

Ballan v Turner

2007 NY Slip Op 33557(U)

October 10, 2007

Supreme Court, New York County

Docket Number: 0116938/2005

Judge: Doris Ling-Cohan

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publication.

NICOLE BALLAN,

Plaintiff,

-against-

OTIS TURNER,

Defendant.

ORDER

116938/05

INDEX NO. ~~104180/00~~

MOTION SEQ. 003

FILED

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NEW YORK COUNTY CLERK'S OFFICE

The following papers, numbered 1 to 5 were considered in plaintiff's motion to strike defendant's answer and cross-motion for an order vacating this Court's order dated July 20, 2007.

<u>Papers</u>	<u>Numbered</u>
Notice of Motion/Order to Show Cause - Affidavits - Exhibits.....	<u>1, 2</u>
Answering Affidavits - Exhibits	<u>5</u>
Reply Affirmation.....	<u>6</u>
Cross-Motion [X] Yes [X] No	<u>3, 4</u>

Upon the foregoing papers, plaintiff's motion to strike defendant's answer is granted, *unless*: (A) *within 20 days of service of a copy of this order with notice of entry, defendant supplies to plaintiff*: (1) the identity of the mortgage company for which the defendant maintained a mortgage for Apartment #3 in July 2003; and (2) a copy of the proprietary lease applicable at the time of plaintiff's tenancy or an affidavit from defendant indicating that such proprietary lease is no longer in his possession, and a diligent search has been conducted;¹ and (B) defendant pays plaintiff's costs on this motion within 20 days of presentment of an affirmation/affidavit of attorney's fees on this motion (affirmation/affidavit shall include the hourly rate, multiplied by the hours expended, not to exceed \$5,000.00).

In its order dated July 20, 2007, this Court previously ordered that the above discovery be supplied. Such order was entered upon defendant's default at a discovery compliance conference. In addition, item two listed above (the proprietary lease) was ordered to be supplied, by order of this Court dated June 15, 2007,² which was consented to by both sides.

¹ According to plaintiff, such discovery remains outstanding. [¶9, Affirmation in Opposition and in Reply]. Although plaintiff indicates that "the identity of and last known address for contractors hired by the defendant to perform repairs during Nicole Ballan's tenancy" is also outstanding, such information was in fact supplied by defendant. [Exh. J, Notice of Cross-Motion].

² The June 15, 2007 order provides that defendant shall supply the "proprietary lease in effect on the date of the accident within 20 days".

There is no dispute that defendant failed to comply with this Court's two orders. Moreover, it is of utmost significance that, it was not until faced with plaintiff's motion to strike defendant's answer, filed on or about September 11, 2007, did defendant even seek to vacate the July 20, 2007 order (by filing a cross-motion). Nor does defendant explain why it failed to vacate the July 20, 2007 order, after it was copied by plaintiff on the letter sent to this Court on or about August 21, 2007, complaining that defendant failed to comply with this Court's order.

Furthermore, in the cross-moving papers, defendant fails to explain why counsel did not promptly move to vacate the July 20, 2007, when counsel learned of the entry of such order, admittedly on July 20, 2007. [¶7, Affirmation in Support of Cross-Motion]. Defendant also utterly fails to address this Court's order dated June 15, 2007, which also required that defendant supply plaintiff with the proprietary lease. Nor does defendant provide proof that it complied with this court's June 15, 2007 order, entered on consent, at any time prior to the July 20, 2007 compliance date.

Instead, defendant merely complains that the July 20, 2007 order was entered on "default" and that it did not appear because the Note of Issue was filed. As noted above, defendant failed to explain why it did not promptly move to vacate such order. Moreover, defendant does not dispute that the June 15, 2007 order clearly set forth the next compliance conference date on July 20, 2007, and indicated that the Note of Issue could be filed with the outstanding discovery. Further, there is no claim that defendant in fact provided the proprietary lease, as ordered in the June 15, 2007 order (and subsequently ordered again on July 20, 2007), so defendant could not reasonably think that it complied with all outstanding discovery, thereby excusing any appearance on July 20, 2007, as ordered, merely because the Note had been filed. In fact, defendant concedes that plaintiff counsel called defendant's offices on the morning of the conference (Affidavit in Support of Cross-Motion of Genine Carboni, Exhibit C, para 4).³ Additionally, the Court notes that while defendant consented to producing the lease on June 15, 2007, it now belatedly claims in its cross motion that it cannot find the lease, but never conveyed that information to the plaintiff or the Court, except by cross-motion.

³ Ms Carboni's explanation is illogical as she claims that she was advised that "a conference was going forward in Supreme Court" and then states in the same sentence "I called plaintiff's counsel's office a number of times requesting an update as to what was going on, and asking whether we needed to appear." Why defendant chose not to dispatch an attorney after being notified by plaintiff that a conference was going forward, or at a minimum, to call the Part Clerk, but rather instead chose to call plaintiff's office several times that day is inexplicable. Of course, as stated above, defendant nevertheless chose to ignore the order (and the previous one) and waited until plaintiff filed a motion to strike, rather than promptly moving to vacate the order.

It is noted that, CPLR §3101 provides for “full disclosure of all matter material and necessary in the prosecution or defense of an action, regardless of the burden of proof.” Regardless of whether or not the subject discovery will be determined at trial to be admissible, at this juncture, such discovery is “...sufficiently related to the issues in litigation to make the effort to obtain [them] in preparation for trial reasonable...”. *Allen v. Crowell-Collier Pub. Co.*, 21 NY2d 403, 406-07 (1968)(citation omitted); *see also Josephs v. Oliver*, 48 AD2d 688 (2nd Dept 1975). Further, “pretrial disclosure extends *not only* to proof that is admissible *but also* to matters that *may lead* to the disclosure of admissible proof”. *Matter of New York County DES Litigation v. Eli Lilly & Co.*, 171 AD2d 119, 123 (1st Dept 1991)(emphasis supplied). The test for CPLR §3101 (a) purposes is “usefulness and reason”; disclosure will be permitted where the information sought concerns the controversy in issue and will assist in the preparation for trial. *Id*; *see also Williams Real Estate, Co., Inc. v. Viking Penguin, Inc.*, 216 AD2d 27, 28 (1st Dept 1995); *Conway v. Bayley Seton Hospital*, 104 AD2d 1018, 1019 (1st Dept 1984). The discovery ordered by this Court to be supplied by defendant in this order, and this Court’s prior orders, falls within this rubric.

Court orders must be obeyed for the court system and process to have any effect. As stated by the Court of Appeals : “In *Kihl v. Pfeffer* (94 NY2d 118, 123 [1999]), we affirmed the dismissal of a complaint for failure to respond to interrogatories within court-ordered time frames, observing that “[i]f the credibility of court orders and the integrity of our judicial system are to be maintained, a litigant cannot ignore court orders with impunity.” *Brill v City of New York*, 2 NY3d 648, 653 (2004). Moreover, the Appellate Division, First Department, in *Figdor v. City of New York*, 33 AD3d 560 (1st Dept 2006) directed that defendant's answer be struck unless it paid a sanction of \$10,000, for its failure to comply with discovery orders, and stated:

“Defendant's response to the myriad discovery orders.... has been inexcusably lax. While discovery has trickled in with the passage of each compliance conference, the cavalier attitude of defendant, resulting as it has in substantial and gratuitous delay and expense, should not escape adverse consequence. We take this opportunity to encourage the IAS courts to employ a more proactive approach in such circumstances; upon learning that a party has repeatedly failed to comply with discovery orders, they have an affirmative obligation to take such additional steps as are necessary to ensure future compliance.”

(emphasis supplied).

Accordingly, it is

ORDERED that plaintiff's motion to strike defendant's answer is granted, unless: (A) *within 20 days of service of a copy of this order with notice of entry, defendant supplies to plaintiff:* (1) the identity of the mortgage company for which the defendant maintained a mortgage for Apartment #3 in July 2003; and (2) a copy of the proprietary lease applicable at the time of plaintiff's tenancy or an affidavit from defendant indicating that such proprietary lease is no longer in his possession, and a diligent search has been conducted (detailing the search made, with dates and places searched, and name of person conducting the search); and (B) defendant pays plaintiff's costs on this motion within 20 days of presentment of an affirmation/affidavit of attorney's fees on this motion (affirmation/affidavit shall include the hourly rate, multiplied by the hours expended, not to exceed \$5,000.00).

It is further

ORDERED that, upon defendant's failure to comply as indicated above, an order striking defendant's answer will be entered against defendant, upon the filing of an affidavit/affirmation indicating non-compliance, and submission of a proposed preclusion order, with the Part 36 Clerk, upon 5 days notice to the other side (and proof of service). **Such submission shall be accompanied by a copy of this order.**

Dated: 10/10/07



Doris Ling-Cohan, JSC

Check One: FINAL DISPOSITION NON-FINAL DISPOSITION

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