

LaSalle Talman Bank, F.S.B. v Weisblum & Felice

2009 NY Slip Op 33234(U)

June 22, 2009

Supreme Court, New York County

Docket Number: 601386/2007

Judge: Louis B. York

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6-23-09

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

PRESENT: LOUIS B. YOERGER
J.S.C. Justice

PART 2

Index Number : 601386/2007
LASALLE TALMAN BANK, F.S.B.
vs.
WEISBLUM & FELICE
SEQUENCE NUMBER : 006
STRIKE

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____
MOTION CAL. NO. _____

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

FILED

JUN 22 2010

NEW YORK
COUNTY CLERK'S OFFICE

MOTION IS DECIDED IN ACCORDANCE
WITH ACCOMPANYING MEMORANDUM DECISION.

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FILED

JUN 25 2009

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JUN 23 2009
IAS MOTION SUPPORT OFFICE
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Dated: 6/22/09

LOUIS B. YOERGER
J.S.C.

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

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

PRESENT: LOUIS B. YORK
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LOUIS B. YORK
J.S.C.

PRESENT: _____

PART 2

Index Number : 601386/2007
LASALLE TALMAN BANK, F.S.B.
vs.
WEISBLUM & FELICE
SEQUENCE NUMBER : 005
DISMISS

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____
MOTION CAL. NO. _____

in 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

**MOTION IS DECIDED IN ACCORDANCE
WITH ACCOMPANYING MEMORANDUM DECISION.**

Dated: 6/22/09

Lly
LOUIS B. YORK J.S.C.
J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

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 2

-----X
LASALLE TALMAN BANK, F.S.B.,

Plaintiff

v

Index No. 601386-2007

WEISBLUM & FELICE and JON B. FELICE,
individually, THE LAW OFFICES OF
JORDAN S. KATZ, P.C. and JORDAN S. KATZ,
individually,

Defendants

-----X
WEISBLUM & FELICE and JON B. FELICE,

Third-Party Plaintiffs,

v

Index No. 590167-2008

THE LAW OFFICES OF JORDAN S. KATZ, P.C
and JORDAN S. KATZ,

Third-Party Defendants..

-----X

York, J.:

THE MOTIONS AND THE MAJOR CONTENTIONS OF THE PARTIES

The two motions (# 005 and # 006) seek to dismiss the complaint for failure to provide discovery, or to preclude plaintiff from introducing evidence at the trial of any documents sought which have not been produced, together with the costs of the motions, including court costs and reasonable attorneys' fees. The motions are consolidated for disposition.

David and Frieda Weber (the "Webers") gave a mortgage on their property in Kings

County to Fairmont Funding Ltd. The mortgage was evidently assigned to LaSalle Talman Bank. ("LaSalle"). According to plaintiff's counsel, LaSalle was thereafter acquired by the Dutch bank ABN AMRO, N.A. ABN AMRO Mortgage Group ("AAMG") was then assigned the role of servicing agent. Thereafter CitiBank acquired AAMG. Certain loans, including the underlying loan herein, were reassigned back to LaSalle. LaSalle was then acquired by Bank of America.

This action arises from two foreclosure actions against the Webers brought in Supreme Court, Kings County, the "1998 action" and the "2003 action", both brought by Jon. B. Felice & Associates, P.C. (The "Felice firm") on behalf of LaSalle.

Plaintiff claims that in 1999 LaSalle's motion for summary judgment was granted, and the decision directed the Felice firm to settle the order within 60 days, but that it failed to do so or to submit an affidavit of lateness, so the motion was deemed abandoned in or about March 2000. In July 2000 the Felice firm filed another motion for summary judgment which was also granted, with a direction to settle order. Again, it failed to do so, and that second motion was also deemed abandoned.

Plaintiff alleges that in June 2003, while the 1998 action was still pending, the Felice firm filed a second action in Kings County, identical to the first action. An answer was interposed but the Felice firm took no further action in that case.

In August 2005 LaSalle terminated its relationship with the Felice firm and retained the law offices of Jordan S. Katz, P.C. (the "Katz firm") to pursue foreclosure. In February 2006, on instructions from ABN AMRO, the Katz firm started a new foreclosure action. However, the Webers obtained summary judgment dismissing that action on the ground that the action was

time barred by the six year statute of limitations, which expired on or about September 4, 2004.

In or about February 2008, on instructions from ABN AMRO, the Katz firm filed a stipulation of discontinuance without prejudice in the 2003 action.

This action was started by LaSalle on or about April 26, 2007 against Weisblum & Felice, the successor to the Felice firm, and Jon B. Felice, individually. Plaintiff alleged breach of contract and legal malpractice in failing twice to timely submit orders in the 1998 action and failing to take any steps beyond commencement of the 2003 action. In 2008 the Felice defendants instituted a third party action against the Katz firm and Jordan S. Katz individually for contribution or indemnification. In August 2008, upon consent of all other parties, plaintiff amended its complaint to allege a cause of action against the Katz firm and Katz that but for their negligence the 2006 action would not have been dismissed.

DISCOVERY

On June 27, 2007 the Felice defendants served three discovery demands upon plaintiff's counsel: 1) Demand for names and addresses of witnesses; 2) Demand for party statements; and 3) Notice of discovery and inspection (Exhibits I, J and K to the Katz defendants motion). The Felice defendants also served a notice pursuant to CPLR § 2103(5) and a notice to take deposition on oral examination and a demand pursuant to CPLR 306-A. Felice defendant's motion, Barbara Henderson affirmation, ¶ 10. On April 16, 2008, the Katz defendants served their first set of written interrogatories directed to plaintiff (Id, Exhibit L). On April 25, 2008 the Felice defendants served their own interrogatories on plaintiff (Id, Exhibit M). On June 17, 2008, the Katz defendants served their first demand for production of documents (Id, Exhibit N).

No attempt was made by plaintiff to respond to any of these various demands, or to secure extensions of time to do so. A preliminary conference was held in this case on June 4, 2008, and a preliminary conference order was signed. Plaintiff was directed to serve its responses to the Felice defendants' demands and the Katz defendants' demands no later than June 30, 2008. That order contained a provision that failure to comply with any directive may result in the imposition of costs or sanctions or other action authorized by law. Plaintiff again simply ignored the court's directive. Counsel for the Katz defendants sent letters to plaintiff's counsel on July 24, July 28, and on August 5 and 15, 2008 in a good faith effort to secure compliance by plaintiff. The last letter said that if responses were not received to the first set of interrogatories or the demand for production by August 15, 2008, a motion would be made for appropriate relief including dismissal. Four days after that good faith deadline, on August 19, 2008, plaintiff finally uttered a document labeled "Plaintiff's Response to Third-Party Defendant's (sic) First Set of Written Interrogatories." Katz defendants' motion, Exhibit P. The response was not verified, as required by CPLR Rule 3133 (b). In addition plaintiff's response starts with 10 "objections" (the tenth is not truly an objection), although it's time to object had long since expired. Almost none of the responses provide any true information, and most of the "answers" end with the sentence "Investigation continues."

The plaintiff's defaults in providing required discovery are longstanding. Plaintiff, through an affidavit of counsel, Michael R. Mulcahy, sworn to on September 18, 2008, asserts that in July 2008, in response to inquires by counsel for the Katz defendants, he called and explained why plaintiff was "somewhat delayed" (a careful understatement) in responding to discovery demands. He then recites the history of LaSalle being acquired multiple times as set

forth above. No affidavit is provided by anyone at LaSalle or any of its acquirers as to when and where and what efforts were made to search for any papers relating to this matter.

Having gotten to the point of being somewhat delayed he then skips to September, 2008 when he asked that Silberblatt (an associate with counsel for the Katz defendants) produce documents responsive to plaintiff's request for the production of documents. Mulcahy states that Silberblatt, "apparently conceding that Plaintiff has essentially complied with all pending discovery requests, stated that in order to resolve the Defendants' pending discovery motion, Plaintiff needed to produce any relevant e mail correspondence.", referring to Silberblatt's letter of September 16, 2008 (Mulcahy affidavit, Exhibit C). Mulcahy asserts that on September 17, 2008, plaintiff produced all "remaining e mail messages in its possession, custody or control that are responsive to Defendants' discovery requests." He also complains that Silberblatt asked for \$75 before sending 300 pages of documents demanded by plaintiff.

Plaintiff's memorandum of law, which I note cites no law whatever, but rather improperly, without the support of any affidavit or affirmation, makes factual assertions that plaintiff has served hundreds of pages of documents allegedly responsive to defendants' demands as well as a response to defendants' supplemental notice for discovery and inspection. The Katz defendants reply by an affirmation of Silberblatt dated September 19, 2008 in which he asserts that the motions of the Katz defendants and the Felice defendants were filed on August 20 and 22, 2008, with a return date of September 19, so that opposing papers were due by September 12, but the Mulcahy affidavit and the memo of law were served on September 18. Silberblatt notes that no reason is given for the failure to respond to his letters requesting compliance with outstanding discovery. Silberblatt asserts that plaintiff still has not properly

responded to the Katz defendants' interrogatories and has not responded at all to the Felice defendants' interrogatories.

He notes that no reason is given for the failure to verify plaintiff's response to the Katz defendants' interrogatories. He states that plaintiff has still not produced any documents concerning or evidencing any communications between LaSalle's service agent, ABN AMRO, and the Felice firm or the Katz firm regarding any of the foreclosure actions in issue.

He notes further that Mulcahy's affidavit simply indicates that plaintiff was having trouble locating the relevant files. But there is no affidavit by anyone who made any search. Moreover, Silberblatt urges, this action was almost one and one half years old at the time he wrote, having been filed on April 26, 2007, concerning two actions on behalf of LaSalle by the Felice firm, one commenced in 1998 and the other in 2003. He urges that plaintiff had to have some good faith basis for the allegations in its original and its amended complaint and should have made disclosure as to whatever it reviewed to formulate the complaint and the amended complaint. He denies that he ever agreed to withdraw the motion he made unless plaintiff's discovery deficiencies were remedied. Nor has any explanation been given as to why there was a failure to comply with this court's preliminary conference order.

DISCUSSION

The New York Court of Appeals has made it abundantly clear that the culture of ignoring statutory and court ordered discovery deadlines is impermissible and will not be tolerated. See, e.g. *Kihl v Pfeffer*, 94 NY2d 118 (1999). Accordingly, in light of the lengthy delay in responding to discovery demands, the failure to comply with this court's preliminary conference order, and the failure to provide any discovery until after these motions were brought, this action shall be

dismissed unless plaintiff, within 30 days after service upon its counsel of the order to be settled hereon with notice of entry, shall: 1) pay the sum of \$1,000 to counsel for the Katz defendants and the sum of \$1,000 to counsel for the Felice defendants, as a condition of being relieved from its default herein, and shall 2) provide the discovery demanded by the Katz defendants (including a verified response to its interrogatories) and the Felice defendants, and shall provide the name of the person who is employed by plaintiff with knowledge of the 1998, 2003 and 2006 actions, and if there is no such person employed by plaintiff, then the last known address of the person formerly with plaintiff who has such knowledge. If plaintiff after diligent effort is unable to respond to any specific discovery demand, plaintiff shall indicate, in appropriate form, what effort was made, when, and by whom.

I do not comment with respect to the defendants' responses, or lack of responses to plaintiff's discovery demands since there is no application regarding them. However, I trust that defendants shall proceed expeditiously in responding to those demands if they have not already done so.

FILED

JUN 22 2010

**NEW YORK
COUNTY CLERK'S OFFICE**

Settle order.

Dated: June 22, 2009

LY

Louis B. York, J.S.C.

**LOUIS B. YORK
J.S.C.**