

Pavia v Couri

2007 NY Slip Op 31512(U)

January 30, 2007

Supreme Court, New York County

Docket Number: 0124625/2002

Judge: Joan A. Madden

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

PRESENT: HON. JOAN A. MADDEN

PART 11

Justice

GEORGE PAVIA and ANTONIO PAVIA,

INDEX NO. :124625/02

MOTION DATE:

Plaintiffs,

MOTION SEQ. NO.: 031

- v -

JAMES COURI AND MARLENE COURI,

Defendants.

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 _____

FILED

Replying Affidavits _____

JUN 04 2007

Cross-Motion: Yes No

NEW YORK COUNTY CLERK'S OFFICE

Defendant James Couri ("J. Couri"), who is pro se, moves, by order to show cause, to (1) stay the trial due to his health issues, and until he is granted certain discovery, (2) dismiss certain claims asserted against him, and (3) have the court so-order certain subpoenas (motion seq. no. 031). Plaintiffs oppose the motion and cross move to rescind the temporary abatement of rent previously granted by this court

Background

These actions arise out of a landlord tenant dispute. Defendants, J. Couri and his wife,

Marlene Couri ("M. Couri") (together "the Couris") live at 18 East 73rd Street, New York, NY (the "Building") in Apartment 3B ("the Apartment") pursuant to two-year lease dated September 27, 1996, between J. Couri, as tenant, and plaintiff George Pavia ("Pavia"), as landlord. At the time of the commencement of this action, the lease had been renewed for one two-year term and expired on October 14, 2000. J. Couri is proceeding pro se,¹ while his wife has an attorney, Jon Paul Robbins, Esq. of McLaughlin & Stern, LLP.

Pavia and his wife, defendant Antonia Pavia ("the Pavias") own the Building, and reside there, as do their adult children, Julian Pavia and Phillipa Pavia. The Building is a brownstone with several small apartments leased to non-family members. The Pavias maintain that J. Couri began to harass them after they refused to sell him the Building, and that he harassed other tenants and is a nuisance.

J. Couri counters that the Pavias began to harass him after he brought a proceeding before the New York State Division of Housing and Community Renewal ("DHCR"), that he is entitled to a rent abatement, and that Pavia has maliciously prosecuted him by having him arrested on baseless charges. The DHCR proceeding, which was initiated by Couri in July 2000, resulted in an order in which the DHCR (i) found that the building was subject to the rent stabilization, (ii) set the legally regulated rent for the Apartment at \$1,820, (iii) granted J. Couri \$3,716.62 as rent overcharge and excess security, and (iv) directed Pavia to offer J. Couri a rent stabilized lease.

In 2002, the Pavias commenced a lawsuit against the Couris and have the following remaining three claims in the action filed under Index No. 124625/02: (1) an ejectment claim based on allegations that J. Couri's conduct constituted a nuisance as set forth in the notice of termination served on J. Couri on July 16, 2003, which purported to end his tenancy on August 7, 2003, (2) a claim for damages resulting from water leak when J. Couri denied them access to the

¹Although he is pro se, J. Couri has extensive litigation experience representing himself and has been involved in multiple law suits. His experience is evident from the manner in which he has conducted this litigation, including the numerous motions he has made in these actions.

Apartment, and (3) a claim seeking a set of keys to the Apartment (hereinafter "the 2002 action").² Couri asserted counterclaims for, *inter alia*, fraud in the inducement in connection with

²The following is a list of motions made by the parties in the 2002 action: (1) motion seq. no. 001-Pavias' motion to compel access to Couri's apartment to repair leak; (2) motion seq. no. 002- Couri's motion to direct that certain repairs be made, to restrain the Pavias from interfering with his tenancy, and to direct a mental examination and Pavias' cross motion for a protective order; (3) motion seq. no. 003-Pavias' motion for a protective order, (4) motion seq. no. 004-Pavias' motion for sanctions, (5) motion seq. no. 005-Couri's motion to dismiss the complaint, (6) motion seq. no. 006- motion to consolidate, (7) motion seq. no. 007-Pavias' motion to amend complaint and Couri's cross motion seeking discovery and disqualification of Pavias' counsel, (8) motion seq. no. 008-Couri's motion to reargue court's denial of motion seq. no. 002, (9) motion seq. no. 009-Couri's motion for summary judgment dismissing the complaint, (10) motion seq. no. 010-Pavias' motion for use and occupancy and related relief and Couri's cross motion directing the Pavias to comply with DHCR's order and related relief, (11) motion seq. no. 011-Couri's request that the court reduce the amount of rent, (12) motion seq. no. 012-Couri's request for a reduction of the rent and a stay of the court's order requiring him to pay use and occupancy, (13) motion seq. no. 013-Couri's request to reduce rents based on DHCR order and stay the collection of use and occupancy, (14) motion seq. no. 014-Couri's request for discovery and reduction of rent, (15) motion seq. no. 015-Pavias' request for a judgment of ejectment based on Couri's failure to pay use and occupancy, (16) motion seq. no. 016-Pavias' motion to reargue with respect to its request for a judgment of ejectment based on Couri's failure to pay use and occupancy; (17) motion seq. no. 017-Pavias' motion for contempt, Couri's cross motion for various relief including directing the Pavias to make certain repairs and directing that use and occupancy be place into Robbins' escrow account;(18) motion seq. no. 018-Couri's request to strike Pavias' jury demand; (19) motion seq. no. 019- Pavias' motion to modify court order to have Couri pay use and occupancy directly to them, Couri's cross motion to stay proceeding based on his health and to have the court recuse itself; (20) motion seq. no. 020- Pavias' motion for an order directing Marlene Couri to pay use and occupancy, Couri's cross-motion for a stay of the payment of use and occupancy and for the court to recuse itself; (21) motion seq. no. 021-Pavias' motion to strike Couri's answer and to adjudge Couri in contempt for failure to pay use and occupancy; (22) motion seq. no. 022- Couri's motion to renew and reargue and to stay prior orders directing the payment of use and occupancy; (23) motion seq. no. 023-Pavias' motion to strike Couri's answer and to eject defendants based on the failure to pay use and occupancy; (24) motion seq. no. 024-Pavias' motion to advance the date motion seq. no. 023; (25) motion seq. no. 025-Couri's motion for various relief, including resolving all issues regarding the greenhouse in accordance with a determination of the Environmental Control Board and clarifying and modifying the rent stabilized lease; (26) motion seq. no. 026-Pavias' motion for an order determining that the rent stabilized lease and riders tendered to Couri conform with the court's order; (27) motion seq. no. 027-Pavias' motion for an order dismissing Couri's claims for constructive eviction and/or breach of warranty and fraud and restoring the use and occupancy paid by Couri; (28) motion seq. no. 028-Pavias' motion to strike Couri's answer, to award a

the lease of the apartment and fraud and "cover-ups" regarding alleged violations of the Couris' tenancy, and interference with quiet enjoyment of the apartment. Note of issue was filed in the 2002 action on August 11, 2004.

J. Couri commenced two lawsuits against the Pavias and others under Index Nos. 101709/03 ("the 2003 action")³ and 106226/04 ("the 2004 action")⁴. In addition to the Pavias, in the 2003 action, J. Couri sued Pavias' attorneys⁵, and in the 2004 action J. Couri sued the Pavias' adult children, Julian Pavia and Phillipa Pavia and 18 East 73rd Street Corp. and 18 East 73rd

judgment of ejectment and enter a money judgment against Couri for unpaid use and occupancy; (29) motion seq. no.029-Pavias' motion to sever Couri's claims for constructive eviction and breach of warranty; (30) Pavias' motion for a pre-trial hearing to determine the extent to which the Couris may submit certain evidence of violations regarding the greenhouse during trial, Couri's cross motion to stay the proceedings, to dismiss certain claims asserted against him, and to have the court so-order certain subpoenas.

³The 2003 action was originally assigned to Justice Alice Schlesinger, who decided motion seq. nos. 001 and 002, seeking consolidation and joint trial. In motion seq. no. 003, the Pavias' moved to dismiss certain of Couri's causes of action, and Couri cross moved to disqualify Pavias' counsel and to dismiss Pavias' counterclaims. In motion seq. 004, Couri moved for summary judgment in his favor against 18 East 73rd Street Corp., compelling compliance with certain discovery demands, and granting recusal and disqualification of this court. In motion seq. No. 05, Couri sought to hold defendants in contempt for failing to answer certain questions at a deposition. In motion seq. no. 06, Couri moved to compel the continued EBT of Pavia, strike Pavia's answer and preclude the introduction of evidence not previously produced regarding the greenhouse and on other matters.

⁴In the 2004 action, the Pavias' moved to dismiss the complaint, to enjoin Couri from commencing any further actions and to consolidate the 2003 and 2004 actions, and Couri cross moved for sanctions and various other relief (motion seq. no. 001).

⁵By decision and order dated February 8, 2005, the court dismissed third, fourth and fifth causes of action in the 2003 action, which effectively dismissed all claims against Pavias' lawyers.

Street Co., which are corporations allegedly controlled by and/or are alter egos of George Pavia.

By decision and order dated September 29, 2003, Justice Alice Schlesinger directed that the 2003 action be consolidated before this court with the 2002 action for joint trial and discovery. On May 14, 2004, J. Couri filed note of issue in the 2003 action, which this court consolidated with the 2004 action under Index No. 101709/03. The court also dismissed J. Couri's counterclaims in the 2002 action, including those for fraud in connection with the lease and interference with quiet enjoyment, as duplicative of the claims in the 2003 action.

J. Couri has the following three remaining claims in the actions consolidated under Index No. 101709/03 : (1) harassment by the Pavias and interference with quiet enjoyment of the Apartment, and claims relating to a glass enclosed area referred to as a greenhouse, covered terrace and atrium (hereinafter "the greenhouse/terrace")⁶ which is part of the Apartment, and which he alleges is illegal and entitles him to an abatement, (2) fraud in the inducement in connection with the lease of the Apartment and fraud and "cover-ups" regarding alleged violations of the Couris' tenancy, and (3) malicious prosecution related to the criminal complaint that Pavia filed against J. Couri, and his arrest based on such complaint.

After a hearing was held in connection with violations issued by the Department of Buildings ("DOB") regarding the greenhouse/terrace, by decision and order dated March 8, 2006, this court determined that if Couri proved at trial that he was entitled to an abatement based on the greenhouse/terrace, at best, it would constitute a partial abatement. This court then directed that until the issue was resolved at trial, that J. Couri pay use and occupancy due and owing since November 2002, less an abatement for certain periods based on violations issued by the DOB. The order conditioned J. Couri's payment of use and occupancy to the Pavias on Pavias'

⁶The structure was originally considered under the Department of Building's ("DOB's") rules and regulations applicable to a greenhouse. However, as indicated below, in its determinations of April 4, 2006 and September 18, 2006, the DOB considered the structure under rules and regulations applicable to a covered terrace.

submission of proof that the Apartment had been registered under the Rent Stabilization Laws and that J. Couri had been provided with a rent stabilized lease. The Pavias submitted such proof, but it was only after the Pavias sought to evict the Couris for failure to comply with the court's March 8, 2006 order, that J. Couri paid past and future use and occupancy.

Request for a Stay Based on J. Couri's Health Issues

J. Couri moves to stay the trial of these actions, which was scheduled to begin on January 22, 2007, asserting that his health issues prevent him from proceeding. In support of the motion, J. Couri relies on the affirmations from three treating physicians, Moshe Rubin, M.D., Jeffrey W. Moses, M.D., and Paulo A. Paciucci, M.D.

At the outset, the court notes that the trial of these actions has already been adjourned numerous times based on J. Couri's health issues. The trial was adjourned in the spring of 2005 due to J. Couri's medical issues. On August 15, 2005, the trial commenced and after jury selection, Couri complained that he was having chest pains, and as delineated in this court's interim decision and order dated August 26, 2005, due to his complaint, the trial was adjourned to September 6 when a mistrial was declared.⁷ Similarly, when the court attempted to hold a

⁷The following is part of a prior decision dated August 26, 2005, detailing the incident during trial and J. Couri's submissions in connection with his medical issues in 2005.

After the jury was selected, due to Couri's complaints of chest pain, the trial was adjourned so Couri could seek medical evaluation. On the following day, August 16, 2005, as Couri had waived the patient/physician privilege, Dr. Weintraub, Couri's treating cardiologist, stated on the record that in his opinion, it was unlikely that Couri had a heart attack, and that while Couri was admitted to the hospital overnight, he was being discharged in about one hour, and that Couri should be able to continue with the trial within 24 to 48 hours. Dr. Weintraub stated there was less than a 10% and probably less than 5% chance that Couri's complaints of chest pain were cardiac.

Dr. Weintraub's statements also indicated that he based his opinion on the results of three types of tests administered to Couri: (1) an EKG which was unchanged since 2003; (2) an angioplasty which indicated nothing different from the one in 1997; and (3) blood tests -one called a CPT test which indicated that Couri results were slightly high, but since his results were generally slightly high, Dr. Weintraub said the result was of questionable diagnostic value; and a second blood test for which the results had not yet been received. Dr. Weintraub further stated

that Couri's heart muscle looked good.

According to Dr. Weintraub, Couri has a history of multiple severe blockages of the artery with two arteries totally blocked and one severely blocked, and that the blockages had not significantly changed since 1997. While a stent was inserted during the angiogram [angioplasty] performed in the evening of the 15th, Dr. Weintraub explained it was for one of the obstructed arteries, and that in 1997, it would have required surgery for insertion of such a stent. Dr. Weintraub further explained that technology had advanced, so that today the stent could be placed during an angiogram [angioplasty] without surgery.

According to Dr. Weintraub, during the angiogram [angioplasty], a catheter was placed over a wire which was threaded through the femoral artery, and at the end of the catheter is a balloon with a stent on its tip, so that when the balloon is inflated the stent is enlarged and left in the artery. Dr. Weintraub stated that the procedure is invasive insofar as the arteries are entered, but he also described the procedure as a non-surgical intervention and indicated that no incision is made in the chest. Dr. Weintraub further stated that the insertion of the stent was preventative, and that Couri's cardiac condition is better now than previously.

The above sequence of events is directly relevant to Couri's cross motion for, inter alia, a stay of this proceeding based on his medical condition. A party seeking an adjournment of a proceeding based on his medical condition must present competent medical evidence of the condition and its effect of his ability to go forward. Ferran v. Dwyer, 252 AD2d 758 (3d Dept 1998); People v. Lubash, 173 Misc2d 524 (Sup Ct Queens Co. 1997).

As Couri has a medical condition, the focus of this court's inquiry is on the effect of such condition on his ability to continue the trial on September 6th and to go forward with the contempt hearing. At the outset, based on Dr. Weintraub's statements, and to a certain extent the documents submitted by Couri, it has been established that Couri has multiple blocked arteries diagnosed as early as 1997. A 1997 letter from Dr. Benjamin Lewis states that Couri was opposed to surgery for the condition and committed to medical therapy. A May 14, 2003 "To Whom It May Concern" letter from Dr. Weintraub indicates he has been under his care since 1999, has multi-vessel coronary artery disease, and advises that he avoid exposure to emotionally stressful situations.

Couri further submits the following: (1) the August 15, 2005 angiogram report, (2) PET MYOCARDIAL viability report of 8/1/01 with impressions, and (3) a 1999 CAT SCAN of chest indicating coronary artery calcification.

Couri submits random and unexplained documents regarding his medical condition and treatment. Couri argues in his papers and on the record on August 23, that he had a mild heart attack on August 15, and that he has unstable angina. However, what can be gleaned from the records and from Dr. Weintraub's statements is that Couri has multiple blockages in his coronary arteries. In 1997 surgery was considered, and Couri chose medical therapy. The 2001 PET and the 1999 CAT SCAN were apparently performed in connection with these blockages. With respect to Couri's complaints on August 15th of chest pains, Dr. Weintraub stated that the results of the angiogram which was performed showed that his heart condition was not significantly different than it was in 1997. As for Couri's complaints of chest pains on August 23, 2005, as Couri signed himself out of the hospital against medical advice and submits no

contempt hearing on August 23, 2005, regarding J. Couri's failure to deposit moneys for past and future use and occupancy with the Clerk of the Court, J. Couri complained of chest pains, and the hearing was adjourned.⁸ The trial was adjourned to October 5, 2005, and then to December 2005

medical records from the hospital other than the release and discharge form, there is no medical evaluation as to his condition. Nor does the disclosure form from the ambulance provide any information as it relates to privacy practices, and the handwritten notations are without any foundation.

As to Dr. Josiah's letter of August 19, 2005, his statements that Couri is undergoing evaluation and has anginal symptoms are general and lack any specificity regarding any examination, diagnostic tests, or other basis for his conclusions. The letter does not even indicate when Dr. Josiah first saw Couri or whether he, in fact, examined or performed any tests or examined any of Couri's medical records. Thus, this letter is insufficient to demonstrate whether Couri's medical condition prevents him from continuing with the trial on September 6th.

Thus, at this time, Couri has failed to present competent medical evidence explaining or evaluating his current medical condition. Without competent medical evidence, the court cannot evaluate the significance of Couri's complaints regarding his medical condition and make a determination as to whether the trial should go forward on September 6th. However, the court will evaluate any competent proof on Couri's medical condition when, and if, it is presented.

⁸The contempt hearing, as noted above, was to be held after the trial. However, in light of the adjournment of the trial to September 6th, and Dr. Weintraub's statement that Couri could go forward in 24 to 48 hours, the contempt hearing in conjunction was adjourned for a week, to Tuesday, August 23. On that date, argument was also scheduled in connection with Paviar's order to show cause to modify the court's February 9, 2005 order to direct the payment of use and occupancy to the Paviar.

During argument on August 23, Couri submitted, and the court accepted a letter from a Dr. Josiah addressed "To Whom It May Concern," dated August 19, 2005 indicating that Couri was undergoing evaluation for acute coronary syndrome, has anginal symptoms and should limit stressful activities that trigger these symptoms. He also resubmitted the angiogram report from August 15, 2005, and excerpts from an unidentified source describing angina. During the proceeding, Couri complained of chest pains and based on this complaint, an ambulance was called. While waiting for an ambulance, Couri left the courtroom and on his return informed the court that he had taken a pill, which he identified as nitroglycerin. The ambulance arrived and took Couri to the hospital. The matter was adjourned to Wednesday, August 24 at 2:00 pm, and the court informed Couri that, if he was unable to personally appear, he could appear by telephone conference or by a representative.

Couri did not appear in person on the August 24 nor by telephone, nor by a representative. Instead, Couri hand wrote a letter to the court stating that on August 23 he went to NYU hospital and the cardiologist who saw him advised him that an angiogram should be

and then to February 22, 2006 due to Couri's health issues. On March 8, 2006, the court adjourned the trial date to May 1, 2006, and that date was adjourned so that J. Couri could undergo treatment for melanoma.

Most recently, at a December 18, 2006 court appearance, when the court indicated that the trial would be set for the first week in January 2007, J. Couri represented that he was unavailable as he was having a procedure performed to replace a heart stent, and based on this representation the court adjourned the trial to January 22, 2007. When the parties came before the court to argue these motions on January 17, 2007, J. Couri stated that no stent was replaced and that he needed open heart surgery, but provided no medical evidence to support this statement. A pre-trial conference and hearing were scheduled for January 19, 2007 in connection with Pavias' motion in limine regarding DOB's recent determination that the greenhouse/terrace was acceptable as a covered terrace, and Deputy Commissioner Fatwa Amer was subpoenaed and appeared for January 19th hearing.

performed, which procedure he declined. He signed a release and discharge form as to the hospital and its physicians and signed himself out against medical advice. In his letter, Couri indicated that he is seeking other opinions, and is scheduled to undergo further tests. In addition to the letter and discharge form, Couri submitted a type-written form entitled Pre-Hospital Care Report (patient information disclosure) apparently from the ambulance technicians, and a separate page of handwritten notes that does not identify its author, and are written on plain white paper, without any heading or other identifying information.

On August 24, the Pavias moved to hold Couri in default on the contempt hearing for failing to provide competent medical evidence that his medical condition prevented him from appearing on that day as directed by the court. Pavias' attorney based his request on the grounds that in an August 16 telephone conference, the court directed Couri to provide competent evidence regarding his condition. The Pavias also argued, based on Dr. Weintraub's medical statements, that Couri did not suffer a heart attack, and that stent which was inserted on August 15 was based on Couri's condition, i.e. blocked arteries, diagnosed back in 1997. The Pavias further argued that since Dr. Weintraub had indicated on August 16 that Couri could resume the trial within 24-48 hours, there was no medical reason that Couri could not go forward with the hearing a week later on August 24th. Finally, the Pavias argued that Couri's search for another doctor was motivated by Couri's dissatisfaction with Dr. Weintraub's statements that he did not suffer a heart attack and that he would be able to go forward within 24-48 hours.

On January 18, 2007, J. Couri telephoned the Clerk for Part 11 and notified him that he was having "cardiac surgery" at Columbia Presbyterian Hospital, and would therefore not appear for the January 19 hearing. While in the hospital, J. Couri left two messages on the voice mail in chambers on the morning of January 19, in which he informed the court that he had three stents inserted and that blood test revealed that he had a heart attack on January 17. According to DOB Deputy Commissioner Fatma Amer, Couri telephoned a secretary at the DOB to inform her he was ill and discussed whether DOB witnesses were necessary at the hearing scheduled for January 19. Couri also telephoned the courtroom on January 19 and told the Part Clerk that he was in the hospital and would not be able to appear at the hearing.

While J. Couri has health issues, according to the affirmations from his physicians, the conditions from which he suffers are chronic and may never be resolved. Moreover, despite his health issues, J. Couri has shown himself to be able to appear in court on numerous occasions without incident, to argue his points clearly and cohesively, and produce voluminous motion papers and other submissions. The court appearances in which Couri has had heart-related complaints have been in connection with going forward with trial or dispositive hearings, such as to hold him in civil contempt. Significantly, at the hearing in September 2005, when this court considered the abatement Couri appeared and participated in the hearing.⁹ Given the history of this action in which J. Couri repeatedly claims that he has a medical crisis on the eve of trial which purportedly prevents him from proceeding, the long period of time during which these actions have been pending and the contentious nature of the claims among the parties who live in the same brownstone, the issues surrounding J. Couri's health issues must be resolved so that this matter can go forward.

Accordingly, pursuant to an order dated January 19, 2007, this court directed that a

⁹Initially Couri complaint he was not feeling well enough to participate, however, at the hearing he actively consulted with Mr. Robbins, who is representing Couri's wife, and subsequently participated.

hearing be held on January 29, 2007 regarding J. Couri's failure to appear in court on that day, his medical condition and whether the matter should proceed to trial forthwith.¹⁰ However, on January 29, J. Couri failed to appear. Mr. Robbins, on his behalf, stated that he was in or at the hospital in connection with the stents inserted on January 18, for chest pains, and to ascertain whether he needed surgery. The decision regarding J. Couri's application for a stay based on his health issues will be resolved following the hearing, which is adjourned to February 5, to follow the hearing in connection with the Pavias' motion to rescind the court's March 8, 2006 order granting a partial abatement of use and occupancy, and the Pavias' motion in limine regarding DOB violations.

Request for a Stay Based on Outstanding Discovery

J. Couri argues that the trial of this action should be stayed to permit him to take the Pavias' depositions as to their conduct with respect to hearings before the DOB and the Environmental Control Board ("ECB") and as to alleged violations issued by the Department of Housing Preservation and Development ("HPD") with respect to conditions in the greenhouse/terrace, recent post-note of issue allegations including loose facade, mold, and a non-operational heating system. J. Couri further claims that he was only permitted to depose George Pavia on March 10, 2003 and May 12, 2003, before the Pavias were granted permission to amend their complaint to include the nuisance claim pursuant to this court's decision and order dated January 30, 2004.

J. Couri also seeks the depositions of Julian Pavia and Todd Romano, a former neighbor in the Building, whose testimony will be used a trial by the Pavias to support their nuisance claim.

¹⁰J Couri was also directed to produce certain certified medical records, including records from any hospitalizations in New York in 2006 and 2007 and certified records from the three treating physicians whose affirmations were submitted in support of this motion, and indicated that the court would consider the application from the Pavias' attorney to accept the testimony of Couri's physicians over the telephone.

Contrary to J. Couri's arguments, there is no basis for staying these actions on the eve of trial for further discovery. Many of the issues raised by J. Couri have already been addressed by this court in its decision and order dated April 29, 2005 under Index No. 101709/03 which denied in part and granted in part J. Couri's motion to compel compliance with certain discovery demands, and its decision and order dated August 12, 2005 which denied J. Couri's motion for further discovery including the continued deposition of George Pavia.¹¹

As indicated above, the September 29, 2003 order of Justice Schlesinger consolidated Pavia's and Couri's claims for joint trial and discovery. The Pavias' 2002 complaint was amended to add the nuisance claim in January 2004 and pursuant to the April 29, 2005 order, George Pavia was deposed on June 2, 2005. Furthermore, Couri filed note of issue certifying discovery was complete in May 2004. Thus, Couri deposed Pavia three times and did not seek to specifically depose him about the nuisance claim until after note of issue had been filed and until the eve of trial. Under these circumstances, Couri has waived his right to depose George Pavia regarding the nuisance claim.

With respect to any discovery regarding the condition of the greenhouse/terrace based on the alleged HPD violations, the court notes that these issues have been newly raised by J. Couri and were not part of the allegations in the counterclaims asserted in the 2002 action or his consolidated claims in the 2003 and 2004 actions. And, while the consolidated complaint contains a general allegation that the Building's basement contained mold, it does not contain any specific allegations that there is mold in the Apartment or the greenhouse/terrace. Significantly, during the three day hearing held in September 2005 to consider Couri's claims that he was entitled to an abatement, Couri made no claim as to any mold in the Apartment. Nor has there been any discovery regarding the mold. Couri first raised the issue on the eve of trial in a request that the court so-order subpoenas in connection with allegations of mold. Thus, as the

¹¹These decisions were filed in the 2003 action under motion seq nos. 004 and 006.

pleadings are insufficient to give notice of any claim of mold in the Apartment, including in the greenhouse/terrace, or with respect to any of the other alleged HPD violations, J. Couri is not entitled to discovery on these issues.¹²

Accordingly, J. Couri's request to stay the trial to obtain additional discovery is denied.

Dismissal Motion

J. Couri moves to dismiss (1) the Pavias' claim relating to the water leak based on the Pavias' alleged failure to provide any evidentiary support for the claim and George Pavia's alleged admission that they suffered no damage from the leak, and (2) the nuisance claim based on the doctrine of collateral estoppel.

The motion is denied as untimely and without merit. With respect to J. Couri's first argument, the court notes that in its decision and order dated September 29, 2003 (motion seq. 002 in the 2002 action), the court denied J. Couri's motion to dismiss the claim relating to the leak and following the completion of discovery, the court by decision and order dated June 28, 2004 (motion no. 009 in the 2002 action), denied J. Couri's motion for summary judgment seeking to dismiss the claim. The court wrote that "the proof submitted on this motion is insufficient to demonstrate as a matter of law that the water damage to the Building was not caused by the leak from [the Couris'] apartment. And, although Pavia's deposition testimony suggests that defendant may have difficulty proving damages at trial, such testimony does not establish a defense as a matter of law." As the party seeking summary judgment, J. Couri, and not the Pavias, had the burden of providing proof demonstrating that there was no damage due to the leak.

J. Couri's latest motion to dismiss the claim relating to the leak is untimely and if considered would be denied for the same reasons stated by the court more than two and a half years ago, and any further attempt by J. Couri to seek this relief again will be considered

¹²This determination is without prejudice to Couri's right to commence a new action based on these alleged violations.

frivolous and will subject him to sanctions.

J. Couri also argues that the nuisance claim is barred by collateral estoppel based on certain determinations by the DHCR, the ECB court and a decision and judgment of Justice Rolando T. Acosta dated July 26, 2005. J. Couri mischaracterizes these determinations and the decisions and judgment which are primarily related to violations in connection with the greenhouse/terrace and are irrelevant to the nuisance claim which is based on J. Couri's alleged campaign of harassment against the Pavias, which purportedly included sending threatening letters, making repeated telephone calls, and harassing other tenants in the Building. Accordingly, the motion to dismiss the nuisance claim is denied.

J. Couri also seeks to have this court resolve the issues regarding the greenhouse/terrace based on Justice Acosta's decision and judgment, which denied George Pavia's request for Article 78 relief from a December 2, 2004 order of the DHCR. As this court stated in its decisions dated February 9, 2005, February 16, 2005, January 17, 2006, and March 8, 2006 (motion seq. nos. 012, 013, 020 in the 2002 action), in its December 2, 2004 order, the DHCR found a decrease in services based on certain issues regarding the greenhouse/terrace, and the DHCR reduced the rent to "the legal regulated rent that was in effect prior to the most recent guidelines adjustment as of the effective date of May 1, 2005," which was \$1,820.

However, J. Couri ignores that this court has taken into account the December 2, 2004 DHCR order in making its prior decisions concerning J. Couri's applications for rent abatements related to the greenhouse/terrace. In these decisions, the court analyzed the DHCR's order and repeatedly rejected Couri's position that the December 2, 2004 order found that the legally regulated rent was less than \$1,820.¹³ Despite the court's multiple decisions addressing this

¹³However, as previously stated, after a hearing in September 2005, the court decided that to the extent Couri succeeded at trial that he was entitled to an abatement based on the greenhouse/terrace, at best, it would constitute a partial abatement, and directed that until the issue was resolved at trial, that J. Couri pay use and occupancy of \$1,419.60 per month for the period after February 1, 2004.

issue, J. Couri continues to claim that the DHCR order as upheld after Article 78 review by Justice Acosta is dispositive of the issues before this court regarding the greenhouse/terrace, and entitles him to an abatement. Accordingly, any further motions by J. Couri seeking relief based on the December 2, 2004 order or Justice Acosta's decision and judgment will be deemed frivolous and will subject him to sanctions.

Subpoenas

J. Couri also seeks to have this court so-order various subpoenas directed at 18 East 73rd Street Corp., 18 East 73rd Street Co., Antonio Pavia, and Julian Pavia or, alternatively, seeks a missing witness charge. While the court declined to sign these subpoenas, it permitted J. Couri to renew his request upon an affidavit indicating, inter alia, the relevancy and materiality of the information sought in the subpoenas. As J. Couri fails to annex a copy of the subpoenas, this aspect of J. Couri's motion is denied.

Furthermore, requests for information by way of subpoenas on the eve of trial have been denied when the information should have been obtained during discovery. See Meistel & Co., Inc. v. Smythe Masterson & Judd, Inc., 215 AD2d 329 (1st Dept 1995)(trial court did not abuse its discretion in quashing two trial subpoenas issued by plaintiff on eve of trial where plaintiff improperly used subpoenas as overly broad discovery device to obtain discovery plaintiff's counsel failed to obtain during three years before trial).

Finally, J. Couri's alternative request for a missing witness charge is denied as without legal or factual basis, without prejudice to its renewal at the trial upon legally sufficient grounds.

Pavias' Cross-Motion

The Pavias cross move for an order (i) rescinding the temporary abatement previously granted by this court's decision and order dated March 8, 2006, (ii) restoring the full use and occupancy retroactively and prospectively, and (iii) directing that the Couris pay the Pavias for the abatement for the period November 2002-January 2007. J. Couri opposes the cross-motion.

In support of their cross motion, the Pavias submit (i) a DOB determination dated April 4,

2006 which upon the Paviass' request for reconsideration, found that the greenhouse is legal and requires no modification and that the greenhouse may be used for daily activities other than sleeping, and (ii) a subsequent DOB order dated September 18, 2006, that the April 4, 2006 determination satisfied certain previously issued violations.

The cross-motion is granted to the extent that as directed in this court's order dated January 19, 2007, at the hearings scheduled for January 29 and February 5, 2007, "the court will entertain an application by [the Paviass] to rescind the court's March 8, 2006 order granting Couri an abatement in the amount of use and occupancy pending trial."

Conclusion


In view of the above, it is

ORDERED that J. Couri's motion for a stay of these proceedings is denied except that, as ordered by this court on January 19, 2007, a hearing will be held on February 5, 2007, regarding J. Couri's health issues; and it is further

ORDERED that J. Couri's motion is otherwise denied; and it is further

ORDERED that Paviass' cross motion for an order rescinding the temporary abatement previously granted by this court's decision and order dated March 8, 2006 is granted to the extent that, as ordered by this court on January 19, 2007, the court will entertain the Paviass' request at the hearing to be held on February 5, 2007.

Dated: January 20, 2007



J.S.C.

FILED

JUN 04 2007

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