

Katz Park Avenue Corporation v Jagger

2005 NY Slip Op 30127(U)

September 28, 2005

Supreme Court, New York County

Docket Number: 0109310/2004

Judge: Lancelot B. Hewitt

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SCANNED ON 10/12/2005

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 25**

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KATZ PARK AVENUE CORPORATION,

Plaintiff,

Index No. 109310/04

Order

-against-

BIANCA JAGGER
"JOHN DOE and JANE DOE,"

Defendants.

FILED

OCT 11 2005

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ORDER OF THE SUPREME COURT, NEW YORK COUNTY.

NEW YORK
COUNTY CLERK'S OFFICE

Defendant moves for an order, pursuant to CPLR 3217[b], discontinuing the counterclaims asserted by defendant in her answer.

Plaintiff cross-moves for an order, pursuant to CPLR 3124, compelling defendant to produce certain documents responsive to the First Notice of Discovery served on it by defendant, as well as answer plaintiff's First Set of Interrogatories; and, pursuant to CPLR 3126, and 22 NYCRR 130-1.1, an order awarding costs and attorneys' fees to plaintiff.

Factual Background

By complaint filed June 23, 2004, plaintiff alleged an Ejectment claim against defendant on the ground that defendant's rent-stabilized apartment was not her primary residency. Defendant's lease expired on February 29, 2004. On November 1, 2003, prior to the expiration of the lease, plaintiff served defendant with a Notice for Renewal of the lease, pursuant to Rent Stabilization Code ("RSC") 2523.5 (a). By operation of the Code and as set forth in the Notice, defendant had 60 days from the date of service of the Notice to renew the lease. Nevertheless, on November 25, 2003, plaintiff served defendant with a termination notice, pur-

suant to RSC 2524.2 and 2524.4(c). The stated ground for termination was defendant's alleged failure to use the apartment as her primary residence. On or about December 22, 2004, defendant served plain-tiff with an executed form by which she agreed to enter into a one-year renewal lease.

In due course, defendant moved to consolidate the instant action with the personal injury action Jagger v. Katz Park Avenue-(Index No. 602947/03), and to grant her leave to renew her motion to dismiss the complaint. Plaintiff cross-moved for summary judgment on the complaint.

By decision and order dated May 25, 2005, the court, *inter alia*, denied defendant's motion for leave to reargue her motion to dismiss the complaint, and denied plaintiff's cross motion for summary judgment, holding that plaintiff moved upon the "erroneous premise that the concepts of domicile and primary residence can be equated."

Pursuant to CPLR 3212[b], however, the court granted summary judgment in favor of defendant and dismissed the Ejectment claim. In granting the motion, the court held that the Notice of Termination served upon defendant by plaintiff was superseded by defendant's proper renewal of the lease. The court also severed and continued the plaintiff's remaining claims and defendant's counterclaims. Additionally, the court ordered a joint trial of the instant action and the personal injury action commenced by defendant against plaintiff.¹

Discontinuance

¹The court also ordered that discovery be supervised by a Special Referee and that all subsequent discovery motions and applications be made to a Special Referee in the "first instance."

Contentions²

In support of the motion, defendant contends that prior to the dismissal of Ejectment claim, plaintiff commenced a third action (Katz v. Jagger- Index No. 104524/05) which asserts a third Ejectment claim. Defendant maintains that this claim alleges that defendant's immigrant status as a British citizen and "non-immigrant" who entered the US on a "B-2" tourist visa, precludes her from claiming any address in the US as her primary residence; the identical allegations made in the first two Ejectment claims.

Defendant contends that she served a verified answer in response to the third Ejectment claim, and that the counterclaims asserted therein, are identical to the counterclaims asserted in the instant action, the third action, and in the complaint in defendant's personal injury action against plaintiff. Defendant asserts that there is no reason, therefore, to maintain these counterclaims in the instant action. She also asserts that plaintiff will not suffer any prejudice if the counterclaims are discontinued in the instant action, and that denying her motion will allow plaintiff to obtain additional discovery which will be utilized in defense of the personal injury action.

Law

CPLR 3217[b] authorizes the court to grant a motion for voluntary discontinuance "upon terms and conditions, as the court deems proper." While the determination upon such an application is generally within the sound discretion of the court, a party ordinarily cannot be compelled to litigate and, absent special circumstances, such as prejudice to adverse parties, a discontinuance should be granted (see, Burnham Service Corporation v. National Council on

²Plaintiff did not offer any arguments in opposition to the motion.

Compensation Insurance, Inc., 288 AD2d 31, 32 [1st Dept. 2001]). Such “special circumstances” may include a party seeking such relief in order to avoid an adverse decision on the merits (see, In the Matter of Baltia Air Lines, Inc. v. CIBC Oppenheimer Corp., 273 AD2d 55, 57 [1st Dept. 2000]).

Analysis

Here, it is clear that defendant has asserted the same counterclaims in both the instant matter, as well as the third action subsequently commenced by plaintiff herein. Inasmuch as plaintiff has failed to make a showing of “special circumstances” in the instant matter, the court, in its discretion, will not compel defendant to litigate her counterclaims in the instant action (id.). As such, defendant’s motion must be granted.

Accordingly, defendant’s motion for an order discontinuing the counterclaims asserted in her answer is granted.

Motion to Compel-Attorneys’ Fees, and Costs

Contentions

In support of the cross motion, plaintiff that discovery is critical to all issues presented in both non-primary residency actions ordered by the court to be tried jointly. Plaintiff contends that it served defendant with its First Notice of Discovery & Inspection and First Set of Interrogatories on March 11, 2005, as directed by the Preliminary Conference (“PC”) Order dated February 15, 2005, and that defendant has failed to produce any documents or to answer the interrogatories by April 11, 2005, as directed in the PC Order. It is contended that defendant should be deemed to have waived her right to discovery since her demand for Discovery & In-

spection was served on July 27, 2005, or months after the April 11, 2005 deadline.³

Law

If a person fails to respond to or comply with any request, notice, interrogatory, demand, question or order, except with respect to a Notice to Admit, the party seeking disclosure may move to compel compliance or a response (CPLR 3124).

If any party, or a person who at the time a deposition is taken or an examination or inspection is made is an officer, director, member, employer or agent of a party or otherwise under a party's control, refuses to obey an order for disclosure or wilfully fails to disclose information which the court finds ought to have been disclosed, the "court may make such orders with regard to the failure or refusal as are just, . . ." (see, CPLR 3126).

The court, in its discretion, may award to any party or attorney in any civil action or proceeding before the court, except where prohibited by law, costs, in the form of reimbursement for actual expenses reasonably incurred, and reasonable attorneys' fees resulting from frivolous conduct (see, 22 NYCRR 130-1.1[a]).

Analysis

Here, the court is persuaded that defendant has failed to respond to plaintiff's First Notice of Discovery & Inspection and First Set of Interrogatories within the time frame set forth in the PC order dated February 15, 2005, as well as failed to timely serve her own notice for Discover & Inspection. As such, defendant is directed to pay plaintiff \$450 in costs within ten (10) days of the date of this order (see, CPLR 3126; 22 NYCRR 130-1.1[a]).

³Defendant has failed to offer any contentions in opposition to the motion.

In addition, both parties are directed to respond to the other parties' demand within ten (10) days of the date of this order.

Date: September 28, 2005.

Lancelot B. Hewitt
Lancelot B. Hewitt
Special Referee

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