

Hines v Charles H. Greenthal Mgt. Corp.

2009 NY Slip Op 31631(U)

July 13, 2009

Supreme Court, Nassau County

Docket Number: 10021/06

Judge: William R. LaMarca

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SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK
COUNTY OF NASSAU - PART 15

Present: HON. WILLIAM R. LaMARCA
Justice

DR. GEORGE HINES and HELEN HINES,
Plaintiffs,

-against-

CHARLES H. GREENTHAL MANAGEMENT
CORP., THE BOARD OF MANAGERS OF THE
WYNDHAM WEST CONDOMINIUM, SPECTRUM
DISTRIBUTING CORPORATION and E.W.
HOWELL d/b/a E.W. HOWELL, CO., INC.,
Defendants

Motion Sequence #8
Submitted March 23, 2009
INDEX NO: 10021/06

CHARLES H. GREENTHAL MANAGEMENT
CORP. And THE BOARD OF MANAGERS OF
THE WYNDHAM WEST CONDOMINIUM,
Third-Party Plaintiffs,

-against-

D&T MIRROR GLASS STORE FRONTS,
Third-Party Defendant.

E.W. HOWELL CO., INC.,
Second Third-Party Plaintiff,

-against-

S.A.F. LASALA CORP., and KINGS COUNTY
WATERPROOFING CORP.,
Second Third-Party Defendants.

The following papers were read on this motion:

Notice of Motion.....	1
GREENTHAL Affirmation in Opposition.....	2
Reply Affirmation.....	3

Counsel for plaintiffs, DR. GEORGE HINES and HELENE HINES, moves for an order, pursuant to CPLR §3124 and §3126, striking the answers served by defendants, CHARLES H. GREENTHAL MANAGEMENT CORP. (hereinafter referred to as "GREENTHAL") and THE BOARD OF MANAGERS OF THE WYNDHAM WEST CONDOMINIUM (hereinafter referred to as the "BOARD"), for failure to comply with plaintiffs Second Request for Production and Inspection of Documents, dated February 5, 2008, and for an order setting this matter down for an inquest as to plaintiff's damages against said defendants. In the alternative, plaintiffs seek an order compelling said defendants to 1) permit plaintiffs to conduct a forensic examination of said defendants' computer system, including making mirror image copies of the hard drives, 2) produce Raymone Renoso, GREENTHAL's IT manager for a further deposition, together with a witness from the BOARD during October through December 2004. An Affidavit of Service reflects service of the instant motion on counsel for all parties, on February 24, 2009, but only counsel for GREENTHAL and the BOARD, submits papers in opposition to the motion, which is determined as follows:

In this action, plaintiffs seek to recover for personal injury and property damage to their condominium alleged to be caused by water leaks and mold resulting from, *inter alia*, the BOARD's failure to maintain the building. Plaintiffs allege negligence, breach of fiduciary duty and breach of the condo documents requiring the BOARD to repair damages caused by casualty losses. It is plaintiffs' position that GREENTHAL, the management company, and the BOARD failed to properly maintain the condo permitting toxic mold to form, and failed to properly remediate the mold contamination in plaintiffs' unit although

obligated to do so by the condo By-laws. Plaintiffs contend that GREENTHAL and the BOARD refused to pay for the cost of remediating plaintiffs' unit while paying for the remediation of mold contamination in other condominium units in the building. Plaintiffs allege that the misconduct of defendants caused plaintiffs to incur hundreds of thousands of dollars to gut and rebuild their unit and replace its contents, and further caused serious personal injuries to plaintiff, HELENE HINES.

The above captioned actions, which bear a 2006 Index Number, has generated extensive discovery which has generally been accomplished with a great deal of professionalism and cooperation between all counsel. On the instant motion, counsel for plaintiffs states that, after the deposition of the witness for the BOARD and GREENTHAL, Jonathan Kavner, the condo's property manager, counsel for plaintiffs served a Second Request for Discovery and Inspection in which he demanded copies of electronic data based upon Kavner's detailed testimony about the e-mail and computer systems maintained by GREENTHAL and the BOARD. Kavner testified about how information was stored for the condo and acknowledged that he regularly used e-mail during the relevant periods of time when discussing the mold problem and the plaintiffs' unit. Moving counsel points out that neither GREENTHAL nor the BOARD objected to the Second Document Request, nor have they responded to the demand. Counsel for plaintiffs claims that, despite repeated good faith letters requesting compliance, and counsel for defendants claims that defendants were "researching the matter", on September 26, 2008 counsel for said defendants advised that, although he was still checking, it appeared that neither GREENTHAL or the BOARD were in possession of any stored documents responsive to the outstanding request. Although stating at Court conferences that he would look again

and provide an affidavit as to his due diligence, counsel for plaintiffs asserts that defendants' counsel has never provided such an affidavit and the instant motion has become necessary. It is plaintiffs' position that they are entitled to defendants' contemporaneous notes and e-mails regarding the mold in their unit, defendants refusal to remediate or repair the damage and defendants agreements to remediate other similarly situated apartments in the building. Counsel asserts that, if the information was deleted, it may still be able to be obtained by obtaining mirror image copies of the hard drives and servers of the condo's computer system and that a further deposition of Raymone Renoso, GREENTHAL's IT manager may provide information about the circumstances surrounding any such deletion.

Moreover, counsel for plaintiffs contends that the testimony of Mr. Kavner failed to provide any information about why the BOARD refused to remediate the plaintiffs unit and that said information must be obtained from a member of the BOARD who served during that period of time. Counsel urges that plaintiffs be permitted to depose a member of the BOARD, under oath, as to why the BOARD refused to remediate the plaintiffs' unit while doing so for the HINES neighbors. Alternatively, plaintiffs demand that GREENTHAL and the BOARD's answer be stricken for failure to comply with multiple requests for the necessary electronic discovery.

In opposition to the motion, counsel for defendants states that, after exhaustive searches of his office computers and the computers of Joan Regnell, Kathy Bauman and Tom Gang, he has responded to the Second Discovery Demand and has provided hundreds of pages of documents by using a Google desktop search program, documents he previously claimed did not exist. Counsel opposes a forensic examination of

GREENTHAL's server and hard drive and claims that most of the information stored on the hard drive is totally irrelevant to plaintiffs' allegations and may be privileged attorney client communications or private information about other condo owners. Counsel for the defendants claims that the plaintiffs have not been treated differently than other unit owners and that the water damage in the plaintiffs unit was their responsibility to repair, as compared to damage to common areas caused by a structural defect. Counsel claims that because attorneys and insurance adjusters became involved with respect to the plaintiffs' claims immediately after the mold was discovered, direct communication with the HINES' ceased when the condo's insurer directed that no conversations take place until the issue of causality was resolved. Counsel for defendants asserts that causation is still very much an issue and urges that the Court deny plaintiffs motion in all respects. It is defendants position that plaintiffs discovery demands have received responses and that no further discovery should be permitted.

CPLR §3101(a) requires the "full disclosure of all information that is material and necessary to the defense or prosecution of an action". The "material and necessary" requirement directed in CPLR §3101(a) is to be liberally construed to require disclosure where the matter sought will assist in trial preparation by sharpening the issues and reducing delay. *Andon v 302-304 Mott Street Associates*, 94 NY2d 746, 709 NYS2d 873, 731 NE2d 589 (C.A. 2000), citing *Allen v Crowell-Collier Publishing Co.*, 21 NY2d 403, 288 NYS2d 449, 235 NE2d 430 (C.A. 1968). The nature and degree of the penalty to be imposed for failure to comply with a disclosure order is a matter generally left to the discretion of the Court. *Kingsley v Kantor*, 265 AD2d 529, 697 NYS2d 141 (2nd Dept. 1999). To invoke the drastic remedy of preclusion, the Court must determine that the

party's failure to comply with a disclosure order was the result of willful, deliberate and continuous conduct or its equivalent. *Patterson v New York City Health & Hospitals Corp.*, 284 AD2d 516, 726 NYS2d 715 (2nd Dept. 2001).

After a careful reading of the submission herein, it is the judgment of the Court that striking the defendants' answer is not warranted. However, the Court is of the opinion that plaintiffs are entitled to the information demanded in the Second Demand for Discovery and Inspection and in the notice of motion, and the only way to insure receipt of said information is by directing a forensic examination of the subject computer system at GREENTHAL and WYNDHAM, a deposition of GREENTHAL's IT manager, Ramon Renoso, and a deposition of a BOARD member who served during the subject period of time from 2004 to 2005. After completion of same, consideration will be given as to whether the personal computers of the five (5) BOARD members who served during the period in question will be necessary. Accordingly, it is hereby

ORDERED, that plaintiffs' motion for an order striking defendant, GREENTHAL and the BOARD'S answer pursuant to CPLR §3126 and for an inquest is denied; and it is further

ORDERED, that plaintiffs' motion for alternative relief is granted to the extent detailed above. Within twenty (20) days of service of a copy of this order, with notice of entry, counsel for all parties shall arrange for the additional depositions directed herein, and it is further

ORDERED, that all discovery with respect to a forensic examination of the computer system at GREENTHAL and WYNDHAM, and any other electronic discovery as he may deem necessary is referred to Special Referee Frank Schellace for the purpose of

supervising said electronic discovery and determining what safeguards are required to protect confidential and privileged information, pursuant to CPLR § 3104. The rules of the Commercial Division, Special Referee Part shall apply; and it is further

ORDERED, that, counsel for all parties shall appear for a conference with Special Referee Schellace on July 29, 2009, at 10:00 A.M. in Courtroom 060, Lower level, (516) 571-2725, and upon completion of electronic discovery, the Court shall schedule a certification Conference in Part 15.

All further requested relief not specifically granted is denied.

This constitutes the decision and order of the Court.

Dated: July 13, 2009


WILLIAM R. LaMARCA

ENTERED

JUL 16 2009

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