

Best v East 77th St. Realty LLC
2007 NY Slip Op 31436(U)
May 17, 2007
Supreme Court, New York County
Docket Number: 0117651/2000
Judge: Edward H. Lehner
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: LEHNER EDWARD H. LEHNER PART 19
Justice

NINA BAUM BEST

INDEX NO. 117651/00

- v -

EAST 77TH STREET REALTY LLC

MOTION DATE 4/19/07

MOTION SEQ. NO. 18

MOTION CAL. NO. 9

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

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

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion *is disposed of in accordance with accompanying memorandum decision*

FILED

JUN 04 2007

NEW YORK COUNTY CLERK'S OFFICE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Dated: MAY 17 2007

[Signature]
J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 19**

-----X
NINA BAUM BEST,

Plaintiff,

-against-

**Index No. 117651/00
(Seq. 018 and 020)**

**EAST 77TH STREET REALTY LLC,
GLENWOOD MANAGEMENT CORPORATION, and
MIDTOWN MOVING & STORAGE, INC.**

Defendants.

-----X
Lehner, Edward H., J.:

Motions and cross-motion under sequence numbers 018 and 020 are consolidated herein for disposition.

FILED

JUN 04 2007

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In motion sequence # 018, defendants East 77th Realty LLC and Glenwood Management Corporation (collectively, movants) move, pursuant to CPLR 2221, for an order granting leave to reargue that portion of their prior motion which sought all outstanding discovery, and, upon granting reargument, permitting them to complete the deposition of plaintiff before Special Referee Howard G. Leventhal (the Special Referee); allowing movants to inspect and inventory plaintiff's goods, located at 140 Jackson Street, Greenpoint, Brooklyn (the Greenpoint premises); and staying plaintiff's filing of the note of issue pending the completion of discovery.

In motion sequence # 020, defendants seek an order, pursuant to 22 NYCRR § 202.21 (e), striking and/or vacating the note of issue pending the completion of outstanding discovery and permitting them a full opportunity to view certain videotapes.

Plaintiff, pro se, cross-moves pursuant to 22 NYCRR § 130-1.1 *et seq.* for an order imposing sanctions against counsel to Landlord and the Managing Agent; pursuant to 22 NYCRR § 100.3 (D) (2), referring the alleged misconduct of movants' attorneys to the appropriate Disciplinary Committee

and to Hon. Jacqueline Silbermann; issuing a protective order on this file and precluding Borah Goldstein, the law firm representing movants, from having any communications with Barry Best (Mr. Best) (plaintiff's former husband), and with Mark Helweil (Helweil), the attorney who represented Mr. Best in the divorce action; and granting her leave to renew and reargue the December 2004 decision of Justice Lebedeff; requiring movants to provide her with copies of all correspondence with Helweil and Mr. Best or any third party relating to her action, and ordering their depositions, as well as the deposition of Edward Baer (Baer), of Borah Goldstein; and requiring movants to provide her with all outstanding discovery requests.

By order dated January 26, 2007, filed February 2, 2007 (Seq. # 17), this court granted defendants' motion and cross motion to the extent of striking the complaint in this action unless plaintiff fully complies and furnishes the matter required for production and which remains outstanding, as denoted in paragraph 30 of defendant East 77th Realty's notice of motion dated July 7, 2006, within 30 days after service of a copy of said order with notice of entry. Plaintiff was further directed to serve her note of issue and certificate of readiness within 10 days thereafter. In the event that the issue of plaintiff's compliance therewith was disputed, the matter was referred back to the Special Referee, who already was familiar with the issues and personae, by virtue of having supervised depositions over the course of 10 days. This court also denied plaintiff's cross motion for sanctions against Landlord's counsel, as well as other relief sought by her.

Defendants' motion-in-chief for leave to reargue is granted. As the Special Referee noted in his decision dated September 14, 2004:

Despite the fact that plaintiff has been deposed for one full day before Justice Lebedeff and 10 days before the undersigned, this property damage/conversion action is far from trial ready. The deposition of plaintiff is so far from completed that the end of plaintiff's deposition is not even in sight, let alone the depositions of other witnesses. I place the blame squarely upon plaintiff because of her willful, continued

refusal to answer questions directly and succinctly, her sparring with counsel and the court, and her failure and refusal forthrightly to produce relevant and material documents requested by defendants necessary to the defense of the action. Despite having been warned numerous times by the undersigned on the record, as well as Justice Lebedeff's written admonition in the Order of Reference, plaintiff continues to march to the beat of her own drum, and refuses to abide by the court's rulings as to her obligations as a litigant and witness to provide "full disclosure of all matter material and necessary in the prosecution or defense of an action, regardless of the burden of proof" (CPLR 3101 [a]; Allen v Crowell-Collier Pub. Co., 21 NY2d 403, 406, 288 NYS2d 449, 452 [1968]).

It is clear that, despite having had plaintiff on the witness stand for over 10 days, defendants were unable to complete the deposition of plaintiff because of her misconduct and cavalier attitude towards disclosure. Such conduct should not be rewarded, and defendants should not be prevented from ascertaining the claims asserted against them, the evidence which will be used against them, and from planning a defense thereto. Plaintiff is directed to resume her deposition before Special Referee Howard G. Leventhal, as per his letter order dated March 30, 2007.

That branch of the motion seeking access to the Greenpoint premises in order to enable defendants to inspect and inventory property allegedly belonging to plaintiff being stored there is denied, without prejudice to the service of an appropriate subpoena duces tecum upon the owner of the property, pursuant to CPLR 3120 (1) (ii), unless the latter consents. As the moving papers make clear, the Greenpoint premises is owned by a friend of plaintiff's brother, neither of whom is a party to this action. It does not appear that the owner of the premises has been served with a subpoena or a notice of motion or process sufficient for this court to issue an order affecting his rights.

Defendants' motion to vacate the note of issue and certificate of readiness is granted. It is clear that, through no fault of their own, defendants have not had a fair opportunity to complete pretrial disclosure, and this case is not ready for trial (22 NYCRR § 202.21 [e]). A copy of this

order shall be served on the Clerk of the Trial Support Office within twenty (20) days after the filing hereof.

That branch of the motion seeking to compel plaintiff to produce relevant videotapes, which would allegedly show that at some point in time prior to the alleged conversion plaintiff possessed certain property, is granted. Plaintiff is directed, within twenty (20) days after service of a copy of this order with notice of entry, to deliver a copy to defendants' counsel (Zegarelli v Hughes, 3 NY3d 64 [2004]). Failure to comply with this directive shall result in her being precluded at trial from offering evidence that she possessed such property.

Movants' request for sanctions against plaintiff, raised for the first time in their reply papers in opposition to plaintiff's cross motion, is denied without prejudice. The function of reply papers is to address arguments made in opposition to the position taken by the movant and not to permit the movant to introduce new arguments in support of, or new grounds for the motion (Schultz v 400 Coop Corp., 292 AD2d 16 [1st Dept 2002]).

Plaintiff's cross-motion is, in all respects, denied as being without merit. This court previously denied plaintiff's cross-motion for sanctions against Landlord's counsel, as well as other relief sought by her. Plaintiff has failed to demonstrate that defendants' counsel engaged in frivolous conduct within the purview of 22 NYCRR § 130-1.1 *et seq.* nor shown that defendants or their counsel engaged in conduct warranting a referral to the Disciplinary Committee.

Her request for copies of correspondence with her former husband and the attorney who represented Mr. Best in the divorce action, Mark Helweil, who are not parties to this action, appears to be vexatious and without any legitimate purpose in this action (CPLR 3103 [a]). Furthermore, where, as here, a plaintiff places a cause upon the calendar by the filing of a note of issue and certificate of readiness, such action constitutes a waiver of plaintiff's right to take further

depositions, absent any special, unusual or extraordinary circumstances (Price v Brody, 7 AD2d 204, 205-206 [1st Dept 1959]).

Plaintiff's request for a protective order on this file is denied. Court rule 22 NYCRR § 216.1

(a) provides as follows:

Except where otherwise provided by statute or rule, a court shall not enter an order in any action or proceeding sealing the court records, whether in whole or in part, except upon a written finding of good cause, which shall specify the grounds thereof. In determining whether good cause has been shown, the court shall consider the interests of the public as well as of the parties. Where it appears necessary or desirable, the court may prescribe appropriate notice and opportunity to be heard.

In general, the courts have been reluctant to allow the sealing of court records (Gryphon Dom.VI, LLC v APP Intl. Fin. Co., B.V., 28 AD3d 322 [1st Dept 2006]; Liapakis v Sullivan, 290 AD2d 393 [1st Dept 2002]; Matter of Brownstone, 191 AD2d 167 [1st Dept 1993]). Confidentiality is clearly the exception, not the rule (Gryphon Dom.VI, LLC v APP Intl. Fin.Co., B.V., *supra*; Danco Labs, Ltd. v. Chemical Works of Gedeon Richter, Ltd., 274 AD2d 1, 6 [1st Dept 2000]). Plaintiff has failed to demonstrate "good cause" for sealing the file.

To recapitulate, it is hereby

Ordered that that branch of the motion by defendants East 77th Realty LLC and Glenwood Management Corporation seeking leave to reargue this court's order dated January 26, 2007 is granted to the extent of vacating the note of issue and certificate of readiness filed by plaintiff; and it is further

Ordered that defendants are directed to serve a copy of this order with notice of entry upon the Clerk of the Trial Support Office within twenty (20) days after filing thereof; and it is further

Ordered that defendants are permitted to complete the deposition of plaintiff, Nina Baum Best, before Special Referee Howard G. Leventhal, who shall supervise disclosure; and it is further

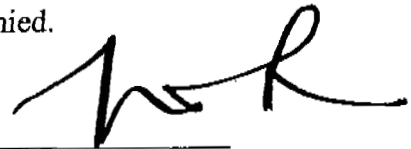
Ordered that that branch of the motion seeking leave to inspect and inventory plaintiff's goods, located at 140 Jackson Street, Greenpoint, New York, is denied without prejudice to the service of an appropriate subpoena duces tecum upon the owner of the property, pursuant to CPLR 3120 (1) (ii), unless the latter consents; and it is further

Ordered that that branch of the motion by defendants seeking a full opportunity to view certain videotapes is granted; and plaintiff is directed, within twenty (20) days after service of a copy of this order with notice of entry, to deliver a copy thereof to defendants' counsel, and that failure to comply with this directive shall result in plaintiff's being precluded at trial from offering evidence that she possessed such property; and it is further

Ordered that defendants' request for the imposition of costs and sanctions against plaintiff, raised for the first time in their reply papers, is denied without prejudice; and it is further

Ordered that plaintiff's cross-motion is, in all respects, denied.

Dated: May 17, 2007



J.S.C.

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