maintain the fire suppression devices including the sprinkler system at the Premises were operational, functional and in working order (complaint, ¶ 117). Further, plaintiff alleges that "defendants breached their nondelegable duties under New York State and New York City code, regulation, statute and common law by failing to have the fire suppression devices including the sprinkler system at the Premises operational, functional and in working order," as well as by "caus[ing] plaintiff's property, possessions and interests to sustain serious and substantial damages and other losses as set forth herein" (*id*., ¶¶ 122, 124). Plaintiff alleges causes of action in negligence (first cause of action), private nuisance (second

cause of action), gross negligence (third cause of action), breach of warranty/nondelegable duty (fourth cause of action), promissory estoppel (fifth cause of action).

The supplemental bill of particulars sets forth six specific statutes, rules, regulations and/or ordinances that it claims were violated as a result of the fire, all of which, plaintiff claims, related to the allegations raised in the complaint. In addition, plaintiff argues that the statutes were raised in plaintiff's partial motion for summary judgment filed November 6, 2019, and included within the affidavit of plaintiff's liability expert, Gerard J. Naylis, A.R M. dated November 5, 2019 (motion sequence no. 008) (plaintiff exhibit E). Plaintiff asserts that defendants addressed each of the codes, statutes, rules and regulations plaintiff raised (plaintiff exhibits E – I). Therefore, it argues that defendants cannot claim prejudice by the filing of the supplemental bill of particulars as defendants had a full and fair opportunity to address their opposition.

Plaintiff further argues that though the supplemental bill of particulars was filed subsequent to the filing of the note of issue, it was filed in order to comply with court order and filed with plaintiff noting that "outstanding party and non-party discovery remain in this action. The Court directed the note of issue filing with the express understanding that discovery may continue in this matter" (note of issue dated July 8, 2019, plaintiff exhibit C). The court notes that both parties participated in discovery post note of issue.

Where the supplemental bill of particulars "merely amplifie[s] and elaborate[s]" on a theory set forth in the complaint or in the original bill of particulars and "raise[s] no new theory of liability," the court will not strike the pleading (*see e.g*. *Scherrer,* 27 AD3d at 209; *Balsamo v City of New York*, 287 AD2d 22, 27 [2d Dept 2001] ["(a) plaintiff may serve a supplemental bill of particulars, even without leave of court, to assert statutory violations which merely amplify his

or her theories of liability"]; *Noetzell v Park Ave. Hall Hous. Dev. Fund Corp.*, 271 AD2d 231, 232 [1st Dept 2000]; *Orros v Yick Ming Yip Realty*, 258 AD2d 387, 388 [1999] [First Department held "plaintiff should have been permitted to file a supplemental bill of particulars with respect to defendants' alleged violations of statutes, ordinances, rules, and/or regulations, since these amendments, which merely amplify and elaborate upon facts and theories already set forth in the original bill of particulars, raise no new theory of liability", despite motion being filed one year after note of issue]). Moreover, defendants have not indicated how they would be prejudiced (*Cevallos v Morning Dun Realty Corp.*, 78 AD3d 547, 549 [1st Dept 2010]).

Based on the foregoing, the court denies defendants' motion to strike the bill of particulars, and the cross motion by plaintiff is granted. The court considers the remainder of the arguments and finds them without merit.

Motion Sequence No. 011

Plaintiff seeks a court order directing the FDNY to release Battalion Chief Patrick G. Tansey's last known address in order to depose Battalion Chief Tansey concerning the fire and documents related to the Building's fire suppression systems (plaintiff exhibit "D"). On January 31, 2020, this court granted and executed the so-ordered Tansey subpoena to allow Manna to depose Chief Tansey. Plaintiff served the subpoena on the Fire Department of the City of New York per the usual nonparty deposition protocol. Upon doing so, the FDNY advised plaintiff that Battalion Chief Tansey retired, and the FDNY will not release Battalion Chief Tansey's last known address absent a court order.

In *Matter of Kapon v Koch* (23 NY3d 32 [2014]), the Court of Appeals held that the subpoenaing party only needs to show that the nonparty discovery is "material and necessary" to the prosecution or defense of the action (CPLR 3101 [a]). Defendants have not explained why

Battalion Chief Tansey's last known address has not been provided. Because the court has already deemed Battalion Chief Tansey's testimony material and necessary, and because the motion is unopposed, the court orders FDNY to produce Battalion Chief Tanney's last known address within 20 days from the date that plaintiff serves a copy of this decision with notice of entry upon the FDNY.

Motion Sequence No. 012

During the course of this lawsuit, plaintiff, through counsel of record Melito & Adolfsen, retained James Valentine (Valentine) to provide liability expert consultant services. Plaintiff's counsel claims that they have engaged in privileged communications with Valentine including the development of prosecution theories, combatting defenses and other strategy on the litigation. In June 2019, Valentine's expert consultant activities for plaintiff concluded.

On March 2, 2020, plaintiff's counsel learned defendants served the Valentine Subpoena for testimony and documents returnable on March 18, 2020, in New Jersey. According to plaintiff, the subpoena that defendants served on Valentine contains a document entitled "Valentine Associates Case Report" apparently accessed from Valentine's litigation file. Plaintiff does not know how defendants came into possession of this allegedly confidential document.

As stated above, CPLR 3101 (a) requires "full disclosure of all matter material and necessary in the prosecution or defense of an action." "While trial courts 'undoubtedly possess a wide discretion to decide whether information sought is "material and necessary" to the prosecution or defense of an action,' such discretion is not unlimited" (*Liberty Petroleum Realty, LLC v Gulf Oil, L.P.*, 164 AD3d 401, 405 [1st Dept 2018], quoting *Allen v Crowell-Collier Pub. Co.*, 21 NY2d 403, 406 [1968]), and disclosure is required where it will "assist preparation for trial by sharpening the issues and reducing delay and prolixity" (*id.*).

"At the same time, the CPLR protects from discovery [of] attorney work product, and, when affirmatively raised as it is here, privileged communications (CPLR 3101[b], [c]), and permits a court to issue a protective order 'denying, limiting, conditioning or regulating the use of any disclosure device' where necessary 'to prevent unreasonable annoyance, expense, embarrassment, disadvantage, or other prejudice to any person or the courts' (CPLR 3103 [a])" (*Liberty Petroleum Realty, LLC*, 164 AD3d at 405).

Where, as here, "an expert . . . is retained as a consultant to assist in analyzing or preparing the case is . . . generally seen as an adjunct to the lawyer's strategic thought processes, thus qualifying for complete exemption from disclosure under [CPLR 3101] subdivision (c) [attorney's work product] and, now, the 'mental impressions ...' exclusion of CPLR 3101 (d) (2) as well" (*Santariga v McCann*, 161 AD2d 320, 321 [1st Dept 1990] [internal quotation marks and citation omitted]; *Hudson Ins. Co. v Oppenheim*m 72 AD3d 489 [1st Dept 2010]). Indeed, the communications between counsel and the expert to aid the attorney in preparing the case would be privileged and, therefore, protected (*see 915 2nd Pub Inc. v QBE Ins. Corp*., 107 AD3d 601 [1st Dept 2013]).

Plaintiff has established that Valentine's only role as an expert was that of a consultant, whose services ceased in July 2019. The burden turns to defendants to show that they have "substantial need of the materials in the preparation of the case and [are] unable without undue hardship to obtain the substantial equivalent of the materials by other means" (CPLR 3101 [d] [2]). As the motion is unopposed, the motion to quash the Valentine Supoena is granted.

The court next turns to the branch of the motion for attorneys' fees.

22 NYCRR 130-1.1 provides:

> "(a) The court, in its discretion, may award to any party or attorney . . . costs in the form of reimbursement for actual expenses reasonably incurred and

reasonable attorney's fees, resulting from frivolous conduct . . .. In addition to or in lieu of awarding costs, the court, in its discretion may impose financial sanctions upon any party or attorney in a civil action or proceeding who engages in frivolous conduct . . ..

"(c) . . . conduct is 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."

In determining whether conduct is frivolous, the court shall consider

"'the circumstances under which the conduct took place, including the time available for investigating the legal or factual basis of the conduct, and whether or not the conduct was continued when its lack of legal or factual basis was apparent, should have been apparent, or was brought to the attention of counsel or the party'"

(*Tavella v Tavella*, 25 AD3d 523, 524-525 [1st Dept 2006], quoting 22 NYCRR 130-1.1 [c]).

Sanctions are appropriate only when a party or an attorney has abused the judicial process or wasted judicial resources by engaging in wholly frivolous litigation. The court must find, not only that the complaint was without merit in law, but also that it could not be "'supported by a reasonable argument for an extension, modification, or reversal of existing law'" (*Kremen v Benedict P. Morelli & Assoc., P.C.*, 80 AD3d 521, 523 [1st Dept 2011], quoting 22 NYCRR § 130-1.1 [c] [1]).

Plaintiff is not entitled to either counsel fees or sanctions pursuant to 22 NYCRR 130–1.1 at this time. The Valentine Subpoena does not rise to the level of lacking any merit or frivolousness warranting sanctions (*cf. Drummond v Drummond*, 305 AD2d 450, 451-452 [2d Dept 2013]).

Accordingly, it is

ORDERED that the motion by defendants West 73rd Tenants Corp., Firstservice Residential New York, Inc., Cooper Square Realty, Inc., Kathleen Murphy, Victoria Bruni, Stan Metelis, Ann Clarke, Aleka Mazarahis, Danny Ben Ari, Ken Borland and John Does/ABC Companies 1-10 (Fictitious Person/Corporations as Currently Unknown) (collectively defendants) for an order striking plaintiff's bill of particulars filed on January 6, 2020(motion seq. no. 010) is denied; and it is further

ORDERED that the cross motion by plaintiff, Manna Amsterdam Avenue LLC d/b/a Gina La Fornarina, for an order granting plaintiff leave and deeming timely served, nunc pro tunc, plaintiff's supplemental verified bill of particulars dated January 2, 2020 and served on January 6, 2020 is granted (motion sequence no. 010); and it is further

ORDERED that the motion by plaintiff to compel the production of the last known address of Battalion Chief Patrick G. Tanney (seq. no 11) is granted, and the FDNY shall provide Battalion Chief Tanney's last known address within 20 days of receipt of this decision and order with notice of entry; and it is further

ORDERED that the motion by plaintiff to quash the subpoena ad testificandum and duces tecum dated February 27, 2020, served on James Valentine by defendants and returnable on March 18, 2020 (motion sequence no. 012), is granted, and the motion is otherwise denied.

9/8/2020
DATE

MELISSA ANNE CRANE, J.S.C.

CHECK ONE:	☐ **CASE DISPOSED**		☒ **NON-FINAL DISPOSITION**		
	☐ **GRANTED**	☐ **DENIED**	☐ **GRANTED IN PART**	☐ **OTHER**	
APPLICATION:	☐ **SETTLE ORDER**		☐ **SUBMIT ORDER**		
CHECK IF APPROPRIATE:	☐ **INCLUDES TRANSFER/REASSIGN**		☐ **FIDUCIARY APPOINTMENT**	☐ **REFERENCE**	