

Ladies Mile, Inc. v Diamond

2008 NY Slip Op 33325(U)

December 9, 2008

Supreme Court, New York County

Docket Number: 111368/04

Judge: Walter B. Tolub

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

PRESENT: Four

PART 15

Justice

LADIES MFG. INC.

INDEX NO.

11369/09

MOTION DATE

- v -

ARTAN DIAMOND

MOTION SEQ. NO.

06

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

PAGES NUMBERED

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

IS DECIDED

IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION

FILED
DEC 12 2008

COUNTY CLERK'S OFFICE
NEW YORK

Dated:

12/9/08

WALTER B. TOLUB s.o.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

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,

Index No. 111368/04
Mtn Seq.006

-against-

AYTAN DIAMOND

Defendant.

-----x

WALTER B. TOLUB, J.:

FILED

DEC 12 2008

COUNTY CLERK'S OFFICE
NEW YORK

This is a motion to strike Plaintiff's Reply to the Amended Answer and Counterclaims and to enter a default judgment.

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.

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 believed 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 apartment¹. Defendant claimed that Mr. Naftali had knowledge about the circumstances surrounding the acquisition of the building and concerning what Plaintiff knew

¹Defendant 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.

regarding the Defendant and his various agreements with the building's prior owners. Plaintiff argued that it produced a witness with knowledge, Yehuda Mor, on February 29, 2008, and that therefore they did not have to produce Mr. Naftali.

Defendant claimed that Yehuda Mor had knowledge about alterations in the building but that he did not have knowledge regarding the agreements entered into at the time the building was acquired by the Plaintiff. Finally, three years after the action was commenced, Mr. Naftali was deposed on July 2, 2008, following a court order dated May 28, 2008, with conditional language providing that if Mr. Naftali not appear, Plaintiff's Reply to the Amended Answer would be stricken.

During the depositions of Mr. Mor and Mr. Naftali, Defendant made a number of requests for documents and information. In July 2008, both Mr. Mor and Mr. Naftali's depositions were sent to Plaintiff for execution. Along with the transcripts, Defendant sent a letter indicating the page in the transcript where further discovery demands were made (Defendant's Ex. J).

More than 60 days have passed since Defendant sent Plaintiff the transcripts and the transcripts have still not been executed. Additionally, Defendant claims that Plaintiff had not produced a substantial majority of the discovery requested and argues that this is consistent with Plaintiff's derelict discovery pattern. Defendant further states that the discovery which was produced,

was incoherent, not organized and not in compliance with CPLR 3122[c].

In light of Plaintiff's pattern of behavior, Defendant now brings this motion to strike Plaintiff's Reply to the Amended Answer and Counterclaims and to enter a default judgment against the Plaintiff.

Plaintiff claims that it has conducted a comprehensive search of its books and records dating back numerous years and has produced all such documents and information within its possession, custody and control. Plaintiff argues that when it received the additional requests for documents and information stemming from the depositions, that Plaintiff began "culling its books and records in an attempt to locate responsive documents and information . . ." (Robles Aff. P.2). Additionally, Plaintiff attributes any delay in producing documents in their possession to the documents not being appropriately indexed and the considerable effort required in gathering information because the litigation involves issues dating back to 1987. Also, information about former employees and information relating to the conversion of the Building from an Interim Multiple Dwelling to a Condominium is complex.

Discussion

CPLR §3126 governs the penalties for non-disclosure. The penalties authorized by the statute are designed to prevent a

party who has refused to disclose evidence from exploiting or benefitting from the unavailability of proof during a pending civil action (DiDomendico v. C&S Aeromatik Supplies, Inc., 252 AD2d 41 [2nd Dept 1998]). While the nature and degree of the penalty to be imposed for failure to comply with an order for disclosure is a matter of discretion with the court, striking a pleading is inappropriate absent a clear showing that the failure to comply with discovery demands is willful, contumacious or in bad faith (Kuzmin v. Visiting Nurse Services of New York, 22 AD3d 643 [2nd Dept 2005]).

Here, Defendant argues that Plaintiff's failure to provide documentary evidence months after the depositions of both Mr. Mor and Mr. Naftali, are indicative of Plaintiff's willful and contumacious behavior since the commencement of this action. Defendant argues that Plaintiff's resistance to disclosure is willful, systematic and has effectively brought discovery to a virtual halt.

Plaintiff essentially argues that discovery takes time and that it is not participating in any willful non-disclosure.

A review of the documents Defendant demands indicates that much of the information requested are the names and addresses of project managers, sponsors, zoning applications, draft lease between the parties, registration documents etc. Many of the documents Defendant has requested are seemingly easy to procure

and organize as required by CPLR §3122[c].

Accordingly, it is

ORDERED that Defendant's motion is granted to the extent that, Plaintiff will provide the appropriate discovery to the Defendant within thirty (30) days of the filing of this order with notice of entry; and it is further

ORDERED that if Plaintiff does not have certain documents or information in its possession or control, it shall provide an affidavit to that effect within thirty (30) days of the filing of this order with notice of entry; and it is further

ORDERED that if the appropriate discovery is not produced as provided for in this order, 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 the Clerk of the Court is directed to enter judgment accordingly.

Counsel for the parties are to appear for a conference on February 13, 2009 at 11AM in room 335 at 60 Centre Street.

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

Dated: 12/9/08

FILED
DEC 12 2008
COUNTY CLERK'S OFFICE
NEW YORK

HON. WALTER B. TOLUB, J.S.C.