

**Park Towers S. Co., LLC v 57 W. Operating  
Co., Inc.**

2009 NY Slip Op 32126(U)

September 9, 2009

Supreme Court, New York County

Docket Number: 117080/2005

Judge: Milton A. Tingling

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

HON. MILTON A. TINGLIN

PRESENT: \_\_\_\_\_ J.S.C. Justice

PART 44

Park Towers South Co LLP

INDEX NO. 117080/05

- v -

57W. Operating Co. Inc.

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

MOTION SEQ. NO. \_\_\_\_\_

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

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

PAPERS NUMBERED

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

Answering Affidavits — Exhibits \_\_\_\_\_

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

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion

*The decision is in accordance with the attached memorandum of decision*

**FILED**  
SEP 18 2009  
COUNTY CLERK'S OFFICE  
NEW YORK

Dated: 9/11/09

MCJ  
J.S.C.

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

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST  REFERENCE

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

PRESENT: Honorable Milton A. Tingling  
Justice

PART 44

-----X  
Park Towers South Company, LLC

Index No.: 117080/2005

Plaintiff,

-against-

57 West Operating Co., Inc., Neil Binder and  
Marc Broxmeyer,

Defendants.  
-----X

**FILED**  
SEP 18 2009  
COUNTY CLERK'S OFFICE  
NEW YORK

This matter presents itself to the court pursuant originally to a motion by defendants to preclude plaintiffs from offering any evidence in contradiction of defendants offering of evidence in support of their defense of constructive eviction due to mold exposure. The motion is premised upon two allegations: 1) of plaintiffs tampering with defendants expert witness and spoliation of evidence and 2) failure of plaintiffs leasing specialist to give honest testimony at a court ordered e.b.t.

The original motion resulted in a court ordered hearing to take testimony from those involved in a situation best relegated to Saturday morning cartoon time.

This matter began as a summary proceeding in Civil Court under Index Nos. 106287/2005 and 106288/2005. Honorable Judge Wright ordered a traverse hearing which was held before the Honorable Judge Moulton.

In a reasoned decision dated October 3, 2006, Judge Moulton dismissed the petition based upon lack of proper service of a predicate notice. (This court is unaware of why there were two Civil Court Index Numbers).

The date of the Civil Court proceedings and the date of Judge Moulton's decision bear significant relevance to this court's earlier dicta on cartoon time, when it is noted that this proceeding bears Index

Number 117080/2005, summons and complaint dated December 2, 2005, which appears to seek the same or similar relief in the civil court proceeding. Not to be outdone, the defendant herein, 57W Operating Co., Inc. filed their own summons and complaint bearing Supreme Court Index Number 600436/2006, alleging defenses and seeking relief obtainable by affirmative defense and or counterclaim in the proceeding herein.

Sometime in November 2005, prior to the filing of the 2005 and 2006 Supreme Court actions and after Judge Moulton's decision, 57 West Operating Co., Inc. retained Five Boro Mold Specialist to conduct an inspection and report on conditions at the premises in issue. They conducted the inspection, took samples and submitted a report dated November 21, 2005. It is that report which is at the heart of the immediate controversy.

Using Index Number 600436/2006, Park Towers South Co., LLC issued a subpoena duces tecum to Five Boro Mold Specialist. The subpoena commanded that they produce for examination, the report, laboratory test results and samples, taken in connection with the mold inspection at the storefront at 315 W 57<sup>th</sup> Street, New York, NY 10019. The subpoena was returnable at the office of Michael Koenig, Esq., attorney for Park Towers South on June 5, 2006. The subpoena was dated May 18, 2006.

The hearing ordered by this court resulted in very little agreement. 57 West Operating Company called Martin Katz, the owner of Five Boro Mold Specialist to testify. Mr. Katz testified that his company inspected the premises for water damage and mold. He testified that a chart was filled out, and samples were taken and sent to a lab for analysis. A report was then made with recommendations and estimates for resolution of any problems found. Katz stated that in May 2006, a Mr. Glenbosky, Esq. from Koenig's office arrived at Five Boro to serve the subpoena duces tecum. Katz stated that Glenbosky was very aggressive and demanded the 57W Operating Company file and trouble for Katz if he did not produce it. Katz testified that he did not want trouble and he stepped out of his office

leaving Glenbosky with the file and a copy machine. When he returned, the file and Glenbosky were gone. He then called Peter Guttman of 57W Operating Company and told him the attorney from Koenig's office had taken the file.

Glenbosky testified that he was assigned to serve the subpoena. He stated that he had never before or after this occasion been assigned to serve a subpoena by Koenig's office. He did not deny arriving at Five Boro Mold Specialist or serving the subpoena duces tecum. However; his testimony was that Katz gave him the file, that he took it and gave it to Koenig.

Movant contends that the action of Park Towers in dealing with Mr. Katz have resulted in his now refusing to be their expert for trial purposes and he could not do so because he lacked his files that contained the information he would need to provide competent testimony.

Exhibit "C" to the motion is a copy of a letter purportedly from Koenig to Katz returning the file materials. The letter is dated December 12, 2006, some six months after Glenbosky took the file.

Cutting to the chase, the party seeking remedies due to allegation of spoliation "bears the burden of demonstrating that a litigant," or agent thereof, "intentionally or negligently disposed of critical evidence" and "fatally compromised its ability to defend the action." Utica Mutual Ins. Co. v. Berkoski Oil Co., 58 AD3rd 717 citing Lawson v. Aspen Ford, Inc., 15 AD3rd 628.

The court finds that any evidence of spoliation and or witness tampering does not rise to this level. No sufficient evidence was presented at the hearing that the purported expert witness was threatened or coerced. The testimony appeared to the court of being more consistent with not wanting to be bothered. Furthermore, the witness presented, Mr. Katz, did not personally conduct the inspection nor did he testify he was qualified to do so and the court has doubts as to whether he could have qualified as an expert.

The court does have a serious concern as to why it took the plaintiff over six months to copy what appears to be no more than at best a ten page report.

That concern is balanced by the record which shows that a report on mold was generated in November 2005 and admittedly taken by plaintiff from Five Boro Mold in May 2006. Movants would certainly seem to have had copies of the report in that six month period.

As to the part of the motion regarding the alleged failure of plaintiffs leasing specialist to give fair and honest testimony, that is best left for cross examination conducted before the trier of fact.

The motion is hereby denied in its entirety.

Dated: September 9, 2009

  
\_\_\_\_\_  
J.S.C.

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NEW YORK