Genson v Sixty Sutton Corp.
2009 NY Slip Op 32467(U)
October 8, 2009
Supreme Court, New York County
Docket Number: 109105/2006
Judge: Michael D. Stallman
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SCANNED ON 10/22/2009

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

PRESENT: Hon. MICHAEL D. STALLMAN PART 7
Justice

JILL GENSON, Individually and on behalf of her infant son Randy Genson,

Plaintiff,

- v -

SIXTY SUTTON CORP.,

Defendant.

INDEX NO. 109105/06

MOTION DATE 3/26/09

MOTION SEQ. NO. 003

MOTION CAL. NO.

The following papers, numbered 1 to 10 were read on this motion to extend the note of issue; cross motions to strike

	PAPERS NUMBERED
Notice of Motion— Affirmation — Exhibits A, B	1-2
Notice of Cross Motion—Affirmations — Exhibits A-Q	3-4
Amended Notice of Cross Motion; Affirmations — Exhibit A; Affirmation In Opposition	5-7
Affirmation In Opposition and in Reply	8
Stipulation	9
Letter dated August 18, 2009	10

FILED
OCT 2 1 2009
COUNTY CLERK'S OFFICE
NEW YORK

Cross-Motions (2): X Yes ☐ No

Upon the foregoing papers, it is ordered that the motion and cross motions are decided in accordance with the annexed memorandum decision and order.

MICHAEL D. STALLMAN
J.S.C.

Dated: 10/8/09
New York, New York

J.S.C.

Check one: ☐ FINAL DISPOSITION X NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

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

[* 2]

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 7

JILL GENSON, Individually and on behalf of her infant son, Randy Genson,

Plaintiff,

-against-

SIXTY SUTTON CORP.,

Defendant.

Index No. 109105/2006

Transfer Order to Civil Court

FILED
OCT 2 1 2009
COUNTY CLERK'S OFFICE
NEW YORK

HON. MICHAEL D. STALLMAN, J.:

It appearing that the Civil Court of the City of New York has jurisdiction of the parties to this action and pursuant to Rule 202.13(a) of the Uniform Civil Rules for the Supreme Court and the County Court, it is

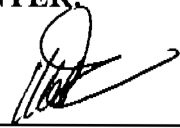
ORDERED, that this cause bearing Index Number 109105/2006 be, and it hereby is, removed from this Court and transferred to the Civil Court of the City of New York, County of New York, except as to the sixth cause of action, and it is further

ORDERED, that the clerk of the New York County shall transfer to the clerk of the Civil Court of the City of New York, County of New York, all papers in this action now in his possession, upon payment of proper fees, if any, and the clerk of the Civil Court of the City of New York, County of New York, upon service of a certified copy of this order upon him and upon delivery of the papers of this action to him by the clerk of the County of New York, shall issue to this action a Civil Court Index Number without the payment of any additional fees, and it is further

ORDERED, that the above-entitled cause, except for the sixth cause of action, be, and it is hereby transferred to said Court, to be heard, tried and determined as if originally brought therein but subject to the provisions of CPLR 325(d). Copies to all.

Dated: 10/8/09

ENTER:



MICHAEL D. STALLMAN, J.S.C.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 7

---X
JILL GENSON, Individually and on behalf of her infant son, Randy Genson,

Plaintiff,

Index No. **109105/06**

- against -

SIXTY SUTTON CORP.,

Decision and Order

Defendant.
---X

HON. MICHAEL D. STALLMAN, J.:

Plaintiff Jill Genson is the proprietary lessee of shares in apartment Unit 14G North in a cooperative building that defendant owns, located at 60 Sutton Place. According to the complaint, Genson occupied the apartment with her young son when she visited New York City from time to time, including most major holidays and for a good part of each summer, until the summer of 2004. Genson alleges that, beginning in April 1, 2001, her apartment suffered leaks from the roof that lasted for over five years. Genson claims that she notified defendant of the leaks and damage, including mold infestation, but defendant allegedly took a "band aid" approach to the leaks, making temporary and ineffective repairs. Beginning in August 1, 2004, Genson began withholding her maintenance due to the alleged leaks, the alleged mold infestation, and the alleged lack of habitability of her apartment. According to Genson, her son developed upper respiratory ailments because of the severe mold infestation in his bedroom.

In this action, Genson seeks to recover for personal injuries to her son, for a permanent abatement of all maintenance due from July 1, 2001 until March 1, 2006, for a waiver of fees and charges resulting from Genson's non-payment of maintenance, and for "loss due to plaintiff's inability to sell the apartment due to the leaks." Defendant counterclaims for maintenance arrears,

late fees, other charges, and attorneys' fees.

Plaintiff moves for an extension of the note of issue deadline. Defendant cross-moves to strike the complaint for plaintiff's alleged failure to respond to defendant's discovery demands. Plaintiff cross-moves to compel defendant to produce documents, to strike defendant's answer, and for sanctions.

DISCUSSION

Genson's motion to extend the note of issue deadline is denied as academic. The note of issue deadline was extended at a compliance conference after the motion was submitted.

Turning to defendant's cross motion, defendant seeks to compel plaintiff to respond to its demand for records and authorizations dated August 15, 2008 and demand for records and documents dated August 21, 2008. Defendant also seeks production of Genson's tax returns, because Genson claims that, during the time her apartment was under repair, she was allegedly prevented from visiting a dying friend due to her financial status. Defendant's application for the tax returns was denied at a compliance conference held on February 21, 2008. See McIntyre Affirm., Ex F. Lastly, defendant seeks authorizations for the medical records of Genson's son, since his birth, to determine whether he was born with an alleged allergic/asthmatic condition, and whether he suffers the symptoms when he is New York, Florida, school, or camp.

As defendant indicates, plaintiff is not entitled to compensation for defendant's alleged breach of the warranty of habitability during a period in which Genson and her son did not live in the apartment. Leventritt v 520 East 86th St., 266 AD2d 45, 46 (1st Dept 1999).

Defendant's demand for records and authorizations and for records and documents seek to obtain information that may lead to admissible information about plaintiff's travels, and accordingly

seek copies of plaintiff's passport entries, copies of airline tickets, vouchers, copies of credit card statements, and so forth. Defendant argues that these records are necessary because Genson stated at her EBT that she stayed in the apartment during summers and holidays, but did not recall specific dates when she was in the apartment.

In response to the demand for a bill of particulars as to the dates when plaintiff resided in the apartment, plaintiff objected to the demand as calling for a matter evidentiary in nature. However, following a conference with the court on July 9, 2009, plaintiff's counsel subsequently submitted a stipulation dated August 13, 2009, which states that, "for purposes of the within captioned litigation, respecting the issue of the warranty of habitability, that Jill Genson was staying at hotels or relatives in lieu of using the premises, 14G North, 60 Sutton Place, New York, NY" during a series of dates set forth in the stipulation. By letter dated August 18, 2009, defendant's counsel object to the purported stipulation because counsel did not agree to the dates, and objected to the stipulation on the ground that it was not verified.

Inasmuch as the purported stipulation was not a writing executed by both parties, it does not qualify as a stipulation pursuant to CPLR 2104. However, that is not to say that the representations of the purported stipulation are not binding upon plaintiff. Admissions of fact by counsel with the implied authority of their clients are binding upon their clients. See Smith v State, 49 Misc 2d 985, 994 (Ct Claims 1966), affd 29 AD2d 1050 (4th Dept 1968) (in a proceeding to recover compensation for taking of an easement, representations by condemnor's attorney at trial bound condemnor); Matter of Hickey's Estate, 73 NYS2d 508 (Sur Ct, Rensselaer County 1939)(admission by attorney at hearing was binding on attorney's client). Thus, the Court accepts the representations of plaintiff's counsel that Genson and her son were not residing in the apartment on the dates set forth in the

stipulation. Because plaintiff has set forth a series of dates for when she was not in New York City, defendant's document demands for those dates are unnecessary.

For the dates not covered in the plaintiff's stipulation, the Court finds that some of defendant's demands are overly broad, such as the demand for copies of plaintiff's passport entries. However, because the demands bear on the question of whether Genson and her son did not reside in the apartment, defendant's document demands should be limited to production of documents, such as receipts or bills, which would indicate that plaintiffs stayed at hotels in New York City during the period when the leaks began until the roof was repaired, from 2001-2006, except as to those dates set forth in the August 13, 2009 stipulation. Defendant is entitled to authorizations from Genson for any credit cards that she used to pay for lodging expenses and for travel to New York City from 2001-2006, except as to those dates in the stipulation. Therefore, the Court grants defendant's motion to compel plaintiff to produce these documents, as limited herein, within 60 days.

As to production of Genson's tax returns, "[b]ecause of their confidential and private nature, disclosure of tax returns is disfavored ... [and a] party seeking disclosure must make a strong showing of necessity ... and demonstrate that the information contained in the returns is unavailable from other sources." Gordon v Grossman, 183 AD2d 669, 670 (1st Dept 1992) (citations omitted). Here, the complaint alleges that Genson experienced mental anguish over not being able to spend time in New York to be near her dying friend in her last months and days of her life. Complaint ¶ 30. At Genson's deposition, she was asked,

> "Q. During that period of time what prevented you from coming to New York and staying at a hotel or at your aunt's or your friend's house?
> **A. Money, money to pay for the hotels.**
> Q. At some point in time were you informed that you would either be reimbursed for the hotels or that the hotels would be paid by someone else?

A. I was told that the insurance company would pay to a certain point.
Q. What was that point?
A. I don't know."

McIntyre Affirm., Ex H, at 94-96 (defendant's emphasis). Defendant seeks Genson's tax returns to determine whether Genson truthfully testified that she did not have enough money to pay for hotels so that she could visit her dying friend in New York, which caused her mental anguish.

Because plaintiff has put her financial resources at issue, defendant is entitled to authorizations for Genson's tax returns.

The branch of defendant's cross motion for authorizations for the medical records of Randy Genson from the date of his birth, January 30, 1997, is denied. Defendant cites no authority for the proposition that it is entitled to medical records since going back to the date of Randy Genson's birth. The leaks in the apartment allegedly began in April 2001, causing Randy Genson to have health and breathing problems. If Randy Genson had these problems since birth, as defendant believes, evidence of treatment for those problems would likely be found in more recent medical records. Defendant does not need records from his birth to determine whether conditions in the apartment allegedly aggravated existing health problems.

The branch of plaintiff's cross motion seeking "to strike defendant's answer to Count 4" of the complaint is denied. In the fourth cause of action, plaintiff alleges that defendant violated Multiple Dwelling Law § 78 because defendant allegedly refused to replace the roof in July 2003, notwithstanding a report recommending that the roof had to be replaced. Consequently, plaintiff argues that defendant's denial of liability as to Count 4 was frivolous under 22 NYCRR130-1.1-a, i.e., without basis in fact.

This branch of plaintiffs' cross motion essentially seeks summary judgment in plaintiff's

favor on the fourth cause of action, in the guise of a motion to strike. Because defendant's deposition has not been completed, such relief is premature.

Finally, plaintiff contends that defendant's responses to her document discovery demands were incomplete, as set forth in her letter dated November 18, 2008. Sigmond Opp. Affirm., Ex 5. Plaintiff asserts that defendant has made three productions of documents, and that each production reveals documents responsive to prior demands that were not produced previously, leading plaintiff to conclude that defendant has been withholding documents. Plaintiff also contends that defendant has been withholding documents in the custody and possession of Rose Associates, the managing agent for the coop.

Defendant submits the affidavit of Denise Lawlor, an employee of Rose Associates. Lawlor's affidavit sets forth the means and methods used to search for responsive documents, including the areas searched, based on her personal knowledge of the search. See McIntyre Opp. Affirm., Ex A [Lawlor Aff.] Lawlor states, in pertinent part, "I am making this affidavit to demonstrate to the Court that every single document that Rose Associates or Sixty Sutton Corp. has available to it concerning the roof, roof leaks, plaintiff or the plaintiff's apartment has been produced. Also, the office of Rose Associates has no other documents responsive to plaintiff's requests." Lawlor Aff. at 3. The affidavit satisfies defendant's obligation under Jackson v City of New York (185 AD2d 768 [1st Dept 1992]). Therefore, the branch of plaintiff's cross motion to compel defendant to produce documents is denied.

Pursuant to CPLR 325 (d), the Court transfers this action to the Civil Court of the City of New York, except as to the sixth cause of action, for declaratory relief. Full relief as to all matters in controversy can be obtained in the Civil Court, which will be determinative as to rights to the

maintenance deposited in escrow, as included in the declaratory cause of action. Because the cause of action for declaratory judgment is essentially a creative redundant repleading of the breach of the warranty of habitability claim and defense to the co-op's counterclaim for maintenance arrears, it need not be separately litigated or tried in Supreme Court. A separate order has been signed herewith. The sixth cause of action is stayed until determination of the Civil Court as to plaintiff's other claims.

Because the transfer of this case will not be effectuated before the October 9, 2009 deadline to file the note of issue, the Court hereby extends the note of issue deadline to March 6, 2010.

CONCLUSION

Accordingly, it is hereby

ORDERED that plaintiffs' motion to extend the note of issue deadline is denied as academic; and it is further

ORDERED that defendant's cross motion for discovery sanctions is granted only to the extent that, within 60 days, plaintiffs must:

(1) produce any receipts or bills, which would indicate that plaintiffs stayed at hotels in New York City during the period when the leaks began until the roof was repaired, from 2001-2006, except as to those dates set forth in the August 13, 2009 stipulation by plaintiffs' counsel;

(2) provide authorizations for any credit cards that Jill Genson used to pay for lodging expenses and for travel to New York City from 2001-2006, again except as to those dates in the August 13, 2009 stipulation;

(3) provide authorizations for the individual tax returns of Jill Genson for the tax years 2001-2006, and the motion is otherwise denied; and it is further

ORDERED that plaintiff's cross motion to compel discovery and for discovery sanctions is denied; and it is further

ORDERED that the sixth cause of action is severed and stayed until resolution or final determination of the balance of the action, which (by separate order) is being transferred to the Civil Court of the City of New York; and it is further

ORDERED that the end date of discovery is to March 5, 2010, and the note of issue deadline is extended to March 25, 2010.

Dated: October 8, 2009
New York, New York

ENTER:

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J.S.C.

MICHAEL D. STALLMAN
J.S.C.

FILED
OCT 21 2009
COUNTY CLERK'S OFFICE
NEW YORK