

**Ladies Mile, Inc. v Diamond**

2008 NY Slip Op 31497(U)

May 28, 2008

Supreme Court, New York County

Docket Number: 0111368/2004

Judge: Walter Tolub

Republished from New York State Unified Court  
System's E-Courts Service.

Search E-Courts (<http://www.nycourts.gov/ecourts>) for  
any additional information on this case.

This opinion is uncorrected and not selected for official  
publication.

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

PRESENT: TOLUB  
Justice

PART 15

LADIES HILL, INC.

INDEX NO. 111368/05

- v -  
AYTAN DIAMOND

MOTION DATE \_\_\_\_\_

MOTION SEQ. NO. 05

MOTION CAL. NO. \_\_\_\_\_

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

Notice of Motion/ Order to Show Cause - Affidavits - Exhibits ...

Answering Affidavits - Exhibits \_\_\_\_\_

Replying Affidavits \_\_\_\_\_

PAPERS NUMBERED

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion

**IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION**  
**IN ACCORDANCE WITH**

**IS DECIDED**

**IN ACCORDANCE WITH**

**FILED**

JUN 02 2008

COUNTY CLERK'S OFFICE  
NEW YORK

Dated: 5/20/08

WALTER B. TOLUB  
J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST  REFERENCE

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

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: IAS PART 15

-----x  
LADIES MILE, INC.,

Plaintiff,

-against-

AYTAN DIAMOND

Defendant.  
-----x

WALTER B. TOLUB, J.:

This is a motion by the Defendant for an order striking Plaintiff's Amended Answer for failing to produce Miki Naftali for a deposition and for summary judgment on its counterclaims. Plaintiff cross-moves for a protective order prohibiting the oral examination of Mr. Naftali and for an order compelling the Defendant's deposition.

Facts

The facts are restated from this court's decision dated March 23, 2006. Defendant is a tenant in possession of Apartment 212 at a premises known as 655 Sixth Avenue, New York. Plaintiff Ladies Mile, Inc. is the owner of the premises. Landlord acquired the building in 2003 from the previous owners, Apache Real Estate (Apache) and Hugh O'Neil Building Co. (O'Neil). The subject building was previously an Interim Multiple Dwelling subject to Article 7-C of the Multiple Dwelling Law. The building was legalized in 1990 with the issuance of a new certificate of occupancy.

Index No. 111368/04  
Mtn Seq. 005

**FILED**

JUN 02 2008

COUNTY CLERK'S OFFICE  
NEW YORK

Defendant's tenancy began in 1977, and he has continuously been living, and until recently, working in the building. At first the Defendant created sculptures, then in 1985 he began making wood cabinets. In 1987, under an Agreement with O'Neil, Defendant moved to Room 212 and a portion of the basement. In connection with the move he agreed that the working component of his unit would be in the basement, and that the residential component of the unit would be located on the second floor space. In 1996, under an agreement with Landlord's predecessor, he relocated his work space to a different portion of the basement. In 2000, Defendant made a further agreement with Landlord's predecessor in settlement of various claims. That agreement reaffirmed the validity of the 1987 and 1996 agreements in that it stated that the second floor and the basement were one combined unit, and that such combined unit was required to be registered by the building owner with the New York State Division of Housing and Community Renewal and was subject to the Rent Stabilization Code.

In 1996 Defendant commenced a harassment proceeding with the New York City Loft Board. On January 12, 2000 the parties entered a stipulation of settlement, in which Defendant agreed to relocate his business to a new premises. Defendant contended that since 2000 he used the basement space only as an ancillary storage area, which use is permitted under the 1990 certificate

of occupancy. The 1990 certificate of occupancy permits the basement to be used as accessory storage and a boiler room. In 1999 one of the predecessor owners performed work in the basement in an attempt to amend the 1990 certificates to allow for use of the basement as an accessory woodworking shop. The Department of Buildings (DOB) had certain objections to the work.

The Landlord claims that in 2001, Apache attempted to gain access to Defendant's portion of the basement in order to perform the work necessary and amend the 1990 certificate to permit the use of that area for a woodworking shop. According to the Landlord, Defendant failed to cooperate. Ultimately the certificate of occupancy was never amended. Due to a change in the Zoning Resolution, it is no longer possible to conduct a woodworking shop in the building.

Based upon Defendant's illegal use of the premises, Landlord commenced the underlying action. Plaintiff's complaint sought (1) a permanent injunction preventing the Defendant from using the basement as a woodworking shop; (2) a declaration that Defendant's use of the basement is in violation of the Zoning Resolution and the 1990 Certificate of Occupancy; (3) a judgment of ejectment pursuant to paragraph 5(c) of the 1996 Agreement; (4) a judgment of ejectment based upon Defendant's illegal use of the basement premises; (5) a permanent injunction preventing the Defendant from using the Basement Premises in any manner not

consistent with the Zoning Resolution or the 1990 Certificate of Occupancy; (6) a declaration that the Lease, except for the designation of unit 2B instead of 212, constitutes the lease agreement that Plaintiff was to provide for Defendant's signature pursuant to the Loft Board Order; and (7) an injunction directing Defendant to execute the Lease, modified to reflect 212 instead of 2B as Defendant's apartment. The Defendant asserted counterclaims for; (1) \$250,000 as damages for failure to amend the certificate of occupancy; (2) an order permitting the Defendant to use the basement for residential purposes; (3) for an order compelling the Plaintiff to restore Defendant to room 415 and compelling the Plaintiff to obtain a residential Certificate of Occupancy; and (4) a judgment for fees and expenses.

After substantial motion practice, this court disposed of all the causes of action set forth in the complaint. The remaining claims in this case are only Defendant's counterclaims.

Defendant then issued various discovery notices. One of the notices was to Miki Naftali, who Defendant believes to be the person in control of the Plaintiff corporation and who is knowledgeable regarding the Defendant's circumstances since Defendant claims that, at one point, he spoke to Mr. Naftali

directly about the apartment<sup>1</sup>. Defendant claims that Mr. Naftali has knowledge about the circumstances surrounding the acquisition of the building and who is invested with knowledge concerning what Plaintiff knew regarding the Defendant and his various agreements with the building's prior owners. Mr. Naftali has not been produced for a deposition to date and Defendant seeks an order striking Plaintiff's answer for its failure to produce him.

Plaintiff argues that it produced a witness with knowledge, Yehuda Mor, and that therefore they do not have to produce Mr. Naftali, and they seek a protective order prohibiting the Defendant from conducting his deposition. Defendant claims that Yehuda Mor has knowledge about alterations in the building but that he does not have knowledge regarding the agreements entered into at the time the building was acquired by the Plaintiff.

Defendant now seeks an order striking Plaintiff's Amended Answer for failing to produce Miki Naftali for a deposition and for summary judgment on its counterclaims. Plaintiff cross-moves for a protective order prohibiting the oral examination of Mr. Naftali and for an order compelling the Defendant's deposition.

#### Discussion

The purpose of Article 31 is to provide full disclosure of all evidence that is material and necessary in the prosecution or

---

<sup>1</sup>Defendant claims that he was told by Miki Naftali that in the event that Defendant agreed to various terms and conditions demanded by the Plaintiff, that Plaintiff would obtain a zoning variance to allow for the cabinetry shop use in the basement.

defense of an action and is liberally construed to give effect to the strong policy favoring full disclosure. (Slabakis v. Drizin, 107 AD2d 45[1st Dept 1985]). CPLR § 3101 states that there shall be full disclosure for all matters that are material and necessary in the prosecution or defense of an action. "Material and necessary" is liberally construed and requires disclosure of any facts bearing on the controversy which assist in the preparation for trial by sharpening the issues and reducing delay and prolixity. (Allen v. Crowell-Collier Pub. Co., 21 NY2d 403, 406-407 [1968]). Disclosure is required for all evidence that may contain information "reasonably calculated to lead to relevant evidence." (Cronin v. Gramercy Five Associates, 233 AD2d 263 [1<sup>st</sup> Dept 1996]). It is incumbent upon the party seeking disclosure to demonstrate that the method used will result in the disclosure of relevant evidence or is reasonably calculated to lead to the discovery of information bearing on claims. (Crazytown Furniture v. Brooklyn Union Gas Co., 150 AD2d 420 [2d Dept 1989]).

When dealing with a corporate structure, if an additional party is sought to be deposed, the examining party must demonstrate that the corporate representative already deposed possessed insufficient knowledge or was otherwise inadequate. (Rosner v. Maimonides Hospital, 89 AD2d 874 [2d Dept 1982]).

Defendant seeks to depose Miki Naftali because he may

possess knowledge about the circumstances surrounding the purchase of the building, the agreements with the building's prior owners and the Defendant. This information would be relevant to find out whether any apartment issues should have been addressed and whether some may be addressed now. Yehuda Mor testified at his deposition that he was unaware of Defendant's apartment issues until 6-9 months after he was assigned a role in the development of the property in 2004. (Defendant's Ex. J).

Additionally, Mr. Naftali possesses knowledge about the structure of Ladies Mile, Inc. Yehuda Mor testified that he is unfamiliar with Plaintiff's corporate structure and Plaintiff's decision making process.

It follows that Mr. Mor's testimony was inadequate and that Mr. Naftali's deposition is relevant to the scope of this action and is reasonably calculated to lead to the discovery of admissible evidence on Defendant's counterclaims.

Once Mr. Naftali's deposition has been taken, Defendant's deposition shall take place.

Accordingly, it is

ORDERED that Defendant's motion to strike the Reply to the Amended Answer is denied and the deposition of Mr. Naftali shall take place within 30 days of service of a copy of this Order with notice of entry and that Mr. Diamond's deposition is to take place within 5 days of Mr. Naftali's deposition; and it is

further

ORDERED that if Mr. Naftali does not appear for the deposition, Plaintiff's Reply to the Amended Answer shall be stricken and a default judgment entered against the Plaintiff on Defendant's counterclaims with an inquest to follow for the assessment of damages; and it is further

ORDERED that Plaintiff's motion to compel the deposition of Defendant is granted in accordance with the above directive; and it is further

ORDERED that Plaintiff's motion for a protective order is denied; and it is further

ORDERED that the Clerk of the Court is directed to enter judgment accordingly.

Counsel for the parties are directed to contact this court at (646)386-3193 upon the completion of depositions to schedule a conference date which is to be held at 11 AM in room 335 at 60 Centre Street.

This memorandum opinion constitutes the decision and order of the Court.

Dated: *5/20/08*

**FILED**

JUN 02 2008

**COUNTY CLERK'S OFFICE  
NEW YORK**

*[Signature]*  
\_\_\_\_\_  
HON. WALTER B. TOLUB, J.S.C.