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

PRESENT: HON. JOAN A. MADDEN PART 11
Justice

WORLD CITY OF FOUNDATION, INC., and JOHN S. ROGERS,

Plaintiffs,

- v -

VITO SACCHETTI and T.M.S. MANAGEMENT, INC.,

Defendants.

INDEX NO. : 114829/03

MOTION DATE:4-6-06

MOTION SEQ. NO.: 015

MOTION CAL. NO.:

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

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits _____	_____
Answering Affidavits — Exhibits _____	_____
Replying Affidavits _____	_____

Cross-Motion: [x] Yes [ ] No

Plaintiffs move, pursuant to 3103, for an order vacating defendants' Notice to Admit as untimely, improper, and unduly burdensome. Defendants oppose the motion, and cross move, pursuant to CPLR 3123, to deem that plaintiffs have admitted all items for which admissions were sought in the Notice to Admit, and for sanctions.

This action involves a protracted dispute between the parties arising out of their landlord-tenant relationship. Plaintiffs are tenants of 330 East 43rd Street, New York, NY ("the building"),

which is owned by Vito Sacchetti and managed by defendant TMS Management Co. Plaintiff World City Foundation is a not-for-profit organization that is a tenant of certain apartments in the building. Decedent John Rogers ("Rogers") was the Chief Executive Officer of World City, and occupied an apartment in the building as his personal residence. Rogers, who was an attorney practicing maritime law, founded World City and related entities for the purpose of promoting the creation of a American cruise ship industry.[1]

Plaintiffs filed a Certificate and Readiness and a Note of Issue on April 14, 2005. On or about July 29, 2005, defendants served plaintiffs with a Notice to Admit containing 139 separate requests, many of which address the admissibility at trial of specific documents. By notice of motion served on August 10, 2005, plaintiffs moved for a protective order pursuant to CPLR 3103.

In support of the motion, plaintiffs argue that the Notice to Admit is untimely as it was served after Note of Issue was filed and discovery was certified as completed. Plaintiffs also assert that the Notice to Admit is burdensome as it is accompanied by only one of the 140 documents referenced therein, and that Notice to Admit improperly requests admissions relating to the admissibility of approximately 60 documents.

Defendants counter that the Notice to Admit was timely served pursuant to CPLR 3123(a), which permits its service 20 days before trial. Defendants also assert that documents referenced in the Notice to Admit need not be included since the documents referenced therein

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[1]After plaintiffs submitted their opposition, and while this motion was pending Rogers, who represented World City and himself pro se , died. These proceedings were stayed pending the substitution of a duly appointed representative for Rogers. After this was accomplished and an attorney appeared for plaintiffs, this motion was restored to my motion calendar.

cross-reference a specific document either (1) exchanged during discovery, (2) marked and produced during depositions of Rogers or World City's Vice President Stephanie Gallagher, or (3) submitted as exhibits to defendants' summary judgment motion. Moreover, defendants assert that the Notice to Admit properly seeks admissions only with respect to items about which there reasonably can be no dispute.

CPLR 3123 (a) provides, in part, with respect to a notice to admit, that:

> At any time after service of the answer or after the expiration of twenty days from service of the summons, whichever is sooner, and not later than twenty days before the trial, a party may serve upon any other party, a written request for admission by the latter of the genuineness of any papers or documents, or the correctness or fairness of representation of any photographs, described in and served with the request, or of the truth of any matters of fact set forth in the request, as to which the party requesting the admission reasonably believes there can be no substantial dispute at the trial and are within the knowledge of such other party or can be ascertained by him upon reasonable inquiry.

Although the CPLR 3123(a) specifically states that the Notice to Admit can be served within twenty days before trial, it has been recognized that this provision conflicts with Uniform Rule of Trial Court section 202.21, which provides that after the note of issue and certificate of readiness has been filed "pretrial proceedings" will be permitted only when "unusual or unanticipated circumstances arise," and such proceedings are " required to prevent substantial prejudice." See Siegel, Practice Commentaries, McKinney's, Book 7B, CPLR 3106-3200, C3223:2, at 400.

The Appellate Division, First Department has resolved this issue by finding that service of the Notice to Admit up to 20 days before trial is permissible, despite the prior filing of note of issue and a certificate of readiness, since "3123(a) is not intended as simply another means for

achieving discovery" but rather is a procedure, akin to a stipulation, which is designed to "crystallize issues and to eliminate from trial those that are easily provable and not really in dispute." Hodes v. City of New York, 165 AD2d 168, 170 (1st Dept 1991); see also, Siegel, New York Civil Practice, section 364, at 603 (4th Ed.2005) Thus, contrary to plaintiffs' position, even though served after plaintiffs filed their note of issue and certificate of readiness, the Notice to Admit, it was timely since such service was made 20 days before trial.

As to plaintiffs' argument that defendants improperly failed to attach the documents referred to in the Notice to Admit, CPLR 3123(a) provides that"[c]opies of the papers, documents or photographs shall be served with the request unless copies have already been furnished." In this case, it appears that the documents have already been provided to plaintiffs so that this objection is without merit. However, to the extent plaintiffs' new attorneys cannot locate the relevant documents, they may seek additional copies from defendants' counsel.

The next issue concerns the items in the Notice to Admit regarding the admissibility of certain documents at trial. A notice to admit is properly used to require a party to admit stated facts, or the authenticity of a document, or the correctness of photographs. CPLR 3123. "The purpose of the notice to admit procedure is not to obtain information in lieu of other disclosure devices...but is intended only to eliminate from issues in litigation matters which will not really be in dispute at trial." Johantgen v. Hobert Manufacturing Co., 64 AD2d 858 (4th Dept 1978); see also, Meadowbrook-Richman, Inc. v. Cicchiello, 273 AD2d 6 (1st Dept 2000)(holding that 3123 (a) is to be used only for disposing of uncontroverted questions of fact or those that are easily provable....").

Under this standard, the court finds that the admissibility of certain documents, as

opposed to their authenticity, is not the proper subject of an item in a Notice to Admit. The determination of whether a document (or other evidence) is admissible is a decision which should be left to the trial court (Wiseman v. American Motors Sales Corp., 103 AD2d 230, 237 (2d Dept 1984)), and may depend on the purposes for which the document is introduced or other circumstances not necessarily foreseen by the party responding to a notice to admit. Indeed, CPLR 3123(b) states that any admission in a notice to admit "is subject to all pertinent objections to admissibility which may be interposed at the trial." Accordingly, plaintiffs' motion is granted to the extent of striking those items in the Notice to Admit which seek admissions related to the admissibility of certain documents.

Defendants' cross motion to deem the items in the Notice to Admit admitted based on plaintiffs' failure to respond to the notice is denied as plaintiffs moved for a protective order within a reasonable time of service of the notice. See Nader v. GMC, 53 Misc2d 515 (Sup Ct NY Co.), aff'd, 29 AD2d 632 (1st Dept 1967). Defendants' request for sanctions is also denied.

In view of the above, it is

ORDERED that plaintiffs' motion is granted to the extent of striking those items in defendants' Notice to Admit which seek admissions related to the admissibility of certain documents; and it is further

ORDERED that plaintiffs shall respond to the remaining items within thirty days of the date of this decision and order; and it is further

ORDERED that defendants' cross motion is denied.

DATED: July 17 ,2006

J.S.C.