

Mangano v Mantell

2009 NY Slip Op 32754(U)

November 20, 2009

Supreme Court, New York County

Docket Number: 112764/2007

Judge: O. Peter Sherwood

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: O. PETER SHERWOOD
Justice

PART 61

ROSOLINO MANGANO and ANNA MANGANO,

Plaintiffs,

-against-

MICHAEL MANTELL,

Defendant.

INDEX NO. 112764/07

MOTION DATE Sept. 21, 2009

MOTION SEQ. NO. 002

MOTION CAL. NO. 51

FILED
NOV 24 2009
NEW YORK COUNTY CLERK'S OFFICE

The following papers, numbered 1 to _____ were read on this motion _____

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

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

1-3


4

5

Cross-Motion: Yes No

Upon the foregoing papers, defendant's motion for an order striking the Note of Issue and Certificate of readiness and removing the case from the trial calendar is decided in accordance with the accompanying decision and order.

Dated: 11/20/09


O. PETER SHERWOOD, *J.S.C.*

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 61

-----X
ROSOLINO MANGANO and ANNA MANGANO,

DECISION AND
ORDER

Index No. 112764/2007

Plaintiff,

-against-

MICHAEL MANTELL,

Defendant

FILED
NOV 24 2009
NEW YORK
COUNTY CLERK'S OFFICE

O. PETER SHERWOOD, J.:

In this action to recover monetary damages for legal malpractice, defendant Michael Mantell ("Mantell" or "defendant") moves for an order striking the Note of Issue and Certificate of Readiness and removing the action from the trial calendar (motion sequence #002).¹

Plaintiffs Rosolino Mangano and Anna Mangano ("plaintiffs") commenced the instant legal malpractice action by filing the summons and complaint on or about September 21, 2007, in which they allege that Mantell was negligent in his representation of them in a landlord/tenant matter with respect to a Manhattan apartment building plaintiffs own. Plaintiffs served and filed the Note of Issue and Certificate of Readiness on or about March 20, 2009, which stated in item #8 that "There are no outstanding requests for discovery other than a previously scheduled deposition of plaintiff" and in item #12 that "The case is ready for trial except for deposition as set forth in item 8 above."

Defendant moves by Notice of Motion, dated March 27, 2009, to strike the Note of Issue and Certificate of Readiness and remove the case from the trial calendar. Defendant contends that not only has he not had the opportunity to depose plaintiffs, but numerous documents were identified at the non-party deposition of plaintiffs' son, Sam Mangano, held on March 24, 2009, which have not yet been received by defendant's attorney. Defendant further contends that plaintiffs have not responded fully to his Notice of Discovery and Inspection. As evidence of his good faith efforts to obtain responses, defendant's attorney contends that he sent letters to plaintiffs' counsel on March 23, 24 and 25, 2009. In the letter dated March 25, 2009, sent after Sam Mangano's deposition,

¹This case was randomly reassigned to this Part pursuant to an order of recusal of Justice Emily Jane Goodman, dated September 22, 2009.

defense counsel made reference to scheduling the depositions of plaintiffs and plaintiffs' non-party witness Victoria Lipani and requested the names of plaintiffs' expert witnesses and a further response to item number 17 of defendant's Notice for Discovery and Inspection.

In opposition, plaintiffs' counsel contends that he responded to defense counsel's March 25, 2009 letter stating that plaintiffs were named in the caption of the proceeding as the record owners of the property in the litigation giving rise to the instant action, but that they did not have knowledge of the material and relevant facts of the underlying proceeding. Indeed, plaintiffs note that Mantell, at his deposition, acknowledged that most of his dealings were with Sam Mangano; he had met plaintiff Rosolino Mangano only a few times; and he had never met or spoken to plaintiff Anna Mangano. On this basis, plaintiffs aver that there is no need to conduct plaintiffs' depositions. In any event, plaintiffs aver that defendant has waived the right to further depositions in the action by failing to take affirmative action during the 18 months that elapsed from the time issue was joined in November 2007, to the date the Note of Issue was served and filed on March 20, 2009, to conduct plaintiffs' depositions or to subpoena the non-party witness Victoria Lipani (who apparently is Sam Mangano's secretary). Plaintiffs note that dates for party depositions were set in the preliminary conference order, dated June 19, 2008, and in compliance conference orders, dated October 16, 2008, and January 22, 2009, and notwithstanding such orders, defendant failed to take steps to conduct such party depositions within the time prescribed. Lastly, plaintiffs argue that defendant's filing of a motion for summary judgment on June 12, 2009, in which he claims that there are no material issues of fact, runs counter to his argument here that he has a need for further discovery.

In reply, defendant states that he first noticed plaintiffs' depositions in July 2008 and, while he conducted the deposition of Sam Mangano, he did not agree to accept such deposition in place and stead of plaintiffs, and has, therefore, not waived his right to such depositions. Defendant contends that since plaintiffs commenced the instant action in their individual capacity, he has an absolute right to depose them as party plaintiffs. Defendant contends that his filing of a motion for summary judgment does not serve as a waiver of his right to discovery since plaintiffs' filing of the Note of Issue commenced the running of the time period for filing such motion and he was compelled to serve the motion to preserve his right to do so.

Under section 202.21 (e) of the Uniform Rules for Trial Courts (12 NYCRR), any party to an action may move within twenty (20) days of service of a note of issue and certificate of readiness to vacate the note of issue upon an affidavit showing in what respects the case is not trial ready. The court may then vacate the note of issue if it finds that a material fact in the certificate of readiness is incorrect or such certificate of readiness fails to comply with the requirements as provided in that section in some material respect. In addition, where unusual or unanticipated circumstances arise subsequent to the filing of the note of issue which require additional pretrial proceedings to prevent substantial prejudice, the court may upon motion supported by affidavit grant permission to conduct such necessary discovery (12 NYCRR § 202.21 [d]).

Granting of a motion to strike the note of issue is within the discretion of the court and may be denied where there are no special, unusual or extraordinary circumstances (*see, Parato v Yagudaev*, 46 AD3d 332 [1st Dept 2007]; *Pannone v Silberstein*, 40 AD3d 327 [1st Dept 2007]) or where the note of issue and certificate of readiness contain no incorrect material issue of fact (*see, Mateo v City of New York*, 282 AD2d 313 [1st Dept 2001]). However, a failure to complete discovery is a material fact that may lead to striking a note of issue (*see, Savino v Lewittes*, 160 AD2d 176 [1st Dept 1990]).

Here, defendant has failed to comply with discovery deadlines contained in the court's orders and has been less than diligent in scheduling plaintiffs' depositions or seeking to obtain the deposition of the identified non-party witness. Nevertheless, none of the court orders contained a waiver or preclusion clause, and, therefore, it is not fair to conclude that defendant waived his right, to depose plaintiffs, particularly since the language in the certificate of readiness that plaintiffs' depositions were outstanding seems to indicate that the conduct thereof was anticipated by the parties subsequent to the filing of the Note of Issue (*cf. Leon v St. Vincent's De Paul Residence*, 56 AD3d 265 [1st Dept 2008]; *Quintana v Rogers*, 306 A2d 167 [1st Dept 2003]). The contention of plaintiffs' attorney that the named plaintiffs lack knowledge of material or relevant facts does not mandate a contrary conclusion. However, under the particular circumstances of this matter, it would not serve justice to strike the note of issue and certificate of readiness. There are situations where the courts have permitted the completion of outstanding discovery without striking the note of issue and certificate of readiness (*see, Torres v New York City Transit Authority*, 192 AD2d 400 [1st Dept

1993]; *see also, Sun Plaza Enterprises Corp. V Crown Theatres, L.P.*, 307 AD2d 352 [2d Dept 2003], *appeal dismissed* 2 NY3d 794 [2004]). However, defendants' pending motion for summary judgment stays disclosure under CPLR § 3214 (b) and, if granted, would resolve the action. Thus, no purpose would be served at this juncture by permitting plaintiffs' depositions to go forward. Rather, in the event the court denies defendant's motion, defendant may at that time seek upon further application to the Court to conduct plaintiffs' depositions.

Accordingly, it is

ORDERED, that defendant's motion to strike plaintiffs' Note of Issue and Certificate of Readiness and remove the case from the trial calendar is denied.

This shall constitute the decision and order of the court.

DATED: 11/20/09

ENTER,



O. PETER SHERWOOD
J.S.C.

FILED
NOV 24 2009
NEW YORK
COUNTY CLERK'S OFFICE