

Reade v 405 Lexington, LLC

2001 NY Slip Op 30029(U)

August 3, 2001

Supreme Court, New York County

Docket Number: 0110178/0178

Judge: Louise Gruner Gans

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

PRESENT: HON. LOUISE GRUNER GANS

PART 61

Justice

Quone-Reads - Trusting

INDEX NO. 110178-99

MOTION DATE 7/11/01

MOTION SEQ. NO. 05

MOTION CAL. NO. 41

- v -

405 Lexington LLC

The following papers, numbered 1 to _____ were read on this motion to/for _____

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion be denied without an
interim order for removal of the order

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE

Dated: 8/3/01

[Signature]
J.S.C.

Check one: FINAL DISPOSITION

NON-FINAL DISPOSITION

HON. LOUISE GRUNER GANS

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 61

-----X
DUANE READE, a Partnership

Plaintiff,

- against -

Index No. 110178/1999

405 LEXINGTON, LLC, TISHMAN SPEYER
PROPERTIES, L.P., and TURNER CONSTRUCTION
CO. ,

Defendants.

-----X
DUANE READE, a Partnership,

Third-Party Plaintiff,

-against-

IDI CONSTRUCTION CO., INC.

Third-Party Defendant.

-----X
LOUISE GRUNER GANS, J.:

Plaintiff Duane Reade moves pursuant to CPLR 3103(a) and 3124 for an order (1) barring defendants from taking discovery on the sixth counterclaim asserted by defendant 405 Lexington LLC ("Lexington") and Tishman Speyer Properties, L.P. ("Tishman"); (2) compelling defendants to submit to depositions noticed by Duane Reade; (3) directing depositions to be taken on an alternating basis; (4) compelling defendants to submit to disclosure on issues related to the sixth counterclaim before taking discovery on it. Third-party defendant IDI Construction Co., Inc. cross moves to (1) dismiss the sixth counterclaim; or (2) to sever and stay the third-party action; or (3) to amend the current scheduling order to allow IDI to participate. Lexington cross-moves pursuant to CPLR 3126(1) and (2) to preclude Duane Reade from offering evidence in opposition to Lexington's sixth cause counterclaim.

This is an action for a declaratory judgment, which was commenced on May 14, 1999. It concerns alleged defaults under two leases that Duane Reade entered into with Lexington, dated July 6, 1998, for the operation of two stores located at 405 Lexington Avenue and 666 Third Avenue. On June 5, 2001, the day before the date on

which the Duane Reade witnesses were to appear for depositions, defendants asserted a counterclaim against Duane Reade in connection with an alleged default under the 405 lease relating to the reconstruction of the storefronts. Reconstruction of the storefronts at 405 Lexington Avenue began on January 10, 2000. Lexington had served a default notice dated December 13, 2000 alleging that Duane Reade "failed to properly fabricate, install and reconstruct, in accordance with the plans approved by [Lexington], the storefronts (including display windows and surrounding stone fascia) at [405 Lexington Avenue]." At the June 6, 2001 deposition of Jerry Ray, Senior Vice President of Store Operations, Duane Reade's counsel advised Mr. Ray not to answer questions concerning the storefront issue.

The preliminary conference order, initially prepared by the partes, sets date for filing the note of issue on July 31, 2000. In the space designated for third-party practice, the parties marked "N/A."

On May 23, 2001, after a significant effort by this Court to settle the action, a compliance conference order was issued. It provides:

Plaintiff Duane Reade has not served interrogatory responses and documents. This is delaying EBTs.

Plaintiff to serve interrogatory responses by May 25, 2001 or it will be precluded from offering evidence called for by demand for interrogatories. EBTs shall be completed by June 20, 2001 or are deemed waived. No service of [Bill of Particulars] required. Otherwise provisions of PC order shall govern.

By order to show cause, dated May 25, 2001, Duane Reade moved for a Yellowstone injunction regarding notices of default issued by Lexington on April 11, 2001. In addition to granting the Yellowstone, the Court granted Duane Reade's request to supplement its complaint to assert causes of action for declaratory relief regarding the April notices of default. In its answer, Lexington asserted the sixth counterclaim. In the third-party complaint, dated June 14, 2001, Duane Reade seeks indemnification and contribution from IDI.

IDI argues that the sixth counterclaim should be dismissed because it was filed

too late and will delay the proceedings. IDI also argues that Lexington did not have the Court's permission to assert the sixth counterclaim. Lexington correctly points out that IDI does not have standing to move to dismiss the sixth counterclaim against Duane Reade. However, CPLR 603 does not require a motion for severance. *Marine Midland Bank, N. A. v. Cafferty*, 174 A.D.2d 932 (3d Dept 1991). Moreover, IDI estimates the time for interpleader and discovery on the single issue of the storefronts to be six to eight months. While the Court finds this estimate to be unreasonably long, and since the Court does not wish to reward Duane Reade for its delaying tactics, this 1999 action will not be delayed any longer. IDI's motion to sever the third-party action is granted. In addition, the Court sua sponte severs the sixth cause of action.

Originally, the parties agreed to depose three defense witnesses after the depositions of Duane Reade's Mr. Ray, Udo Steudtner, Director of Construction, and Anthony Cuti, President, Chairman and CEO, have been completed. Plaintiff argues that under CPLR 3106(a), which gives defendants initial deposition priority, Duane Reade as the defendant on the counterclaim should now have priority. In light of the severance of the sixth counterclaim, Duane Reade's argument is rendered moot. Otherwise, Duane Reade has not provided any reason to change the order of discovery. Moreover, the deposition schedule here, alternating blocks, is consistent with *Allis-Chalmers Corp. v United States Steel Corp.*, 94 Misc 2d 865 (Sup Ct, New York County 1978), a case relied upon by Duane Reade. Therefore, plaintiff's motion is denied.

For allegedly failing to comply with this Court's May 23, 2001 order, Lexington moves for an order precluding Duane Reade from offering evidence against Lexington concerning the storefront issue. Lexington maintains that the storefront issue has been a part of this litigation since July 2000 when it provided Duane Reade with an expert's report that the storefronts were improperly attached. Lexington served Duane Reade with a notice to cure the storefront problems, dated December 13, 2000. And, the storefront issues have been discussed as part of settlement negotiations on October

10, 2000, and May 23, 2001. Indeed, Lexington points out defendants' document requests and interrogatories included the storefront issue and Duane Reade produced documents relating to the storefront claim. Defendants contend that settlement negotiations delayed pleading the storefront issue. Accordingly, Lexington asserts that the penalty in the May 23, 2001 compliance conference order should be enforced against Duane Reade for its failure to answer questions concerning the storefront issue.

Lexington's motion for a preclusion order against Duane Reade on the storefront issue is denied. While the Court agrees with Lexington that the better course would have been to put Duane Reade's objection on the record and continue with the deposition, including questions concerning the storefront issues, having refused to answer the questions concerning the storefronts cannot constitute a violation of the May 23 order. The May 23 compliance conference order was entered into two weeks before Lexington asserted the sixth counterclaim.

Accordingly, it is

ORDERED, that plaintiff's motion to bar defendants from taking discovery on the sixth counterclaim is denied as moot; and it is further

ORDERED, that plaintiff's motion to change the order of depositions is denied and the parties are directed to take depositions on an alternating block basis, as originally agreed; and it is further

ORDERED, that IDI's cross-motion to dismiss the sixth counterclaim is denied; and it is further

ORDERED, that IDI's cross-motion to sever the third-party action is granted and is otherwise denied. In addition, the Court sua sponte severs the sixth counterclaim. Lexington is directed to exchange, without paying for a new index number, the third party index number for another index number, as if this counterclaim had been filed as a new action. The parties shall appear for a preliminary conference in the new action on the sixth counterclaim on August 29, 2001 at 2:15 and the parties shall notify any

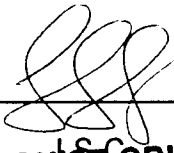
additional fourth parties of the date and time of the conference; and it is further

ORDERED, that Lexington's cross-motion to preclude Duane Reade from offering evidence in opposition to Lexington's sixth cause counterclaim is denied; and it is further

ORDERED, that the Note of Issue and Certificate of Readiness shall be filed by any party on or before September 14, 2001.

Dated: 8/3/01

ENTER:



HON. LOUISE GRUNER GANS