

37 W. 46th St. Realty Corp. v KS Homes NY Inc.

2022 NY Slip Op 32936(U)

August 30, 2022

Supreme Court, New York County

Docket Number: Index No. 656254/2020

Judge: Arlene P. Bluth

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This opinion is uncorrected and not selected for official publication.

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

PRESENT: HON. ARLENE P. BLUTH PART 14

Justice

-----X

37 WEST 46TH STREET REALTY CORP.,

Plaintiff,

- v -

KS HOMES NY INC., KEWON SONG aka KAY SONG,

Defendants.

-----X

KS HOMES NY INC., KEWON SONG aka KAY SONG

Plaintiffs,

-against-

PAULA BOKSIL LEE aka BOKSIL P. LEE and JOSEPH LEE

Defendants.

-----X

INDEX NO. 656254/2020

MOTION DATE 08/29/2022

MOTION SEQ. NO. 004

**DECISION + ORDER ON
MOTION**

Third-Party
Index No. 596022/2020

The following e-filed documents, listed by NYSCEF document number (Motion 004) 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111

were read on this motion to/for PROTECTIVE ORDER.

The motion by the third-party defendants for *inter alia* a protective order precluding the deposition of third-party defendant Paula Boksil Lee is granted only to the extent that there shall be a virtual deposition of this witness.

In this case, plaintiff (a property owner) sued defendants (real estate brokers), claiming, among other things, breach of fiduciary duty. Defendants claim plaintiff is just trying to get out of paying the commission due and also brought a third-party action against plaintiff's principal, Mrs. Lee and her son, Joseph Lee. Joseph Lee appeared as a representative for plaintiff at

plaintiff's deposition. This motion is in regard to Mrs. Lee's deposition as a third-party defendant.

Background

The third-party defendants insist that Mrs. Lee is unable to appear for a deposition because she is "living in an independent living facility due to her declining health" (NYSCEF Doc. No. 89 at 2). They point to a letter from her physician that asserts that she "is not likely able to cooperate adequately or give reliable information under deposition due to the current state of her progressing cognitive decline. Furthermore, it is likely that the stress of this type of encounter could cause significant anxiety and agitation and be injurious to her cognitive function" (NYSCEF Doc. No. 93). As stated above, Ms. Lee is not just a third-party defendant; she is also the president of plaintiff (a corporate entity that owned the property that forms the basis of this dispute). The parties disagree about defendants' role as brokers who tried to sell the property; defendants insist they are owed a broker's commission while plaintiff says defendants breached their fiduciary duties as brokers.

Movants assert that they will agree to stipulate that Mrs. Lee be precluded from testifying at trial and observe that her son testified on behalf of plaintiff. They claim that defendants have refused to agree to this proposed solution.

In opposition, defendants claim that Mrs. Lee is the president of plaintiff and she initiated this lawsuit against defendants. They assert that third-party defendants/plaintiff have failed to provide adequate copies of medical records to demonstrate that Mrs. Lee is incapable of appearing for a deposition.

In reply, third-party defendants insist that Mrs. Lee has had a number of strokes and her condition is deteriorating. They ask that in the absence of a protective order preventing Mrs. Lee's deposition, the Court should issue a protective order compelling a virtual deposition and "gentle questioning."

Discussion

The Court grants the motion to the extent that it grants plaintiff's request (made in the alternative) for a virtual deposition because it is clearly the best solution. Mrs. Lee lives in Washington State and although the extent of her medical issues is unclear (for example, the vague doctor's submission is only a letter, not even an affirmation), there is no reason to force her to travel across the country for a deposition on the record before the Court.


The Court declines to grant the branch of the motion that seeks a protective order precluding the entire deposition of Mrs. Lee. The letters from the medical providers are not notarized or affirmed and, even if they were admissible, they only suggest a deposition might not be productive. There is nothing on this record that shows Mrs. Lee is incapable of appearing for a deposition. Given the fact that she is president of plaintiff and a third-party defendant, defendants are entitled to do a virtual deposition of her.

Accordingly, it is hereby

ORDERED that the motion by third-party defendants is granted only to the extent that the deposition of Mrs. Lee shall occur virtually and it must occur on or before September 22, 2022; and it is further

ORDERED that the date for filing a note of issue shall remain October 17, 2022 but plaintiff may not file the note of issue before the subject deposition is completed.

8/30/2022
DATE


ARLENE P. BLUTH, 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