# SUPREME COURT OF THE STATE OF NEW YORK
# NEW YORK COUNTY

**PRESENT:** **HON. ARLENE P. BLUTH** **PART** **IAS MOTION 14**

***Justice***

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KYLE JEKIELEK, JON JEKIELEK

Plaintiff,

- v -

260 PARTNERS, L.P.,

Defendant.

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**INDEX NO.** 161176/2017

**MOTION DATE** 12/14/2020, 12/14/2020

**MOTION SEQ. NO.** 003 004

**DECISION + ORDER ON MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 003) 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 109, 112

were read on this motion to/for DISCOVERY.

The following e-filed documents, listed by NYSCEF document number (Motion 004) 100, 101, 102, 103, 104, 105, 106, 107, 110, 113, 114, 115

were read on this motion to/for DISCOVERY.

Motion Sequence Numbers 003 and 004 are consolidated for disposition.

The motion (MS003) by defendant to deny plaintiff's demand for an EBT of Mark Scharfman is denied. The motion (MS004) by plaintiff to compel Mark Scharfman for a deposition is granted in part and denied in part.

## Background

This rent overcharge case arises out of an apartment leased by plaintiffs. They claim that the building where their apartment is located received J-51 benefits and, therefore, the apartment could not be deregulated under high rent vacancy deregulation. Plaintiff also allege that the registration statements filed with the DHCR were false.

Defendant explains that a central issue in the case is the rent increase after a tenant left in 1994. The rent prior to the vacatur of that tenant was $529.32 per month. In order to legally charge the rent to the next tenant's rent ($1,100), the vast majority of the increase had to come from Individual Apartment Improvements (IAIs). Defendant acknowledges that the registered rent was $1,200 but claims that it has found six leases incorporate rent increases based on a rent of $1,100 in 1995. Defendant observes that there have been depositions of Mitchell Rothken, an employee for the management company at the building since 2008 and Lisa Bringman, who was employed by the management company in 1994.

Plaintiffs assert that Ms. Bringman was only able to provide limited testimony about the IAIs from 1994 and did not have personal knowledge about them. Now plaintiff wants a deposition of Mark Scharfman, who is the main principal of the management company. Defendant attaches the affidavit of Mr. Scharfman who claims he has no personal knowledge about the IAIs.

In opposition, plaintiffs point to a decision issued by the judge previously assigned to this matter which concluded that defendant failed to raise the statute of limitations as an affirmative defense and found a colorable claim of fraud. Plaintiff observes that Mr. Rothken identified Mr. Scharfman as a possible witness who had potentially relevant knowledge. They contend that after the Court directed defendant to produce a witness with knowledge, defendant produced Ms. Bringman who lacked familiarity with the issues in this case. Plaintiffs point out that she was an administrative assistant to Mr. Scharfman.

In reply, defendant questions how plaintiff is entitled to a third EBT and that a recent Court of Appeals case compels the Court to grant the motion.

**MS003**

The Court denies the instant motion. As an initial matter, the timeline of events suggests that Mr. Scharfman is a logical and appropriate person to depose. Defendant produced Ms. Bringman, an administrative to Mr. Scharfman who lacked the requisite personal knowledge about the 1994 IAIs. It may be that Mr. Scharfman also lacks personal knowledge, as his affidavit suggests (NYSCEF Doc. No. 92), but plaintiff should be entitled to question Mr. Scharfman about the documents that defendant claims it has produced concerning the IAIs.

The Court of Appeals ruling in *Regina Metro. Co., LLC v New York State Div. of Hous. and Community Renewal* (2020 WL 1557900 *10, 2020 NY Slip Op 02127 [2020]) does not change the Court's decision. In *Regina*, the Court of Appeals affirmed the fact that there could be discovery beyond four years (the lookback rule) where there is a colorable claim of fraud. Of course, this discovery is intended to reveal whether there was a fraudulent scheme to deregulate the apartment but does not apply to the calculation of damages. The remaining conclusions in the case dealt with the retroactive effect of the overcharge rules contained in a recently passed housing statute. Here, plaintiffs are entitled to do a deposition of someone who might shed light about a possible fraudulent scheme to deregulate (i.e. the over 100% increase in rent from 1994 to 1995 that was allegedly based on IAIs).

A deposition of this Mr. Scharfman must be completed before the next conference (February 25, 2021). Plaintiffs are directed to work with defendants to accommodate Mr. Scharfman's stated disability. That means the deposition should happen virtually and may require frequent breaks to facilitate the completion of this deposition. While the Court recognizes that Mr. Scharfman claims he does not have personal knowledge, it cannot simply credit that statement as a basis to deny a deposition. The fact is that defendant claims it has

produced documents supporting its claimed IAIs and Mr. Scharfman is in the best position to discuss those documents and the IAIs from 1994. Otherwise, any potential witness could avoid a deposition by stating that he or she lacks any knowledge.

**MS004**

In this motion, plaintiffs move to compel the deposition of Mr. Scharfman, for preclusion language if he is not produced and to direct defendants to pay the legal fees for the costs of the prior depositions.

As stated above, plaintiffs are entitled to the deposition of Mr. Scharfman. However, the Court declines to impose self-executing preclusion language if his deposition does not go forward. If Mr. Scharfman is not deposed and the Court determines that defendant defied this Court's order, then appropriate penalties may be imposed. But the Court prefers to evaluate the facts after they occur rather than assign blame *a priori*.

The Court also denies plaintiffs' request to recover fees from the two previous depositions. Defendants were entitled to pick who they wanted for the depositions. And the witnesses produced were not completely without knowledge, they simply lacked personal knowledge about specific topics. That is why the deposition of Mr. Scharfman is necessary. But just because the depositions were not as productive as plaintiffs may have wanted does not justify requiring defendant to pay for them.

Accordingly, it is hereby

ORDERED that the motion (MS003) by defendant to deny plaintiffs'' request for a deposition of Mr. Scharfman is denied; and it is further

ORDERED that the motion (MS004) by plaintiffs is granted to the extent that a deposition of Mr. Scharfman must occur before the next conference in accordance with the directives described above and denied as to the remaining relief requested.

Already Scheduled Conference: February 25, 2021 at 10 a.m.

12/16/2020
DATE

ARLENE P. BLUTH, J.S.C.

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